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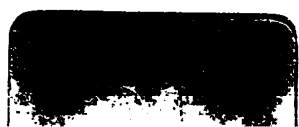
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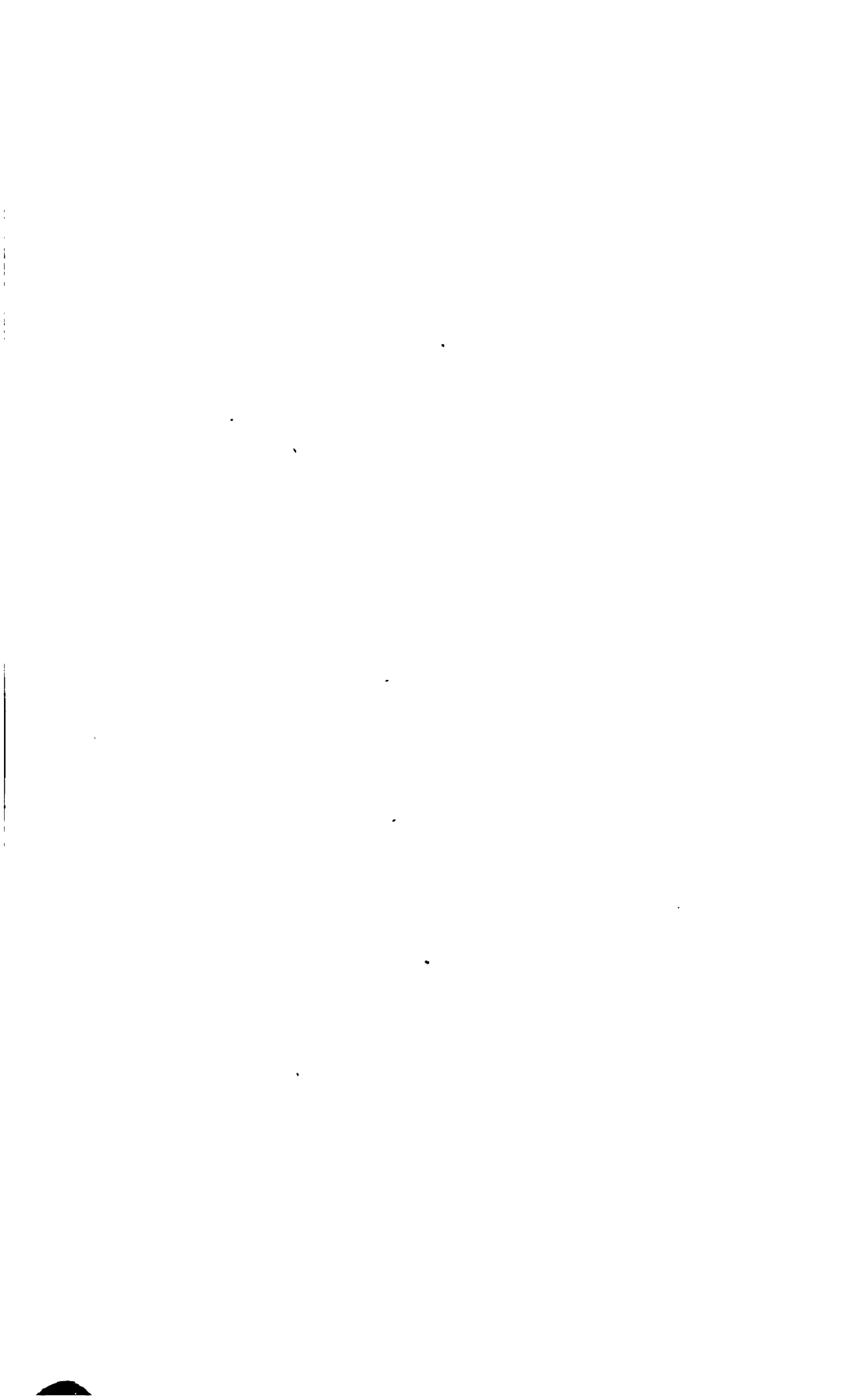
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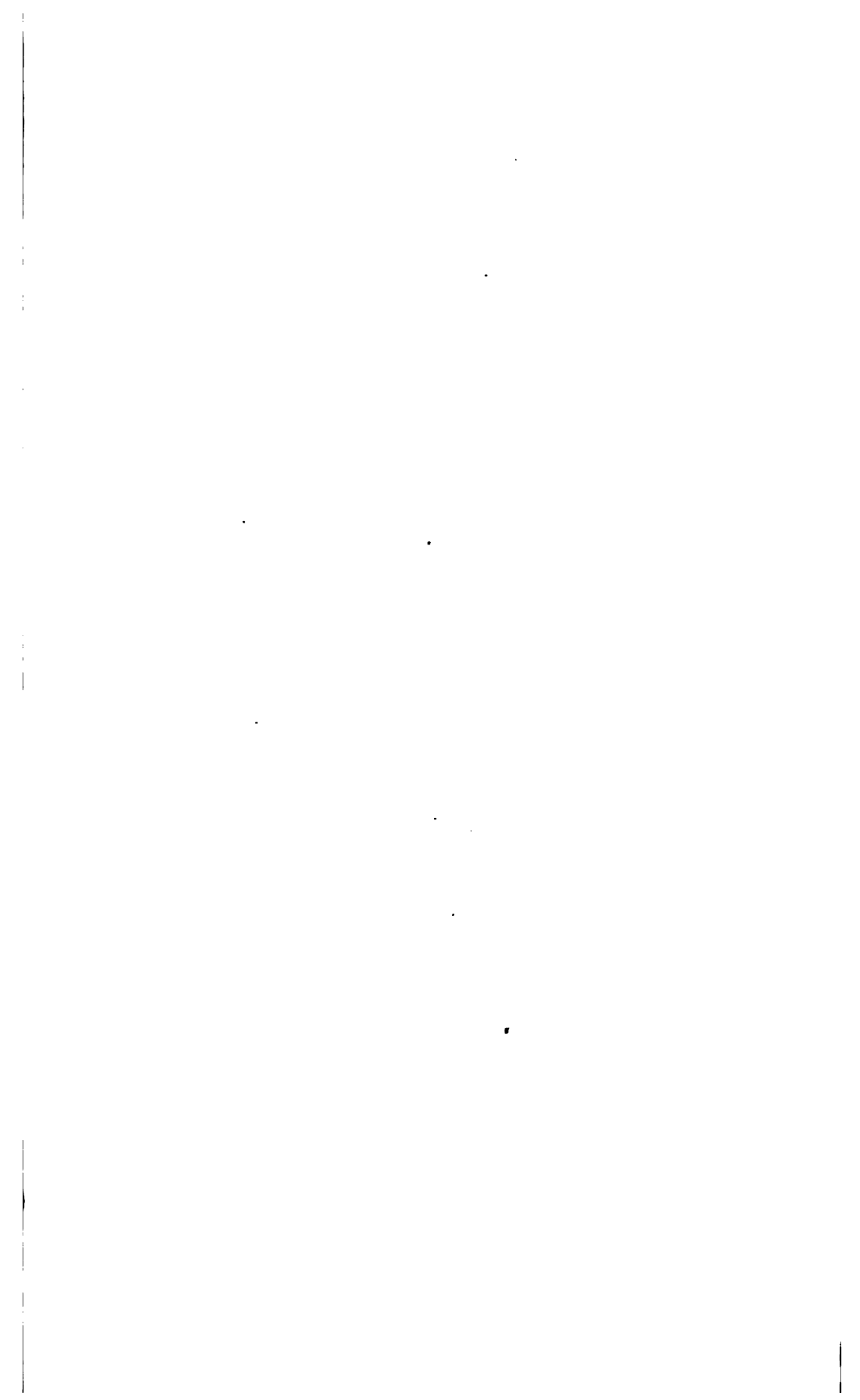
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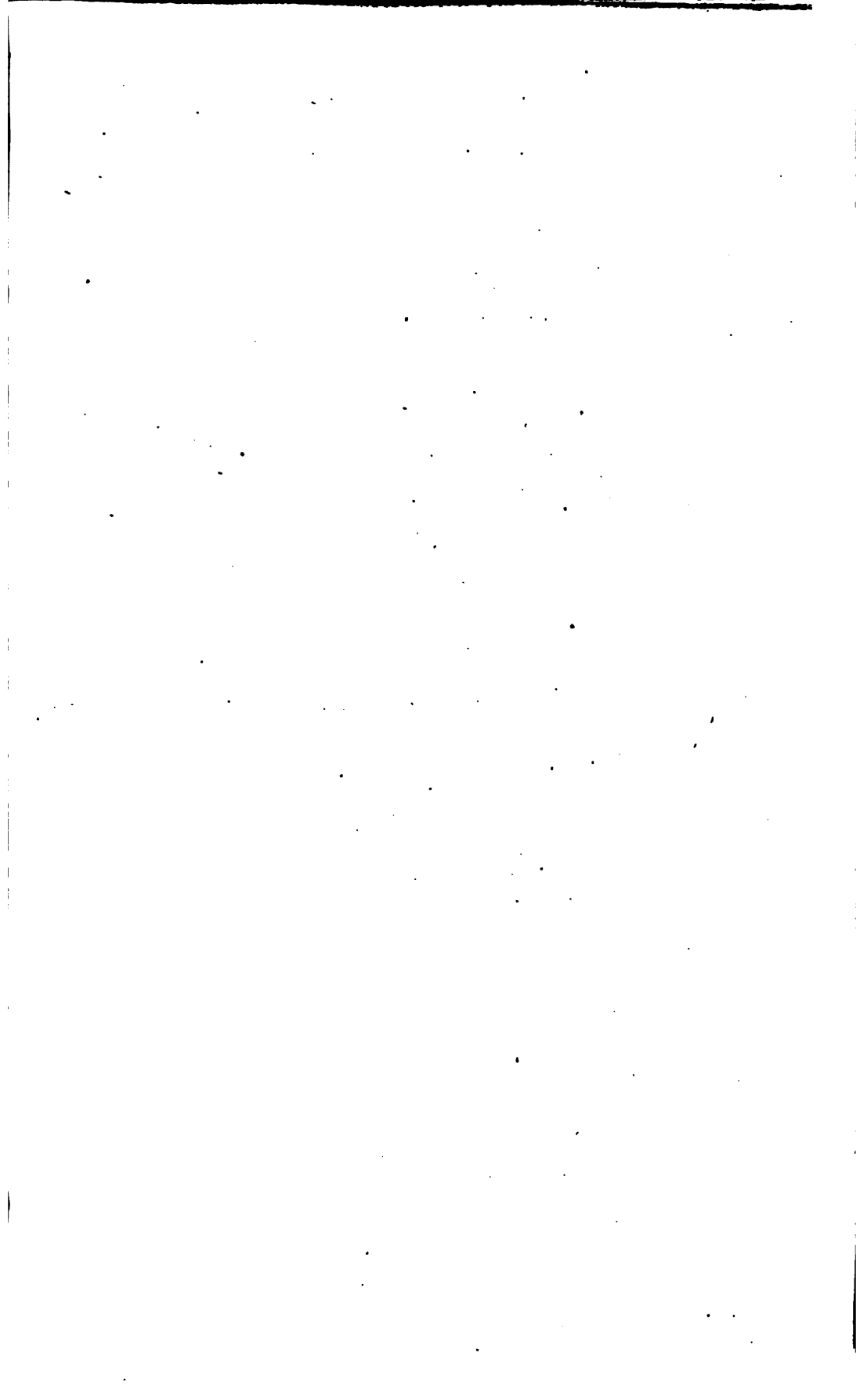






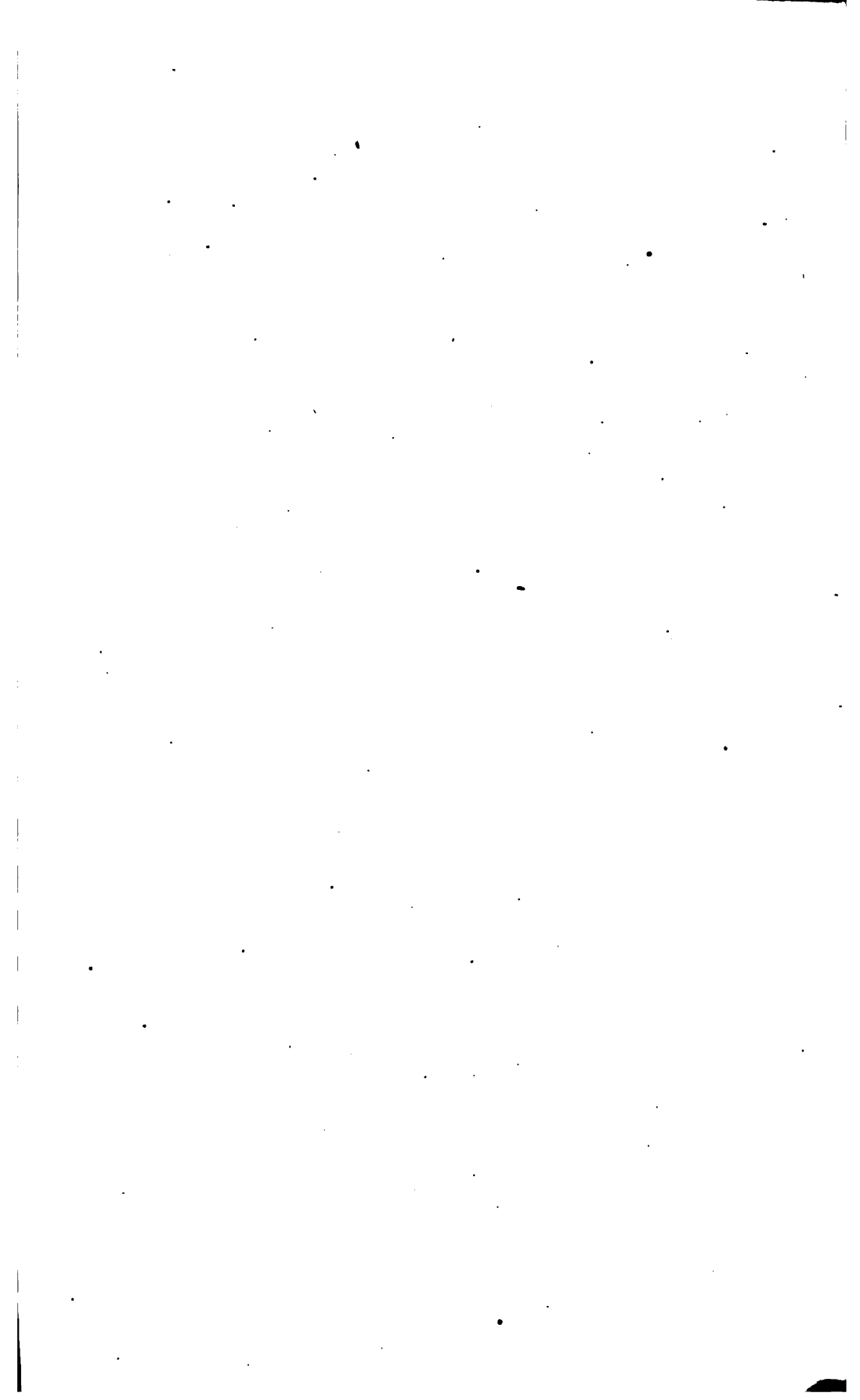














THE
LAWYERS REPORTS
ANNOTATED

NEW SERIES
BOOK 39

BURDETT A. RICH, HENRY P. FARNHAM,
EDITORS

1912

ROCHESTER, N. Y.
THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY
1912

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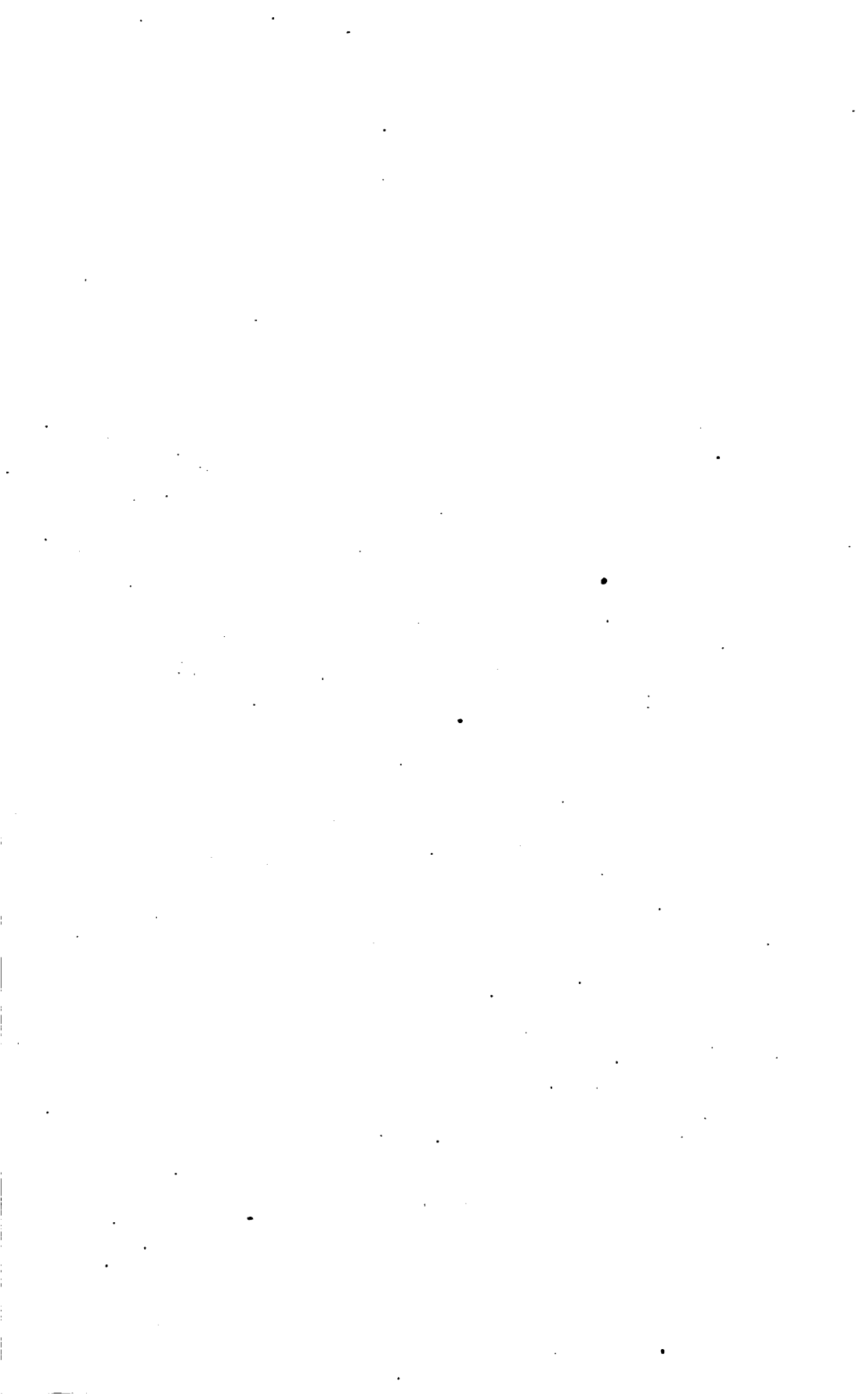
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LAWYERS REPORTS

ANNOTATED

NEW SERIES.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

KRYPTOK COMPANY, Appt.,
v.
STEAD LENS COMPANY.

(111 C. C. A. 495, 190 Fed. 767.)

Preliminary injunction — discretion.

1. The granting of a preliminary injunction rests in the discretion of the trial court, not in its arbitrary, whimsical will, but in its sound judicial discretion, informed and guided by the established principles, rules, and practice of equity jurisprudence; and where the court has not de-

parted from them, its injunctive orders may not be reversed without clear proof of an abuse of its discretion.

Injunction — protection of rights.

2. One may not be enjoined from protecting and enforcing his rights by lawful means, unless his acts to that effect are done or threatened unnecessarily, not really for the purpose of protecting his rights, but maliciously, to vex, annoy, and injure another.

Same — defense — disproportionate injury.

3. It is a good defense to an application for an injunction that the wrong and injury likely to be inflicted upon the opponent of the application by its issue will probably be greater than that which the applicant is likely to suffer from its denial.

Headnotes by SANBORN, Circuit Judge.

Note. — Doctrine of comparative injury in suit to enjoin infringement of patent.

- I. Where injunction sought to restrain other infringement suits, 1.
- II. Where injunction sought to restrain infringement.

a. On application for preliminary injunction.

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 - (a) Clearness or doubt as to validity of patent or fact of infringement, 3.

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5. When equities favor defendant.

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- b. Suspension of injunction on appeal, 14.
- c. Final injunction, 15.

I. Where injunction sought to restrain other infringement suits.

It will be noted that *KRYPTOK Co. v. STEAD LENS Co.* involved the question of a comparison of injuries as affecting the discretion of the court in issuing an injunction wherein a manufacturer, the defendant in one infringing suit, sought to restrain the commencement or prosecution of suits against his customers, involving a similar infringement. It is the purpose of this note, however, to cover not only cases of this character, but also ordinary suits to restrain infringement; since the same principles apply in both classes of cases so far as concerns the comparison by the court of the injuries and benefits to the parties therefrom.

It is well established that in a proper case the court may enjoin a multiplicity of suits against users of an alleged infringing article where a suit is also pending against the manufacturer, to enjoin the manufacture of the alleged infringing article and to recover profits and damages on account of the manufacture and sale

Patent — infringement — suit against users.

4. The owner of a patent cannot recover in a suit against a manufacturer of an infringing article which the latter sells to retailers all the relief to which he is entitled in suits against the latter, and a suit or a decree for an injunction, gains, profits, and damages against the manufacturer is no bar to suits for infringement against those who purchase from him and use or sell the infringing article.

Injunction — against suits.

5. The owner of patents sued a manufacturer for infringement on June 11, 1909, closed its evidence in chief on April 19, 1910, threatened to bring suits against four retailers who purchased the infringing article from the defendant in October, 1910, brought one such suit in November, 1910,

notified the manufacturer's customers that the article they bought of it infringed, and threatened to sue them if they did not stop selling the article.

Held, these facts furnished no just ground to enjoin the owner of the patent from prosecuting the suit against the retailer he had already commenced, or from commencing others of like character.

(October 16, 1911.)

A PPEAL by complainant from an order of the Circuit Court of the United States for the Western District of Missouri, enjoining it from bringing other suits for infringement of patents. Reversed.

The facts are stated in the opinion.

thereof. *Commercial Acetylene Co. v. Avery Portable Lighting Co.* 87 C. C. A. 206, 159 Fed. 935.

Thus, on the theory that public policy requires that the question of infringement of manufactured goods be tried in an action between the patentee and the manufacturer of the alleged infringing goods, rather than between the former and the purchaser of the goods from the latter, thereby flooding the court with suits of the latter character, a preliminary injunction has been held proper to restrain the patentee from bringing different suits against the users of the alleged infringing goods, although the issuance of the injunction might result in inconvenience or injury to the patentee. *Ide v. Ball Engine Co.* 31 Fed. 901.

So, in an aggravated case of threatened irreparable injury to defendant's business, or if there is evidence of malice and oppression or bad faith on the part of the plaintiff, the court may enjoin temporarily the commencement of new suits against the users of the alleged infringing article until after the trial of the case between the plaintiff and the defendant, who is the manufacturer of the article. *Kelley v. Ypsilanti Dress-Stay Mfg. Co.* 10 L.R.A. 686, 44 Fed. 19.

And where the result of bringing many suits for infringements against the manufacturer's customers would be the impairment or destruction of the former's rights as the successful party to a suit by the patentee against him personally, involving a similar infringement, such infringement suits will be restrained. *Kessler v. Eldred*, 208 U. S. 285, 51 L. ed. 1065, 27 Sup. Ct. Rep. 611.

So, where a manufacturer, by a stipulation on the record of a suit against one of his customers, to restrain the use or sale of an article manufactured by him, on the ground that it was an infringement, is admitted to defend the suit, and a result is reached favorable to him, he may rely upon the judgment therein to obtain an injunction restraining the prosecution of similar suits against other customers, the probable damage to him from a multiplicity 39 L.R.A. (N.S.)

of suits against his customers being sufficient to authorize the injunction. *Marshall v. Bryant Electric Co.* 107 C. C. A. 599, 185 Fed. 499, writ of certiorari denied in 220 U. S. 622, 55 L. ed. 613, 31 Sup. Ct. Rep. 724.

And *National Cash Register Co. v. Boston Cash Indicator & Recorder Co.* 41 Fed. 51, asserts the power of a court of equity, by a petition in the main suit against a manufacturer, to restrain the complainant from bringing further suits against the purchasers or users of the patented article, and holds that such injunction should be granted where numerous suits brought by the complainant against the customers of the defendant are vexatious and oppressive.

The showing of injury must be very strong to induce the court, by a preliminary injunction, to restrain a patentee from bringing suits against the users of the alleged infringing articles, although a suit is also pending against the manufacturer thereof, since the loss to complainant is apt to be different, by reason of the delay in the trial of the suit against the manufacturer, and the operation of local statutes of limitation upon his rights against the users, and also because the right of the complainant to claim an accounting and reparation from the users generally dates from the commencement of his suit. *Computing Scale Co. v. National Computing Scale Co.* 79 Fed. 962.

It has been asserted, however, that the proper practice in such cases is to secure a postponement of the suits against the user until after a trial of the case against the manufacturer; and this may generally be done upon motion addressed to the court wherein each particular suit is pending. *Ibid.*

To prevent a multiplicity of suits the court may, in a proper case, and on a proper showing, restrain the prosecution of suits between the patentee and the mere user of the patented machine, to be suspended to await the result of the suit between the patentee and the principal infringer, from whom the user purchased the particular machine. A preliminary in-

Argued before Sanborn, Circuit Judge, and Marshall and William H. Munger, District Judges.

Messrs. John H. Atwood and Edward D. Ellison, for appellant:

It is only when more suits than one are instituted with a view of annoying, harassing, or oppressing a litigant, either by putting him to unnecessary expense or by attempting to terrorize his customers, that such a situation arises that the chancellor can lawfully exercise his injunctive power.

New York Filter Co. v. Schwarzwalder, 53 Fed. 579; Commercial Acetylene Co. v. Avery Portable Lighting Co. 152 Fed. 645, 87 C. C. A. 206, 159 Fed. 935; Dittgen v. Racine Paper Goods Co. 164 Fed. 85; Ameri-

junction will not, however, be granted in such cases. Kelley v. Ypsilanti Dress-Stay Mfg. Co. supra.

II. Where injunction sought to restrain infringement.

a. On application for preliminary injunction.

1. In general.

In acting on applications for temporary injunctions to restrain the infringement of letters patent, there is much latitude for discretion. The application may be granted or refused unconditionally, or terms may be imposed on either of the parties as conditions for making or refusing the order. And the state of the litigation, where the plaintiff's title is denied, the nature of the improvement, the character and extent of the infringement complained of, and the comparative inconvenience which will be occasioned to the respective parties by allowing or denying the motion, must all be considered in determining whether it should be allowed or refused; and if at all, whether absolutely or upon some and what conditions." Forbush v. Bradford, 1 Fisher, Pat. Cas. 317, Fed. Cns. No. 4,930.

In Westinghouse Air-Brake Co. v. Carpenter, 32 Fed. 484, Judge Brewer remarked that on an application for a preliminary injunction a court considers always the relative situation of the parties and the injury or benefit which may result to them either from granting or refusing the injunction.

The duty of the court to consider the convenience of the parties in granting a preliminary injunction, or in suspending the operation of an injunction pending an appeal, is also asserted in Barnard v. Gibson, 7 How. 650, 12 L. ed. 857, holding, however, that the question as to the action of the court in that regard cannot properly be raised on appeal. In replying to the contention that the decree enjoining the defendants from the use of their machines destroys their value and places them in a 3 L.R.A. (N.S.)

can School Furniture Co. v. J. M. Sauder Co. 106 Fed. 731.

The discretion which is vested in a chancellor does not authorize him to grant a preliminary injunction in any and all kinds of cases, with or without a reasonable showing.

Logansport v. Uhl, 99 Ind. 539, 50 Am. Rep. 109; Baxter v. Chicago Bd. of Trade, 83 Ill. 149; Brown v. Newall, 2 Myl. & C. 568, 6 L. J. Ch. N. S. 348, 1 Jur. 422; Lowenfeld v. Curtis, 72 Fed. 105; Russell v. Farley, 105 U. S. 433, 26 L. ed. 1060.

Messrs. Wash Adams and Theoph. L. Carns, for appellee:

The law protects manufacturers from assaults upon customers by a rival owning even an adjudicated patent, pending the

remediless condition, and that many thousands of dollars have been invested in the machinery which, by such procedure, becomes useless, the court said: "The hardship stated is an unanswerable objection to the operation of the injunction until all the matters shall be finally adjusted. If the injunction has been inadvertently granted the circuit court has power to suspend it or set it aside, until the report of the master shall be sanctioned. And unless the defendants below are in doubtful circumstances and cannot give bond to respond in damages for the use of the machines, should the right of the plaintiff be finally established, we suppose that the injunction will be suspended. Such is a correct course of practice, as indicated by the decisions of this court, and that is a rule of decision for the circuit court."

It is sufficient to induce the court to refuse to grant a preliminary injunction if it appears that there would be at least as much probability of its doing irreparable mischief as preventing it. North v. Kershaw, 4 Blatchf. 70, Fed. Cas. No. 10,311.

2. As affected by the merits.

(a) Clearness or doubt as to validity of patent or fact of infringement.

An application for a preliminary injunction to restrain the infringement of a patent imposes upon the applicant the burden of establishing the validity of his patent, which generally requires proof either of favorable decisions thereon by the court in which the application was presented, although in some other case, or by some other court of concurrent jurisdiction. He must also clearly show the actual fact of infringement by the defendant, and also usually show that on a comparison by the court of the advantages and disadvantages resulting to the parties and to the public from issuing the injunction, the equities are with him. Columbia Wire Co. v. Freeman Wire Co. 71 Fed. 302.

A court is more apt to balance conven-

farther juridical determination of its validity.

Commercial Acetylene Co. v. Avery Portable Lighting Co. 152 Fed. 642, 87 C. C. A. 206, 159 Fed. 935; *Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co.* 164 Fed. 871; *Kessler v. Eldred*, 206 U. S. 285, 51 L. ed. 1065, 27 Sup. Ct. Rep. 611; *Dittgen v. Racine Paper Goods Co.* 164 Fed. 89; *Rubber Tire Wheel Co. v. Goodyear Tire & Rubber Co.* 106 C. C. A. 318, 183 Fed. 978.

An appellate court will not interfere with the exercise of the discretion of a chancellor in refusing to dissolve an injunction, either absolutely or upon condition of giving security, unless there is manifest error in the conclusion reached by him.

iences and compare injuries to the parties in exercising its discretion in granting or refusing a preliminary injunction where the validity of the complainant's patent or claim of infringement is not entirely free from doubt. *Morris v. Lowell Mfg. Co.* 3 Fisher, Pat. Cas. 67, Fed. Cas. No. 9,833; *Howe v. Morton*, 1 Fisher, Pat. Cas. 586, Fed. Cas. No. 6,769; *North v. Kershaw*, 4 Blatchf. 70, Fed. Cas. No. 10,311; *Parker v. Sears*, 1 Fisher, Pat. Cas. 93, Fed. Cas. No. 10,748.

Hence, where the right of the complainant under its patent, and the violation thereof by the defendant, are not clear, plain, and manifest, and by granting an injunction there would be a greater probability of producing incalculable mischief than there would be of preventing it, neither an absolute nor conditional injunction ought to be granted. *Day v. Candee*, 3 Fisher, Pat. Cas. 9, Fed. Cas. No. 3,676.

And in such a case a preliminary injunction will not issue if the result therefrom will be to put in jeopardy the defendant's business, where the complainant can be compensated in damages and the defendant is financially responsible. *George Ertel Co. v. Stahl*, 13 C. C. A. 29, 24 U. S. App. 563, 65 Fed. 517; *Standard Elevator Co. v. Crane Elevator Co.* 6 C. C. A. 100, 9 U. S. App. 556, 56 Fed. 718.

Nor where the patent has never been adjudicated and proof of public acquiescence is inadequate, and there is a controversy upon the claim of infringement, and the defendants have been for years in a business which will be seriously injured by the injunction, and there is no proof that they are not pecuniarily responsible. *Johnson v. Aldrich*, 40 Fed. 675.

—where clear.

In some jurisdictions the rule has been asserted that where the validity of the patent is fully established and the infringement is clear, the owner has the right to protection by injunction, although it may cause great injury to the infringer. *Potter v. Fuller*, 2 Fisher, Pat. Cas. 251, Fed. Cas. 39 L.R.A. (N.S.)

Ritter v. Ulman, 24 C. C. A. 71, 42 U. S. App. 263, 78 Fed. 222; *Bradshaw v. Miners' Bank*, 23 C. C. A. 578, 46 U. S. App. 663, 77 Fed. 932.

The order of injunction will not be reversed unless it appears that the legal discretion of the lower court was improvidently exercised.

Thompson v. Nelson, 18 C. C. A. 137, 37 U. S. App. 478, 71 Fed. 339; *Southern P. Co. v. Earl*, 27 C. C. A. 185, 48 U. S. App. 716, 82 Fed. 690; *Rahley v. Columbia Phonograph Co.* 58 C. C. A. 639, 122 Fed. 625.

Sanborn, Circuit Judge, delivered the opinion of the court:

On June 11, 1909, Kryptok Company, a corporation; exhibited a bill in the court

No. 11,327; *Potter v. Whitney*, 1 Low. Dec. 87, Fed. Cas. No. 11,341.

In the cases applying the rule, however, there has generally appeared some fact or circumstances disentitling the defendant to invoke the equitable consideration of the court.

Thus where the validity of a patent and the infringing character of the articles complained of are conclusively established against the defendant by the decision of the court of appeals of another district, and no certiorari to the Supreme Court having been allowed, the decision is by the court of last resort, a preliminary injunction will be issued restraining the defendant from using in his business infringing articles which he bought from the manufacturer, who was the defendant in the suit mentioned. Under such circumstances the fact that it may take time and trouble to locate and remove the infringing articles is no defense to the application for injunction, since that is a risk the user of the infringing article always takes. The defendant, however, being a municipality, and public convenience requiring that the removal shall be by instalments, the injunction will be so framed. *National Meter Co. v. Poughkeepsie*, 75 Fed. 405, affirmed in 32 C. C. A. 463, 45 U. S. App. 761, 89 Fed. 1014.

If the validity of a patent and the fact of infringement are clear, it is no objection to the issuance of a preliminary injunction that the defendant, relying upon the opinion of experts that the article he manufactures is not an infringement, has expended large sums of money in preparing to make use of the infringing machinery. *Norton v. Eagle Automatic Can Co.* 57 Fed. 929.

That great hardship will be imposed upon the defendants if a preliminary injunction be issued against them is not a valid reason for not issuing the same, where the validity of the patent and the fact of infringement are clear and many of the defendants were officers in another company which some time previously was adjudged guilty of the same infringement, such offi-

below at Kansas City, in the state of Missouri, against Stead Lens Company, another corporation, for infringement of letters patent Nos. 637,444 and 876,933, on improvements in bifocal lenses, and prayed for an injunction and an accounting of gains and profits and for damages. On September 9, 1909, the Stead Company answered, and denied the validity of the patents and its alleged infringement of them. On April 19, 1910, Kryptok Company closed its evidence in chief, and any delay thereafter in the proceedings in the case seems to have been attributable to the Stead Company. That company was a manufacturer of bifocal lenses alleged to infringe the patents, and Hausman & Company, a corporation of Pennsylvania, was one of their customers,

that bought the lenses of the Stead Company at wholesale and sold them at retail. In November, 1910, about seventeen months after it instituted its suit against the Stead Company, and about seven months after it closed its evidence in chief in that suit, Kryptok Company brought a suit, in Philadelphia, against Hausman & Company, for infringement of the patents. Thereupon the Stead Company filed a petition and affidavits in the suit in Kansas City, and prayed that the Kryptok Company be enjoined from prosecuting its suit against Hausman & Company, and from beginning any other suits against others who were purchasing bifocal lenses of the Stead Company; and upon this petition, these affidavits and counter affidavits presented by

cers thereafter entering upon the present enterprise. *United Indurated Fibre Co. v. Whippany Mfg. Co.* 83 Fed. 485, reversed in 30 C. C. A. 615, 57 U. S. App. 270, 87 Fed. 215, on the ground that the complainant's case was not clear, and it did not appear that the decisions relied upon construed the patent in accordance with the present claims of the complainant, and broad enough to cover defendants' process.

Where the defendant stands fair before the court, it is generally held not to be a matter of course to issue a preliminary injunction to restrain the use of an alleged infringing article, although a *prima facie* showing is made of the right of the patentee to the thing patented, and of the violation thereof by the defendant, but it must also appear, if the injunction is not issued, that complainants will be irreparably injured, and that no subsequent decree of the court can sufficiently ascertain and make good their damages; especially where the result of the injunction would be greatly to injure the defendant or the public.

Thus, even if the court regards the complainant's claim both as to the validity of the patent and infringement to be well established, a comparison of advantages and injuries resulting to the parties from a preliminary injunction will nevertheless be made, and may result in the denial of the injunction. *Morris v. Lowell Mfg. Co.* 3 Fisher, Pat. Cas. 67, Fed. Cas. No. 9,833.

And even when complainant's title is clear, if there are peculiar circumstances showing that the defendant's interests would be very injuriously affected by the issuance of an interlocutory injunction, while the interests of the complainant would not be so affected by refusing it, the court, in its discretion, may refuse it. (Injunction to restrain manufacture and sale of machine.) *Potter v. Whitney*, 1 Low. Dec. 87. 3 Fisher, Pat. Cas. 77, Fed. Cas. No. 11,341.

—as to validity of patent.

As to the effect of fully establishing the validity of a patent upon the right to a preliminary injunction to restrain its infringement, *39 L.R.A. (N.S.)*

fringement, the rule is thus stated in *Morse v. Lowell Mfg. Co.* supra: "In granting or refusing a preliminary injunction, the court will carefully consider the situation of the parties. Its important office is to preserve the rights of the patentee pending the litigation of his title. If the title has already been fully established, or is otherwise so clear that no reasonable doubt of its validity remains, a court of equity would, in many cases, grant such an injunction, as it would a final injunction, notwithstanding the injury which might result to the defendant. But where there is no danger of loss to the plaintiff, and great loss will result to the defendant, the case must be substantially free from doubt to require such action."

In granting an interim injunction, the court will cautiously consider the degree of convenience and inconvenience to the parties therefrom, and according to the doubt which may exist in the mind of the court upon the facts, and according to the degree of inconvenience to the parties, the court will be guided. *Birdson v. McAlpine*, 8 Beav. 229.

And where a reasonable question is raised as to the validity of a patent, a preliminary injunction to restrain an alleged infringement thereof will not issue, where the issuance thereof will work great injury to the defendant, without corresponding benefit to the complainant, and the complainant can be adequately protected without it. *Swift v. Jenks*, 19 Fed. 641 (proceedings by one manufacturer against another, to restrain the manufacture of an alleged infringing article).

Nor where the decisions affecting the validity of the patent leave the matter in some doubt, and a preliminary injunction would result in breaking up an extensive business established by the defendants, and the complainant has established a license fee for the use of the invention, so that, if a final decree is in its favor, it will have a remedy by way of royalty. *Eastern Paper Bag Co. v. Nixon*, 35 Fed. 752.

Nor where the validity of the patent is in substantial controversy, and the issuance

Kryptok Company, the court below entered an order whereby it enjoined Kryptok Company from proceeding farther with its suit against Haussman & Company, and from commencing any suits for infringement of its patents against any of the purchasers of bifocal lenses of Stead Company until the final decree should be rendered in the suit of the Kryptok Company against the Stead Company. From this order the Kryptok Company has appealed to this court.

The grant of a preliminary injunction rests in the discretion of the trial court, not in its arbitrary, whimsical will, but in its sound judicial discretion, informed and guided by the established principles, rules, and practice of equity jurisprudence; and where the court has not departed from

them, its injunctive orders may not be reversed without clear proof of an abuse of its discretion.

Established principles of equity jurisprudence are (1) that one may not be enjoined from doing lawful acts to protect and enforce his rights of property or of person, unless his acts to that effect are clearly shown to be done unnecessarily, not for the purpose of preserving and enforcing his rights, but maliciously, to vex, annoy, and injure another; and (2) that where the injury to the applicant if the preliminary injunction is refused will probably be greater than the injury to the opponent if it is granted, it should be issued; while if the contrary is the probable result, the application for it should be denied. *Rus-*

of the injunction would result in great injury to the defendant, who is financially able to respond to any claim against him. *Diamond Match Co. v. Union Match Co.* 129 Fed. 602.

But a patentee who has established the validity of his patent against the manufacturer of an infringing article will not be compelled to litigate the same question over again against scores or hundreds of users, or denied the only relief which can secure him the fruits of his invention during its lifetime, merely because the injunction prayed for is in form *pendente lite*, even though the issuance thereof will result in personal inconvenience to the defendant, as well as inconvenience to the public at large. *Westinghouse Air Brake Co. v. Great Northern R. Co.* 86 Fed. 132.

A preliminary injunction will issue against the manufacturer of an article alleged to infringe a patent, although the latter is of doubtful validity, the public, however, having acquiesced in the patent for a long period, and its validity having been sustained in different proceedings at law, although in granting the injunction the risk is run of doing considerable damage to defendant by his work being stopped for a long period, where, on the other hand, the refusal of an injunction might occasion injury to the plaintiff to an indefinite extent, it appearing that the injunction had been withheld on defendant's promise to give a bond to account to the plaintiff for all damages occasioned by the infringement, should the final decision be in favor of the plaintiff, and that the defendant has failed to give this bond, and the fact of his solvency is not clear. *Newall v. Wilson*, 2 DeG. M. & G. 282.

—as to fact of infringement.

If the question of infringement is not clear, and a preliminary injunction will greatly interfere with the business of the defendant, whose financial responsibility is unquestioned, no preliminary injunction will issue. *Williams v. McNeely*, 56 Fed. 39 L.R.A. (N.S.)

265; *Rogers Typographic Co. v. Mergenthaler Linotype Co.* 58 Fed. 693.

Or where there is a question as to the infringement, and the defendant is financially responsible, and the extent of the injury to the complainant will be the depriving of his royalty or license fee, and this without reference to the effect of the injunction upon the defendant. *Overweight Counterbalance Elevator Co. v. Cahill & H. Elevator Co.* 86 Fed. 338; *Scoville Mfg. Co. v. Patent Button Co.* 99 Fed. 743.

Nor where the fact of infringement is in controversy, and there would be no serious, irreparable damage to complainant prior to the trial of the case on the merits, providing the defendant gives security to answer to the complainant for all damages from the infringement. *Motion Picture Patents Co. v. New York Motion Picture Co.* 174 Fed. 51.

Although, for the purposes of an application for a preliminary injunction, the validity of a patent alleged to be infringed may be unquestioned, and it may receive a broad construction, nevertheless, where the defendant denies the infringement, and the fact of infringement is not clear, and it further appears that the patent will soon expire, the issuance of the injunction will be denied, where it would result in great loss to the defendant. *American Sulphite Pulp Co. v. Great Northern Paper Co.* 159 Fed. 167.

(b) Doubt as to miscellaneous facts.

When the court has serious doubts as to the validity of contested claims, a preliminary injunction will not issue where the result would be a serious interference with the business of one manufacturer in order to strengthen the business of another. *Welsbach Light Co. v. Benedict & B. Mfg. Co.* 82 Fed. 747.

In *Schalkenbach v. National Ventilating Co.* 129 App. Div. 389, 113 N. Y. Supp. 352, a preliminary injunction the purpose of which was to restrain the defendant from manufacturing in violation of the terms of a license was denied where the fact of

sell v. Farley, 105 U. S. 433, 438, 26 L. ed. 1060, 1061; Shubert v. Woodward, 92 C. C. A. 509, 522, 167 Fed. 47, 60; Blount v. Société Anonyme, 3 C. C. A. 455, 458, 6 U. S. App. 335, 53 Fed. 98, 101.

The Stead Company, by its petition, based its application for this injunction upon two grounds: upon the proposition of law that in this suit against it Kryptok Company could procure all the relief it was entitled to obtain for the infringement of its patents by the Stead Company and by Hausman & Company and the other customers of Stead Company who bought the infringing article of it at wholesale and sold it at retail, and upon the averment of the fact that the Kryptok Company had brought the suit against Hausman & Com-

pany and threatened to bring like suits against three other customers of the Stead Company, and had notified and were notifying its customers that they were infringing its patents, and had threatened and were threatening its customers with like suits for infringement, not for the purpose of protecting and enforcing its rights under its patents, but for the sole purpose of vexing and annoying the Stead Company, which was morally bound to defend the suits against its customers, and of maliciously injuring its business. The proposition of law which the Stead Company relied upon was an error of law. There was no denial that the patents were issued, and from their issue the legal presumption arose that they were valid. While infringement

the violation was not clear, and the defendant would sustain far greater damage by the issuance of the injunction than would the plaintiff by its denial.

To protect an unadjudicated patent where the defense involves such a pure question of fact as whether the complainant was the individual inventing the device, a temporary injunction will not issue where the result would be severe loss to defendant if his position should be substantiated, and the interval before final hearing need not be sufficiently long to occasion the complainant any substantial loss. *Meyers v. Skinner*, 179 Fed. 860.

Nor where the outcome of the proceeding to enjoin the infringement will ultimately turn upon a defense as to which the preliminary proofs are very conflicting, and the defendant is a mere user of the alleged infringing article, and no special injury to complainant from such use is alleged or shown. *Jefferson Electric Light, Heat, & P. Co. v. Westinghouse Electric & Mfg. Co.* 67 C. C. A. 189, 134 Fed. 392 (a preliminary injunction was granted in this case on final hearing, 135 Fed. 365, affirmed in 71 C. C. A. 481, 139 Fed. 385).

3. Effect of laches of complainant or plaintiff.

Laches and tacit, not to say express, acquiescence in the use of a patent by the defendant, estops the plaintiff from equitably demanding a preliminary injunction to restrain further infringement. *Keyes v. Eureka Consol. Mfg. Co.* 45 Fed. 199, affirmed in 158 U. S. 150, 39 L. ed. 920, 15 Sup. Ct. Rep. 772.

The plaintiff, by standing by for many years without complaint or demand for compensation, furnishes conclusive evidence that the continuance of the use of his invention for a few weeks, or even months, longer, if paid for in the end, will not be an injury of such an irreparable nature as to require the issuance of a preliminary injunction, especially where the issuance of the injunction would suddenly stop large mills and manufactories, causing great and 39 L.R.A. (N.S.)

irreparable injury not only to the defendants, but to the public at large, without any corresponding benefit to the plaintiff, whose interest it is that the defendants should use his invention if they pay him for it. *Parker v. Sears*, 1 Fisher, Pat. Cas. 93, Fed. Cas. No. 10,748.

A preliminary injunction will not be granted to restrain the use of alleged infringing machines where such use has been acquiesced in for over nine years, during which the defendant has built up a large industry, and where he is financially solvent and responsible for any judgment against him. *Keyes v. Pueblo Smelting & Ref. Co.* 31 Fed. 560.

Where the defendant has invested large sums in its business with the knowledge of the complainants, and the latter have been guilty of inexcusable laches in asserting and maintaining their rights, if the defendant is amply responsible, and will suffer greater injury from the issuance of the injunction than will the complainants from its refusal, a preliminary injunction will be refused, even though it is conceded that the defendant has not succeeded in casting serious doubts upon the validity of the complainants' patent. *Hurlburt v. Carter*, 39 Fed. 802.

4. When equities favor complainant or plaintiff.

Where the validity of a patent has been sustained in different courts, and the fact of infringement is clear, a preliminary injunction will not be withheld on the grounds that the infringement complained of is so small (being against a mere user of articles valued at \$22) that it does not seriously imperil the complainant's business, where the effect of the injunction will not seriously imperil defendant's business. *Carter & Co. v. Wollschlaeger*, 53 Fed. 573.

A preliminary injunction will be granted to restrain a manufacturer from manufacturing and selling an article alleged to infringe a patent of the complainants, where much more injury would or might result to the complainants from a refusal

was denied, the legal right to sue and to prosecute suits for infringement to a hearing must be admitted in the consideration of this injunction, because thus only could that issue ever be tried or determined. Kryptok Company therefore had the legal right to sue Haussman & Company and every other purchaser and retailer from Stead Company of the infringing lenses, and if it proved their infringement, it had the right to an injunction forbidding each of them from selling or using any of the lenses, and to a recovery of the gains and profits each of them had made by purchasing and selling them, and to the damages it had sustained by their infringement. It is always difficult to prove the gains and profits an infringer obtains, and the

damages suffered by the owner of a patent from the sales of the infringing article are equally difficult to prove, so that the most valuable relief to which he is entitled in equity is the injunction against further infringement. Such an injunction against the retailers Kryptok Company could not secure in its suit against Stead Company. It might in that suit recover the gains and profits Stead Company had acquired by its manufacture and sale to its customers of the infringing lenses, and the damage Stead Company had inflicted thereby, but it could not in that suit recover the gains and profits the purchasers from the Stead Company had made, nor the damages their infringement had inflicted. The owner of a patent cannot recover, in a suit

of the injunction than to the defendants by granting it, it appearing that the defendants have very little invested in their business, and no substantial damages would be apt to accrue to them, while, if they were to go on with the business as competitors, they might seriously injure the complainant's business, and in the end, perhaps, not be able to respond in damages, and there might also be a class of damages for which complainants could not be entirely compensated, they being manufacturers. *Irwin v. Dane*, 2 Biss. 442, 4 Fisher, Pat. Cas. 359, Fed. Cas. No. 7,081.

If the validity of a patent has been established in different actions, and the fact of the infringement is clear, a preliminary injunction will issue where the issuance thereof will be attended with but slight loss to the defendant, a manufacturer of the alleged infringing article, while the denial thereof will be productive of great loss to the complainant, a manufacturer of the invention. *Hat Sweat Mfg. Co. v. Davis Sewing Mach. Co.* 32 Fed. 401.

A manufacturer will be restrained by a preliminary injunction from using in his manufacturing business alleged infringing machines, where he has not yet commenced the use of the machines, while, on the other hand, the complainant has been using his invention for a long period of time, and has built up a large trade in the product of such invention. *Columbia Wire Co. v. Freeman Wire Co.* 71 Fed. 302.

So, where the complainants are the owners of the patents alleged to be infringed, and are manufacturing under them, and have been engaged in such manufacture for some time, and the defendant entered upon the manufacture of the competing article just prior to the commencement of the suit, and has invested very little money in it, and acquired no reputation for his manufacture in that line, a preliminary injunction will issue, it being apparent that much more injury would or might result to the complainants from a refusal of an injunction than to the defendant by granting it. *Irwin v. Dane*, supra.

And where the defendant's business is a 39 L.R.A. (N.S.)

new one, while the complainants' is old and well established, there is generally less hardship in enjoining the former's business until a hearing upon the merits, than in permitting the infringement to continue to the injury of the complainants. *Plimpton v. Spiller*, L. R. 4 Ch. Div. 286, 35 L. T. N. S. 656, 25 Week. Rep. 152.

Where the complainant is the manufacturer of an invention and the defendant is engaged in selling the infringing article, a preliminary injunction will issue, since, under such circumstances, it is manifest that a refusal thereof would work great and perhaps irreparable injury to complainant's business, while it is not easy to perceive how the defendant, being a merchant, and not a manufacturer, can be materially injured by being required to discontinue his sales until the question of infringement is finally determined. *Covert v. Curtis*, 25 Fed. 43.

5. When equities favor defendant.

(a) Where plaintiff in business of licensing invention.

Generally, where the defendant does not make or vend the alleged infringing machine, but only uses it, so that the injury to the plaintiff is merely the loss of royalty, and not damage from a constantly increasing competition, an injunction will not issue if the loss or inconvenience to the defendant will be great. *Forbush v. Bradford*, 1 Fisher, Pat. Cas. 317, Fed. Cas. No. 4,930; *Morris v. Lowell Mfg. Co.* 3 Fisher, Pat. Cas. 87, Fed. Cas. No. 9,833 (burring machine); *Neilson v. Thompson*, Webster, Pat. Cas. 278.

Where the nature of a machine alleged to infringe a patent is such, and it is intended to be put to such a use, that the use thereof will not be injurious to the complainant, and he can be fully compensated for any injury from the infringement, since the injury, if any, will be merely the value of the royalty, a preliminary in-

against a manufacturer of an infringing article which he sells to retailers, the full relief to which he is entitled in suits against the retailers, and a decree for an injunction and damages against a manufacturer is no bar to suits against those who purchase from the manufacturer and use or sell to others. *Birdsell v. Shaliol*, 112 U. S. 485, 488, 28 L. ed. 768, 769, 5 Sup. Ct. Rep. 244. The proposition of law, therefore, on which the petition for this injunction is based, must fall.

The evidence fairly established these facts: Kryptok Company, in October, 1910, more than eleven months after it sued Stead Company, and more than five months after it closed its evidence in chief, notified Stead Company that it would sue four

of the purchasers from it if it did not stop its alleged infringement, and in November, 1910, it sued one of them. But it had the legal right to sue them, and to endeavor by such suits to obtain an injunction to stop their alleged continuing trespass upon its rights. It notified many of the customers of the Stead Company that the lenses they were buying of that company were infringements of its patents, and that if they did not cease dealing in them it would sue them for infringement. But there was danger that if, knowing of their infringement, it failed to give these notices, it might thereby lose its right to recover the gains and profits they made anterior to the filing of its bills against them. *Layton Pure Food Co. v. Church & D. Co.* 32 L.R.A. (N.S.)

junction will be denied. (Machine used in dredging operations.) *Morris v. Shelbourne*, 8 Blatchf. 266, 4 Fisher, Pat. Cas. 377, Fed. Cas. No. 9,836.

So, where the complainant is not a user of the patented article, but seeks to benefit under the patent by licensing the use thereof by others, and the parties are wide apart in their views as to the proper amount of royalty to be paid, a preliminary injunction against the continued use of articles then in use will not be issued, although the acquirement and use of similar articles will be restrained. *Campbell Printing Press & Mfg. Co. v. Manhattan R. Co.* 47 Fed. 663.

And even though the court has serious doubts as to the good faith of the defendant, if the complainant does not use his patent as a monopoly, but grants licenses to others to use it, and there is some doubt on the question of prior use, a preliminary injunction will be withheld, providing the defendant gives security to answer for any judgment for damages recovered against him. *Greenwood v. Bracher*, 5 Bann. & Ard. 302, 1 Fed. 856.

It has been asserted that while the fact that the plaintiff grants licenses at a fixed sum, and that the defendant is not the maker and vendor, but only uses the machine, is of itself a circumstance to be taken into account by the court in exercising its discretion in ordering a preliminary injunction, nevertheless that is not a sufficient reason to refuse the writ, except in combination with other circumstances, either of doubt as to title or of hardship in the operation of the injunction. *Howe v. Newton*, 2 Fisher, Pat. Cas. 531, Fed. Cas. No. 6,771.

A preliminary injunction will issue restraining the use of a patent by a licensee, fraudulently procured, or by anyone holding under such licensee, taking with notice of the charge of fraud, and such relief will be given without reference to the injury thereby caused the defendant. *Consolidated Fruit-Jar Co. v. Whitney*, 1 Bann. & Ard. 356, Fed. Cas. No. 3,132.
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(b) Where defendant is mere user of article.

An important circumstance to be considered in determining whether, in the exercise of its discretion, an injunction should be granted restraining the use of an alleged infringing machine, is the fact that defendant does not make or sell it, but only uses it in his business; since in such case injury to the complainant from the infringement is generally the mere loss of royalty rather than any damage from a constantly increasing competition. *Morris v. Lowell Mfg. Co.* 3 Fisher, Pat. Cas. 67, Fed. Cas. No. 9,833.

In *Sanders v. Logan*, 2 Fisher, Pat. Cas. 167, Fed. Cas. No. 12,295, equity jurisdiction was denied where a bill praying for an injunction and accounting was based on the use of machines containing parts alleged to infringe complainant's invention, and the only injury to complainant's right was not in using his invention, since it was for his interest that the invention should be used, but the injury was rather in the failure to pay the license charge for the use of it. The court said that as a remedy, an injunction should be administered only for prevention or protection, and where it is not necessary for these purposes, it is merely vindictive, injuring one party without benefit to the other, and added: "There are many cases of patents where it is the only efficient remedy to protect the patentee, and prevent continuing trespasses on his rights. But there are others in which it answers neither purpose, and is only used for extortion or vengeance. A chancellor who would issue an injunction to stop a mill or manufactory, locomotive or steam engine, because in their construction some patented device or machine has been used, would act with more than doubtful discretion. Stopping the mill or steam engine might inflict irreparable injury, but could not benefit the inventor. The compensation to him for this trespass on his rights is the price of a license. The wrong done him is not the use of his invention,

274, 104 C. C. A. 475, 481, 182 Fed. 35, 41, and cases there cited.

The result is that all the acts of Kryptok Company were justified by the law, were well calculated to and tended to preserve and enforce its legal rights under its patents, and these acts fail to convince that they were not done for that purpose, or that they were done unnecessarily and maliciously, for the sole purpose of annoying and vexing Stead Company and injuring their business.

Finally, it is a good defense to an application for a preliminary injunction that the wrong and injury likely to be inflicted upon the opponents of the application by its issue are greater than those which the applicant is likely to suffer from its denial.

but the nonpayment of a given sum of money. To issue an injunction in such a case, where neither prevention nor protection is sought or required, but only compensation, would be an abuse of power. An injunction is not to be used as an execution or for extortion."

Considering this point in *Parker v. Sears*, 1 Fisher, Pat. Cas. 93, Fed. Cas. No. 10,748, the court said: "The issuing of an interlocutory injunction is always a matter of discretion with the court, and depends on the peculiar circumstances of each case. To suspend the operation of a single mill or manufactory, but for a week or two, because some wheel, bucket, or other small portion of its machinery may chance to infringe some dormant patent, would be a doubtful exercise of discretion, where the benefits to result from it to the complainant are so comparatively trifling, and his loss, if any, so perfectly capable of compensation. How much more so when we are called upon to stop the operations of one hundred."

On the same point in *Neilson v. Thompson*, Webster, Pat. Cas. 278, Lord Cottenham said that stopping the works under such circumstances is just inverting the purpose for which an injunction is used, since an injunction is used for the purpose of preventing mischief, and this would be using the injunction for the purpose of creating mischief, because the plaintiff cannot possibly be injured.

Where the alleged infringement is in the use of an article in connection with other machinery in the defendant's business, and hence the only damage to the plaintiff should he establish the infringement, is the loss of his royalty, while to enjoin the operation of the machinery would be to cause great loss to the defendant, a preliminary injunction will not issue. *Consolidated Roller-Mill Co. v. Richmond City Mill-Works*, 40 Fed. 474.

Nor where the alleged infringing article is but a part of a large machine upon which the daily newspaper of the defendant is printed, and a change of this part of it, though possible, is difficult, and might embarrass

The only loss which Stead Company would probably have sustained by the prosecution of the suit against Hausman & Company and the commencement of the threatened suits against three of its other customers, if the injunction had been denied, would have been the cost of defending those suits, which cost, it alleges, it was morally, but not legally, bound to pay. The loss which Kryptok Company will probably sustain from the issue and continuance of the injunction, if its bills are well founded, will be the postponement of its injunction against the infringement by these customers of its patents for several years, and the loss of those gains and profits made by those customers which it is unable eventually to prove. The evidence is not con-

barrass his usual course of business and cause him much expense, and would be of no especial advantage to the plaintiffs, since they do not use printing machines, but make and sell them in the market, and hence, whatever they are entitled to in the way of damage amounts in effect to a royalty. *Hoe v. Boston Daily Advertiser Corp.* 14 Fed. 914.

Nor where the defendant is not engaged in manufacturing and selling the alleged infringing article, and hence does not interfere with the business of complainants by competition or otherwise, and does not injure their business or impair the present value of profits which they derive from their monopoly, but he has merely a single machine connected with and used for lighting his private residence, and it would be a great inconvenience to him and of no legitimate advantage to complainants to compel him to discontinue such use. *Gilbert & B. Mfg. Co. v. Bussing*, 12 Blatchf. 426, Fed. Cas. No. 5,416.

Nor when the use is of but one machine and the defendant is neither forestalling the market, competing with the complainants, nor multiplying suits for infringement in event the claim of infringement is established, and the use of the machine in his business is of great importance thereto, and the effect of an injunction would be to close up suddenly the defendant's business, thereby causing him great damage as well as being productive of great expense and inconvenience to third parties, and the complainants have none of the machines on hand, and neither manufacture nor use any of them, and hence their only injury, if injured, is the deprivation of the value of the license to use the machine. *Hockholzer v. Eager*, 2 Sawy. 361, Fed. Cas. No. 6,556.

Nor where the defendants are pecuniarily responsible, and are not manufacturers of the alleged infringing article, but are simply using it in their business. *Nilsson v. Jefferson*, 78 Fed. 366.

Nor when the use is of machinery in a large manufacturing plant, the enjoining of which would produce great mischief, for

vincing that the probable loss of the Stead Company from the denial is greater than that of the Kryptok Company from the granting of the injunction.

No case has been cited that sustains an injunction of the character here in question under a similar state of facts. In *Commercial Acetylene Co. v. Avery Portable Lighting Co.* (C. C.) 152 Fed. 642, upon which counsel for the Stead Company seem to rely, the suit against the manufacturer was instituted on July 24, 1906, and within three months the complainant had brought ten suits against purchasers from the defendant, and threatened more. Perhaps those facts indicated a purpose unnecessarily and maliciously to annoy the defendant and injure its business. But, even so, the

court granted an injunction against the commencement of more such suits only, and refused to enjoin the prosecution of the ten that had already been commenced. There is a wide difference between a case in which ten suits against customers of the defendant are brought within three months after the bill against a manufacturer is filed, and probably before the complainant has made his *prima facie* case, and one in which no such suit is instituted until seventeen months after the bill is filed, and more than six months after the complainant has closed its case in chief.

Because the proposition of law upon which Stead Company founded its petition for the injunction was an error, because the evidence in the petition and affidavits fail

which, if the suit should terminate in favor of the defendant, there would be no remedy, where, on the other hand, there is no doubt of their pecuniary ability to pay any damages awarded against them by reason of such use. *Essex Hosiery Mfg. Co. v. Dorr Mfg. Co.* Fed. Cas. No. 4,533.

So, a preliminary injunction will not issue although the validity of the patent and the fact of the infringement are fully established in another suit to which the defendant is not a party, where the defendant is using a large number of machines in its manufacturing business, the use of which is necessary to enable it to fill large orders booked for the future, and the complainant is unable at once to furnish to the defendant machines of its own manufacture, since, under such circumstances, the enforcement of the complainant's naked right to an injunction is not necessary to enable it to recover the profits and damages to which it is entitled as against the defendant, and to award the injunction would result in throwing out of employment a great number of persons, thereby causing much suffering and distress, and would bring to a stop a useful industry, prevent the performance of contracts, and cause a disarrangement of business beyond that which is under the direct control of the defendant. *Huntington Dry-Pulverizer Co. v. Alpha Portland Cement Co.* 91 Fed. 534. In this case the complainant suggested as a measure of relief that it would build for defendant enough machines of the complainant's device to take the place of the infringing machines then used by the defendant, and offered to consent that the injunction order operate against the infringing machines only when it should furnish machines of its own device, capable of doing the work then being performed by those in use, and that, as the work of each infringing machine was provided for by its patented device, such supplanted machine should fall within the scope of the order, and its further use be discontinued. The court, however, did not give relief along this line, merely remarking that the estimated cost of the machines was a very large

sum of money, and it did not appear within what time they could be built and when ready for use, nor whether they could advantageously be erected upon the defendant's premises.

Where there can be no difficulty in ascertaining the loss to complainants by the use by the defendant of cars claimed to infringe complainants' patent, and to restrain the use thereof *pendente lite* would unnecessarily deprive the defendant of the large capital invested in the building of the cars before the question of infringement is adjudicated, and the defendant is solvent, no preliminary injunction will issue. *Pullman v. Baltimore & O. R. Co.* 4 Hughes, 236, 5 Fed. 72.

Nor where the effect of the injunction would be suddenly to stop mining operations in all the mines of a district, causing great, if not irreparable, injury to the defendants and to the public, and where the complainants' right to the invention may be fully recognized and all injury to them fully compensated by damages. *Whitcomb v. Girard Coal Co.* 47 Fed. 318.

Where grave doubts arise as to what the final decree on the merits of a proceeding to enjoin an infringement will be, the summary powers of the court to grant an injunction *pendente lite* will not be exercised where, after due regard to the injuries and advantages resulting therefrom, it appears that the injury to the complainant is slight, since the articles whose manufacture complainant seeks to restrain are quite generally manufactured by other parties and are on the open market for sale, while, on the other hand, the granting of a temporary injunction would result in great loss to defendant, a large manufacturer of the article. *Johns-Pratt Co. v. Sachs Co.* 155 Fed. 120.

A preliminary injunction, however, will be granted even as against the user of an alleged infringing machine, where the refusal of it would be to jeopardize complainant's market. *Bresnahan v. Tripp Giant Leveller Co.* 43 C. C. A. 48, 102 Fed. 899.

And it has been asserted that there are no reasons which disentitle a complainant to the remedy of a preliminary injunction

to show that Kryptok Company's notices to the customers of Stead Company of their infringement and of coming suits were given, that they commenced the suit against Haussman & Company, or that their threats to sue three other customers of Stead Company were made, unnecessarily and maliciously, for the sole purpose of vexing and

annoying Stead Company and injuring their business, and because it does not appear that the injury to Stead Company by refusing the injunction would probably be greater than to the Kryptok Company by granting it, the order below must be reversed.

And it is so ordered.

against the infringement of his patent by a defendant who is a user of the infringing article, when the facts are such that he would be entitled to it if the defendant were a manufacturer or a seller. Other language of the court, however, indicates an exception in the one case that would not exist in the other, since it is further stated that whenever it is manifest to the court that, upon the case made, an injunction will be granted at final hearing to the complainant, one should be awarded to him preliminarily, in the absence of facts presenting special equitable considerations to induce the court, in the exercise of judicial discretion, to withhold it. The court, however, held that there was nothing in the circumstance that defendant was merely a user of the patented invention, or that the complainant derived his profit exclusively from the manufacture and sale of the patented article, to warrant the court in refusing an injunction. *Allington & C. Mfg. Co. v. Booth*, 24 C. C. A. 278, 45 U. S. App. 627, 78 Fed. 878.

The effect of a prior adjudication of the validity of the same patent where the defendant is a mere user of the article is emphasized in *Campbell Printing-Press Co. v. Prieth*, 77 Fed. 976, holding that where the infringing machine has been installed and in operation but a few days prior to the filing of the bill, and the old machine previously used is still in defendants' possession, and at slight expense is capable of being put in condition to do their work, so that, if given a few days' time, they will be able to conduct their business as cheaply and expeditiously as before the infringing machine was installed, the loss or hardship to them is not sufficient to induce the court to deny a preliminary injunction, where the validity of the patent and the fact of infringement have been clearly established in another court of concurrent jurisdiction, since on appeal this case was reversed on the ground that the decision referred to and relied upon as establishing the validity of the patent had been reversed on appeal. 25 C. C. A. 624, 39 U. S. App. 591, 80 Fed. 539. See *supra*, 2, a, as to effect of clearness or doubt as to validity of patent or fact of infringement.

6. Public convenience.

Where the benefit to the complainant from enjoining the use *pendente lite* of the alleged infringing article is doubtful, and the injury which will thereby be occasioned the public and the defendant is certain, the injunction will not issue.

Thus, where the complainant introduced into public use a certain style of lamp for

public lighting, and the use of the same by a company engaged in lighting the streets of a large city is of importance to the public, and enjoining the use thereof would result in great injury, both to the defendant and the public, and would be without direct benefit to the complainant, which is insolvent, while the defendant is solvent, a preliminary injunction will not issue. *Southwestern Brush Electric Light & P. Co. v. Louisiana Electric Light Co.* 45 Fed. 893.

Nor where the alleged infringer is a common carrier, and the alleged infringement is the use of an article in connection with that business, the restraining of which would not be of legitimate benefit to complainant, while it might result in great loss to the defendant, and make travel by the public more unsafe. *Root v. Mt. Adams & E. P. Inclined R. Co.* 40 Fed. 760.

Nor where the defendants and the public to be benefited by certain harbor improvements then under way will probably sustain heavy loss and be subjected to inconvenience by being prevented from using a dredge alleged to consist in part of machinery which infringes complainants' patent, and where, if the dredge is found not to be an infringement, the defendants and the public will have suffered deprivation of legal rights for which they will have no adequate remedy, and, on the other hand, if the complainants finally prevail, the exact amount necessary to compensate them for the infringement can be computed and recovered in an action for damages. *Bowers Dredging Co. v. New York Dredging Co.* 77 Fed. 980.

Nor to restrain a city from entering into a contract for paving a street with alleged infringing paving material, where by so doing the loss to the city will be considerable, while, without the injunction, all the alleged rights of the complainant may be secured if he establishes the same. *Guidet v. Palmer*, 10 Blatchf. 217, 6 Fisher, Pat. Cas. 82, Fed. Cas. No. 5,859.

Nor where the alleged infringing machine is used for a public purpose, to keep the roads of a large cemetery in repair, and the plaintiff's profits arise from licensing the use of the machine, for which a fixed royalty is charged, the amount of which the defendant offers to pay into court, to abide the result of the suit. *Blake v. Greenwood Cemetery*, 14 Blatchf. 342, Fed. Cas. No. 1,497.

Nor where it is admitted that the defendant is financially responsible, and is under contract to furnish alleged infringing articles to the government within a limited time, for use in time of war, and

there is immediate and impending danger. *American Ordnance Co. v. Driggs-Seabury* Co. 87 Fed. 947.

Where the defendants, in the use of machinery alleged to contain infringing parts, have gradually created and developed an extensive market for the product of such machines, to the extent that if their works were stopped the market could not be supplied and serious inconvenience would result, and they have also invested large capital in the business, employing a great number of workmen, many of whom would be temporarily cut adrift if an injunction were granted, and it is difficult to see how the defendants could remove the alleged infringing apparatus without substantially dismantling and reorganizing their works, a preliminary injunction will be refused. *New York Grape Sugar Co. v. American Grape Sugar Co.* 20 Blatchf. 386, 10 Fed. 837.

It has, however, been held that the fact that there is an enormous demand by the public for the infringing articles, and the complainant is unable entirely to meet this demand, which would result in great inconvenience to the public, furnishes no legal excuse for a wholesale infringement of the invention, nor a valid objection to a preliminary injunction restraining the same. *Commercial Acetylene Co. v. Autolux Co.* 181 Fed. 387.

The fact that cars equipped with an alleged infringing article are in actual use, and to enjoin the use of the article upon such cars will result in inconvenience to the public, is not sufficient ground for denying a preliminary injunction, where the circumstances call for the issuance thereof, although that fact is a ground for the modification of the injunction as to the time of its operation, in order that the defendant may be able to substitute noninfringing material. *Thomson-Houston Electric Co. v. Union R. Co.* 78 Fed. 365.

And it has been held that where the validity of a patent and the fact of the infringement have been decided by the court in a case similar to the one then presented, the consideration of either public or private convenience will have little weight on the right of complainant to a preliminary injunction. *Sickels v. Tileston*, 4 Blatchf. 109, Fed. Cas. No. 12,837 (injunction to prevent use of attachment to machinery on steamboat).

And that where the validity of a patent has been repeatedly sustained in different actions, and the fact of infringement is clear, the complainant, as a matter of right, is entitled to a provisional injunction, although great injury may thereby be occasioned to the infringer and also to the public. But the order for the injunction will be conditional, conditioned upon the failure of the defendant to pay a reasonable license fee for the use of the invention during the unexpired term, to be ascertained by a reference to a master. Such relief will be given although the defendants are common car-

riers of persons and also carriers of the mails of the United States, and their business is large and extensive, and is carried on by means of connection with other railroads, and the issuance of the injunction might result in a prolonged interruption of their business, and would do great and irreparable injury to them, and cause great detriment and inconvenience to the public, and the removal of the infringing device would endanger the safety of passengers. *Hodge v. Hudson River R. Co.* 6 Blatchf. 165, Fed. Cas. No. 6,560.

And although the defendant is a common carrier, nevertheless, if the validity of the patent is practically conceded, and it is apparently easy for the defendant to substitute other articles equally as efficient as the infringing devices, a preliminary injunction will be granted; in such form, however, as to allow the change to be made without undue inconvenience to the traveling public. *Campbell Printing-Press & Mfg. Co. v. Manhattan R. Co.* 47 Fed. 663.

So, where the defendant, although a common carrier, has known for a long period of time that it was using an infringing valve on many of its cars, and has preferred to run the risk of an injunction rather than to displace its present equipment, no equities are disclosed requiring the court to withhold a preliminary injunction, although the issuance thereof may result in hardship and inconvenience to the defendant and the public. *Westinghouse Air Brake Co. v. Great Northern R. Co.* 31 C. C. A. 525, 59 U. S. App. 592, 88 Fed. 258.

A preliminary injunction will be granted to restrain a common carrier from purchasing and using an alleged infringing article (vulcanized rubber car springs), except those then in use, where a prima facie showing of infringement is made out, and no ground for refusal can be founded upon any claim of inconvenience to the public or to the parties. *Goodyear v. Central R. Co.* 1 Fisher, Pat. Cas. 626, Fed. Cas. No. 5,563.

Although, by the issuance of a preliminary injunction, great loss will result to the defendant, and the public will be inconvenienced thereby, nevertheless, such injunction will issue where the court, in another case involving the same patent, after full consideration, and upon substantially similar evidence to that now presented, sustained the validity of the patent and the fact of infringement, it appearing that the operation of the injunction has already been suspended for nearly a year, thereby affording to the defendant abundant opportunity to make such changes in its machinery as to avoid further infringement. *Lan- yon Zinc Co. v. Brown*, 53 C. C. A. 354, 115 Fed. 150.

It is asserted in *Warren Bros. Co. v. Montgomery*, 172 Fed. 414, that neither a city nor the defendants are in a position to set up public inconvenience from the stoppage of work which has not yet been begun, where the contract was made with full knowledge of the claims of complainant and

that an injunction would probably be sought; the court, however, held that substantial justice would be done by withholding a preliminary injunction as to the particular contract on condition that the defendants execute a bond, conditioned to pay all costs and damages ordered against them.

Where no question is made of the fact of infringement, but the issuance of a preliminary injunction is objected to on the ground that the defendant is a municipal corporation, and is using the infringing device in a public building, no equity is thereby raised in favor of the corporation against the issuance of a preliminary injunction, it also appearing that the device was installed with knowledge of the claim of infringement, and a bond was taken to hold the municipality harmless in damage by reason thereof, and other fixtures may be substituted for the infringing fixtures with very little delay. And this is true although the amount of the royalty on the infringing fixtures is not large, and the time during which the injunction will operate will be short. *Pelzer v. Binghamton*, 37 C. C. A. 288, 95 Fed. 823.

On a petition for a preliminary injunction to enjoin the use of an alleged infringing filtering process, the fact that the defendant is a public servant, engaged in supplying a city with water, is no ground for refusing an injunction, where it was eager for the injunction bill to be brought, and stated its desire that an application for a preliminary injunction be made, in order that the matter might be disposed of speedily. *New York Filter Mfg. Co. v. Niagara Falls Waterworks Co.* 26 C. C. A. 252, 51 U. S. App. 355, 80 Fed. 924.

7. Where patent soon to expire.

Another ground on which an injunction will be refused is that the patent will soon expire, and the defendant is using the alleged infringing machine in connection with other machinery which it will require considerable time for him to change, and by the time the change is completed the patent will have expired. *Morris v. Lowell Mfg. Co.* 3 Fisher, Pat. Cas. 67, Fed. Cas. No. 9,833; *Parker v. Sears*, 1 Fisher, Pat. Cas. 93, Fed. Cas. No. 10,748; *Potter v. Whitney*, 1 Low. Dec. 87, Fed. Cas. No. 11,341.

Although the validity of a patent is fully established and the fact of infringement is clear, nevertheless the court will not grant a preliminary injunction where the patent will expire in four days, even though the bill was filed some time prior. *National Cash-Register Co. v. Navy Cash-Register Co.* 99 Fed. 565.

In such cases, the court may refuse to issue a preliminary injunction, but may require the defendants to give bonds to keep an account and pay all profits from the infringement or loss to the complainant, it appearing that all the legitimate rights of the complainant will be thereby protected. *Howe v. Morton*, 1 Fisher, Pat. Cas. 586, Fed. Cas. No. 6,769.
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The fact that the patent will soon expire, however, is not in all cases conclusive against the right to injunction; there may be circumstances in the conduct of the infringer which will induce the court to interfere at the very latest period to stop a fraudulent or even wilful use of a patent right. *Morris v. Lowell Mfg. Co.* 3 Fisher, Pat. Cas. 67, Fed. Cas. No. 9,833.

As, where the patent is for a machine to make some article of manufacture or merchandize in a cheaper method than was before known, and where the source of profit to the patentee arises from his monopoly of the article, he having no competitors in the market, the damages to the patentee by the piracy of his invention might be very great, and the court would issue an injunction on a plain case in the last month or week of the patent's life, or even after the time limited for its expiration, to restrain a sale of the machines or articles piratically manufactured in violation of the patent while it was in force. *Parker v. Sears*, 1 Fisher, Pat. Cas. 93, Fed. Cas. No. 10,748.

And the fact that a patent will soon expire does not authorize the refusal of an injunction *pendente lite*, where its validity has been adjudicated by an appellate court, and it appears that the expired patents are improvements on an unexpired generic patent. *Electric Storage Battery Co. v. Buffalo Electric Carriage Co.* 117 Fed. 314.

A preliminary injunction will be granted restraining an infringement by a person who has not yet commenced to put on the market the alleged infringing goods, although there are but a few months before the expiration of the patent. *Westinghouse Air-Brake Co. v. Carpenter*, 32 Fed. 484.

b. Suspension of injunction on appeal.

On appeal the court may suspend the operation of a preliminary injunction where the interruption of defendant's business thereby may be attended with serious consequences and the time the patent is to run is limited. As a condition to such suspension, however, defendant will be required to give a bond to satisfy all damages caused by the infringement. *Interurban R. & Terminal Co. v. Westinghouse Electric & Mfg. Co.* 108 C. C. A. 298, 186 Fed. 166.

And although a patent has been sustained in an action at law, if a bill of exceptions has been taken, a court of equity will deny a motion for a preliminary injunction, where the defendants are manufacturers, and use the invention in connection with other machinery in their manufacturing business, but do not manufacture the invention itself, while the complainants manufacture the invention, but do not use it other than to sell it, and hence the particular infringement does not deprive the latter of their monopoly, but only of what they would be entitled to receive for the article or a license to use it, while, on the other hand, the defendants cannot be restrained from using

the invention without being at the same time deprived of the use of the entire machinery used in connection therewith, and hence the practical effect of the injunction would be to stop the defendants' machines, thereby depriving the latter of the use of a large amount of capital invested in the business, and would also throw out of employment a large number of operators of the machine. *Forbush v. Bradford*, 1 *Fisher*, Pat. Cas. 317, Fed. Cas. No. 4,930.

Although the defendant offers to give a bond for damages should the result of a contemplated appeal be adverse to him, an injunction after decree will not be suspended even though the defendant claims the injunction will prevent him from carrying out enormous contracts then on hand, thereby destroying their connection, to his irreparable damage, where, however, it appears that he can buy the articles in the open market, and thus fulfil his contracts. *Flower v. Lloyd*, 36 L. T. N. 544.

c. Final Injunction.

A distinction is made in *Brown v. Deere*, 2 *McCrary*, 422, 6 Fed. 487, between a preliminary injunction and a final injunction; as to the rights of the parties with reference to the issuance thereof to restrain infringements, the former is regarded as a matter of discretion, while the latter is regarded more as a matter of strict right.

In this case, after a hearing upon the merits and a favorable decree for the complainant, the court refused to suspend an injunction although it appeared that before the hearing the defendants had entered into a large number of contracts to furnish their machines to agriculturists, and there was not adequate time for them to reconstruct same, so as to avoid the infringement, without disappointing their customers and fastening large damages upon themselves for nonfulfilment of their contracts. The court, while admitting that the plaintiff seemingly put very little value on his patent until the defendants and their associates introduced and popularized same, nevertheless held that plaintiff's rights existed and must be protected, even to the extent of restraining the manufacture of the infringing article, although such injunction would result in great loss to the defendants as well as to the people contracting with them, since the plaintiff conceded that it would be impossible for them fully to supply the trade.

That an injunction after a hearing on the merits, if the decision is favorable to the complainants, is a matter of right, is also the theory adopted by the court in *Consolidated Roller Mill Co. v. Coombs*, 39 Fed. 803. On this point it is said: "After an adjudication upon the merits, the case becomes somewhat complicated by the provisions of the Constitution and statutes which secure to the inventor 'the exclusive right to his discovery.' If this right be 'exclusive,' it is difficult to see how the court can limit or impair it by requiring the pat-

entee to accept anything less than the complete monopoly which the law awards him. While he may not be a manufacturer himself, and may derive his sole profit from licensing others to use his device, still, such licenses are entirely voluntary upon his part, are completely within his own control, and the courts have, strictly speaking, no power to demand of him that he shall license the defendant to use his machine, as they are enabled to do indirectly by refusing an injunction upon requiring a bond to pay the amount of the license or such damages as he may have suffered by defendant's use of his machines. If this, then, were a final decree, we should have no hesitation in denying this motion to stay the injunction, unless immediate notice were given of an appeal, when the provisions of the ninety-third rule would attach, and the staying of an injunction would become a matter of discretion, to be determined by the facts of each particular case."

However, in *Dorsey Harvester Revolving Rake Co. v. Marsh*, 6 *Fisher*, Pat. Cas. 387, Fed. Cas. No. 4,014, after a hearing on the merits and giving the complainant a decree for an accounting and an injunction, the court said that the injunction ought to be so framed as not to subject the defendants to any avoidable loss or injury, and to this end provided that no injunction should issue until a further order of the court if the defendants, within a stipulated time, filed a bond securing to the complainant the profits and damages which, on the accounting, they may ultimately be decreed to pay. In this case the complainant was not a manufacturer of the invention, and hence would be adequately protected by the payment of a just compensation for the use thereof; while, on the other hand, the defendants had an extensive establishment and a large capital invested in it, and a sudden stoppage of the business would be disastrous to them without benefit to the complainant.

And the court will arrange the terms of the injunction so as to accomplish the result intended with the least disturbance to the business of the defendant (a railway company), where the business is one concerning the public. *Westinghouse Air Brake Co. v. Great Northern R. Co.* 86 Fed. 132.

In other jurisdictions it is held that, although the proof of the infringement, as well as the validity of the patent, is satisfactory, a final injunction will not be granted where the allowance thereof will cause much greater injury to defendant than benefit to the complainant, and in such case the decree will be only for an accounting. *McCrary v. Pennsylvania Canal Co.* 5 Fed. 367. The facts in this case are not very fully set forth. It, however, appears that the invention involved was an improvement in coupling and steering canal boats, but it does not appear whether the defendant was a manufacturer or a mere user of the article found to infringe.

And a final injunction will not be granted where the infringement relates to the minor

part of a large machine, the use of which is essential to the defendant, while probably the complainant would not materially suffer by the continuance of the use of the device for the short time remaining before the expiration of the patent, providing the defendant gives security that he will account to the complainant for the infringement, either by way of damages or royalty. *Draper Co. v. American Loom Co.* 88 C. C. A. 588, 161 Fed. 728.

Nor where the patent alleged to be infringed will expire in about two months, and the defendant is a railroad company, using in its business many hundreds of the patented articles, scattered over 2,000 miles of track, and hence but few of the devices could be removed before the expiration of the patent if a reasonable time be given for the removal thereof in installments, as is usual in such cases. *Vermilya v. Erie R. Co.* 89 Fed. 96.

Nor where the effect of the injunction would be to restrain the use by a city of an invention necessary for daily use in the prevention of fires, and the complainants' rights may be otherwise protected. *Bliss v. Brooklyn*, 4 Fisher, Pat. Cas. 596, Fed. Cas. No. 1,544.

Nor where the injunction will interfere with the use of wooden pavements constructed in a city in infringement of complainant's rights, and will only operate injuriously upon the public, without benefitting the complainant, but the complainant will be limited to relief by way of profits and damages. *Ballard v. Pittsburg*, 12 Fed. 783. A. G. S.

GEORGIA SUPREME COURT.

HERBERT BROWN et al., Plffs. in Err,
v.
R. B. MARTIN et al.

(137 Ga. 338, 73 S. E. 495.)

Venue — life estate — forfeiture for waste.

1. An action under Civil Code 1910, § 3660, by a remainderman against a life tenant, to have the estate of the latter declared forfeited and the remainderman put in possession, because of waste committed by the tenant, is a suit "respecting titles to land," and the venue thereof is the county in which the land involved is located.

Headnotes by HILL, J.

Note. — No case other than *Brown v. Martin* has been found which passes upon the question whether a suit to oust a life tenant for waste is one respecting title to land, which must be brought in the county where the land is located.

In fact the remedy of forfeiture against a life tenant is in force in but few of the 39 L.R.A. (N.S.)

Pleading — demurrers — sufficiency.

2. None of the grounds of demurrer were well taken, and the court erred in dismissing the petition.

(January 9, 1912.)

ERROR to the Superior Court for Calhoun County to review a judgment in defendants' favor in an action brought to declare a forfeiture of a life estate and to acquire possession of the property because of alleged waste committed. Reversed.

Statement by HILL, J.:

Herbert Brown and others, as remaindermen under a certain deed, brought an action against Mrs. Madden and R. B. Martin, to declare a forfeiture of the life estate conveyed by the deed, and to acquire possession of the property because of alleged waste committed. By the terms of the deed the property was conveyed to Mrs. Madden for life, for the comfortable maintenance of herself and children, and at her death to go to the children in fee simple. The plaintiffs are the children just referred to. The original petition made substantially the following averments: On June 16, 1908, a decree was taken subjecting the interest of Mrs. Madden in the property named in the deed to a certain indebtedness, under which decree her life estate was sold at public outcry, and was bought in by her; but, she failing to comply with her bid, under the terms of the decree "title to the said property went to various creditors, subject to a fixed charge for the maintenance of petitioners." The defendant Martin was one of the creditors, and went into possession of the land, holding the life interest only as held by Mrs. Madden, and subject to the liabilities imposed by law on her, and entitled to only such rights as she had. The land is located in Calhoun county. Mrs. Madden is a resident of that county, and Martin is a resident of Randolph county. Various acts of waste have been committed by Martin, and allowed by him to be committed by others, consisting of working the timber for turpentine purposes, cutting, selling, and destroying valuable timber in large quantities. Mrs. Madden, the life tenant, fails and neglects to prevent these acts of waste, and both defendants have been guilty of such acts "as to forfeit her or his interest

states (16 Cyc. 646), and appears to be little used at the present time.

As to jurisdiction of actions at law for breach of contract or for tort concerning real property in another state or country, see *Smith v. Southern R. Co.* 26 L.R.A. (N.S.) 928, and *Hodges v. Hunter Co.* 34 L.R.A. (N.S.) 994, and the notes thereto.

in said land, and cause said estate to vest absolutely in fee simple in petitioners," and they elect to claim immediate possession. The prayers of the petition are that the life estate be declared to be forfeited; that Mrs. Madden and Martin, holding under her, be decreed to have forfeited their interest in said estate; and that plaintiffs recover the land, with the title, possession, and right of possession vested in them free of condition, together with the rental value of the land since the filing of the suit.

An amendment to the petition was allowed, in which it was alleged Mrs. Madden leased to one Sealy about 75 acres of the land for the purpose of working turpentine thereon, and Sealy extracted the turpentine from the trees and carried it away, and cut timber and converted it into barrel staves, and used large quantities of timber for making turpentine, which "act was done by Mrs. Madden, with the knowledge and assistance, in the year 1906, of R. B. Martin." Mrs. Madden and Martin conspired and confederated, while she was life tenant, to sell and dispose of the real estate, and in furtherance of that intention Martin leased the land and sold said timber for Mrs. Madden. "Said Madden permitted said Martin to waste said real estate, by neglecting to care for same, and neglecting to prevent the cutting of same. Said Madden has committed voluntary waste, and in a manner evidencing entire disregard of the rights of the next taker, by cutting said timber, allowing it to die and fall upon the ground and rot. Said Martin had full knowledge of this fact, and knew that said waste was permissive and voluntary, and took title to said land under a decree, with full knowledge of the facts that said Madden had committed said acts." Martin has continued the acts of waste, and his title was taken subject to full knowledge that Mrs. Madden had forfeited her entire life estate.

A demurrer was filed by Martin, setting up the following grounds: "(1) Because no cause of action, either legal or equitable, is set forth in the petition. (2) Because no such acts are alleged in the petition as will justify the court in decreeing a forfeiture as prayed. (3) Because no copy of the decree under which it is alleged defendant holds title is attached to the petition, nor does it appear with sufficient fullness under what title the defendant claims. (4) Because the land referred to in paragraph 1 of the petition is not described with sufficient fullness or definiteness. (5) Because the petition shows that the superior court of Calhoun county has no jurisdiction of this defendant."

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The court rendered judgment as follows: "The plaintiffs having amended their petition, and said amendment having been allowed, and the within and foregoing demurrers having been renewed to said petition as amended, it is, after argument, ordered that said demurrers be sustained, and the petition as amended dismissed, both parties by agreement treating the decree referred to in the petition as being a part of and attached to the petition." To this judgment the plaintiffs filed their bill of exceptions.

Mr. M. C. Edwards, for plaintiffs in error:

Cases respecting titles to land shall be tried in the county wherein the land lies.

Kehr v. Floyd, 132 Ga. 626, 64 S. E. 673; Wall v. Mercer, 119 Ga. 346, 46 S. E. 420; Baker v. Davis, 127 Ga. 652, 57 S. E. 62; Southern R. Co. v. Grizzle, 124 Ga. 735, 110 Am. St. Rep. 191, 53 S. E. 244; Mashburn v. Dannenberg Co. 117 Ga. 568, 44 S. E. 97.

Messrs. Hawes & Pottle for defendants in error.

HILL, J., delivered the opinion of the court:

There is no merit in the first and second grounds of the demurrer. Acts of waste on the part of the life tenant, of the character alleged in the petition, would give the remaindermen the right to bring an action to declare a forfeiture of the estate of the life tenant, as provided for in the Civil Code 1910, § 3666. In view of the recital of the court, in his order quoted in the statement of facts, that by agreement both parties treated the decree referred to in the petition as though it were a part thereof, the third ground of demurrer will be considered as having been waived. It might be here remarked, however, that this decision, in its entirety, is made without reference to the decree, as it does not appear to have been actually attached to the petition, and was not brought to this court. This statement is made in view of the fact that the plaintiffs may have been parties to the decree and bound thereby, and it may have contained provisions which would affect their rights with respect to the present litigation. There is no merit in the fourth ground of demurrer. Paragraph 1 of the petition gives the numbers of the land lots involved, and this description, taken in connection with the allegation elsewhere in the petition that the property is situated in Calhoun county, sufficiently identifies the land referred to, or can be made to do so when aided by parol testimony.

This brings us to the fifth and last ground

of the demurrer, by which the defendant Martin challenges the jurisdiction of Calhoun superior court with respect to him. Counsel in their briefs largely deal with the case on the theory that it is an equitable proceeding, and should be located in the county of his residence, because he is the defendant against whom substantial relief is prayed; however, counsel for the plaintiffs in error does insist that the suit is one respecting title to land, and therefore properly brought in Calhoun county, where the land in controversy is situated. In order to determine the venue of the suit, it is important to classify the action. While the petition does not in terms so state, the suit evidently is brought under the statute of this state providing for a forfeiture in behalf of the remainderman against the life tenant, in the event the latter wastes the estate, which statute is hereinafter copied. Originally at common law an action of waste was maintainable only against the holder of the legal estate, or a guardian in chivalry, or tenant in dower or by the curtesy, on the theory that, this class of estates being creatures of the law, the law would protect the inheritance of the heir by affording him a remedy for waste committed. No action could be maintained against the holder of an estate for life or for years, since they were created by the demise or lease of the owner, and it was deemed that his failure, when granting the estate, to provide against waste by the tenant, constituted an act of neglect on his part, the consequences of which he would be left to suffer. 2 Bl. Com. 283. The statute of Marlbridge (52 Hen. III. chap. 23) extended the common-law liability, so as to make it apply to tenants of the last-named class, and to make them liable for full damages resulting from waste; and the statute of Gloucester (6 Edw. I. chap. 5) gave a more stringent remedy in such cases by a writ of waste, under which the tenant was liable to forfeiture of the thing wasted and treble damages. 2 Bl. Com. 283, 284; 1 Reeves, Real Prop. § 558; Roby v. Newton, 121 Ga. 679, 68 L.R.A. 601, 49 S. E. 694. In Parker v. Chambliss, 12 Ga. 225, it was held: "In this state, a tenant in dower is liable for waste committed on the estate, but she does not thereby forfeit her estate, and treble damages, as provided by the statute of Gloucester. The remedy against her is by an action on the case, in the nature of waste, to recover the actual damage done to the estate; or by an injunction to restrain her from committing waste, when necessary, on a proper case made." In the opinion Judge Warner, after pointing out that we had adopted the common and statute law of

England only where "properly adapted to the circumstances of the inhabitants of this state," and quoting Chancellor Kent to the effect that the writ of waste had gone out of use, and special action on the case in the nature of waste had superseded the common-law remedy, on page 238, said: "We therefore adopt and recognize the principles of the common law, including the statute of Gloucester, so far as the same make the tenant in dower liable for waste committed, but reject the harsh and penal remedy provided by that statute." This decision was made in 1852.

Code of 1863, § 2235 (which is identical in language with § 3666 of the Code of 1910), contained the following provisions: "The tenant for life is entitled to the full use and enjoyment of the property, so that in such use he exercises the ordinary care of a prudent man for its preservation and protection, and commits no acts tending to the permanent injury of the person entitled in remainder or reversion. For the want of such care, and the wilful commission of such acts, he forfeits his interest to the remainderman, if he elects to claim immediate possession." In Dickinson v. Jones, 36 Ga. 97, a case of injunction to restrain threatened waste, it was assumed that the statute of Gloucester was of full force in Georgia; but in Woodward v. Gates, 38 Ga. 205, 212, it was pointed out that the apparent holding in the Dickinson Case was *obiter*, no question of forfeiture being there involved; and the true rule in Woodward v. Gates was declared to be that the effect of the adoption of the Code of 1863 was that (page 213), "in case of waste, the tenant for life shall forfeit his interest to the remainderman, if he elects to take immediate possession. But the rule of the statute of Gloucester as to treble damages is not still adopted." And this decision was construed and followed in Belt v. Simkins, 113 Ga. 894, 39 S. E. 430. It appears, therefore, that the present statute (Civil Code 1910, § 3666), quoted *supra*, is declaratory, and at the same time restrictive, of the common law, and that the right of action thereunder is purely an action at law. What was the nature of this action at common law? Blackstone says: "This action of waste is a mixed action; partly real, so far as it recovers land, and partly personal, so far as it recovers damages." 3 Bl. Com. 228. It would seem, therefore, that, our statute having eliminated the treble damages feature, and retained only the forfeiture provided for by the common law, an action brought under such statute would be a real action.

The suit in the present case is based purely on this statute. It is in no sense an

equitable action, and no equitable features are involved. The allegations of the petition, simplified, are to the effect that the life tenant has been guilty of acts of waste, within the meaning of the statute, and thereby rendered his estate subject to the forfeiture, and that the remaindermen elect to have such forfeiture declared, and to take immediate possession of the estate. The prayers all seek relief within the bounds of the statute; that is, that the interest of the life tenant be declared to be forfeited and the plaintiffs be put in possession of the land. True, there is an additional prayer that the defendants be required to account for the rental value of the premises since the filing of the suit; but this is merely a prayer for incidental relief with respect to a right which will accrue to the plaintiffs pending the action, provided they succeed in maintaining their claim of forfeiture, which, if declared, would relate back at least to the filing of the suit. There is also a prayer to the effect that the plaintiffs recover the premises free of any charge for the maintenance of the life tenant, or anyone holding under her. The property was conveyed to the life tenant for life, for the comfortable maintenance of herself and children. The children are the remaindermen, and are the plaintiffs in this case. The right of the life tenant to maintenance from the property is incidental to and a part of her life estate, and would cease with the loss of that estate, in the event a forfeiture thereof be declared. Neither of the prayers just mentioned seeks any relief other than is incidental to an action under the statute. The suit being one in which no equity is invoked, but purely a real action under a statute having its origin in the common law, its venue is not affected by the constitutional provision that equity cases shall be tried in the county of the residence of a defendant against whom substantial relief is prayed. (It might here be remarked that no equity jurisdiction can attach with respect to legal waste, except for purposes of injunction. 5 Pom. Eq. Jur. § 491.) "Real actions at common law were those by which all disputes concerning corporeal hereditaments were decided." Will's Gould, Pl. 6. They extended to actions claiming title to rents, commons, and the like, in fee simple, fee tail, or for life, as well as actions for the recovery of the land itself. 3 Bl. Com. 117. Such actions were local in character. 3 Bl. Com. 234. But with us the venue of suits is now controlled by constitutional and statutory provisions. In addition to the constitutional provision regarding equity cases above referred to, the Constitution further declares that "cases respecting titles to

land shall be tried in the county where the land lies," and, with exceptions as to specified actions not material here to mention, "that all other civil cases shall be tried in the county where the defendant resides." This suit was brought in Calhoun county, in which the land involved is located. The demurrers were filed by the defendant Martin, who did not reside in that county; and unless the suit was one "respecting titles to land," within the meaning of the constitutional provision referred to above, there was no jurisdiction over Martin.

Was it such a suit? Numerous adjudications have been made with respect to what did or did not constitute an action respecting titles to land; but an examination of all the cases we have been able to find discloses that those held not to be of this nature are, in the main, reducible as follows: (a) Those in which the action sounded in trespass, and the object was the recovery of damages, or proceedings were for the purpose of injunction to prevent trespass, or an attempt was made to fasten a lien on property,—actions in which the question of title was only incidentally involved to the extent of showing a right on the part of the plaintiff to maintain his action. Examples of this class are *Omond v. Flournoy*, 34 Ga. 510; *Powell v. Cheshire*, 70 Ga. 357, 48 Am. Rep. 572; *Beckwith v. McBride*, 70 Ga. 642; and *Wheatley v. Blalock*, 82 Ga. 406, 9 S. E. 168. (b) Those in which the legal title was out of the plaintiff, and it was sought to cancel a deed, or to obtain specific performance, or in some other way invoke the aid of a court of equity in order to establish the plaintiff's legal title. The following cases fall within this class: *Smith v. Bryan*, 34 Ga. 53; *Bivins v. Bivins*, 37 Ga. 346; *Taylor v. Cloud*, 40 Ga. 288; *McArthur v. Matthewson*, 67 Ga. 134; *Lowe v. Mann*, 74 Ga. 387; *Saffold v. Scottish American Mortg. Co.* 98 Ga. 785, 27 S. E. 208; *Fulgham v. Pate*, 77 Ga. 454; *Clayton v. Stetson*, 101 Ga. 634, 28 S. E. 983; *Ellis v. Farmer*, 119 Ga. 238, 46 S. E. 105; and *Martin v. Gaissert*, 134 Ga. 34, 67 S. E. 536.

The line of cases just cited are the progeny of *Smith v. Bryan*, 34 Ga. 53, in which the ruling was that "a bill in equity to set aside and cancel a deed, on the ground of fraud, is not a case respecting title to land," within the meaning of the provision of the Constitution fixing the venue in such cases. In that case (34 Ga. 62, 63) the court used this language: "What, in intentment of the Constitution, are 'cases respecting titles to land?' We understand them to be cases in which the plaintiff asserts his title to the land in question, and

depends for a recovery upon his maintenance of it, or to supply a link in the chain wanting by reason of accident or other cause. In order to determine whether or not a plaintiff at law or a complainant in equity, who selects his forum upon this clause of the Constitution, has made a case of jurisdiction for the selected court, it is necessary to examine carefully his allegations. What, then, is the gravamen in this case? Is it that, at the time of filing this bill, the complainant had title to the lands, and that the defendant held possession, or committed waste, or did any other act respecting them, without his consent, and in derogation of his title? Not at all. . . . His case is not that the title never legally passed from him, nor that it has legally returned to him. His prayer is not that his title, under existing circumstances, may be adjudged good and valid, but that, by reason of certain facts *dehors* the title, the contract which divested him of it may be annulled, and it restored. The case, then, does not respect title to lands, but is respecting a contract in relation to them, and certain fraudulent practices, which, it is alleged, vitiate that contract." And in *Clayton v. Stetson*, 101 Ga. 634, 638, 28 S. E. 983, 984, it was said: "If the plaintiff, without resorting to the powers of the superior court as a court of equity, and without invoking equitable relief, can, upon her legal title, recover, the suit is well brought in the county where the land lies; but if, in order to vest herself with a legal title upon which she can recover at law, it becomes necessary at first to assert an equity as against the person invested with the legal title, then we conclude that the action should have been brought in the county wherein the defendant resided."

In the present case, proof of the conveyance to them by deed of the remainder interest (giving to them the right of ultimate enjoyment), and proof of acts of waste on the part of the life tenant such as to create a forfeiture of the intermediate estate, within the intendment of the Civil Code, § 3666, quoted *supra*, is sufficient to show in the plaintiffs a legal title, and make out a *prima facie* case for recovery. We are satisfied that where the plaintiff, as in this case, confines himself to the remedy afforded him by the statute, he is seeking only to maintain a title devolving upon him by law, as against the defendant's possession and claim of title under deed, and the suit is one "respecting titles to land," within the meaning of the Constitution. The very gist of the action is: Whose legal title is superior with respect to the right of possession *in presenti*, — the defendant, claiming the life estate 39 L.R.A. (N.S.)

under deed, or the plaintiff, claiming it under forfeiture by virtue of the statute? The object of the action is to gain possession, and the right to possession is determined by an adjudication as to which has the superior legal title. We think the case we are considering measures up to the criterion laid down in *Clayton v. Stetson*, quoted *supra*, by which to determine when the action is one respecting titles to land, and that the venue of the suit, as brought, is in Calhoun county.

None of the grounds of demurrer were well taken, and the court committed error in sustaining them and dismissing the petition.

Judgment reversed.

All the Justices concur.

INDIANA SUPREME COURT.

CLEVELAND, CINCINNATI, CHICAGO,
& ST. LOUIS RAILWAY COMPANY,
Appt.,

v.

PAUL O. TAUER.

(— Ind. —, 96 N. E. 758.)

Fire — interference with apparatus — liability.

1. A railroad company which permits a train to stand on a street crossing in violation of statute is liable for injury done to private property through the inability of the city fire apparatus to reach it because of such obstruction.

Pleading — complaint — proximate cause — loss by fire.

2. A complaint, to hold a railroad company liable for injury to private property by fire because of its unlawful obstruction of a highway crossing to the delay of the fire apparatus, is not demurrable for failure to show that the wrong was the proximate cause of the loss, if the facts alleged do not show as a necessary inference that such was not the fact.

Same — contributory negligence — negating.

3. A complaint, to hold a railroad company liable for injury to property by fire

Note. — Duty of railroad or street railway company to avoid interference with extinguishment of fire.

This question is covered in notes in 12 L.R.A. (N.S.) 382, and 20 L.R.A. (N.S.) 1110. Aside from *CLEVELAND, C. C. & ST. L. R. Co. v. TAUER*, the only subsequent case found in point is *Phenix Ins. Co. v. New York C. & H. R. R. Co.* 196 N. Y. 554, 90 N. E. 1164, which affirms 122 App. Div. 113, 106 N. Y. Supp. 696, cited in note in 20 L.R.A. (N.S.) 1110.

because of its wrongful obstruction of a highway crossing so as to delay the fire apparatus, is insufficient if it does not show freedom from negligence on the part of complainant, bringing about the fire, contributing to its spread, or in removing goods, for which purposes a general allegation that the loss was the proximate result of defendant's acts is not sufficient.

(December 12, 1911.)

APPEAL by defendant from a judgment of the Circuit Court for Boone County in plaintiff's favor in an action brought to recover damages for injury to property by fire, alleged to have been caused by an unlawful obstruction of the highway by defendant, to the delay of the fire apparatus. Reversed.

The facts are stated in the opinion.

Messrs. L. J. Hackney, F. L. Littleton, S. M. Ralston, and Bert Winters for appellant.

Messrs. Shelby & Worley and Wymond J. Beckett for appellee.

Cox, J., delivered the opinion of the court:

This appeal is an action for damages to personal property occasioned by fire which originated on the appellee's premises, within the corporate limits of the city of Lebanon. The damages were alleged to have been aggravated by the negligence of appellant in delaying the city firemen in charge of the fire apparatus on the way to the scene of the fire, by obstructing, with one of its freight trains, a street along which they had to pass with it. From a verdict and judgment in favor of appellee for \$2,500, this appeal is taken.

Appellant first relies on the action of the trial court in overruling its demurrer to the complaint.

The first objection to the complaint is that its allegations do not serve to show that the obstruction of the street leading to the scene of the fire was the proximate cause of any of appellee's damages; that it appears from the facts alleged that the connection between the obstruction of the crossing by appellant's train and the fire is too remote to give rise to a cause of action for any part of the damage wrought by the fire. After alleging the status of the appellant as the owner and operator of the railroad, and its location in the city of Lebanon, the fact of appellee's ownership of the greenhouse and stock of flowers and plants, and its location in the city with reference to the railroad of appellant, and the building in which the city firemen and apparatus were stationed, between which fire house and appellee's greenhouse the

tracks of appellant intervened, the proper equipment of the city's fire department with apparatus and men, and the existence of an adequate water system with hydrants located conveniently to the greenhouse, and the necessity for the firemen to proceed to the fire on the street in question on the day of the occurrences complained of, the complaint further alleged that, at about the hour of 7 o'clock in the evening of the day in question, a fire broke out in the boiler room connected with the greenhouse, and an alarm of fire was immediately sent to the fire department. It averred that the fire department at once responded, and proceeded to the fire by the nearest and most practicable route, which lay along the street obstructed; that when the firemen and apparatus reached the appellant's track, they found the street closed by appellant's freight train standing across it; the train being composed of an engine and twenty-five cars, the engine being about 40 feet west of the street crossing, and the train extending about a quarter of a mile east thereof. It alleged that the firemen notified appellant's employees in charge of the train of the fire, and that they demanded that the obstruction be removed, so that they could proceed; that they saw, or in the exercise of ordinary care could have seen, that the train prevented the firemen from continuing their run to the fire; and that they knew, or could have known, that the quickest way to clear the crossing was to back the train east of the crossing, which, it was alleged, could have been done in less than two minutes, or they could have uncoupled the train and cleared the crossing in about the same time; but that, with full knowledge of all of the conditions, they carelessly and negligently refused to so open the crossing, but that they unlawfully and carelessly and negligently obstructed the street with the train for more than ten minutes, and then proceeded with the long train westwardly across the street. It is alleged that, had the firemen not been stopped by the obstructed crossing, they could and would have saved the greenhouse from destruction; that before they finally reached the greenhouse the fire had spread from the boiler room to the greenhouse, which contained the plaintiff's flowers and plants, and killed them, to the damage of the plaintiff in the sum of \$3,000. The complaint concluded with the allegation "that all of said damages and destruction of said greenhouse and contents was the direct and proximate result of the carelessness and negligence of said defendant, as herein averred," and a demand for judgment.

The complaint shows a violation of §

2671, Burns's Anno. Stat. 1908, which makes it a misdemeanor for a conductor or other person in charge of a railroad freight train to permit or suffer the same to remain standing across any public highway, street, alley, or farm crossing, or who, whenever it becomes necessary to stop such train across any public highway, street, alley, or farm crossing, neglects to leave a space 60 feet across such highway, street, alley, or farm crossing. See *Cleveland, C. C. & St. L. R. Co. v. Wynant* (1884) 100 Ind. 160; *Pittsburgh, C. & St. L. R. Co. v. Kitley* (1888) 118 Ind. 152, 20 N. E. 727; *State v. Malone* (1893) 8 Ind. App. 8, 35 N. E. 198; *Becker v. State* (1904) 33 Ind. App. 261, 71 N. E. 188.

The violation of a statutory duty is negligence *per se*, and when injury and damage flow directly therefrom as a natural and probable result of the wrongful act, unaffected by the contributory negligence of the injured party, a liability is incurred by the wrongdoer. 29 Cyc. 436; 1 *Thomp. Neg.* § 10; 3 *Elliott, Railroads*, §§ 1155, 1206; *Pennsylvania Co. v. Hensil* (1880) 70 Ind. 569, 36 Am. Rep. 188; *Indiana, B. & W. R. Co. v. Barnhart* (1888) 115 Ind. 399, 16 N. E. 121; *Pittsburgh, C. & St. L. R. Co. v. Kitley* (1888) 118 Ind. 152, 20 N. E. 727; *Baltimore & O. S. W. R. Co. v. Young* (1896) 146 Ind. 374, 45 N. E. 479; *Nickey v. Steuder* (1904) 164 Ind. 191, 73 N. E. 117; *Pittsburgh, C. C. & St. L. R. Co. v. Terrell*, — Ind. —, — L.R.A.(N.S.) —, 95 N. E. 1109.

Of course, the violation of the statutory duty must produce or help to produce the injury; the injury or damage must flow from the wrong. While consequential damages which may be recovered are such as might reasonably be anticipated by the perpetrator of the wrongful act, and must be the natural and probable effect of the wrongful act, yet it is not essential to a recovery against the wrongdoer that he should have foreseen the identical injury to the particular person. If the act has a tendency to injure someone, and finally does so, the wrongful act is a proximate cause. 1 *Sutherland, Damages*, 3d ed. § 25; 1 *Thomp. Neg.* § 59; *Davis v. Mercer Lumber Co.* (1904) 164 Ind. 413, 73 N. E. 899; *Hohenstein-Hartmetz Furniture Co. v. Matthews* (1910) 46 Ind. App. 616, 92 N. E. 196; *King v. Inland Steel Co.* — Ind. —, 96 N. E. 337.

The purpose of the statute was to keep open the ordinary ways of communication of the people in going about their affairs, where such ways are crossed by railroads. Great quickness in responding to fire alarms, it is well known, is constantly sought in fire-fighting organizations. Speed 39 L.R.A.(N.S.)

in getting to the scene of the fire, as well as in throwing the quenching element on the flames, is a test of efficiency. So we know that the loss of a few minutes' time often means much in checking or controlling fires and saving property. In this case we know from the allegations of the complaint that the firemen got to the burning property of appellee, and that some loss occurred which would not have, if the firemen had not been delayed by what appears from the allegations of the complaint to have been the unlawful act of appellant's employees. Whatever that loss was which the earlier arrival of the firemen, undeterred by the unlawful or negligent obstruction of the street crossing, would have prevented, the appellant is liable for, in the absence of contributory negligence on the part of appellee, for such loss would be directly attributable to appellant's wrongful act.

Appellant's employees were bound to know that the obstruction of the street crossing by their train might work inconvenience, delay, or positive harm and damage to someone in some matter connected with the proper use of the highway so obstructed; and the complaint adds to this that they actually knew that a fire was raging beyond the tracks of the railroad, and that the firemen were on their way to the fire on the obstructed street, and were demanding that the obstruction be removed, so that they might proceed. That some damage—that which the firemen and the means at their command for stopping and controlling the fire would have been able to prevent, if undelayed by the obstructing train—would occur the employees of appellant must have known. That damage would be the proximate result of the obstruction, and appellee was entitled to have determined, as a question of fact, to what extent the obstruction of the crossing proximately caused him injury. The facts alleged do not show, as a necessary inference, and therefore as a matter of law, that the obstruction was not the proximate cause of damage to appellee.

In the case of *Metallic Compression Casting Co. v. Fitchburg R. Co.* (1872) 109 Mass. 277, 12 Am. Rep. 689, it appeared that, to obtain the only available supply of water to throw upon a burning building, a line of hose was laid across a railroad track, and a train was run over it and severed it, while the water was being applied to the fire. In any action by the owner of the building against the railroad company to recover consequential damages, it was contended, as in this case, that no direct or immediate injury was occasioned to the plaintiff by the act of the defend-

ant, but that the injury was occasioned by the fire directly, and by the defendant but remotely. In the opinion of the supreme court, holding the railroad company liable. it was said: "The law regards practical distinctions, rather than those which are merely theoretical; and practically, when a man cuts off the hose through which firemen are throwing a stream upon a burning building, and thereupon the building is consumed for want of water to extinguish it, his act is to be regarded as the direct and efficient cause of the injury."

In a later case, that of Kiernan v. Metropolitan Constr. Co. (1898) 170 Mass. 378, 49 N. E. 648, the same court held that a liability was incurred by a construction company doing public work in the streets, which had taken possession of the only available fire hydrant in the vicinity of a fire, and whose employees objected to and for a time prevented the use of the hydrant by firemen called to extinguish the fire.

In the case of Little Rock Traction & Electric Co. v. McCaskill (1905) 75 Ark. 133, 70 L.R.A. 680, 112 Am. St. Rep. 48, 86 S. W. 997, a street car ran over and cut the hose through which firemen were throwing a stream of water upon a burning building, whereupon furniture contained therein, which otherwise could have been saved, was consumed for want of water to extinguish the fire; and it was held that the act of cutting the hose was to be regarded as the proximate cause of the loss of a part of the furniture.

The case of Houren v. Chicago, M. & St. P. R. Co. 236 Ill. 620, 20 L.R.A.(N.S.) 1110, 127 Am. St. Rep. 309, 86 N. E. 611, is very much like the one under consideration. In that case it appears that a train obstructed a street crossing in violation of a statute, and firemen and fire-fighting apparatus were thereby delayed in reaching a fire. It was held that the violation of the statute was negligence *per se*, and that such negligence was the proximate cause of damages to appellant by the spread of the fire to his house. In the opinion of the court, it is said: "It seems clear to us that if a prudent man of experience had reflected upon the probable consequences of entirely closing up this street in a great city, he would have foreseen, first, that to close the street would obstruct and delay public travel thereon; second, that among the travel liable to be so obstructed and delayed would be the passage of teams, engines, and other appliances of the fire department; third that of the travel of the fire department was so obstructed and delayed, any fire which the men of that department were seeking to reach would be more extensive, and do 39 L.R.A.(N.S.)

greater damage, than if the obstruction and delay had not taken place." See also Gilson v. Delaware & H. Canal Co. (1892) 65 Vt. 213, 26 Atl. 70, 36 Am. St. Rep. 802, note, p. 827; Couch v. Steel (1854) 3 El. & Bl. 402, 2 C. L. R. 940, 23 L. J. Q. B. N. S. 121, 18 Jur. 515, 2 Week. Rep. 170; Atkinson v. Newcastle & G. Waterworks Co. (1871) L. R. 6 Exch. 404; Phenix Ins. Co. v. New York C. & H. R. R. Co. (1907) 122 App. Div. 113, 106 N. Y. Supp. 696; Shelbyville Water & Light Co. v. McDade (1906) 122 Ky. 639, 92 S. W. 568; Byrd v. English (1903), 64 L.R.A. 94, and note (117 Ga. 191, 43 S. E. 419); White v. Colorado C. R. Co. 5 Dill. 428, Fed. Cas. No. 17,543; Crissey & F. Lumber Co. v. Denver & R. G. R. Co. 17 Colo. App. 275, 68 Pac. 670; note to American Sheet & Tin Plate Co. v. Pittsburgh & L. E. R. Co. 12 L.R.A.(N.S.) 382; Coy v. Indianapolis Gas Co. (1896) 146 Ind. 655, 36 L.R.A. 535, 46 N. E. 17; 2 Thomp. Neg. § 2306; 1 Ray, Negligence of Imposed Duties, p. 107.

The case of Mott v. Hudson River R. Co. (1863) 1 Robt. 585, which is cited and relied on by counsel for appellant, is much like the cases which we have referred to at length. It was before three justices of the superior court of New York city, and a majority of these decided that damages caused by the spreading of a fire in consequence of the defendant negligently running over and cutting hose through which water was being thrown on the fire, whereby the only supply of water available was cut off, were too remote to sustain an action. The majority opinion is much weakened as authority by the clear opinion of the dissenting justice, and it seems wholly destroyed by the later contrary decision of the appellate division of the New York supreme court, in the case of Phenix Ins. Co. v. New York C. & H. R. R. Co. 122 App. Div. 113, 106 N. Y. Supp. 696.

The case of Lebanon, L. & L. Teleph. Co. v. Lanham Lumber Co. (1909) 131 Ky. 718, 21 L.R.A.(N.S.) 115, 115 S. W. 824, 18 Ann. Cas. 1066, in which it was held that the negligent failure of the defendant to give telephone connection with the fire department for a call to extinguish a fire in plaintiff's buildings for a time that rendered the efforts of the firemen, who afterwards arrived, fruitless, was too speculative and remote to authorize a recovery, and upon which reliance is placed by appellant, is easily distinguishable from this and the cases above referred to, which are therein considered and conceded to have been well decided.

The case before us may be near the verge of liability, but it is not outside; for there

is here an act done which is unlawful, and from which some damage directly flowed to appellee.

It is next contended by counsel for appellant that the complaint is bad for a failure to negative contributory negligence on appellee's part. The act of 1899 (§ 362. Burns's 1906) did not change the rule which has long prevailed in this state, that in actions to recover damages to property wrought by negligence of another, the plaintiff must allege his freedom from contributory negligence, either by direct averment, or by facts from which the inference that he was free from contributory negligence must be drawn. There is in the complaint no direct averment that the appellee was free from contributory negligence, and the facts alleged in the complaint do not compel any inference that the appellee was free either from any negligence which might have brought about the fire, or contributed to the spread of it after it was started, or that he could not have saved goods by removal. All of the facts alleged may have been true, and yet the appellee may have been guilty of contributory negligence.

But the general averment "that all of said damages and destruction of said greenhouse and contents was the direct and proximate result of the carelessness and negligence of said defendant, as herein averred," is relied on by counsel for appellee as being sufficient to rescue the pleading from the objection that it does not negative appellee's contributory negligence. A similar allegation to this is frequently found in complaints for negligence, and its office is to aid the allegations as to negligence of the defendant as a proximate cause of the damage sustained. It has no real significance, as a part of the complaint, as to any negligence on the part of the plaintiff.

Both negligence on the part of the appellant, which was effective in producing the damage to appellee, and freedom from negligence on the part of appellee, which contributed thereto, were, under the rules of pleading in force in this state, necessary to be shown to make the complaint good as the statement of a cause of action. The general averment in the complaint just quoted must be taken to be the pleader's conclusion from the facts specifically alleged. The facts specifically alleged warrant the conclusion that appellant's negligence was potent in causing appellee's damage, but they do not necessarily warrant the conclusion that the appellee was free from negligence which contributed thereto; and therefore the latter conclusion cannot be said to be involved in this general averment. *Wahl v. Shoulders* (1895) 14 Ind. App. 665, 43 N. E. 458; *Louisville, N. A. 39 L.R.A.(N.S.)*

& *C. R. Co. v. Schmidt* (1885) 106 Ind. 73, 5 N. E. 684; *Wabash, St. L. & P. R. Co. v. Johnson* (1884) 96 Ind. 40; *Wabash, St. L. & P. R. Co. v. Johnson* (1884) 96 Ind. 44, 46; *Pennsylvania Co. v. Gallentine*, 77 Ind. 322; *Cincinnati, L. & A. Electric Street R. Co. v. Klump* (1905) 37 Ind. App. 660, 77 N. E. 869; *Potter v. Ft. Wayne & W. V. Traction Co.* (1909) 43 Ind. App. 427, 87 N. E. 694; *Indianapolis Street R. Co. v. Robinson* (1901) 157 Ind. 232, 61 N. E. 197; *Logansport v. Kihm* (1902) 159 Ind. 68, 71, 84 N. E. 595.

It seems that the cause was submitted to the jury on the theory that the complaint was good without an allegation of freedom from contributory negligence; that the rule in force since the act of 1899, placing the burden of proving contributory negligence on the defendant in actions for personal injuries, applied as well to actions for injuries to property, for the court charged the jury in instruction No. 8, that, "if you shall find from a preponderance of all of the evidence in the case that the plaintiff was guilty of any act of negligence that proximately contributed to or caused the damage sued for, the plaintiff cannot recover." The complaint is bad as against a demurrer, because it does not negative contributory negligence, and the giving of this instruction was error. Other questions raised are not likely to arise in another trial.

The cause is reversed, with instructions to the lower court to sustain the appellant's demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

IOWA SUPREME COURT.

HORACE LAVALLEUR et al., Appts.,

v.

J. H. HAHN.

(152 Iowa, 649, 132 N. W. 877.)

Statute of frauds — parol evidence to show fraud in contract.

In an action to recover from an agent to purchase real estate, the secret profit which he made by falsely representing that he was compelled to pay for the property the price paid him, parol evidence is admissible on the ground of fraud, to show that he had,

Note. — No other case has been found involving the precise question as to the admissibility of parol evidence to show that the purported vendor in a written contract for the sale of property was in reality an agent of the other party, employed to purchase the property.

It has been said that "there is perhaps

in fact, been acting as agent, and promised to purchase as cheaply as possible, although the positive written contract to pay him a certain sum for the property as vendor is thereby contradicted.

(October 20, 1911.)

APPEAL by plaintiffs from a judgment of the District Court for Jasper County in favor of defendant in an action brought to recover a profit alleged to have been secured through fraud and deceit in the purchase of real estate. Reversed.

Statement by Deemer, J.:

Action to recover a sum of money secured by defendant from plaintiffs through fraud and deceit. Defendant's defense was a general denial. At the conclusion of the testimony, the trial court directed a verdict for defendant, and plaintiffs appeal.

Messrs. Mowry & Cross for appellants.
Messrs. Tripp & Tripp and E. J. Salmon for appellee.

Deemer, J., delivered the opinion of the court:

Plaintiffs are residents of Jasper county, Iowa, and defendant is a resident of the same county, and in the year 1907 was engaged in the real estate business at the town of Colfax. One L. E. Zachary, at that time a resident of Colorado living at the city of Pueblo, owned 320 acres of land in Jasper county, Iowa, which plaintiffs were desirous of purchasing, and they employed defendant to purchase the same for them from Zachary. Defendant was in partnership with one Stouffer, and it seems that on the 21st day of September, 1907, this partnership, in the name of Hahn & Stouffer, entered into a written contract with Zachary and wife for the purchase of the 320 acres of land at the agreed price of \$24,000. This contract was entered into

pursuant to correspondence had between Zachary and defendant during the latter part of August and the 1st of September of the year 1907. At the time of the purchase, defendant represented to Zachary that he was buying the land for other parties who lived in Kansas, but that for convenience the land was to be conveyed to him. By the terms of the contract, Zachary was to deed the land before March 10, 1908, but, as a matter of fact, the deed was made by Zachary and wife to J. H. Hahn and H. G. Stouffer on October 3, 1907, although not delivered perhaps until a later date, and recorded March 30, 1908. Defendant stated at the time the deed was made that he was buying the land for someone else; that the conveyance should run to him and his partner, and that they would convey the land to the purchaser. The testimony shows that on the 19th day of September, 1907, one of the plaintiffs called upon defendant at his office, in Colfax, to ascertain whether he (defendant) could buy the land for the plaintiffs. After some negotiations, defendant undertook to purchase the land, and the following is some of the testimony with reference to this agreement:

"I said to him [Mr. Hahn], 'You go and buy that land as cheap as you can, and make as good terms as you can,' but that we would pay \$80 an acre, but that he should buy it as cheap as he could, and make the terms as good as he could make them; and he said, 'All right, I will do it; I will go out and see Mr. Zachary; I will make the terms as good for you boys as I can.' He said, 'I want to get away today; this is Friday, and I want to get back Sunday.' He said, 'You get your draft for a thousand dollars at once.' There was nothing said about a contract up to that time. After I got the \$1,000 draft, it was along late in the evening, along about 6 o'clock, and after he had receipted for the \$1,000 he said, 'Boys, I ought to have a

no rule of law which is more flexible or subject to a greater number of exceptions than the rule which, in actions at law, excludes parol evidence offered to vary or explain written documents." And "it may be stated, generally, . . . that the courts have endeavored to adapt their rulings, either way, to the obvious demands of abstract justice in each particular case." 17 Cyc. 638.

So, where an agent to purchase property has been guilty of fraud or duress toward his principal; or where, even in the absence of fraud, some contemporaneous parol agreement has been the inducing cause of a written contract for the purchase of property, executed and delivered by an intending purchaser to one who was, in fact, his agent, employed to purchase the property from a third person; or where a written instrument, in form an absolute contract for the

purchase of property, has been so executed and delivered, with a parol agreement that it is to become binding only upon some contingency, or that it is not, in fact, to be effective as a binding contract between the parties at all; or in any other possible case falling within one of the general exceptions to the parol evidence rule, especially where justice requires that the fact be shown,—it would seem that parol evidence would be admissible to show that the purported vendor in the written contract for the conveyance of the property was in reality an agent of the other party for the purchase thereof. Various aspects of the general subject of admissibility of parol evidence as affecting written contracts are treated in the notes referred to in the Index to Notes, under the title, "Evidence—parol and extrinsic evidence as to writing."

A. C. W.

contract for this farm.' I said, 'All right.' Then we made the contract. After the contract was made, he said, 'Boys, if I do not buy this for \$80 an acre, you will not hold me to the contract?' I said, 'Certainly not,' and replied, 'If you can buy it for less, you will buy it for less.' He said, 'Certainly.' That statement was made after the written contract was made. Exhibit B, Robinson, is the contract that was executed at that time. Mr. Hahn went to Pueblo, Colorado. I saw him start. We had a conversation with him after he returned from Colorado in regard to this matter, in Colfax, on the following Monday, the 22d or 23d. I said to him, 'What do you want of me?' and he said he had bought it. I ask him how, and he said at \$80 an acre; that he had stayed there until 2 o'clock at night, and that was the best he could do. He further said that there would have to be a change made in the contract; that he would have to pay a thousand dollars more down, and that the rate of interest would be raised; that if we would make it an all cash payment before a certain time, we would be allowed \$300 off. Another contract was drawn at that time. Mr. Hahn drew it. Exhibit C. Robinson, is the contract that was drawn and signed on the 23d day of September, 1907, by myself and Mr. Hahn. I believed at that time the statements made to me by Mr. Hahn, to the effect that he had been obliged to pay \$80 an acre for the land, and relied on them; if I had known his statements to be false, and had known that he had agreed to pay only \$75 an acre for the land, I would not have entered into the second contract. Deeds were afterwards made for the land. The consideration paid for the land was \$25,600, or \$80 an acre. The money was paid as follows: \$2,000 to Hahn; \$1,000 for possession paid to Cross and myself; \$2,880 for two notes (they were the rent notes that we had given to Mr. Zachary, and he had sold them to the Valley National Bank of Des Moines, Iowa); \$530 to Meredith & Son; there was \$3,300 and some odd dollars that was adjusted through Hahn; then there was \$13,500 Allfree mortgage on this land, and that brought it down to \$3,300 and some odd dollars; I do not remember just how much. We (Ed Cross and myself) had the place rented, and had given our notes for three years. I had put something like \$375 of improvements on the place, and Ed Cross had put something like \$200 worth of improvements on the farm, and, of course, we could not let the place go for nothing. The \$1,000 was paid to cover these improvements. The \$530 paid to Meredith & Son was for a mortgage on the place. The \$13,500 to Allfree was a 30 L.R.A. (N.S.)

mortgage we put on the place; that was so we could pay cash for the place, and we put a mortgage of \$13,500. The money we received on that mortgage was paid to Mr. Hahn, and as a matter of fact he received that money. There was \$105 of taxes paid, and a mortgage of \$2,732.64 to the Security Loan & Trust Company of Des Moines, Iowa. As a matter of fact, we paid \$25,600 for the premises, less \$1,000 allowed us for possession. Exhibit D. Robinson, is in the handwriting of Mr. Hahn, and it represents the settlement for the farm between Mr. Hahn, L. L. Lavalleur, and myself. I did not know at the time of the settlement for the farm that Hahn had purchased the farm for less than \$80 an acre. He had told me that he paid \$80 an acre. The first that I had learned that he had purchased the land for less than \$80 was probably along in April, 1908. I suspectioned there was something wrong when we were making settlement. I could not get anything out of Hahn. The date of the settlement and the date of the memorandum was, I think, March 9, 1903."

Another witness by the name of Cross testified as follows: "I was with Horace Lavalleur at the office of J. H. Hahn, in Colfax, on the 19th day of September, 1907, and heard some of the conversation between Lavalleur and Hahn at that time, with reference to the land in controversy. . . . Mr. Hahn said that he would go out and buy the land as cheap as he could. He said he would go out that evening, and wanted a thousand dollars to take with him to make the purchase. He said, 'I will go out and work in your interest [Horace and L. L. Lavalleur's], and I will buy the land as cheap as I can, and make as good terms as I can.' He said, 'Of course, I will buy it in Mr. Stouffer's and my name, so Mr. Zachary won't know I am getting the land for you, as he might not allow the \$1,000 for giving possession.' Exhibit B, Robinson, was signed by the parties at that time. When that was signed, Mr. Hahn said, 'Now, if I do not buy the land for you boys, you will not hold me to this contract?' and they said, 'Certainly not;' that they would not do that. Nothing that I remember was said by Mr. Hahn that he would not hold Lavalleur to the contract in case he could buy the land for less than \$80 an acre. This took place after the contract was signed. The statement of Mr. Hahn that he would buy the land as cheaply as possible took place at the same time as the other conversation. It was at the time they gave him the \$1,000 draft, the same day."

The other plaintiff testified: "I was present in his office, in Colfax, Iowa, on the

19th day of September, 1907, and took part in the conversation. . . . Mr. Hahn said, 'I will go out and try to buy this land for you boys as cheap as I can. If I cannot buy the farm for less than \$80 an acre, then you will give \$80?' We said that was all right, and we went over to the bank to get a draft for \$1,000. He said, 'Boys, I will go out and work in your interests, and buy the land for you as cheap as I can; if I can buy the land for less than \$80, I will do it; but if I cannot, I will give \$80.' We said that was all right, and for him to buy it as cheap as he could, and he said he would do it. This conversation was after the signing of the contract (Exhibit B, Robinson). Of course, it had been talked before the contract was signed, and afterwards, too. Hahn said, 'Boys, I will go out and work in your interests; if I cannot get the land for \$80 an acre, you will not hold me to this' and we told him, 'No.' Mr. Hahn said that he was going to see L. E. Zachary, in Colorado, about the purchase of the land. I saw Mr. Hahn after he returned from Colorado, at my residence in Ira, Iowa. Horace Lavalleur was with him. They drove into my place. I was out in the field somewhere, and they called me, and I went where they were. Hahn said, 'Well, I got the farm.' I said, 'Did you?' and he said, 'I got it all right, but I have got to have a little more money.' I asked him how much, and he said he would have to have another \$1,000. We talked awhile, and he read over another contract. I supposed it would be all right, and we went to Ira and got a thousand dollars at the bank, and my brother and I signed the other contract, and they went home. He said that he had to pay \$80 an acre for the land; that he worked there until 2 o'clock at night with Zachary and his wife, before he could get them to sign a contract. He said that he had worked and done everything he could, but he could not get them to sign a contract for less than \$80. He said that Zachary had to have more money; that he needed some more money right at present, and that we could not have thirty days, but would have to have it in a shorter time, and that we would have to pay 6 per cent interest, when it should have been 5½. I was not present when the settlement was made, only the \$2,000 payment. The other settlement was made by my brother. They could not get the papers straightened out, and some of it is not yet settled. The title to the farm is not yet cleared up. Conveyances of the land were made to Horace Lavalleur and myself. The consideration paid for the land was \$25,600, at the rate of \$80 an acre. At the time Mr. Hahn and Horace

to L.R.A. (N.S.)

Lavalleur called at my place, in Ira, after the return of Hahn from Colorado, I did not know how much he had agreed to pay Mr. Zachary for the place. Nothing more than what he said. He said he had to give \$80 an acre. I believed and relied upon his statements. If I had known his statements to be false, and, as a matter of fact, he had agreed to pay but \$75 an acre, I would not have entered into the second contract."

In addition to the testimony first quoted, Horace Lavalleur testified as follows: "The defendant, J. H. Hahn, received \$170 as compensation for acting as our agent in the purchase of the Zachary land. He figured it out. Do not know that I can explain how he figured it out, but he set down the figures showing how it was done. We were to get \$300 off if we made it a cash payment, and \$170 of that was not allowed. He said he was out there and made those trips, and that he was entitled to \$170. He said he had to pay his fare both ways and his expenses. He said he was keeping out the \$170 to pay his bills. Mr. Stouffer was not present when this talk was had in regard to this matter between Mr. Hahn and myself. I had a talk with Mr. Stouffer about buying the farm. Mr. Stouffer was out there at the time. He was not present when the contracts were made. Mr. Stouffer is the first man I spoke to about the sale of the land. The settlement I finally made was not made until after Mr. Hahn returned from Pueblo. I think he went out there (Pueblo) on the 21st day of September, and I think this settlement was made on the 9th day of March, afterwards. It was at the final settlement, on the 9th day of March of the year following, that I had the talk with Mr. Hahn about the \$170. I asked Mr. Hahn what was going to him. He commenced to figure up. I wrote him a check when he was done figuring it up for what it amounted to. I gave him a check for \$3,351.50. That is just the amount that Exhibit D shows."

So far as material, the first contract referred to by these witnesses, of date September 19, 1907, reads as follows: "This agreement made and entered into this 19th day of September, A. D. 1907, by and between J. H. Hahn, party of the first part, and Horace and L. L. Lavalleur, parties of the second part, witnesseth: That the party of the first part has this day bargained and sold to the party of the second part the 320 acres of land known as the L. E. Zachary farm, being now occupied by Horace Lavalleur and E. A. Cross and described more particularly as follows: [here follows description of land].

for the consideration of twenty-five thousand and six hundred and 00-100 dollars (25,600) upon the following terms and conditions: Ten hundred and 00-100 dollars (1,000) cash, the receipt of which is hereby acknowledged. Ten hundred and 00-100 dollars (1,000) October 1, 1907. Eighty hundred and 00-100 dollars (8,000) on or before March 10, 1908. Ten hundred and 00-100 dollars being the amount expended for improvement and surrender of possession of said place on March 1, 1908, and which amount is to be credited as part of the purchase price of said land. The said improvements to remain upon the said place, and the parties of the second part agree to pay the two notes of \$1,440 each, making \$2,880, which are due January 1, 1909, and January 1, 1910, being the rent notes of the said place for the seasons of 1908 and 1909, and which are now sold to the Valley National Bank of Des Moines, Iowa, the same to be credited as part of the above purchase price of said place. The parties of the second part further agree to pay the mortgages of \$2,500 and \$500 now upon the said place, the same to be deducted from the purchase price as above, and to execute in favor of L. E. Zachary real estate mortgage and notes for the sum of eighty-seven hundred twenty and 00-100 dollars (8,720), dated on March 1, 1908, on or before eight (8) years, and bearing 5½ per cent interest, payable annually. It is further agreed by the party of the first part that he will execute a warranty deed and deliver a good abstract of title, pay the interest on the \$3,000 loans now upon the said place up to March 1, 1908, and the taxes on the said place for the year 1907; and it is further agreed by the party of the first part that he will execute the said warranty deed and deliver the said good abstract of title to the Citizens' State Bank of Colfax, Iowa, not later than January 1, 1908 (unless called for sooner by the parties of the second part), to be held by them for the fulfillment of this contract. It is further agreed by the parties of the second part if it is possible for them to arrange matters to lift the said mortgages of \$3,000 now against the said place, and to make a loan sufficient to pay the said amount together with the sum of \$8,720 (which sum was to be in a mortgage to L. E. Zachary), that they will execute the new loan and will pay cash in lieu of the mortgage to the said L. E. Zachary, less any expense he may be to in making the said change." (Duly signed by the parties.)

The material parts of the second or substituted contract referred to read: "This agreement made in duplicate this 23d day of 30 L.R.A. (N.S.)

September, A. D. 1907, by and between J. H. Hahn, party of the first part, and Horace and L. L. Lavalleur, parties of the second part, witnesseth: That the party of the first part has this day bargained and sold to the parties of the second part the 320 acres of land known as the L. E. Zachary farm, being now occupied by E. A. Cross and Horace Lavalleur, and more particularly described as follows: [here follows description], for the consideration of twenty-five thousand six hundred and 00-100 dollars (25,600), upon the following terms and conditions: Twenty hundred and 00-100 dollars (2,000), the receipt of which is hereby acknowledged. Ninety hundred and 00-100 dollars (9,000) on or before March 5, 1908. Ten hundred and 00-100 dollars (1,000), being the amount expended for improvements and surrender of possession of said place by Cross & Lavalleur by March 1, 1908, and which amount is to be credited as part of the purchase price of said land. The said improvements to remain upon the said place, and the parties of the second part assume and agree to pay the two rent notes of \$1,440 each, making \$2,880, which are due January 1, 1909, and January 1, 1910, being the rent notes for the said place for the seasons of 1908 and 1909, and which are now sold to the Valley National Bank of Des Moines, Iowa, the same to be credited as part of the above purchase price of the said place. The parties of the second part further agree to pay the mortgages of \$2,500 and \$500 now upon the said place, the same to be deducted from the purchase price as above, and to execute a mortgage back upon the said place for five years at six (6) per cent interest, to be for the balance due of \$7,720. It is further agreed by the party of the first part that he will execute a warranty deed and furnish a good abstract of title, and deliver the same to the Citizens' State Bank of Colfax, Iowa, not later than January 1, 1908, or sooner if called upon to do so by the parties of the second part, if they are ready to close deal before that date. Pay the interest on the loans of \$3,000 now upon the place up to March 1, 1908, and the taxes for the year 1907; the said delivery to the Citizens' State Bank being for the purpose of getting the papers in readiness to get the deal closed up as soon as possible. It is further agreed by the party of the first part that if the deal can be closed up and all cash paid (in lieu of the mortgage that was to be executed, together with the cash payments as per contract), that the party of the first part will allow a discount of \$300 for the same, together with the expense the parties of the second part may be to in canceling

mortgages now against the said place. It is further agreed by the parties of the second part that if it is possible for them to arrange matters to lift the said mortgages, amounting to \$3,000 in all, against the said place, and to make a loan sufficient to pay the said amount together with the sum of \$7,720 (which sum was to be a mortgage), that they will execute a new loan and will pay cash in lieu of the mortgage which was to be executed" (Duly signed by parties.)

The statement upon which the settlement was made is in the following words and figures:

Cash	\$2,000 00	
Possession	1,000 00	
Rent Notes	2,880 00	
Security Mtg.	2,732 64	
Meredith	530 00	
Taxes	105 86	
		\$9,248 50

\$25,600 00
9,248 50

\$16,351 50 With commission of \$130
13,000 00 to come out of \$13,000
 loan.

\$3,351 50

The defendant, although a witness on his own behalf, did not in any way deny the testimony which we have set out, but planted himself squarely upon the contracts just quoted, claiming that all the testimony introduced by plaintiffs was inadmissible, because it tended to vary and contradict the written contracts between the parties. The sole question in the case is the admissibility of the testimony quoted, under the issues tendered by the pleadings. The action is to recover damages from the defendant on the theory that he was plaintiffs' agent for the purchase of the farm, and that as such he was bound to the exercise of absolute good faith in the matter. It is charged that he did not carry out his duties as agent, but, on the contrary, sought to profit himself by the transaction, and was guilty of actual fraud and deceit. Defendant's claim, as we understand it, is that, as the written contracts show he was not an agent, but a vendor of the land, plaintiffs cannot show by parol evidence that he stood in any other relation to them. He especially relies upon the so-called parol evidence rule, and, if it be found that the rule does not apply to the issues as tendered by the pleadings, then the trial court was in error in excluding the testimony and in directing a verdict for the defendant. The general rule is that parol evidence is inadmissible to contradict, vary, add to, or subtract from the terms of a

valid written agreement in an action between the parties thereto or their privies. Elliott, Ev. § 568. But to this rule there are many exceptions, among them the following:

(1) "It may always be shown that the document in question never had any legal existence. On this ground rests the very important exception that duress or fraud in the inception of the contract may be proved, although accompanied by the most solemn formalities. Such proof does not recognize the contract as ever existing as a valid agreement, and is received, from the necessity of the case, to show that that which appears to be a contract is not and never was a contract. . . . For the purpose of proving the contract, verbal statements which are material and fraudulent, although made before or at the same time with the written agreement, may be proved. In such case the rule that prior negotiations are merged in the written agreement does not apply. No rule is better settled than this. Where fraud is alleged, a very broad range is given to the testimony. . . . In such cases any secret agreement or trust may be shown by them, although directly contradicting the face of the conveyances. The consideration may be inquired into, the purpose and object of mortgages or assignments may be shown, and generally the entire transaction may be investigated. Again, in actions upon a written contract, brought by one of the contracting parties against the other, the rule under discussion is constantly invoked; and parties are allowed to prove fraudulent representations or conduct which formed an inducement to the contract." Jones, Ev. Pocket ed. § 435.

(2) "It is a principle, to which we shall frequently have occasion to allude, that, 'in order to exclude oral evidence of a contract, it must be first established that there is a subsisting written contract between the parties; and, where the immediate issue is whether there is or was a writing covering the contract, it is not competent to exclude oral testimony bearing on that issue upon an assumption of such writing. To do so is to beg the question.'" Jones, Ev. Pocket ed. § 434; Brewster v. Reel, 74 Iowa, 506, 38 N. W. 381; 1 Greenl. Ev. § 284. This exception has been shortly stated as follows: Parol evidence is admissible to show that an apparent contract never had a legal existence. Browne, Parol Ev. § 33. As illustrating the application of the exception, see cases cited under this section.

(3) "Parol evidence is competent to show that a writing in form a complete contract, and delivered, was not to become binding

until the performance of some condition resting in parol." Browne, Parol Ev. § 32. This exception is very similar to the second one just quoted, and the manner of its application is shown in the cases cited by Mr. Browne under the section quoted.

(4) "It has long been the settled rule that in courts exercising equitable jurisdiction, it is admissible to prove by parol that instruments in writing apparently transferring the absolute title are in fact only given as security." Jones, Ev. Pocket ed. § 446. "Although evidence to show that an instrument absolute in form is not such in fact is most frequently used to show that an apparent deed is a mortgage, it is not limited to this class of cases. The rule that deeds and other instruments absolute in terms can be thus transformed into instruments for the security of money is purely an equitable doctrine; and it has sometimes been held that in actions at law evidence for this purpose is not admissible. But in some states such evidence has been held proper in legal actions, as well as in those of an equitable nature; and, as the differences between legal and equitable procedure become less marked, there will doubtless be a tendency toward the adoption of the same rule of evidence both in legal and in equitable proceedings." Jones, Ev. Pocket ed. § 448.

The exceptions are well sustained by authority, and we have heretofore recognized them in many cases. See *Hinsdale v. McCune*, 135 Iowa, 683, 113 N. W. 478; *Sutton v. Griebel*, 118 Iowa, 78, 91 N. W. 825; *McCaskey Register Co. v. Hall*, 140 Iowa, 87, 117 N. W. 1124; *Cavanagh v. Iowa Beer Co.* 136 Iowa, 236, 113 N. W. 856; *McNight v. Parsons*, 136 Iowa, 390, 22 L.R.A.(N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 Ann. Cas. 665; *Oakland Cemetery Asso. v. Lakins*, 126 Iowa, 121, 101 N. W. 778, 3 Ann. Cas. 559; *Bonewell v. Jacobson*, 130 Iowa, 170, 5 L.R.A.(N.S.) 436, 106 N. W. 614; *Morrison Mfg. Co. v. Bryson*, 129 Iowa, 645, 103 N. W. 1016, 106 N. W. 153; *Providence Jewelry Co. v. Fessler*, 145 Iowa, 74, 123 N. W. 957; *Rohrabacher v. Ware*, 37 Iowa, 85; *Walker v. Camp*, 63 Iowa, 627, 19 N. W. 802; *Sutton v. Weber*, 127 Iowa, 361, 101 N. W. 775; *Fisher v. Lee*, 94 Iowa, 611, 63 N. W. 442.

The exception which permits the introduction of parol evidence where fraud is alleged has been thus formulated: "It has been held that, where the execution of a written instrument has been induced by an oral stipulation or agreement made at the time, on the faith of which the party executed the writing, and without which he would not have executed it, but such agree-

ment or stipulation is omitted from the writing, even if its omission is not due to fraud or mistake, evidence of the oral agreement or stipulation may be given, although it may have the effect of varying the contract or obligation evidenced by the writing, where there has been an attempt to make a fraudulent use of the instrument in violation of such promise or agreement, or where the circumstances would make the use of the writing for any purpose inconsistent with such agreement dishonest or fraudulent. This rule is put upon the ground that the attempt by one party afterward to take advantage of the omission of such terms from the contract is a fraud upon the other party, who was induced to execute it upon the faith of such promise; and hence he will be permitted to show by parol evidence the truth of the matter." See 17 Cyc. 693, 694, citing many cases.

Going now to the substantive law of the case, it is apparent, if the testimony before quoted is to be believed, that defendant was plaintiffs' agent to purchase the land at the lowest price he could for the benefit of his principals, the plaintiffs herein; that he did make such purchase (that is, bought the land for \$75 per acre), but that he concealed that fact from plaintiffs, and represented that he had had to pay \$80 therefor; that he settled with plaintiffs on that basis, and conveyed them the land which he had purchased in the name of his firm, although for the plaintiffs, and received their money on the theory that he had paid \$80 per acre for it. This under our holdings constituted a fraud upon them, and they are entitled to recover the profits made by defendant in the transaction. *Merrill v. Sax*, 141 Iowa, 394, 118 N. W. 434; *Morey v. Laird*, 108 Iowa, 670, 77 N. W. 835; *Green v. Peeso*, 92 Iowa, 261, 60 N. W. 531; *Rorebeck v. Van Eaton*, 90 Iowa, 82, 57 N. W. 694; *Schneider v. Schneider*, 125 Iowa, 1, 98 N. W. 159; *Leasure v. Boie*, 142 Iowa, 284, 120 N. W. 643.

Now, if to the parol evidence rule there be an exception in the case of fraud, then clearly it was competent for the plaintiffs to show that, instead of purchasing the land from the defendant, Hahn, as the written contracts show, he (Hahn) was acting as their agent for the purchase of the lands, and that the contracts were never intended to be binding, or the complete evidence of the transaction, but were being used fraudulently by the defendant to escape a duty owing by him under the law. Where fraud is charged, the court looks behind all forms, and at the substance of the transaction, and in such cases no one can shield

himself under the parol evidence rule. We think the testimony was admissible under at least two exceptions to the parol evidence rule. The conclusion finds abundant support in *Bonewell v. Jacobson*, 130 Iowa, 170, 5 L.R.A.(N.S.) 436, 106 N. W. 614; *Rorebeck v. Van Eaton*, 90 Iowa, 82, 57 N. W. 694; *Sutton v. Griebel*, 118 Iowa, 78, 91 N. W. 825; *McCormick Harvesting Mach. Co. v. Morlan*, 121 Iowa, 451, 96 N. W. 976; *Esterly v. Eppelsheimer*, 73 Iowa, 260, 34 N. W. 846; *Dowagiac Mfg. Co. v. Gibson*, 73 Iowa, 525, 5 Am. St. Rep. 697, 35 N. W. 603.

In *Humbert v. Larson*, 99 Iowa, 275, 68 N. W. 703, we said: "Appellant further argues that the court erred in allowing certain evidence, over his objections, tending to contradict the written bill of sale. The record shows that the court below did admit evidence to prove the representations and statements made by plaintiff as an inducement to the sale. Under the issues in the case, this evidence was properly received. The defendants did not rely upon their bill of sale. Their defense was independent of it, and was based upon fraud. It is elementary that the rule excluding evidence contradictory of a written instrument does not apply when fraud is the gravamen of the action or gist of the defense. It is clear that there was no error here."

In *Stanhope v. Swafford*, 80 Iowa, 45, 45 N. W. 403, the court said: "It will be observed that the action is to recover for false representations inducing plaintiff to make the trade. Now, if it be assumed that all the terms of the contract are embodied in the writing, and the false representations are not expressed therein, plaintiff may recover thereon, for the reason that the action is not upon the contract, but for false representations,—a cause of action other and independent of the contract. If one should be inveigled or induced by false representations to enter into contract of a sale of property, he could maintain his action on the false representations, and would not be required to sue on the contract of sale, in order to recover his damages therefor." See also *Nixon v. Carson*, 38 Iowa, 338; *Mann v. Taylor*, 78 Iowa, 355, 43 N. W. 220; *Rohrabacher v. Ware*, 37 Iowa, 85.

None of the cases cited or relied upon by appellee seem to be in point. Counsel for appellee throughout the discussion seem to overlook the fact that fraud is the gravamen of plaintiffs' action, and that in such cases the parol evidence rule does not obtain.

For the reasons pointed out, the judgment must be, and it is, reversed.

39 L.R.A.(N.S.)

KANSAS SUPREME COURT.

LILLIE ATKINSON et al., Plffs. in Err.
v.
J. R. CROWE COAL & MINING COMPANY.

(80 Kan. 161, 102 Pac. 50.)

Right to jury — settling title to land.

1. In an action commenced for the purpose of settling disputed questions of title to real estate, and to recover the possession thereof, either party is entitled to a jury as matter of right, regardless of the form in which the action may be brought.

Same — equitable action.

2. While a person was in the actual, exclusive, and peaceable possession of real estate, claiming to be the owner thereof, another person claiming to be the owner of the coal and mineral in such land, and to have a right to use the surface for mining purposes, attempted to enter thereon for such purpose, but was forcibly prevented by the person in possession, who denied such claimed ownership of the coal. The person out of possession then commenced a suit to obtain a perpetual injunction to restrain the person in possession from interfering with the mining and removal of the coal. In that suit the defendant was, upon demand, denied a trial by jury. Held error.

(May 8, 1909.)

Headnotes by GRAVES, J.

Note. — Right to preliminary injunction which would have effect of transferring possession of property from defendant to plaintiff.

General rule.

Cases involving the right to the appointment of a receiver of property, and a preliminary injunction restraining interference with the receiver's possession of the property, are not included herein. Neither are cases included wherein the question is considered as to the right by permanent injunction to require one party to the suit to surrender possession of the property to another; nor are cases included which pass upon the power of a court to make effectual prior orders or executions, by a mandatory injunction requiring the surrender of the possession of property in accordance with the previous order or execution.

In general, the function of a preliminary injunction is to afford preventive relief and preserve the *status quo* until the rights of the contending parties may be judicially investigated and determined. Ordinarily, it cannot be used to take the possession of the property from one party to a suit and transfer it to another, where the title or right of possession is in dispute. There are some exceptions to this rule, which will be hereafter referred to.

ERROR to the District Court for Cherokee County to review a judgment permanently enjoining defendants from interfering with the mining and removing coal from certain lands. Reversed.

Statement by Graves, J.:

This suit was commenced by the J. R. Crowe Coal & Mining Company in the district court of Cherokee county, to obtain a perpetual injunction against Lillie and Ed. Atkinson. The defendants insisted that the remedy sought by the plaintiff could be obtained only in an action of ejectment. They therefore demurred to the plaintiff's petition, the demurrer being overruled, they filed an answer, and demanded a jury, which was refused, and the case was then

tried to the court upon the facts. A permanent injunction was allowed, from which judgment of the court the defendants prosecute error. To avoid the production of the entire petition, which is of great length, the material facts will be stated: The dispute arose over the ownership of real estate. It is conceded that the Kansas City, Ft. Scott, & Gulf Railroad Company was the former owner of the land in controversy, and each party claims title from this source. The plaintiff claims that the railroad company sold the land to Jeremiah Hogan, reserving to itself the coal and mineral therein, together with the right to use the surface for the purposes of exploring for such coal and mineral, and for mining and removing the same from the land, and

The general rule as stated finds support in the following cases:

U. S.—*Lacassagne v. Chapuis*, 144 U. S. 119, 36 L. ed. 368, 12 Sup. Ct. Rep. 659; *Black v. Jackson*, 177 U. S. 349, 44 L. ed. 801, 20 Sup. Ct. Rep. 648; *Potts v. Hollen*, 177 U. S. 365, 44 L. ed. 808, 20 Sup. Ct. Rep. 654.

Ala.—*Yellow Pine Export Co. v. Sutherland-Innis Co.* 141 Ala. 664, 37 So. 922.

Conn.—*Roy v. Moore*, — Conn. —, 82 Atl. 233.

Del.—*Tatem v. Gilpin*, 1 Del. Ch. 13.

Ga.—*Beacham v. Wrightsville & T. R. Co.* 125 Ga. 362, 54 S. E. 157; *Vaughn v. Yawn*, 103 Ga. 557, 29 S. E. 759; *Harris v. Pounds*, 64 Ga. 121.

Ill.—*Lowenthal v. New Music Hall Co.* 100 Ill. App. 274.

Iowa.—*Hall v. Henninger*, 145 Iowa, 230, 139 Am. St. Rep. 412, 121 N. W. 6; *Doige v. Bruce*, 141 Iowa, 210, 119 N. W. 624; *Minneapolis & St. L. R. Co. v. Chicago, M. & St. P. R. Co.* 116 Iowa, 681, 88 N. W. 1082.

Mich.—*State Road Bridge Co. v. Saginaw Circuit Judge*, 143 Mich. 337, 106 N. W. 394; *Hall v. Wayne Circuit Judge*, 111 Mich. 395, 69 N. W. 643; *Toledo, A. A. & M. R. Co. v. Detroit, L. & N. R. Co.* 61 Mich. 9, 27 N. W. 715.

N. D.—*Dickson v. Dows*, 11 N. D. 404, 92 N. W. 797.

Okla.—*Brown v. Donnelly*, 19 Okla. 296, 91 Pac. 859; *Laughlin v. Fariss*, 7 Okla. 1, 50 Pac. 254.

Pa.—*Stout v. Williams*, 203 Pa. 161, 52 Atl. 169; *Fredericks v. Huber*, 180 Pa. 572, 37 Atl. 90; *Audenried v. Philadelphia & R. R. Co.* 68 Pa. 370, 8 Am. Rep. 195; *Farmers' R. Co. v. Reno, O. C. & P. R. Co.* 53 Pa. 224.

S. D.—*Catholicon Hot Springs Co. v. Ferguson*, 7 S. D. 503, 64 N. W. 539.

Vt.—*Cheever v. Rutland & B. R. Co.* 39 Vt. 653.

Eng.—*Black Point Syndicate v. Eastern Concessions*, 79 L. T. N. S. 658.

And an injunction will not issue to take the possession of personalty from one party claiming a right thereto, and put the same

into possession of another. *Yellow Pine Export Co. v. Sutherland-Innis Co.* 141 Ala. 664, 37 So. 922.

Equity has no power in a summary manner to dispossess a claimant of property which undisputedly had for a long time been in his rightful possession. *McCombs v. Merryhew*, 40 Mich. 725.

A "court of chancery has no more power than any other to condemn a man unheard, and to dispossess him of property *prima facie* his, and hand over its enjoyment to another on an *ex parte* claim to it." Per Cooley, Judge, in *Arnold v. Bright*, 41 Mich. 207, 2 N. W. 16.

—violation of injunction as contempt.

And since an injunction or order depriving possession or rights on a preliminary inquiry is illegal and void, no one need respect the same, and a violation thereof does not constitute contempt of court. *Tawas & B. C. R. Co. v. Circuit Judge*, 44 Mich. 479, 7 N. W. 65; *Calvert v. State*, 34 Neb. 616, 52 N. W. 687; *State ex rel. Reynolds v. Graves*, 66 Neb. 17, 92 N. W. 144.

A person in the actual possession of land at the time an injunction is issued, enjoining him from in any way interfering or meddling with the possession of the complainant, and from entering upon the premises, cannot be punished for contempt of court for thereafter retaining his possession even by the exercise of force, since the court is without power by preliminary *ex parte* order to turn even a wrongdoer out of possession of property. *People ex rel. Messler v. Simonson*, 10 Mich. 335.

—injunction as violative of guaranty of trial by jury.

Such an order depriving, as it does, a person in possession of property under a claim of right thereto of the possession thereof on an *ex parte* hearing, violates the constitutional guaranty against taking property except by due process of law on a judgment of the peers of the person affected. *Bodwell v. Crawford*, 26 Kan. 292, 40 Am. Rep. 306.

that Hogan had no other or further right or title in said land. It is further claimed that the only right in the premises possessed by the defendants is the right of Hogan, which was obtained by a sheriff's deed issued upon the sale of the land, in proceedings to foreclose a mortgage given by Hogan. The plaintiff claims to have succeeded to the rights of the railroad company under its reservation in the deed to Hogan, by a lease from it granting the right to enter upon the land, and mine and remove coal and mineral therefrom. The defendants deny that the deed to Hogan contained any reservation, but insist that he acquired the entire estate in the land from the railroad company, and that they succeeded to such estate through the sheriff's

deed. At the time this suit was commenced, and for about two years prior thereto, the defendants were in the actual possession of the land in controversy, claiming the entire estate therein and title thereto. Before this suit was commenced, the plaintiff attempted to enter upon the land for the purpose of mining coal under its lease. The defendants, by force, denied it that privilege, and have ever since, by force, excluded it from the premises. This suit was commenced to enjoin such interference. The original deed to Hogan is lost, and the record thereof is mutilated so as to render its contents uncertain. The plaintiff has never been in the actual possession of the land, or asserted its rights as lessee.

Such an injunction is a clear invasion of the constitutional right to a trial by jury by due process of law, before a person shall be deprived of his property. *Crossland v. Crossland*, 53 W. Va. 108, 44 S. E. 424.

—form of injunction as affecting question.

A preliminary injunction will not issue where the effect of it is to put the plaintiff in possession of the disputed premises, although in form it is preventive, merely being to restrain the defendant from interfering with the plaintiff in taking possession. *Lowenthal v. New Music Hall Co.* 100 Ill. App. 274.

A person out of possession of land cannot regain possession by means of an interlocutory injunction restraining those in possession from interfering with the possession of the plaintiff or from molesting him on the land, and this is true although he claims to have been ousted from possession by a suit in the state court which acted in the matter without jurisdiction. *Lacastagne v. Chapuis*, 144 U. S. 119, 36 L. ed. 368, 12 Sup. Ct. Rep. 659.

Equity will not by preliminary injunction restrain the interference with complainant's possession of land where the effect would be to reinstate him in possession, where the right of possession is disputed and depends upon the construction of a contract. *Akrill v. Selden*, 1 Barb. 316.

Nor will it evict a person from the actual possession of land the title to which is in dispute, although in form the order merely restrains him from further interfering with the land or the house and crops thereon. *Laughn v. Yawn*, 103 Ga. 567, 29 S. E. 159; *Beacham v. Wrightsville & T. R. Co.* 125 Ga. 362, 54 S. E. 157.

Cases illustrating general rule—contesting factions.

A preliminary injunction should not issue in favor of contending church factions, the result of which would be to take the church property from possession of one faction and turn it over to the other. *Fredericks v. Huber*, 180 Pa. 572, 37 Atl. 90.
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Nor will it issue for the purpose of ousting from possession the trustees appointed by the court, and place in control trustees appointed by an organization owning the property. *Harris v. Pounds*, 64 Ga. 121.

In a contest between different societies for the possession of a room or hall wherein their meetings are held, equity will not by preliminary injunction deprive an innocent third party of the actual, and the defendants of the constructive, possession of the room or hall. *Stout v. Williams*, 203 Pa. 161, 52 Atl. 169.

—contesting railroad companies.

Where there is a bona fide dispute as to the title to a strip of ground occupied by a side track, a court of equity will not by preliminary injunction require a railroad company in possession of the strip of land to surrender it to another company asserting title and right of possession thereto. *Wilkinson v. Philadelphia & R. R. Co.* 13 Montg. Co. L. Rep. 93.

Equity is without power to restrain a railroad company in possession of land from interfering with the act of another company in constructing upon such land another railway. *Calvert v. State*, 34 Neb. 616, 52 N. W. 687.

A preliminary injunction will not issue in behalf of a railroad company out of possession of land, but claiming title and the right of possession, restraining another company in possession from enjoying the use thereof, or interfering with its use by the plaintiff. *Farmers' R. Co. v. Reno*, O. C. & P. R. Co. 53 Pa. 224.

Nor in favor of one illegally claiming title and right of possession to land, as against another company in bona fide possession under claim of title. *Minneapolis & St. L. R. Co. v. Chicago, M. & St. P. R. Co.* 116 Iowa, 681, 88 N. W. 1082.

Nor to restrain a railroad company from interfering with the intended execution of a crossing under their track by virtue of a right alleged to have been secured by condemnation proceedings. *Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co.* 61

Messrs. William F. Sapp, Andrew S. Wilson, and Francis M. Brady for plaintiffs in error.

Messrs. A. H. Skidmore and S. L. Walker for defendant in error.

Graves, J., delivered the opinion of the court:

The plaintiff freely admits that the defendants own the land in controversy, subject only to its rights as lessee to mine and remove coal and mineral therefrom. It merely claims an easement in the surface, such as will enable it to exercise fully its rights as lessee, and does not wish to disturb the defendants in the enjoyment of the possession and use of the surface further than is reasonably necessary to the

enjoyment of its own rights under its lease. It therefore insists that ejectment is neither an adequate nor an appropriate remedy under the facts of this case, and that injunction is both appropriate and adequate, and the only proper remedy. The defendants urge that the coal which the plaintiff claims to own is a part of the land which they occupy, and of which they have exclusive, actual, peaceable possession, peaceable even against the plaintiff; that they claim to be the owners of the entire estate in the land, including the coal and mineral, and the only contention between them and the plaintiff is as to the ownership of the coal; that an injunction would deprive them of their title to, and possession of, the coal, as completely and effectually

Mich. 9, 27 N. W. 715.

Nor to prevent a railroad company in possession of certain track under a claim of right thereto, from using the same except on specific conditions. *Tawas & B. C. R. Co. v. Circuit Judge*, 44 Mich. 479, 7 N. W. 65.

Where the right of possession of a railroad track is in dispute, and neither party is in actual possession, a court of equity will not interfere to aid either in obtaining the actual control. *St. Louis, K. C. & C. R. Co. v. Dewees*, 23 Fed. 691.

—miscellaneous.

A preliminary injunction will not issue to restrain a person holding land under a contract of purchase claimed to have been forfeited, from planting or sowing crops thereon, or from interfering with the possession of the premises by the vendor, where the purchaser is in the actual possession. *Dickson v. Dows*, 11 N. D. 404, 92 N. W. 797.

Equity will not by a preliminary injunction restrain a person in possession of land under claim of title thereto, from removing or attempting to remove crops then on the land, or from disposing of the same, or in any manner interfering with the possession of the property by the complainant, who also claims title thereto. *State ex rel. Reynolds v. Graves*, 66 Neb. 17, 92 N. W. 144.

As an incident to a suit to foreclose his mortgage, a mortgagee is not entitled to an injunction transferring the possession of the mortgaged land to him from the mortgagor. *Cheever v. Rutland & B. R. Co.* 39 Vt. 653.

Pending quo warranto proceedings to test the right of a corporation to maintain its franchise and privilege of collecting tolls, the court has no power to issue an order restraining the company from collecting tolls or further exercising any rights under its franchise. *State Road Bridge Co. v. Saginaw Circuit Judge*, 143 Mich. 337, 106 N. W. 394.

It is error to issue a preliminary injunction. *39 L.R.A. (N.S.)*

junction requiring a defendant in possession of property claimed by the administrator of the decedent, to surrender possession thereof to the administrator, where the defendant himself asserts title to the property. *Crossland v. Crossland*, 53 W. Va. 108, 44 S. E. 424.

But trustees appointed by an assignment for the benefit of creditors of a bank are entitled to the aid of a court of equity as against the directors of a bank to have the trust established, and by preliminary injunction to prevent the directors from interfering with the trustees in obtaining possession of the assets of the bank, although such assets are then in the possession of the director, and the effect of the injunction is to transfer the possession of the estate and the assets of the bank from the directors to the trustees. *Ex parte Conway*, 4 Ark. 302. This case recognizes the general rule that equity will not by preliminary injunction transfer the possession of property from one party to the suit to the other, but holds that the rule does not apply where the purpose is to enforce a trust like the one mentioned.

Contest between entrymen under homestead laws.

The general rule that a person out of possession of land cannot by a preliminary injunction be restored to possession does not apply where the person in possession is a mere trespasser, although claiming as an entryman, where the plaintiff's right in the property is that of a prior entryman. In cases of this character an injunction will issue (*Sproat v. Darling*, 2 Okla. 24, 35 Pac. 682, 886; *Procter v. Stuart*, 4 Okla. 679, 46 Pac. 501; *Glover v. Swartz*, 8 Okla. 642, 58 Pac. 943); or where the person in possession is retaining possession after his claim as entryman has been decided adversely to him by the land office. (*Barnes v. Newton*, 5 Okla. 428, 48 Pac. 190, 49 Pac. 1074; *Calhoun v. McCormack*, 7 Okla. 347, 54 Pac. 493; *Barnett v. Ruyle*, 9 Okla. 635, 60 Pac. 243.)

But the United States Supreme Court,

as could be done by an action of ejectment, and therefore they are entitled to have the issue tried by a jury as matter of right.

Attention has been called to § 5 of the Bill of Rights, which reads, "The right of trial by jury shall be inviolate." Attention has also been called to § 4713, Gen. Stat. 1901, which reads: ". . . Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as hereinafter provided." It is everywhere held that this constitutional provision preserves whatever rights of trial by jury existed at common law when the provision was adopted. We are

inclined to agree with the view of the defendants. It is apparent that the real contention of the parties involves the ownership of the coal in question. If the plaintiff has an easement in the surface of the land, it is because of, and incident to, its ownership of the coal. Before a court can enjoin the defendants from interfering with the plaintiff in the use of the surface of the land for the purpose of mining coal, it must determine that the plaintiff is the owner of the coal. The defendants being in the actual possession of the coal as nearly as such possession is possible, the granting of such an injunction would be the same, in effect, as a judgment in ejectment, as it would determine both the title and possession of the real estate in contro-

reversing an Oklahoma case, holds that an entryman out of possession, although having a decision by the land office in his favor, is not entitled to a preliminary injunction in effect giving to him the possession of the land as against the adverse claimant thereof then in possession, since he has a complete remedy by an action of forcible detainer. *Black v. Jackson*, 177 U. S. 349, 44 L. ed. 801, 20 Sup. Ct. Rep. 648. The question of the right of possession is a proper matter for a jury trial. *Potts v. Hollen*, 177 U. S. 365, 44 L. ed. 808, 20 Sup. Ct. Rep. 654, reversing 6 Okla. 699, 52 Pac. 917.

And it has been held that a preliminary injunction will not issue to adjust possessory rights under the homestead laws to a tract of land, after the equitable title has passed from the United States and become vested in the individual, unless in a case which presents some recognized special ground therefor; and it is not sufficient that one party claims that he is the owner entitled to the immediate possession of the land, and that the other party unlawfully and without any right holds and retains possession. *Laughlin v. Fariss*, 7 Okla. 1, 50 Pac. 254.

And the general rule is asserted that a court of equity is without authority by preliminary injunction to dispossess one bona fide claimant of the land under the homestead laws, and turn the land over to another claimant. *Brown v. Donnelly*, 10 Okla. 296, 91 Pac. 859.

As between adverse claimants to land under the homestead laws, each of whom are in possession of different parcels of the same tract, equity will not interfere with the possession of either by a preliminary injunction restraining the one from interfering with the possession by the other of the whole. *Littlefield v. Todd*, 3 Okla. 1, 42 Pac. 10.

When suit between landlord and tenant.

By the weight of authority, the fact that there exists between the parties to a suit the relation of landlord and tenant affords 39 L.R.A. (N.S.)

no ground for equitable interference by injunction, where the effect will be to transfer the premises under lease from the one party to the other. Thus, it has been held that equity has no power upon a bill to set aside a lease of land on the ground that it was procured through fraud, by preliminary injunction, to turn the lessee out of possession of the land, and give the same to the lessor. *Arnold v. Bright*, 41 Mich. 207, 2 N. W. 16. And a court of equity will not by preliminary injunction deprive a tenant in possession of land, of the right secured to him by statute, of a notice to quit, as a condition precedent to proceedings to oust him from the possession. *Hall v. Henninger*, 145 Iowa, 230, 139 Am. St. Rep. 412, 121 N. W. 6. Nor restore to a landlord the possession of premises, the right to which is denied by the tenant. *Hubbard v. Mobray*, 20 Md. 165. Neither will it interfere in behalf of the owner of land against a person claiming as tenant under a lease with the owner's agent, whose authority the owner denies. *Bodwell v. Crawford*, 26 Kan. 292, 40 Am. Rep. 306. Nor in favor of a landlord as against the assignee of his tenant, although the landlord asserts the assignment is in violation of the lease and hence a forfeiture of all rights thereunder. *Doige v. Bruce*, 141 Iowa, 210, 119 N. W. 624.

In *Pokegama Sugar-Pine Lumber Co. v. Klamath River Lumber & Improv. Co.* 86 Fed. 528, however, a preliminary injunction mandatory in form was issued requiring a landlord to surrender to the tenant the possession of the leased premises, which the landlord had forcibly and unlawfully obtained. In this case the possession had continued for a period of two or three weeks at the time the application for the injunction was made, but, notwithstanding this fact, the relief was given, on the theories, first, that the nature of defendant's possession, together with his relation of landlord, was such as to require equitable interference in behalf of the tenant, and, second, that the case came within the rule that the defendant's possession was but an interruption of the prior possession of the com-

versy. The plaintiff has never been in the possession and enjoyment of the so-called easement, and its right thereto is now being asserted for the first time. It may be conceded that injunction is a proper and ordinary remedy for the protection of owners in the enjoyment of their rights in real estate, but here this remedy is invoked for a very different purpose. Its object is not to protect a right which the plaintiff has in real estate, but its purpose is to obtain thereby a title to real estate from others who are already in possession and claiming to be the owners thereof. It is true, as has been suggested, that courts of equity often examine into questions of title not for the mere purpose of determining the

question of ownership between the parties, but for the purpose of administering equitable relief concerning the use or occupancy of the land. Upon this point Chancellor Kent, in the case of *Abbott v. Allen*, 2 Johns. Ch. 519, 7 Am. Dec. 554, said: "This court may perhaps try title to land when it arises incidentally; but it is understood not to be within its province when the case depends on a single legal title, and is brought up directly by the bill. The power is only to be exercised in difficult and complicated cases affording peculiar grounds for equitable interference." In 24 Cyc. 109, it is said: "While courts of equity have jurisdiction to protect and enforce equitable titles, and may in certain

plaintain, and hence the complainant might be restored to possession without first establishing his title or right to possession. The form of the injunction was negative, and restrained the defendant from interfering with complainant's control of the property. And see as to proceedings for contempt for violation of an injunction issued as above stated, 86 Fed 538. And see also same case on final hearing, 96 Fed. 34, reaffirming the jurisdiction of equity under such circumstances to interpose by way of an injunction.

But it has been held that equity will not, at the instance of a lessee of mining property, restrain the lessor from taking or keeping possession of the property, where he is in fact in possession, although such possession was forcibly taken, and had been continued but a few days at the time of the application for a preliminary injunction. *Black Point Syndicate v. Eastern Concessions*, 79 L. T. N. S. 658.

Lowenthal v. New Music Hall Co. 100 Ill. App. 274, also, holds that where a landlord has forcibly repossessed himself of a leased property, and placed in possession another tenant, the original tenant is not entitled to a preliminary injunction in effect restoring him to possession.

Character of possession.

In *People ex rel. Massler v. Simonson*, 10 Mich. 335, it is asserted that a court of equity is without power by preliminary *ex parte* order, to turn even a wrongdoer out of possession of land.

Hence, although a person is forcibly ousted from the possession of land, he is not entitled to a preliminary injunction restoring such possession, where the other party for some days has been in the exclusive possession. *Catholicon Hot Springs Co. v. Ferguson*, 7 S. D. 503, 64 N. W. 539. In reaching this conclusion in the foregoing case, it is said that the allegations in the complaint that the defendants, without right or title, by fraud and stealth, entered into possession, ousted and ejected the complainant therefrom, and ever since have withheld by force and violence, and still 30 L.R.A. (N.S.)

withhold in like manner, the premises, came very far short of stating facts entitling the plaintiff to an injunction, and the court adds: "The facts so alleged, in connection with the other facts alleged in the complaint, constitute a good cause of action at law for the recovery of the possession of the premises from the defendant, but they show no right in the plaintiff to equitable relief by way of injunction."

And although the plaintiff has been interfered with and deprived of the use of a shaft or well by the defendants, who have forcibly taken possession thereof, the former is not entitled to an injunction restraining the latter from further interfering with his use of the well, the injunction being in effect a writ of restitution. *San Antonio Water Co. v. Bodenhamer*, 133 Cal. 248, 65 Pac. 471.

See also *Laughlin v. Fariss*, 7 Okla. 1, 50 Pac. 254, and *Lowenthal v. New Music Hall Co.* 100 Ill. App. 274, *supra*.

And it has been held that equity would not by preliminary injunction oust a water company from the possession of the tow-path of a canal company, although possession was forcibly taken, and the rule is stated that the mere taking possession of lands, and holding them *vi et armis*, would not form the basis for arresting the commission of the wrongful act, although it is recognized that equity will protect an easement from violation if the existence of the easement and its character and extent are plain. *Lehigh Valley R. Co. v. New York & N. J. Water Co.* 76 N. J. Eq. 504, 74 Atl. 970.

Where a person has taken forcible possession of property, and commences legal proceedings to have a void contract relating thereto avoided, the defendant in the proceeding is not entitled to equitable aid to have restored to him the possession of the property pending the proceedings, especially where such possession would be of no real advantage to him; and this is true although plaintiff in obtaining possession ousted defendant. *Central Branch Union P. R. Co. v. Western U. Teleg. Co.* 1 McCrary, 551, 3 Fed. 417.

In some jurisdictions an exception is

cases try suits to quiet title or remove cloud without the intervention of a jury, questions as to the legal title to land are of right triable by jury, and this right cannot be abrogated by statute, or avoided by bringing an action which is, in effect, an action of ejectment in the form of a suit in equity."

The rule that actions for the trial of title to real estate shall be tried to a jury has always been favored, and with practical unanimity has been upheld by the courts. The difficulty encountered in the enforcement of this rule consists chiefly in determining whether or not the action under consideration comes within the rule. The test upon this question which has been

generally followed is that, where the real object of the action, whatever its form, appears to be to settle a disputed question of title, then either party may demand a jury as matter of right. If, on the other hand, the purpose is to obtain proper equitable relief, then the chancellor may administer it, even though it involves an examination of title. In the case of *Martin v. Martin*, 118 Ind. 228, 20 N. E. 783, it was said: "It is not every cause of action which the pleader styles an action of ejectment or to quiet title, that entitles the parties to a trial by jury; nor will the prayer for relief have any controlling influence in determining whether or not a jury may be called. The court will look

made to the general rule, of cases where the defendant obtained possession of the premises through force and without any apparent right, and his possession had continued for a comparatively short period of time. Such possession is regarded merely as an interruption of the complainant's possession, and as not such a possession as entitled the defendant to insist that the complainant be relegated to his remedy at law before being restored to possession. This doctrine was applied in *Pokegama Sugar-Pine Lumber Co. v. Klamath River Lumber & Improv. Co.* 86 Fed. 528, an action by a tenant for injunction to be restored to the possession of the leased premises, from which he had been wrongfully ousted by the landlord.

And in *Jeff Chaison Townsite Co. v. McFaddin, W. & K. Land Co.* 56 Tex. Civ. App. 611, 121 S. W. 716, where an injunction was granted restraining the defendants from further interfering with the complainant's possession of a canal running through defendants' property, and requiring them to remove all obstructions placed by them upon the canal, it was issued on the theory that, the complainant having opened a canal through the land in question, with the consent or acquiescence of the then owners, and having been in the quiet and undisturbed use and enjoyment of the easement for some period of time when the defendants forcibly took possession of the same, and fenced the land including the canal, hence the effect of the injunction was merely to restore the possession thus forcibly invaded, and preserve the status until the question of plaintiff's right is determined; and the rule is here asserted that, in determining whether or not to issue a preliminary injunction, the effect of which will be to take possession of property from one person and give it to another, a court will look not only to the fact that the defendant is in possession of the property, but will also consider the nature of his possession and the manner in which he acquired it.

In *Hadfield v. Bartlett*, 66 Wis. 634, 29 N. W. 639, the granting of a preliminary injunction was said to be within the sound discretion of the trial court, although it is 39 L.R.A. (N.S.)

run against a person in possession of land and buildings thereon, and enjoined such person from taking possession of the premises or certain of the buildings, which had formerly been in possession of the plaintiff, holding under a contract of purchase from the vendor of the defendant, the plaintiff having been forcibly ousted from his possession after he had commenced a suit for the specific performance of his contract of purchase. The question here under consideration was not alluded to by the court in reaching its conclusion, and it apparently regarded the injunction as in effect preserving the property in the condition in which it was in at the time of the commencement of the suit for specific performance. The purpose of the injunction suit was not only in effect to have restored to the plaintiff the possession of the property, but also to restrain the prosecution of suits at law brought against him by the defendant for trespass, the trespass being based on acts of plaintiff in his attempts to regain possession of the property, and in addition to enjoin the defendant from taking possession of the property. The further prosecution of these trespass suits was also enjoined until the final determination of the suit for specific performance.

Sproat v. Durland, 2 Okla. 24, 35 Pac. 682, 880, has frequently been cited as supporting the doctrine that the court, in determining the right to a preliminary injunction transferring the possession of property from the defendant to the plaintiff, will consider the manner in which the defendant obtained the possession, as well as the period of time he has held it, and if he is a mere trespasser, and his possession amounts merely to an interruption of the possession of the plaintiff, a preliminary injunction will issue restoring possession to the plaintiff. The case, however, does not give full support to this theory; indeed it is doubtful if it gives any support to the doctrine, since the right to an injunction is confined to cases where the plaintiff is an entryman of land under the homestead laws, and hence, according to the laws of Oklahoma, has no adequate remedy at law. A. G. S.

to the substantial averments of the complaint or cross complaint, as the case may be, and from the facts so averred determine whether the action is one of equitable or common-law jurisdiction, and, if the former, refuse a trial by jury." In the case of *Spencer v. Robbins*, 106 Ind. 580, 5 N. E. 726, it was said: "Where the purpose of the action is primarily to establish an equitable right to land, and acquire a legal title through such right by the decree of a court, as by the specific enforcement of an agreement, the reformation of a deed, or the establishment of a trust, etc., the case is of equitable cognizance." In the case of *Angus v. Craven*, 132 Cal. 691, 64 Pac. 1091, it was said: "Courts, however, in guarding the constitutional rights to a jury trial, have repeatedly held that, where the suit should have been, and in substance is, an action for the recovery of the possession of land, the right of a defendant to a jury cannot be defeated by the mere device of bringing the action in an equitable form. And so it has been held that the right to a jury is not defeated where, at the commencement of the action, the defendant, and not the plaintiff, was in the actual possession of the premises involved; and it has also been held that where the defendant had been for a long time in the actual possession, and the plaintiff had ousted him, the plaintiff, by first bringing his action to quiet title, could not, by such inversion of parties, avoid the defendant's right to a jury, but that the action should be treated as substantially an action to recover possession." See also *Newman v. Duane*, 89 Cal. 597, 27 Pac. 66. For other cases on this subject generally, see 3 Ann. Cas. 245-250, where they are collected in a note.

The petition in this case is full and complete in its statement of fact. It is not difficult to ascertain from it what the plaintiff wants. It wants the coal. Its right to take the coal depends upon ownership. The ownership is strenuously denied; indeed the denial is asserted by force and arms. The defendants are in the actual possession of the land, and claim to have full title thereto. They are in a position to protect the coal by preventing the plaintiff from removing it. The important question, as it seems to us, is, Who owns the coal? If this question is answered, then the whole controversy will be settled; but nothing can be settled until it is answered. The coal is specific real property as much

as the surface. Together they constitute the entire estate in the land. The plaintiff wants to try out the question of title to the coal without a jury, and then take possession of it under the protection of an injunction, which will prevent the opposition of the defendants. This avoids the real merits of the controversy. It gives undue prominence to the question of whether or not the plaintiff has an easement under which it may mine coal, and treats the ownership of the coal as a minor and comparatively unimportant inquiry. By such a proceeding the defendants are deprived of a right given to them both by the Constitution and the statute. This cannot be sustained.

The judgment of the District Court is reversed, with direction to proceed in accordance with the views herein expressed.

A petition for rehearing having been filed, *Graves, J.*, on June 12, 1909, handed down the following additional opinion:

A petition for rehearing has been filed in this case, wherein it is urged that the opinion herein does not contain an order dissolving the temporary injunction granted by the probate judge when the action was commenced. It is also suggested that because of this omission the plaintiff is continuing to operate the coal mines upon the premises in controversy, to the great loss and injury of the defendants. It is further stated that the plaintiff is acting in this respect under the assumption that the temporary order furnishes complete protection for such conduct.

It was the view of the court when the opinion was formulated that the order therein made would vacate and set aside all the injunction orders which had been made in the action, and the intention was that it should have that effect. The final decree contains the following language: "It is therefore by the court considered, ordered, adjudged, and decreed that the temporary injunction heretofore issued herein be, and it is hereby made, permanent and perpetual, that is to say," etc., indicating an intention to adopt and make the temporary order a part of the final judgment. If the temporary injunction continued to be operative until the final decree was entered, then it became a part of such decree, and was annulled by the order of reversal. No further order, therefore, seems to be necessary.

With this explanation, the petition is denied.

MAINE SUPREME JUDICIAL
COURT.

PHILADELPHIA TRUST, SAFE DEPOSIT, & INSURANCE COMPANY et al.

v.

IRENE C. ALLISON, Exrx., etc., of William C. Allison, Deceased.

(108 Me. 326, 80 Atl. 833.)

Incompetent person — consent to sale of real estate.

1. One under guardianship as an habitual drunkard is not capable of giving his valid consent to the conveyance of property which has been placed in trust for him, and which may be conveyed by the trustee with his consent.

Consent by guardian — authority of court.

2. A court having jurisdiction to appoint a guardian for an habitual drunkard may, if it also has full equity powers, authorize the guardian to consent to the conveyance of real estate situated in another state, and which has been placed in trust for the ward prior to his becoming incompetent, with authority in the trustee to

Note. — Power of court or guardian of incompetent or habitual drunkard to consent to conveyance by trustee under a trust requiring consent by cestui que trust.

The decision in PHILADELPHIA TRUST, S. D. & INS. CO. v. ALLISON, holding that a court having jurisdiction to appoint a guardian for an habitual drunkard may, if it also has full equity powers, authorize the guardian to consent to the conveyance of certain real estate, situated in another state, which had been placed in trust for the ward prior to his becoming incompetent, with authority in the trustee to convey it with the consent of the beneficiary, appears to be a pioneer.

Where it is provided that the trust property may be sold with the consent of the *cestui que trust*, it is held where the *cestui que trust* is competent to give consent, that it must be obtained before a valid transfer of the property can be made. Thus, where a provision to this effect existed in *O'Connor v. Waldo*, 83 Hun, 480, 31 N. Y. Supp. 1105, the court said: "It seems to be apparent, upon a consideration of this trust deed, that the trustee had no power to make any conveyance of this trust property except upon the consent of his *cestui que trust*. In the case at bar it is not claimed that any such consent was obtained. All that the record discloses is a simple assignment executed by the trustee. The rule has been too well established to need the citation of authorities here that a trustee has no general power of disposition of a trust estate, but must derive such power from the instrument creating the trust; or, in special

convey it with the consent of the beneficiary.

(August 3, 1911.)

REPORT by the Supreme Judicial Court for Hancock County for the determination of the Law Court of a bill in equity praying for the specific performance of the agreement of the defendant's testator to purchase and take a conveyance of certain real estate. Decree for plaintiffs.

The facts are stated in the opinion.

Messrs. Symonds, Snow, Cook, & Hutchinson for plaintiffs.

Messrs. E. B. Mears and Deasy & Lyman for defendant.

Savage, J., delivered the opinion of the court:

Bill in equity praying for the specific performance of the agreement of William C. Allison to purchase and take a conveyance of certain real estate situated in Bar Harbor, in this state. The case is reported to the law court on bill, answer, and proofs for its determination and final judgment.

circumstances, it has been held that such power might be implied. But where there is a designation of the method in which the trust estate is to be sold, if at all, there can be no question but that the trustee cannot convey any title except in the manner provided for by the trust deed. The provision in the deed necessarily excludes all other powers."

Where, as in PHILADELPHIA TRUST, S. D. & INS. CO. v. ALLISON, the *cestui que trust* was *sui juris* at the time the trust was created, but became incompetent thereafter, a situation arises which the creator of the trust did not anticipate; and it would seem proper in such a case that the court should have power to authorize the guardian to consent to a conveyance of the property in behalf of the *cestui que trust*. It would seem that the result might be different in a case where the trust was created after the *cestui que trust* was under a disability, should such a case arise.

Under an act passed in Pennsylvania in 1853, the orphans' court was authorized to decree a sale where property was held in trust, and one or more persons required to consent to its conveyance unreasonably withheld their consent, and it has been held under this act that an objection by the owners of a one-sixth interest to the making of an improvement lease of the trust property which was advantageous was unreasonable, and that a decree should be made. *Freeman's Estate*, 181 Pa. 405, 59 Am. St. Rep. 659, 37 Atl. 591.

As to who may elect against will in behalf of insane widow, see notes to *Andrews v. Bassett*, 17 L.R.A. 297, and *Hardy v. Richards*, 35 L.R.A. (N.S.) 1210. J. T. W.

The present defendant is the executrix of the will of William C. Allison.

Omitting unimportant allegations, the bill shows, and it is admitted or proved, that on November 3, 1905, William C. Allison, of Philadelphia, in accordance with a previous written agreement between himself and his wife, Lenore M. Allison, dated October 24, 1905, executed and delivered to the Philadelphia Trust, Safe Deposit, & Insurance Company a deed of trust for the benefit of Lenore M. Allison, for life, with remainder over to such person or persons as Mrs. Allison should appoint by will or other written instrument, or, in default of such appointment, to her next of kin. In that trust deed it was stipulated that the trustee should have full power "to sell in fee simple or otherwise the real estate thereafter to be conveyed to it, under and in accordance with the provisions of the agreement of October 24, 1905," and reinvest the proceeds, but it was "provided that the said cottage at Bar Harbor, Maine, should be subject to sale or rent by the said trustee only with the consent of the said Lenore M. Allison, and should be sold or rented by said trustee at any time upon her request, and for a price or sum acceptable to her." The agreement of October 24, 1905, between Mr. and Mrs. Allison, contained a similar stipulation. The "cottage at Bar Harbor" is the subject of the present controversy.

It appears that afterwards, on December 9, 1905, and in accordance with their previous agreement of October 24, 1905, referred to in the trust deed, Mr. and Mrs. Allison conveyed the Bar Harbor property to the plaintiff trust company in trust, for the purposes and uses set forth in the deed of trust, for the benefit of Mrs. Allison, for life, with remainder over, as already stated.

It appears that Mrs. Allison was divorced from her husband in 1907. It also appears that afterwards, in the same year, by virtue of proceedings instituted in the court of common pleas for the county of Philadelphia, in which county Mrs. Allison resided, she was "duly declared" by that court to be an habitual drunkard, and the court appointed George F. Pettinos a committee of her person and estate. Mr. Pettinos joins in this bill as a party plaintiff.

Afterwards, on May 27, 1909, the plaintiff trust company, as trustee, and Mr. Pettinos, as committee of the person and estate of Mrs. Allison, entered into a written agreement with the defendant's testator for the sale and conveyance to him by the trust company, with the consent of the committee, of the Bar Harbor property. The agreement contained the stipulation 39 L.R.A. (N.S.)

that "the title is to be good and marketable."

Subsequently, on petition of Mr. Pettinos, the committee, the court of common pleas of Philadelphia, which had appointed him, made an order approving the sale, and authorizing Mr. Pettinos, as committee, "to formally consent thereto on behalf of the said Lenore M. Allison, and to join therein." Mrs. Allison joined in the prayer of the petition, and consented, so far as she had legal capacity to do so, to the making of the order. Under this order, Mr. Pettinos, as committee, and for and in behalf of Mrs. Allison, formally consented to the sale and conveyance, as a compliance with the provisions relating to the consent of Mrs. Allison, contained in the agreement of October 24, 1905, and in the trust deed.

A deed executed by the trust company and consented to by Mr. Pettinos, as committee, was seasonably tendered to the defendant's testator, who refused to accept it and pay according to the terms of the agreement. And this bill is brought to compel specific performance of his agreement to purchase.

The defense relied upon may be stated in these words:

(1) That, as appears by the bill and exhibits, the title tendered by the plaintiffs to the defendant was not good and marketable, as required by the contract set forth.

(2) That the Philadelphia Trust, Safe Deposit, & Insurance Company, trustee, was authorized to make sale of the property described in the bill only with the consent of Lenore M. Allison, and that it is not shown that Lenore M. Allison has consented to the sale of the described premises.

(3) That the personal consent of Lenore M. Allison is necessary, and that no other person can be authorized by any court to exercise this consent for her.

(4) That the giving of such consent is a necessary step in the transfer of title to land in Maine, and that, if any person can be authorized to consent in behalf of Mrs. Allison, such authority must come from the courts of Maine, which have exclusive jurisdiction over the subject-matter.

The pivotal question is whether Mrs. Allison's committee could, under the decree of the court of common pleas of Philadelphia, give consent to the sale, with the same effect as if it had been given by Mrs. Allison personally, when not under guardianship. The fact that Mrs. Allison personally gave her consent to the decree may be disregarded, for it is practically conceded, and such is the law, that, while Mrs. Allison is under guardianship as an

habitual drunkard, she is incapable of giving consent, the same as if she had been adjudged insane. She is conclusively presumed to be incapable of conducting her affairs. She cannot transact any business. She cannot make a valid deed or bond. She cannot waive the notice of protest on a bill. She cannot waive the provisions of her husband's will, and elect to take dower. She cannot do anything which involves the exercise of discrimination and judgment. *Cockrill v. Cockrill*, 79 Fed. 143; *L'Amoureux v. Crosby*, 2 Paige, 422, 22 Am. Dec. 655; *Imhoff v. Witmer*, 31 Pa. 244; *Wadsworth v. Sharpsteen*, 8 N. Y. 338, 59 Am. Dec. 499; *Penhallow v. Kimball*, 61 N. H. 596; *Ashby v. Palmer*, 1 Meriv. 296, 15 Revised Rep. 116, 7 Eng. Rul. Cas. 38; *Re Wharton*, 5 De. G. M. & G. 33, 23 L. J. Ch. N. S. 522, 18 Jur. 289, 22 L. J. N. S. 298, 2 Week. Rep. 248. So here the right to consent implies the right not to consent. The exercise of the right is an election, and involves the exercise of judgment, to do which Mrs. Allison is incapable.

So, too, we may dismiss the question whether the committee, irrespective of the decree of the court, had authority to consent for Mrs. Allison. The right to consent was personal to her. She might exercise it or not, according to her fancy or her judgment. No one else could exercise it for her, in the absence of statute authority, except under the decree of a court having jurisdiction to authorize its exercise. *Penhallow v. Kimball*, 61 N. H. 596; *Heavenridge v. Nelson*, 56 Ind. 90; *Merrill v. Emery*, 10 Pick. 507; *Sherman v. Newton*, 6 Gray, 307; *Kennedy v. Johnston*, 65 Pa. 451, 3 Am. Rep. 650; *Griswold v. Butler*, 3 Conn. 227; *Pinkerton v. Sargent*, 102 Mass. 568. We know of no case where the facts are like those in the case at bar. But the cases we have cited, all involving the right of personal election, are so closely analogous in principle to this one that they may be regarded as authorities on the question. And, too, this case must be distinguished from the class of cases, some of which are cited by the plaintiff, in which it is held that a guardian may avoid or confirm the deed or other contract of his own ward, or may indorse a note payable to him, or may take an appeal for him, or may do many other things which are proper for the collection or conservation of the estate which has been committed to his management and control. These matters relate to the administration of the estate, and do not involve the exercise of a right of personal election given to the ward by statute or contract. In this case Mr. Pettinos, the committee, had nothing to do with the management or control of the trust estate.

It remains to inquire as to the effect of the decree of the court in Philadelphia. It is not disputed that the court of common pleas of Philadelphia had jurisdiction to appoint a committee or guardian of Mrs. Allison. And it is clearly shown by the Constitution and statutes of Pennsylvania, which are made a part of the record, that that court did have such jurisdiction. The extent of the power of that court under the Constitution and statutes is stated in *Kennedy v. Johnston*, 65 Pa. 451, 3 Am. Rep. 650, as follows: "In this state the fifth article of the Constitution, § 6, confers on the court of common pleas the power of a court of chancery, so far as relates (*inter alia*) to the persons and estates of those who are *non compos mentis*. The act of 13th June, 1836, relating to lunatics and habitual drunkards, Phamph. L. 592, was passed to carry out this provision of the Constitution." And again, in *McGinnis v. Com.* 74 Pa. 245, [Tarr's Estate, 10 Pa. Super. Ct. 577]: "Under our statutes, an habitual drunkard is classed with a lunatic, and all such are special subjects in relation to whom the courts of common pleas are expressly invested with the jurisdiction and powers of a court of chancery. In effect, the lunatic is the ward of the court, and his estate is *in custodia legis*." Thus it is seen that the court of common pleas of Philadelphia not only has jurisdiction over the persons and estates of lunatics and habitual drunkards, such as is commonly exercised by probate courts in this state, but also, in the exercise of this jurisdiction, it possesses broad chancery powers. It is a court of equity as to matters within its jurisdiction. Such is the effect of the Constitution and statutes of Pennsylvania, as interpreted by the highest court in that state.

So the question now is, Can a court having jurisdiction of the person and estate of a lunatic or drunkard, and being also possessed of chancery powers, authorize the committee or guardian to consent to a conveyance by the trustee, when the ward is no longer competent to consent? We think it can. It is true, as we have already said, that the right to consent was personal to Mrs. Allison. So long as she was *sui juris*, no one else could exercise it for her. But suppose the title to the property had been in her instead of in the trustee, the right to convey it would have been personal to her. The one right was no more personal than the other. It is not doubted that the court, after she was adjudged incompetent, might authorize, or even in some cases order, her committee to convey her estate. If it is competent for a court of equity to authorize or order a sale when

the title is in her, why may it not authorize her committee to consent to a sale for her, if consent is a necessary prerequisite, when the title is in a trustee for her benefit? We perceive no valid distinction. In each case, it is in reality the court acting for the ward, doing what she can no longer do, consenting when she can no longer consent.

The underlying reason for the existence of such a power is, we think, because the good of the ward requires it. It seems to us to be a proper chancery power. It may be indispensable for the protection or conservation of the ward's interests. And it must be assumed that it will not be exercised except it be for the advantage of the ward.

No case precisely in point has been cited by counsel, nor have we found any. But there are cases which in principle are closely analogous. The right to elect between a testamentary provision and dower is personal to the widow. If she dies, it cannot be exercised by her heirs. *Sherman v. Newton*, 6 Gray, 307. If she is insane, her guardian, as such, cannot exercise it. *Pinkerton v. Sargent*, 102 Mass. 568. Nevertheless, the almost unbroken current of authority is that, where the person entitled or bound to elect is a lunatic, the court having jurisdiction of the matter will make the election in her behalf. 1 Pom. Eq. Jur. § 510; *State ex rel. Martin v. Ueland*, 30 Minn. 277, 15 N. W. 245; *Washburn v. Van Steenwyck*, 32 Minn. 336, 20 N. W. 324; *Van Steenwyck v. Washburn*, 59 Wis. 483, 48 Am. Rep. 532, 17 N. W. 289; *Penhallow v. Kimball*, 61 N. H. 596; *Kennedy v. Johnston*, 65 Pa. 451, 3 Am. Rep. 650. So, in *Wilder v. Pigott*, L. R. 22 Ch. Div. 203, 52 L. J. Ch. N. S. 141, 48 L. T. N. S. 112, 31 Week. Rep. 377, it was held that the court could confirm a marriage settlement for an insane wife, though the right to confirm was personal to her.

We conclude that the court of common pleas of Philadelphia had the power to authorize Mrs. Allison's committee to consent to the conveyance in her behalf.

The defendant contends next that the decree of the Philadelphia court could not have any effect, no matter what authority or jurisdiction may have been conferred upon that court by statute in Pennsylvania, because the land to be affected lay not in Pennsylvania, but in Maine, and because questions involving titles to land in a state are exclusively cognizable by the courts of that state.

It is true, as claimed, that the laws of the state in which land is situated control exclusively its descent, devise, alienation, 39 L.R.A. (N.S.)

and transfer, and the effect and construction of instruments intended to convey it, and that the disposition of immovable property, in whatever manner, is exclusively subject to the government within whose jurisdiction the property is situated. *United States v. Fox*, 94 U. S. 315, 24 L. ed. 192; *Hutchinson Invest. Co. v. Caldwell*, 152 U. S. 65, 38 L. ed. 356, 14 Sup. Ct. Rep. 504. It is true, also, that while a court having jurisdiction over the owner of land in another state may compel him to transfer, by proceedings *in personam*, it cannot empower its master, or committee, guardian, administrator, or other officer to transfer the land. And the deed of the officer of the court of land outside the jurisdiction of the court is ineffectual. *Watts v. Waddle*, 6 Pet. 389, 8 L. ed. 437; *Watkins v. Holman*, 16 Pet. 25, 10 L. ed. 873; *Hotchkiss v. Middlekauf*, 96 Va. 649, 43 L.R.A. 806, 32 S. E. 36; *Davis v. Headley*, 22 N. J. Eq. 115.

But this is a different case. The Philadelphia court is not undertaking to transfer the title to land in this state, nor to make any decree which affects the title, or the mode of its conveyance. The trust company has the title in fee. It wishes to convey it, but its power to do so is limited, not by the laws of the state, but by the terms of the trust deed. The court creates neither the power nor the limitation. The giving consent does not transfer the title. It merely affects the exercise of the power. It removes an obstacle to the exercise of the power. The court did not attempt to act upon the land, but upon one of the parties. It did not assume jurisdiction over lands in Maine. It merely exercised jurisdiction to do what its ward, if sane, might have done. It consented that the trustee, having title, might convey it. See *Washburn v. Van Steenwyck*, 32 Minn. 336, 20 N. W. 324. If a court with appropriate jurisdiction over the parties may compel a transfer of land in another state by *in personam* proceedings, it is difficult to see why it may not permit a transfer, which is this case, by similar proceedings. And we are unable to perceive how the decree of the Philadelphia court, having jurisdiction of the parties, was in any sense an infringement of the exclusive jurisdiction of this state over the land.

The court are of opinion accordingly that the deed tendered by the plaintiffs to William C. Allison, as set forth in the bill, conformed to the agreement of sale of May 27, 1909, which we have referred to, and conveyed a good and marketable title to the real estate described in the agreement, subject, of course, to encumbrances men-

tioned therein, and that specific performance should be decreed as prayed for.

Bill sustained, with costs. Decree for specific performance, to be entered by a single justice.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL. WILLIAM MORRIS, Appt.,
v.

BERT CLARK, Town Treasurer, Respnt.

(116 Minn. 500, 134 N. W. 129.)

Mandamus — payment of town orders.

1. Mandamus is a proper remedy to compel the treasurer of a town to pay valid orders issued by the board of supervisors, and the validity of such orders may be determined in such proceeding.

Municipal corporation — contract for labor — absence of bond — allowance of claim.

2. Conceding that a contract made with a town is invalid for the failure to give the bond provided by Rev. Laws 1905, § 4535, after the contract has been fully performed, and the work has been approved and accepted by the town board, the contractor has a valid claim against the town for the reasonable value of the services

Headnotes by BUNN, J.

Note. — Liability of municipality upon implied contract for labor performed or services accepted by it.

This note is supplemental to a note in 27 L.R.A.(N.S.) 1125.

As to the general question of the liability of a municipality or other public corporation on an implied contract, see note in 27 L.R.A.(N.S.) 1117, and note appended to Perry Water, Light, & Ice Co. v. Perry, post, 72.

The general rule has been stated that counties are governmental agencies of the state, and hence are chargeable with and liable only for those claims or demands which the law imposes upon them or empowers them to contract, and no officer can charge the county with the payment of any claim due him, however meritorious, or whatever benefit the county may derive therefrom, unless expressly or by necessary implication authorized by law. Mobile County v. State, — Ala. —, 54 So. 995.

But where general authority exists in a county to make a contract for services to be performed in the preparation of the delinquent tax record, the reasonable value of services rendered in this regard may be recovered, although the county cannot be held upon the express contract. Stringer v. Franklin County, — Tex. Civ. App. —, 123 S. W. 1168.

And a county may be liable on an implied contract for labor or material furnished 39 L.R.A.(N.S.)

rendered, and the board may audit and allow such claim, and draw orders in payment thereof. Such orders are valid, and the treasurer is not justified in refusing to pay the same on the ground that no bond was given.

(January 19, 1912.)

APPEAL by relator from a judgment of the District Court for Hubbard County in respondent's favor in a mandamus proceeding brought to compel respondent, as town treasurer, to pay to relator two several orders or warrants issued to him by the board of supervisors in part payment for work and services performed under a contract with the town board. Reversed.

The facts are stated in the opinion.

Messrs. Spooner, Laybourn, & Lucas for appellant.

Mr. G. W. Campbell for respondent.

Bunn, J., delivered the opinion of the court:

This is a mandamus proceeding, brought to compel the respondent, as treasurer of the town of Rockwood, in Hubbard county, to pay to the relator two several orders or warrants issued to him by the board of supervisors, of the town, in part

of benefit to and officially accepted by it, where the subject-matter of the contract was within the range of the contractual powers of the county. Montgomery County v. Pruett, — Ala. —, 57 So. 823.

A recovery cannot be had on an implied contract for services rendered a city in paving streets under a written agreement invalid because it did not comply with the charter provisions designed to secure competition in such contracts, although the work described in the contract is completed and has been accepted by the city. Cawker v. Central Bitulithic Paving Co. 140 Wis. 25, 121 N. W. 888.

But where a municipality has general authority in that regard, although no written contract exists between the parties, if the proper official directs a person to proceed with certain work, and permits him to continue for some time before notifying him to quit, the municipality is liable to him for the reasonable value of the services thus performed. Stivers v. Cherryvale, 86 Kan. 270, 120 Pac. 361.

So, a school district is liable for the reasonable value of services performed in its behalf by an officer of the district, the contract, for this reason, being invalid. Smith v. Dandridge, 98 Ark. 38, 34 L.R.A.(N.S.) 129, 135 S. W. 800; and see note in 34 L.R.A.(N.S.) 129, as to the liability of a municipality on implied contract for benefits received under an express contract, invalid because of interest therein by an officer of the municipality. A. G. S.

payment for work done under a contract made by relator with the board for grubbing, clearing, and preparing for grading certain public roads in the town. Respondent answered, setting up a large number of defenses, including fraud and failure to complete the work, and, further, that the relator failed to give the bond required by § 4535, Rev. Laws 1905. The trial court found in substance that the warrants were presented to respondent as treasurer of the town, and payment thereof refused; that relator, at the time the warrants were issued, had fully performed his contract, and that the supervisors of the town had duly approved and accepted the services; that at the time the orders were presented there was sufficient money in the hands of respondent belonging to the road and bridge fund to pay the same; that none of the defenses set up in the answer were proven, except that no bond was ever given by relator, or filed with or approved by the treasurer of the town, as required by the provisions of §§ 4535 and 4536, Rev. Laws 1905. The court held that the failure to give this bond rendered the contract void, and that the treasurer, therefore, legally refused payment of the orders. Judgment in favor of respondent was entered, and relator appealed.

1. Respondent contends that mandamus is not the proper remedy. But, if the orders were valid, it was the duty of the respondent to pay them. The matter did not involve the judgment or discretion of the treasurer, within the meaning of the rule that mandamus lies only to compel the performance of ministerial duties. We hold that there was no speedy and adequate remedy at law, and that mandamus was the proper remedy to compel the performance by respondent of an act which the law enjoined as a duty resulting from his office. *State ex rel. Minneapolis Tribune Co. v. Ames*, 31 Minn. 440, 18 N. W. 277; *State ex rel. Young v. Holgate*, 107 Minn. 71, 119 N. W. 792. Nor does it affect this question that it was the duty of the treasurer to refuse payment of warrants when he had knowledge of facts which made them illegal. Such duty did not make the payment of legal warrants other than a ministerial duty. The question of their legality could be, as it in fact was, tried out in the mandamus proceeding, just as fully as in an action against the town on the warrants or on a *quantum valebat*.

2. Was the filing and approval of the bond required by statute absolutely essential to a recovery in this proceeding? That is, was the action of the board of supervisors in issuing to relator the warrants or orders referred to void, because the bond

was not given, notwithstanding the contract has been fully completed and the work accepted? Section 4535, Rev. Laws 1905, provides that no contract with a municipal corporation, for the doing of any public work, shall be valid for any purpose, unless the contractor shall give a bond to the municipal corporation for the use of the obligee and all persons doing work or furnishing materials or machinery under the contract, conditioned to save the obligee harmless from all claims that may accrue on account of the doing of the work specified. Section 4536, as amended by Laws 1907, chap. 379, p. 535 (Rev. Laws Supp. 1909, § 4536), provides that the bond shall be approved by and filed with the treasurer of the obligee, and that, if such bond be not taken, the corporation or body for which the work is done under the contract shall be liable to all persons furnishing labor or material to the contractor for any loss resulting to them from the failure to take the bond.

As said in *Wilcox Lumber Co. v. School Dist. No. 268*, 103 Minn. 43, 114 N. W. 262, the purpose of this statute was the protection of laborers and materialmen performing labor or furnishing materials for the execution of a public work to which the mechanics' lien statute does not apply. The bond stands as security for the payment of all obligations incurred by the contractor. If he fails, and is unable to pay such obligations, the corporation becomes liable for losses sustained by such failure and inability of the contractor to pay the debts incurred by him. The statute provides that the contract shall not be valid for any purpose if the bond is not given and approved. But conceding that the contract is void, and that it cannot be validated or vitalized, nevertheless it is clear that relator, on full performance of his work and the acceptance thereof by the town, had a moral and legal claim against the town for the reasonable value of his labor and the materials furnished. This is practically conceded by respondent, and is clearly correct under numerous decisions of this court. The supervisors of the town recognized this claim, and issued the orders in question in part payment thereof. They must be presumed to have known that relator had not given the bond, as it was their duty to see that the bond was given, so as to protect the town from liability. They have charge of all the affairs of the town not by law committed to other officers. Rev. Laws 1905, § 651. But they knew that relator had completed the work he agreed to do, that his services had been duly approved and accepted, and that the town was morally and legally liable for

such services. We perceive no statutory prohibition against the issuance of orders to pay such a claim, notwithstanding that the contract under which the work was done may have been invalid. The question here is as to the validity of the orders issued to relator, and their validity depends not on the validity of the contract, but on the validity of relator's claim in payment of which the orders were issued.

The invalidity of the contract, if it was invalid, was not because of fraud, or for any reasons that would defeat recovery of a claim for part performance. There was simply the failure to give security for the benefit of laborers and materialmen,—an omission that may have rendered the contract invalid, but which could not and did not affect the right of the contractor to receive payment for his services after they were rendered and accepted. It was the duty of the supervisors to audit and allow proper accounts and claims against the town, and to draw orders on the treasurer in payment of such accounts and claims when allowed. They audited and allowed relator's claim, and drew the orders in question in part payment thereof. It was a legal and valid claim for services actually rendered and accepted, and we hold that the orders issued to relator were valid, even though the contract may have been invalid. There being funds in his hands applicable to their payment, it was the duty of the treasurer to pay the orders. It is immaterial whether this conclusion be based upon the doctrine that a contract that is *ultra vires*, but which has been fully performed by both parties, is no longer assailable by either, or upon the rule that one who renders services that are accepted by the corporation can recover on a *quantum meruit*. Either rule leads to the same result,—the conclusion that the orders were valid. The following authorities support the conclusions here reached: *Schmidt v. Stearns County*, 34 Minn. 112, 24 N. W. 358; *Andrews v. School Dist. No. 4*, 37 Minn. 96, 33 N. W. 217; *Swenson v. Bird Island*, 93 Minn. 336, 101 N. W. 495; *Currie v. School Dist. No. 26*, 35 Minn. 163, 27 N. W. 922; *Wilcox Lumber Co. v. School Dist. No. 268*, 103 Minn. 43, 114 N. W. 262; *Bell v. Kirkland*, 102 Minn. 213, 13 L.R.A.(N.S.) 793, 120 Am. St. Rep. 621, 113 N. W. 271; *Moore v. Ramsey County*, 104 Minn. 32, 115 N. W. 750.

The judgment appealed from is reversed, with directions to the trial court to amend its conclusions of law in accordance with this opinion, and to grant the writ as prayed for in the petition.

39 L.R.A.(N.S.)

NEW HAMPSHIRE SUPREME COURT.

WILLIAM R. DALEY

v.

A. CROSBY KENNETT.

(75 N. H. 536, 78 Atl. 123.)

Jury — trover — complicated action.

In trover by the holder of a chattel mortgage to recover possession of the chattels from one denying his title because of subsequent conveyances, the court cannot deny defendant a jury trial because the matters are so complicated and involved that they cannot be clearly understood by a jury, where no accounting, marshaling, or other equitable relief is necessary.

(November 1, 1910.)

Note. — Denial of jury trial simply because matters in issue are complicated.

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 3. Doctrine that complexity alone insufficient, 56.
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- IV. Miscellaneous, 58.

I. Introductory.

The correctness of the decision in *DALEY v. KENNETT*, that a case could not be withdrawn from the jury because it was "so complicated, and involved so many details, that the jury could not clearly comprehend it," admits of no question.

The complication of facts has never been a reason for withdrawing issues from a jury, except in matters of account.

Where civil cases involving matters of account have been held triable without a jury, in jurisdictions where the Constitution preserves the right of trial by jury in civil cases, it has been in general on the ground that the case was one in which a jury trial was not a matter of right at the time of the adoption of the Constitution of the state, the constitutional provisions upholding the right of trial by jury usually being construed to mean that it was the right as then exercised which was intended.

This would exclude from such right in general (1) cases at law involving accounts where a compulsory reference was allowable at the time of the adoption of the

EXCEPTIONS by defendant to rulings of the Superior Court for Carroll County denying him a jury trial in an action for the conversion of certain machinery and appliances. Sustained.

This is an action for the conversion of certain machinery and appliances upon which mortgages were held by both plaintiff and defendant. Defendant holds also a vendors' lien and bill of sale. There was a trial by the court, which rendered a verdict for the plaintiff. Before bringing suit, the amount due upon the vendors' lien held by defendant was tendered by plaintiff and the property demanded, which the defendant refused to deliver, claiming title under his mortgage and bill of sale. De-

fendant excepted to the denial of a jury trial.

Further facts appear in the opinion.

Mr. W. D. H. Hill, for defendant:

A jury trial may be demanded in all ordinary actions at law where issues of fact arise upon the pleadings, and where the action is to recover money, and equitable relief is not asked or necessary.

24 Cyc. 105, 106.

Actions of tort are triable by jury.

24 Cyc. 108.

An action of replevin and the issues growing out of the same are triable by jury.

O'Loughlin v. Bird, 128 Mass. 600.

So of trover.

Powers v. Raymond, 137 Mass. 484; East

Constitution, and (2) matters of account cognizable in equity.

It is the purpose of this note to confine the discussion of the subject to the question of complexity or complication of accounts as a reason for dispensing with a jury. Cases relating to the appointment of an auditor whose report is to be used at a jury trial are excluded.

For cases on the constitutional right to trial by jury, see the note to *Grand Rapids & I. R. Co. v. Sparrow*, 1 L.R.A. 480.

For compulsory reference as a denial of the constitutional right to trial by jury, see the note to *Steck v. Colorado Fuel & Iron Co.* 25 L.R.A. 67.

II. *Compulsory reference of actions at law involving accounts.*

As heretofore stated, the usual test of the constitutionality of a statute allowing compulsory references in actions at law involving an account is whether a jury was required in cases involving such an account at the time of the adoption of the Constitution of the state.

It will be observed that it has been held in jurisdictions where the act permitting compulsory references was passed under the territorial government that the provisions of the Constitution of the later-born state, preserving the right of trial by jury, will not be construed to give such right where such statute had denied it. This produces a curious result. While the Constitution of the United States, preserving the right of trial by jury, does not apply to the states, it is generally held that in the United States courts, under the United States Constitution, the mere fact that the trial will require the examination of a long account on either side will not justify a compulsory reference (though that be the law of the forum). (See *infra*, "Federal courts.") Yet it was held in Wisconsin when it was still a territory (see *infra*) that such a statute was not contrary to the Constitution of the United States, and since becoming a state, its decisions have been based on the ground that the right of trial by jury at the time of the adoption of the 33 L.R.A. (N.S.)

Constitution did not exist in cases covered by such statute. The same question is involved in the North Dakota and Oregon cases, *infra*.

Statute preceding Constitution.

At the time of the adoption of the New York Constitution in 1777, there was in force a statute allowing a compulsory reference in a case where the trial would require the examination of a long account, either on one side or the other. *Steck v. Colorado Fuel & Iron Co.* 142 N. Y. 236, 25 L.R.A. 67, 37 N. E. 1 (per Earl, J.), where, however, it was held that the case could not be sent to a referee, as it was not within the statute in force at the adoption of the Constitution.

So, in *Lee v. Tillotson*, 24 Wend. 337, 35 Am. Dec. 624, it was said that references as broad as that in the case then pending, which was a case obviously requiring the examination of a long account, were sanctioned by statute and sanctioned by the court long before the adoption of the state Constitution, but in that case the reference was by consent.

In *Smith v. Kunert*, 17 N. D. 120, 115 N. W. 76, it was held that as, at the time of the adoption of the North Dakota Constitution, there was in force a territorial statute authorizing a compulsory reference in actions the trial of which involved the examination of a long account on either side, such compulsory references were not against the constitutional provision that "the right to trial by jury shall be secured to all and remain inviolate." Cited in *Dreveskracht v. First State Bank*, 16 N. D. 555, 113 N. W. 1032.

Similarly, in *Tribou v. Strowbridge*, 7 Or. 156, where a statute of the territory of Oregon permitting a compulsory reference where the trial of an issue of fact required an examination of a long account on either side was in force at the time of the adoption of the Oregon Constitution, providing that in civil cases the right of trial by jury shall remain inviolate, it was held that the statute did not abridge the right of trial by jury as it existed at the

Kingston v. Towle, 48 N. H. 57, 2 Am. Rep. 174, 97 Am. Dec. 575.

And of trespass.

Wooster v. Plymouth, 62 N. H. 194; 3 Bl. Com. 152; Copp v. Henniker, 55 N. H. 185, 20 Am. Rep. 194.

Messrs. William R. Daley and Leslie P. Snow, for plaintiff:

Neither party is entitled, "as a matter of right," to a jury trial in a case which is so complicated.

Sargent v. Putnam, 58 N. H. 182; Davis v. Dyer, 62 N. H. 231; Low v. Independent Christian Soc. 67 N. H. 488, 32 Atl. 762; Copp v. Henniker, 55 N. H. 179, 20 Am. Rep. 194; Perkins v. Scott, 57 N. H. 55; Bellows v. Bellows, 58 N. H. 60.

time of the adoption of the Oregon Constitution. And this decision was followed in McDonald v. American Mortg. Co. 17 Or. 626, 21 Pac. 883; Trummer v. Konrad, 32 Or. 54, 51 Pac. 447; Salem Traction Co. v. Anson, 41 Or. 562, 67 Pac. 1015, 69 Pac. 675.

In Hall v. Armstrong, 65 Vt. 421, 20 L.R.A. 366, 26 Atl. 592, it was held that whereas, under the Vermont statute in force at the time of the adoption of its Constitution, the parties in an action of "book account" were not entitled to a trial by jury, they were not entitled to a trial by jury in such an action after the adoption of the Constitution.

In Norton v. Rooker, 1 Jinney (Wis.) 195, it was held in the territory of Wisconsin that the statute of the territory authorizing a reference to three referees in cases which might require the examination of a long account on either side was not contrary to the Constitution of the United States.

In Mead v. Walker, 17 Wis. 189, it was held that as before the adoption of the Wisconsin Constitution, compulsory references were allowed in all actions involving the examination of a long account, a statute permitting them would not conflict with the constitutional provision that "the right of trial by jury shall remain inviolate," but that, under the terms of the statute in force when the action arose, the consent of both parties was necessary.

In Dane County v. Dunning, 20 Wis. 210, after the statute had been changed so as to eliminate the consent of the parties, it was held that a compulsory reference in case of a long account was allowable. This case was approved in Cairns v. O'Brien, 40 Wis. 469, and in Monitor Iron Works Co. v. Ketchum, 47 Wis. 177, 2 N. W. 90, and has continued to be cited in Wisconsin. See Brillion Lumber Co. v. Barnard, 131 Wis. 284, 111 N. W. 483.

—Missouri.

In Edwardson v. Garnhart, 56 Mo. 81, the court said: "It is contended that the Constitution provides that the right of trial by jury shall forever remain inviolate, and that this action being an action at law, the defendant had the right to have the question of fact involved therein tried by a jury; that if our statute providing for the reference of cases is to be construed to include actions at law, the statute itself would be unconstitutional and void. Our statute provides that the court in which a cause is pending may, on the application of either party, direct a reference where the trial of an issue of fact shall require the examination of a long account on either side, etc. Wagner, Stat. 1041, § 18. This statute has been in force in this state for at least thirty years,—twenty years before the adoption of our present Constitution [of 1865]. It is not to be presumed that the provision of the Constitution relied on was intended to change the law as it then existed and had been practised on in the state for a quarter of a century; the object of the framers of the Constitution must have been to preserve the right of trial by jury, as it then existed and had been practised in the state, and not to establish a new rule of practice on that subject."

Peaslee, J., delivered the opinion of the court:

The trial of this case involved a question of what property was covered by the descriptions in the plaintiff's mortgages, and a large number of items of damage. It was taken from the jury and tried by the court, because the presiding justice found it was "so complicated, and involved so many details, that the jury could not clearly understand and comprehend it." To this procedure the defendant excepted. The finding of fact involved in the ruling is conclusive here. Low v. Independent Christian Soc. 67 N. H. 488, 32 Atl. 762; Dole v. Pike, 64 N. H. 22, 3 Atl. 743. The question presented by the

by jury shall forever remain inviolate, and that this action being an action at law, the defendant had the right to have the question of fact involved therein tried by a jury; that if our statute providing for the reference of cases is to be construed to include actions at law, the statute itself would be unconstitutional and void. Our statute provides that the court in which a cause is pending may, on the application of either party, direct a reference where the trial of an issue of fact shall require the examination of a long account on either side, etc. Wagner, Stat. 1041, § 18. This statute has been in force in this state for at least thirty years,—twenty years before the adoption of our present Constitution [of 1865]. It is not to be presumed that the provision of the Constitution relied on was intended to change the law as it then existed and had been practised on in the state for a quarter of a century; the object of the framers of the Constitution must have been to preserve the right of trial by jury, as it then existed and had been practised in the state, and not to establish a new rule of practice on that subject."

This authority was followed in cases arising under the Constitution of 1875. Crève Cœur Lake Ice Co. v. Tamm, 138 Mo. 385, 39 S. W. 701; Wentzville Tobacco Co. v. Walker, 123 Mo. 662, 27 S. W. 639; Tinsley v. Kemery, 170 Mo. 310, 70 S. W. 601.

But it had already been held in Missouri that a similar statute was valid, though passed subsequent to the adoption of the first Constitution of the state. Shepard v. Bank of State, 15 Mo. 143, where the customer of a bank, having brought an action for an alleged balance, the court referred the case to a referee, and said, upon affirming the report: "The petition claims that there is no account to be settled, but a single issue of payment to be proved. This payment, however, is founded on a long list of items, extending through several years, and requires as much care and knowledge of keeping and making entries in books as is necessary in keeping accounts between merchants and others. Nor do we consider the statute, thus authorizing the

exception, therefore, is whether, in a case like this, the defendant can claim a jury trial as of right, even when the matters to be tried are so complicated and involved that they cannot be clearly understood by the jury. The logical answer to this isolated inquiry is not necessarily the legal one. The people having reserved to themselves the right of jury trial, except "in cases in which it has been heretofore otherwise used and practised" (Bill of Rights, art. 20), the scope of the exception is shown "by common-law principles and by history." *Wooster v. Plymouth*, 62 N. H. 193, 203.

What was the practice in cases of this class in 1784? With some exceptions which do not bear upon the present contro-

versy, the right to trial by jury in suits at law was absolute. The books will be searched in vain for a precedent for taking a common-law action from the jury upon the ground that the particular case was beyond their comprehension. And so the practice continued to be in England. The situation is thus described as late as 1847: "The facts of the case, as stated by my noble and learned friend on the Woolsack, very clearly show that it would be mere mockery to bring such an action before a jury. What would be done if such an action were brought at *nisi prius*? I know that within five minutes from the opening of the case by the leading counsel for the plaintiffs the judge would say: 'If we sit here for a fortnight we cannot try this

court to appoint referees, unconstitutional, as trenching upon the trial by jury. It has even been the practice of the courts, in somewhat kindred cases, to appoint auditors or referees to settle accounts; nor has the power ever been seriously disputed before. Without going into a labored defense of this power of the court, under the present statute, to appoint referees, in cases like the one before us, we will state it as our opinion that this power is vested in our courts, and that it is not inconsistent with the provisions of our Constitution, in trenching upon the right of trial by jury. Its practice often tends to the elucidation of accounts and transactions between man and man, and mainly contributes to the ends of truth and justice. We are not willing, therefore, to put a stop to its exercise by throwing out doubts of its constitutionality. This settles the case, so far as regards the errors in respect to referees and trial by jury. We rule these points against the petitioner."

Statute succeeding Constitution.

In *Grim v. Norris*, 19 Cal. 140, 79 Am. Dec. 206, it was held that the California statute as to the referring of a long account should be construed as applying only to equity causes; and that in an action at law the court had no power of reference in an action or matter containing a long account, without the consent of the parties,—that it would be contrary to the Constitution.

In *St. Paul & S. C. R. Co. v. Gardner*, 19 Minn. 132, Gil. 99, 18 Am. Rep. 334, the court said: "The Gen. Stat. (chap. 66, § 228) provides that when the parties to a civil action, or a proceeding of a civil nature, do not consent, the court may, upon the application of either, or of its own motion, direct a reference when the trial of an issue of fact requires the examination of a long account on either side. . . . This is a case at law, strictly and properly so called, in contradistinction to a case in equity, or a special proceeding. It is undeniable that the statute above cited, in 39 L.R.A. (N.S.)

terms, authorizes a compulsory reference in actions at law. Gen. Stat. chap. 66, § 1. It is equally clear, in our judgment, that in so far as it does, it conflicts with the constitutional provision (art. 1, § 4) that 'the right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy.'" The court distinguishes the New York rule inasmuch as, at the time of the adoption of the Minnesota Constitution, the law of the United States was the law of the territory.

So, in *Norden v. Buck*, 79 Minn. 352, 82 N. W. 644, the court said: "We have no doubt the trial court was right in refusing to withdraw the cause from the jury. The action was somewhat complicated, with quite a number of disputed claims for labor and material, all issues of fact to be determined, although none of them matters of an equitable character, but purely of such a nature as would, under the common-law practice, have been submitted to a jury."

Federal courts.

Where the question arises in the United States courts, it is the provision of the United States Constitution which controls in such cases, irrespective of the law of the forum.

In *Howe Mach. Co. v. Edwards*, 15 Blatchf. 402, Fed. Cas. No. 6,784, it was held that the circuit court of the United States had no right to order a reference without the consent of one of the parties, under the New York statute providing that the court may, on the application of either party, without the consent of the other direct a trial of the issues of fact by a referee, where the trial will require an examination of a long account on either side, and will not require the decision of difficult questions of law.

The same was held as to the district court of the United States with reference to a similar earlier New York statute *United States v. Rathbone*, 2 Paine, 578, Fed. Cas. No. 16,121.

In *Sulzer v. Watson*, 39 Fed. 414, it was

sort of case, and therefore it is indispensably necessary for the sake of justice—not to save us from the trouble of trying the case, which we are perfectly willing to take, but for the sake of justice—that there should be a reference to an arbitrator, who will take accounts between the parties.' My lords, in ninety-nine cases out of a hundred that recommendation would at once be acceded to. Sometimes there is a wrong-headed client who is fool enough to resist such a recommendation, and to whom, according to a well-known saying we have in Westminster Hall, it is necessary to use 'strong language' to induce him to listen to the recommendation of my lord, the judge." *Taff Vale R. Co. v. Nixon*, 1 H. L. Cas. 111, 1 Eng. Rul. Cas. 406.

held that a Vermont action of book account, being an action at law, though not in any form known to the common law, could not be tried in the usual manner in the United States circuit court, as that would deprive the parties of the right of trial by jury, required by the laws of the United States, and an auditor could not be appointed therefor in such action.

In *Davis v. St. Louis & S. F. R. Co.* 25 Fed. 786, the court considered that the local statute (of Kansas) was to be disregarded if it did not extend to references such as the one in question, and the court there ordered a reference (in a case which seemed to be simply a claim against a railway company for many overcharges) on the ground of necessity. The court took the view that such references were allowable at common law,—an idea which might have been corrected by the reading of Lord Campbell's opinion in *Taff Vale R. Co. v. Nixon*, quoted in *DALEY v. KENNETT*.

While this note does not include the subject of what is an "account" under such statutes, the reader is reminded that the expression does not embrace every aggregation of items of damage.

III. *Equitable cognizance of accounts as complicated.*

a. *In general.*

In general, in matters cognizable in equity, there is no right to a jury trial.

While the contrary was held at one time in New Hampshire (*Marston v. Brackett*, 9 N. H. 346, and *Hoitt v. Bureleigh*, 18 N. H. 391), these decisions have since been overruled (*Bellows v. Bellows*, 58 N. H. 60; *Davis v. Dyer*, 62 N. H. 231; *State ex rel. Rhodes v. Saunders*, 66 N. H. 39, 18 L.R.A. 646, 25 Atl. 588).

It was held, however, in *Lamaster v. Scofield*, 5 Neb. 148, that some of the jurisdiction of equity had been lost by the statutory creation of a remedy at law where formerly there was none save in equity. In that case the court said, in ruling that a reference in an action at law was wrong—
L.R.A. (N.S.)

But if the obdurate litigant still persisted in his course, the judge could go no further. "I may remind your lordships that the inadequacy of a jury to try such a case was felt so strongly by the common-law commissioners appointed some years ago, that to meet the case of an obstinate party who stood out against the recommendation of a reference they recommended that an act of Parliament should be passed, giving the judge power to force a reference, and such a bill was brought in, but it was opposed by high authority" and failed of enactment. *Ibid.* In this state of the law, and with the distinction between law and equity strictly and technically observed, it is manifestly useless to search for precedents in the common-law reports.

fully ordered, under the statute permitting it in case of mutual accounts or where the account is on one side only, and it is necessary that the party on the other side be examined as a witness to prove the account: "Under the Code, discovery has ceased to be one of the objects sought in a court of equity; jurisdiction, therefore, in cases involving the examination of mutual accounts, cannot be maintained on that ground. The parties to the suit may be examined as witnesses in the case; and a court of law has authority, equal to that possessed by a court of equity, to compel the production of books, vouchers, or other documentary evidence. The jurisdiction of courts of equity is therefore restricted to those cases which have their origin in intimate or confidential relations of the parties, and does not extend to ordinary actions involving mutual accounts between creditor and debtor. In all such cases either party has a right to demand a jury; and a court cannot refer such a cause except by consent of the parties. This right is guaranteed by the Constitution, and its application should not be restricted by the courts."

And something of the same nature is suggested in the opinion of Finch, J., in *Marvin v. Brooks*, *infra*, subd. III. c. 4.

This note is here concerned with the question whether equity has cognizance of a matter of account simply on account of its complications or complexity; that is to say, where the account is only on one side, and no discovery is required, and there is no fiduciary relation or other matter of equitable cognizance.

It is frequently difficult to separate the cases; often the court does not state whether, in its opinion, the accounts are "mutual" or not, and thus the grounds of its decision are uncertain; particularly as the cases as reported often do not show what the accounts were. A refusal of jurisdiction on the ground of lack of complexity may mean that the court is simply holding that there should be complexity even in cases of mutuality of accounts.

In England it was laid down by Lord Eldon as late as *Dinwiddie v. Bailey*, 6 Ves.

The power now invoked was unknown to the common law.

"But these courts [of law] possess no authority to stop the progress of such suits for the purpose of subjecting the matter in dispute to the investigation of a more convenient tribunal. Unless the parties voluntarily adopt an arrangement for that purpose, the case proceeds to trial with a certainty in many instances that it will not be tried. A reference is proposed by the judge and is recommended by the counsel; but the parties, having made expensive preparation for the trial, are unwilling to forego the right of an immediate decision, and, as the judge has no power to enforce compliance with his proposal, the cause is suffered to go on till it becomes

at length manifest that no satisfactory verdict can be given by the jury, and a consent to arbitration is extorted rather than given." Second Report to His Majesty by the Commissioners Appointed to Inquire into the Practice and Procedure of the Superior Courts of Law (1830), p. 26.

In equity, however, there was no jury trial as of right (*State ex rel. Rhodes v. Saunders*, 66 N. H. 39, 18 L.R.A. 646, 25 Atl. 588), and in matters involving accounts the jury trial was avoided by proceeding on the chancery side of the court. "It is not improbable that originally, in cases of account which might be cognizable at law, courts of equity interfered upon the special ground of accident, mistake, or fraud. If so, the ground was very soon

Jr. 141, that there must be mutual demands.

And the very broad terms in which Kent, Ch. J., in *Ludlow v. Simond*, 2 Cai. Cas. 1, 2 Am. Dec. 291, and in *Post v. Kimberly*, 9 Johns. 470, referred to the jurisdiction of equity in matters of account must be read with the same judge's judgment as chancellor in *Porter v. Spencer*, 2 Johns. Ch. 169, where he said, in granting a *ne exeat*: "In the present case I have some doubts whether the bill states a matter of account on which the jurisdiction of the court can attach. To sustain a bill for an account there must be mutual demands, and not merely payments by way of set-off. A single matter cannot be the subject of an account. There must be a series of transactions on one side, and of payments on the other. *Dinwiddie v. Bailey*, 6 Ves. Jr. 136, and *Wells v. Cooper*, there cited. I place my interference on the necessity of the case. From the facts charged and sworn to, it appears to me that the remedy in the suit pending at law would be absolutely defeated without the interposition of this court."

That complexity alone will not give jurisdiction was also the opinion of Mr. Justice Story in his *Equity Jurisprudence*, where he says, §§ 458, 459: "Courts of equity will also entertain jurisdiction in matters of account not only when there are mutual accounts, but also when the accounts to be examined are on one side only, and a discovery is wanted in aid of the account and is obtained. But in such a case, if no discovery is asked or required by the frame of the bill, the jurisdiction will not be maintainable. . . . So that, on the whole, it may be laid down as a general doctrine that in matters of account growing out of privity of contract, courts of equity have a general jurisdiction where there are mutual accounts (and *a fortiori* where these accounts are complicated), and also where the accounts are on one side, but a discovery is sought and is material to the relief. And on the other hand, where the accounts are all on one side and no discovery is sought or required, and also where there

is a single matter on the side of the plaintiff seeking relief, and mere set-offs on the other side, and no discovery is sought or required,—in all such cases courts of equity will decline taking jurisdiction of the cause."

Notwithstanding the clearness of this statement, in many of the American cases Story's *Equity Jurisprudence* is given as authority to the contrary.

b. English cases.

The later English cases hold complexity or complication a sufficient ground of jurisdiction. Such was the view of Lord Redesdale in *O'Connor v. Spaight*, 1 Sch. & Lef. 305, which was approved in *Kennington v. Houghton*, 2 Younge & C. Ch. Cas. 620.

And in *Taff Vale R. Co. v. Nixon*, 1 H. L. Cas. 111, 1 Eng. Rul. Cas. 406, Cottenham, L. Ch., said: "Now I think the rule is very well laid down by Lord Redesdale in the case of *O'Connor v. Spaight*, in which he says (1 Sch. & Lef. 309): 'The ground on which I think that this is a proper case for equity is, that the account has become so complicated that a court of law would be incompetent to examine it, upon a trial at nisi prius, with all necessary accuracy, and it could appear only from the result of the account that the rent was not due. This is a principle on which courts of equity constantly act, by taking cognizance of matters which, though cognizable at law, are yet so involved with a complex account that it cannot properly be taken at law, and until the result of the account, the justice of the case cannot appear. Matter of account may indeed be made the subject of an action; but an account of this sort is not a proper subject for this mode of proceeding. The old mode of proceeding upon the writ of account shows it. The only judgment was that the party 'should account,' and then the account was taken by the auditor. The court never went into it.'" In the same case Lord Campbell said: "I proceed upon this ground, that here is a complicated account and could not by possibility be taken by a jury." And after

enlarged, and embraced mixed cases not governed by these matters. The courts soon arrived at the conclusion that the true principle upon which they should entertain suits for an account in matters cognizable at law was that either a court of law could not give any remedy at all, or not so complete a remedy as courts of equity. And the moment this principle was adopted, in its just extent, the concurrent jurisdiction became almost universal, and reached almost instantaneously its present boundaries." 1 Story, Eq. Jur. § 452; *Davis v. Dyer*, 62 N. H. 231.

This jurisdiction was limited to causes involving some sort of an account, as that term is popularly understood. It could be invoked only in cases founded on contracts,

making the statement quoted in *DALEY v. KENNETT*, he continued: "But, my Lords, it is quite clear that trial by jury never was meant for such a case, and it is wholly incapable of doing justice in such a case. Although a demand may resolve itself into a legal demand, still if there is such a complication of accounts that it is not a fit case for a trial at law, then, according to the rule laid down by that most eminent judge, Lord Redesdale, a bill in equity is the remedy."

So, in *Foley v. Hill*, 2 H. L. Cas. 28, which was a case between a customer and a banker, and the accounts were very simple and probably not mutual, Lord Campbell said, in concurring in the view that the case was not one for equity: "The time when the jurisdiction of equity attaches is when, at law, there is not a satisfactory remedy, or when, from the complexity of the accounts, it is not a fit case to be referred to a jury. I most heartily concur in the case of *Taff Vale R. Co. v. Nixon*, supra, in it, I think, most salutary doctrine, that where there are complex accounts, it is a much better thing, though all rests upon a legal demand, to file a bill, and at once to go to the master's office, and have the accounts taken there, than to bring an action at law, and have that investigation before a jury, for which a jury is clearly inadequate."

And this view of the jurisdiction was maintained in *Curllish v. Wilson*, 13 Ves. Jr. 276; *Cooke v. Betham*, 4 Jur. 957; and in *Hill v. South Staffordshire R. Co.* 12 L. T. N. S. 63, 11 Jur. N. S. 192.

But the doctrine of the O'Connor and *Taff Vale Cases* was adopted with reluctance.

In *Phillips v. Phillips*, 9 Hare, 471, the court said: "I have no doubt that this bill cannot be maintained. I take the rule to be that a bill of this nature will only lie where it relates to that which is the subject of a mutual account; and I understand a mutual account to mean, nor merely where one of two parties has received money and paid it on account of the other, but where each of two parties has received and paid

or implied trusts, or when a remedy at law was lacking. It may be that it could with consistency have been extended generally to cases arising *ex delicto*, but this was not done. While, as Judge Story suggests, it is "difficult to trace out a distinct line where the legal remedy ends and the equitable jurisdiction begins" (1 Story, Eq. Jur. § 460), it quite plainly appears that when there was an action for trover, equity would not interfere unless there was some special ground of jurisdiction. Bacon, Abr. Acompt. In 1745, a bill was brought against a former tenant for an accounting for timber cut from the freehold during the tenancy. Lord Chancellor Hardwicke said: "This is the most extraordinary bill that ever was brought in this court,

on the other's account. I take the reason of that distinction to be that, in the case of proceedings at law, where each of two parties has received and paid on account of the other, what would be to be recovered would be the balance of the two accounts; and the party plaintiff would be required to prove, not merely that the other party had received money on his account, but also to enter into evidence of his own receipts and payments,—a position of the case which, to say the least, would be difficult to be dealt with at law. Where one party has merely received and paid moneys on account of the other, it becomes a simple case. The party plaintiff has to prove that the moneys have been received, and the other party has to prove his payments. The question is only as to the receipts on one side and the payments on the other, and it is a mere question of set-off; but it is otherwise where each party has received and paid. Mr. Baggallay says, and says truly, that there are cases of the first description which may still come to a court of equity. It is true that a case of mere receipts and payments may become so complicated, as Lord Cottenham said in the case of the *Taff Vale R. Co.*, that the account cannot be taken at law, and may become properly the subject of the jurisdiction of a court of equity. But where the account is on one side only, I think a strong case must be shown before this court will exercise its jurisdiction."

In *North-Eastern R. Co. v. Martin*, 2 Phill. Ch. 758, Lord Chancellor Cottenham, in denying an injunction to restrain an action at law, said: "I am of opinion that this is not a proper case for an injunction. It is applied for upon the ground that, under the circumstances disclosed in the pleadings, justice cannot be done, or not so effectually done, by a trial of the action, as by an account taken before the master. That may be; but it does not of necessity follow that the trial of the action ought to be restrained. The observations of two noble Lords in the House of Lords, in the case of *Taff Vale R. Co. v. Nixon*, supra, have been referred to as expressing opinions

and I hope never to see one of the like nature again. . . . Waste is a loss for which there is a proper remedy by action. In a court of law the party is not necessitated to bring an action of waste, but he may bring trover. Those are the remedies, and therefore there is no ground of equity to come into this court." *Jesus College v. Bloom*, 1 Ambl. 54. To the same effect are later English cases. *Pulteney v. Warren*, 6 Ves. Jr. 73, 89; *Gent v. Harrison*, 5 Jur. N. S. 1285, *Johns. V. C.* (Eng.) 517, 29 L. J. Ch. N. S. 68, 1 L. T. N. S. 128, 8 Week. Rep. 57; 1 Maddock, Ch. Pr. 119.

Historically, if not logically, there was ground for this distinction. When the cumbersome action of account came into use in

courts of law, the mathematical features of the case went to an auditor, while the ordinary issues of fact were separated out and tried by jury. "The old mode of proceeding upon the writ of account shows it. The only judgment was that the party 'should account,' and then the account was taken by the auditor; the court never went into it." *O'Connor v. Spaight*, 1 Sch. & Lef. 305; *Carlisle v. Wilson*, 13 Ves. Jr. 276. As accounts (in the technical sense) had never been tried by jury, there was no fundamental objection to the assumption of jurisdiction in equity.

This was the state of the law in 1784. At common law and in ordinary actions, the right to a jury trial was absolute. In equity there was jurisdiction in matters of

that accounts ought to be decreed in all cases in which references would be pressed at nisi pruis: I apprehend that those observations were not intended to intimate any such rule or opinion, but were intended only to exemplify the great difficulty in dealing with such cases at law. But, be that as it may, I cannot accept any such ground or measure for exercising the equitable jurisdiction of this court in matters of account. It has rules and principles of its own, although the practical difficulty experienced in proceeding at law does form an important consideration in the exercise of the discretion of this court. The jurisdiction in matters of account is not exercised, as it is in many other cases, to prevent injustice which would arise from the exercise of a purely legal right, or to enforce justice in cases in which courts of law cannot afford it; but the jurisdiction is concurrent with that of the courts of law, and is adopted because, in certain cases, it has better means of ascertaining the rights of parties. It is therefore impossible with precision to lay down rules or establish definitions as to the cases in which it may be proper for this court to exercise this jurisdiction. The infinitely varied transactions of mankind would be found continually to baffle such rules, and to escape from such definitions. It is therefore necessary for this court to reserve to itself a large discretion, in the exercise of which due regard must be had, not only to the nature of the case, but to the conduct of the parties. In the present case, both concur in satisfying me that the trial of the action at law ought not to be stayed; it is not a case of mutual accounts, the only items on the one side being certain payments by the company to the plaintiffs at law which are not in dispute."

In *Padwick v. Hurst*, 18 Beav. 575, 23 L. J. Ch. N. S. 657, 18 Jur. 763, 2 Week. Rep. 501, the jurisdiction was refused where the accounts were not mutual, but the court seemed to consider that great complication would be a good ground for retaining the case in equity.

So, in *Smith v. Leveaux*, 2 De G. J. & S. 39 L.R.A. (N.S.)

1, 9 Jur. N. S. 1140, 9 L. T. N. S. 313, 3 New Reports, 18, 33 L. J. Ch. N. S. 167, 12 Week. Rep. 31, 1 Eng. Rul. Cas. 419, the jurisdiction was denied where the acts were not mutual and there was no complication.

And in *Bliss v. Smith*, 34 Beav. 508, a building contract, *Romilly, M. R.*, said: "Courts of equity interfere in two cases; one, where there is collusive dealing and concert between the employer and the person whom he has appointed architect, overseer, or agent, for the purpose of injuring the contractor or defeating his claim; then equity will interfere to prevent it. The other instance in which this court will interfere is a matter of discretion, when there are very long and complicated mutual accounts, which cannot be conveniently taken at law. Where neither of these circumstances occur, the case is simply one for the determination of a court of law."

It may be noted that in *Dabbs v. Nugent*, 11 Jur. N. S. 943, 13 L. T. N. S. 396, 14 Week. Rep. 94, the court criticizes the *Taff Vale Case* (as holding equity better than law) for the reason that in the final result of that case it afforded no relief.

c. American cases.

1. In general.

In the American cases there has been a drift in the direction of admitting the jurisdiction of equity in cases of accounts upon the ground of complexity alone; and the later writers in general seem to take this view, while the earlier writers, such as *Story* and *Willard*, are to the contrary.

In *Fowle v. Lawrason*, 5 Pet. 495, 8 L. ed. 204 *Marshall, Ch. J.*, perhaps intended to admit the jurisdiction of equity upon the ground of complexity alone where he said: "In all cases in which an action of account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted. It is the appropriate tribunal. But in transactions not of this peculiar character, great complexity ought to exist

accounts if it appeared that the case could not be intelligently tried by jury. But there was no such equitable jurisdiction in actions sounding in tort, where the sole complaint was that the defendant had converted chattels, and damages alone were asked as a remedy. Logical or illogical, this was the line of demarcation. This was the use and practice which the people made the constitutional measure of their rights. This measure is not varied by modern methods of procedure, wherein forms of action are treated as largely immaterial. Its application is not abolished by the rule that the same suit may be at once an action at law and a bill in equity. *Tasker v. Lord*, 64 N. H. 279, 8 Atl. 823. "Constitutional construction . . . is not

to be dealt with like unimportant forms of procedure, or English rules of law that are not adapted to the situation and circumstances of this country. On questions concerning the foundations of society, where a system of government has lasted more than a century, the ancient landmarks cannot be removed by judicial decisions." Unreported opinion by Doe, Ch. J. "The formal distinctions in the pleadings and modes of procedure are abolished; but the essential distinction between law and equity is not changed. The relief which the law affords must still be administered through the intervention of a jury, unless a jury be waived." *Basey v. Gallagher*, 20 Wall. 670, 680, 22 L. ed. 452, 453; *State ex rel. Rhodes v. Sanders*, 66 N. H. 39, 18 L.R.A. 646, 77,

in the accounts, or some difficulty at law should interpose, some discovery should be required, in order to induce a court of chancery to exercise jurisdiction."

And such may have been the meaning of Harlan, J., where he says in *Kirby v. Lake Shore & M. S. R. Co.* 120 U. S. 130, 30 L. ed. 569, 7 Sup. Ct. Rep. 430 (though the point was not indispensable to the decision): "The complicated nature of the accounts between the parties constitutes itself a sufficient ground for going into equity."

2. Doctrine that complexity alone sufficient.

The view that complexity of accounts alone is sufficient to sustain equity jurisdiction was taken in *Fenno v. Primrose*, 116 Fed. 49; *McMullen Lumber Co. v. Strother*, 60 C. C. A. 433, 136 Fed. 295; *Balfour v. San Joaquin Valley Bank*, 156 Fed. 500; *London Guarantee & Acci. Co. v. Bell Teleph. Co.* 171 Fed. 278; *Gleason & B. Mfg. Co. v. Hoffman*, 168 Ill. 25, 48 N. E. 143; *Crown Coal & Tow Co. v. Thomas*, *infra*; *O'Connor v. Henderson Bridge Co.* 95 Ky. 633, 27 S. W. 251, 983; *Sallee v. Fades*, 21 Ky. L. Rep. 109, 50 S. W. 1102; *Blodgett v. Foster*, 114 Mich. 688, 68 Am. St. Rep. 504, 72 N. W. 1000; *Sargent v. Putnam*, 58 N. H. 182 (possibly *obiter*); *Davis v. Dyer*, 62 N. H. 231 (*obiter*); *Low v. Independent Christian Society*, 67 N. H. 48, 32 Atl. 762; DALEY v. KENNETT (*obiter*); *McCulla v. Beadleston*, 17 R. I. 20, 20 Atl. 11 (*obiter*); *Kerr v. Camden S. E. Co. Cheves*, Eq. 189; *Devereaux v. McCady*, 46 S. C. 133, 24 S. E. 77 (probably *obiter*); *Lindley v. McGlauffin*, 57 Wash. 581, 107 Pac. 355.

The same view was apparently taken in *Down v. Johnson*, 12 Ga. 9; *Printup v. Mitchell*, 17 Ga. 558, 63 Am. Dec. 258; *Covington v. Limerick*, 19 Ky. L. Rep. 330, 40 S. W. 254; *Fair v. Stickney Farm Co.* 35 Minn. 380, 29 N. W. 49; *Seymour v. Long Dock Co.* 20 N. J. Eq. 396; *Ely v. Crane*, 57 N. J. Eq. 157 (reversed on other grounds 70 L.R.A. (N.S.)

in 37 N. J. Eq. 564); *State ex rel. Klutta v. McKenzie*, 6 N. C. 102. See also *Wilson v. Granger*, 134 Ga. 680, 68 S. E. 514, where, however, there may have been mutual accounts.

In *Fenno v. Primrose*, 116 Fed. 49, the court said: "The only ground on which jurisdiction is asserted is the complicated nature of the accounts, rendering it, as we have shown, impracticable to take them by the ordinary common-law proceedings. In Mr. Bigelow's note to the section in Story's Equity Jurisprudence to which we have referred, he states three grounds of equity jurisdiction, among which is where dealings are so complicated that they cannot be properly adjusted in a court of law. That under such circumstances the chancellor has jurisdiction is apparently thoroughly settled in England, and, as is well known, the Federal courts act on the rules and principles which have long been recognized by the English equity courts, notwithstanding the general enactment in the statutes of the United States, barring the exercise of equitable jurisdiction where there is ample remedy at law."

In *McMullen Lumber Co. v. Strother*, 60 C. C. A. 433, 136 Fed. 295, where there were other matters of equitable cognizance, the court said: "The very condition on which a court of equity takes jurisdiction for the adjustment of mutual accounts is the presence of the fact of their intricacy and complications. It should therefore logically follow, where the intricacy and complication exist, the mere singleness of the accounting should not be controlling. . . . Moreover, the want of mutuality can present no barrier where a discovery lies and relief is asked thereon. . . . Nor should it present any obstacle to a resort to equity where, from the peculiarly complicated transactions, a trial to a jury at law would, in all reasonable probability, fall far short of the remedial adequacy of a proceeding in equity. While judges of state courts have expressed reluctance to entertain equity jurisdiction in such conditions of an accounting, it will generally be found that they parry the force of the

25 Atl. 588. The fact that the present suit is called an action in trover is not determinative of the issue presented by the exception. The nature of the case and of the relief sought must be looked to for the settlement of the constitutional question.

If this were in effect a suit for an accounting, the authorities cited by the plaintiff would be applicable and his claim well founded. But it is not such a suit. The vendors' lien held by the defendant is not of importance in the litigation. The amount due upon it is unquestioned, and the defendant refused to accept it because he denied the plaintiff's title to the property and claimed to hold the same under conveyances other than the lien memorandum. The case is the ordinary one of the

holder of a chattel mortgage whose title is denied by one in possession under subsequent conveyances. With this case in hand, the plaintiff chose his remedy. If he might have proceeded in chancery for an equitable adjustment of conflicting claims, he did not do so, but elected to treat the conduct of the defendant as a conversion and to bring suit in trover. Having sought to avail himself of this remedy, he cannot now complain of the consequences which follow. The law applicable to the case is the same as it would be if a single chattel owned by the plaintiff had been converted by the defendant. There is nothing in the nature of an accounting involved in this controversy. The mere fact that the chattels are numerous does not make such a case. Un-

argument of the practical unfitness of the average jury to deal with such matters by recourse to the provision of the state Code, which, in an action at law, authorizes the court, in its discretion, to send the matter to a referee."

In Alabama, while in *Avery v. Ware*, 58 Ala. 475, the court said that equity will not take jurisdiction when the accounts are all on one side, the court seems now to be in favor of the equity jurisdiction from its opinion in *Beggs v. Edison Electric Illuminating Co.* 96 Ala. 295, 38 Am. St. Rep. 94, 11 So. 381, where, while sustaining a demurrer to a bill on the ground that the complaint did not show the complication of accounts with sufficient particularity, it was nevertheless said: "Where the accounts are mutual and founded in privity, the jurisdiction of equity is undoubted. But where the accounts to be examined and stated are on one side only, the allegations of the bill must show the existence of certain conditions which are prerequisites to the exercise of equitable jurisdiction. There must either be so great a complication in the matters of account that a common-law court is unable to ferret them out, or there must be the allegations of such facts as show the necessity for a discovery, and this discovery must be prayed for."

In Arkansas, while the cases are obscure, they are probably to be understood as favoring the complexity of accounts as sufficient ground for equity jurisdiction.

In *Trapnall v. Hill*, 31 Ark. 345, the court, in sustaining the jurisdiction of equity in a case where it would seem that the account was only on one side, said: "In the case of *Post v. Kimberly*, 9 Johns. 493, it was held that, even admitting that the remedy was complete at law, that in matters of account, chancery courts exercised a very broad jurisdiction; their course of proceeding was considered peculiarly well calculated for the settlement of accounts, if they are in any degree long and complicated. . . . It is well to bear in mind that a single transaction will not amount to an account; the items must be mutual, the account a running one, or present some

complications to distinguish it from a debt on one side, and a set-off on the other."

In *State v. Churchill*, 48 Ark. 426, 3 S. W. 352, 880, the court said that the treasurer of a state, keeping her accounts against him and his own against her, may be said to have kept "mutual accounts," because there were upon his books almost innumerable items of debt and credit, many of which were matters of contention and dispute between himself and the state, and that "it is safe to say that in all cases where 'mutuality of accounts' is claimed to be the basis of equity jurisdiction, 'mutuality' is only an essential element in this,—that it indicates intricacy and complication."

In *Charlesworth v. Whitlow*, 74 Ark. 277, 85 S. W. 423, where the jurisdiction was possibly sustainable by reason of the transactions being complicated by the acts and interests of a third person, the court, in sustaining equity jurisdiction, cites the *Trapnall* and *Churchill* Cases, but does not state the particular grounds of its decision.

In *Printup v. Mitchell*, 17 Ga. 558, 63 Am. Dec. 258, the court, in dismissing a bill to enjoin an action at law, said, among other things: "Again, it is contended that the bill should not be dismissed, as it will serve to adjust the unsettled accounts between the parties. To make this ground tenable, it should further appear that the accounts cannot, owing to their complexity or some other special cause, be arranged in a court of law. Nothing of this sort is pretended."

In *Crown Coal & Tow Co. v. Thomas*, 177 Ill. 534, 52 N. E. 1042, the court said: "Where the state of accounts between the parties is complicated and intricate, where the state of accounts between the parties is involved with third parties, where to do justice requires the employment of methods of investigation peculiar to courts of equity, and where it would be very difficult for a jury to unravel the numerous transactions, are conditions usually held to be sufficient to give a court of equity jurisdiction. The jurisdiction in equity does not, in such cases, depend upon the absence of a remedy at law, but upon its adequacy

termyer v. Beinhauer, 105 N. Y. 521, 11 N. E. 847; Johnson v. Atlantic Ave. R. Co. 139 N. Y. 449, 34 N. E. 925. "Mere inconvenience is not a reason for refusing a jury trial in cases where the right is guaranteed by the Constitution." Davis v. Dyer, 62 N. H. 231, 239.

The encumbrances are not interwoven. There is no occasion to marshal assets or make an equitable application of the proceeds of the chattels. The plaintiff's two mortgages are admittedly prior to the defendant's mortgage and bill of sale. The issue is not of priority, but of title and value. In such a case the defendant is entitled to a jury trial. "In all actions for injury to property, the trial by jury included the assessment of the plaintiff's dam-

ages, when the verdict was for him. This we regard as an essential part of the trial by jury intended to be secured by the Constitution." East Kingston v. Towle, 48 N. H. 57, 64, 97 Am. Dec. 575, 2 Am. Rep. 174.

The suit is not one to redeem or foreclose. The plaintiff seeks to defeat the defendant's mortgage by showing a superior title. There is no suggestion in the case that he desires to redeem. Nor does he seek a foreclosure of his own mortgage by this proceeding. His sole claim here is to recover damages for a wrongful withholding of the mortgaged chattels.

The plaintiff errs in his assumption that the claim he asserts is an equitable one. He stands upon a strict legal right. It is

or practicability, and upon the discretion of the court." Approved in Billboard Pub. Co. v. McCarahan, 151 Ill. App. 227.

In New Hampshire it is seen in DALEY v. KENNETT, that the court is committed to the doctrine that complexity alone is sufficient, as it says: "In equity there was jurisdiction in matters of accounts if it appeared that the case could not be intelligently tried by jury."

In Davis v. Dyer, 62 N. H. 231, where the court stated that the accounts were both mutual and complicated, it was said: "The leading ground on which the defendants claim the privilege of a jury trial for the purpose of changing the auditor's report is the right of trial by jury, given by the Constitution. Art. 20 of the Bill of Rights provides 'that in all controversies concerning property, and in all suits between two or more persons, except in cases in which it has been heretofore otherwise used and practised, the parties have a right to trial by jury, and this method shall be held sacred.' . . . Cases involving the investigation of accounts, particularly where the accounts are mutual or complicated, are within the equity jurisdiction of the court. 1 Story, Eq. Jur. §§ 441, 442, 442a, and notes. Although such cases are made the subjects of suits at law, in the trial equitable principles are applied, and equity jurisdiction is not lost. Wells v. Pierce, 27 N. H. 511. It is the inconvenience and difficulty of properly and accurately adjusting and settling accounts of a complex nature in suits at law that have brought them within the equity jurisdiction of the court. . . . And the subject-matter of this suit requiring an investigation of accounts, both mutual and complicated, to which must be applied equitable principles, and lying within the equity jurisdiction of the court, the defendants have no absolute right to such a jury trial as is guaranteed by the Bill of Rights. . . . It was found that the case was too complicated to be intelligently understood by a jury, and for this reason the defendants were not entitled to any form of jury trial. Mere inconvenience is not a reason for refusing a jury trial in cases where

the right is guaranteed by the Constitution. Copp v. Henniker, 55 N. H. 206, 20 Am. Rep. 194. When, as in this case, there is no right of trial under the Constitution, and the fact exists, not of inconvenience, length of time, and increased expense of trial, but of the intrinsic impracticability of bringing the case to the intelligent comprehension of a jury, a trial would be a mockery of justice, and could not reasonably be insisted upon. It would not be claimed that a trial could be conducted in the presence of a musical concert or of a theatrical performance. The confusion arising from disturbing sounds and motions could be avoided by adjournment to another time and place. But a confusion arising from complications too intricate and difficult for the intelligence of jurymen to unfold cannot be controlled by time and place, nor avoided by postponement or change of location of the trial."

In Lindley v. McGlauffin, 57 Wash. 581, 107 Pac. 355, where the court stated that there was in the case a fiduciary relation, but that that was not necessary to give equity jurisdiction over accountings, it was also said: "In this state it is especially provided by statute (Rem. & Bal. Code, § 370) that a compulsory order of reference may be made when the trial of an issue of fact shall require the examination of a long account on either side; this, on the principle, of course, that the proceeding was formerly cognizable in chancery, and not subject to trial as an action at law. . . . If the action involves a long and complicated account, as it did in this instance, the court has jurisdiction to try it in that manner which will do justice between the parties, regardless of the character of the legal relationship between them."

And in Poultry Producers' Union v. Williams, 58 Wash. 64, 137 Am. St. Rep. 1041, 107 Pac. 1040, the court said: "We have only recently held that, where a case involves the examination of a long or complicated account, the case may be sent to a referee to return the facts. Under the statute, it is a matter of discretion with the trial judge. Lindley v. McGlauffin, supra."

true that he demanded a delivery of the chattels in order that he might foreclose his mortgages upon them; but the demand, whether complied with or not, was no part of a foreclosure. He was entitled to the demanded possession whether his purpose was at once to commence a foreclosure, or merely to hold the property. *Leach v. Kimball*, 34 N. H. 568. He had a right to the

possession by virtue of the title he held. That right did not depend upon some action which he purposed to undertake after he obtained possession. Under these circumstances, the defendant was entitled to a trial by jury.

Exception sustained.

All concur.

3. Doctrine that complexity alone is sufficient.

But in some of the American cases it is held that mere complexity of accounts is not a sufficient ground of equity jurisdiction.

In *Norwich & W. R. Co. v. Storey*, 17 Conn. 364, the court said, in dismissing a bill: "It is a provision of our statute, as well as a rule of equity, that courts of equity shall take cognizance of those matters only in which adequate relief cannot be had in the ordinary course of law. Have the plaintiffs, then, adequate remedy at law? If so, they cannot have the interference of a court of chancery. . . . It is said the accounts are numerous and complicated. That circumstance alone will not be sufficient to oust a court of law of its jurisdiction."

In *Field v. Brown*, 146 Ind. 293, 45 N. E. 464, the court said: "It has never, in this state, been deemed a cause for equitable relief that one may set forth an account of numerous items. As early as *Cummins v. White*, 4 Blackf. 356, it was held that 'equity has no jurisdiction over accounts, however numerous and important the charges, where there is no mutuality of dealing, and discovery is not required; but law has.' That there should appear affirmatively some cause for equitable relief, independently of the presentation of numerous items of account, before the equity side of the court will be opened to entertain the question, is manifest."

This is, perhaps, more clear than the opinion in *Cummins v. White*, supra, where the court said: "It is certain that over multifarious and complicated mutual dealings, a court of equity has jurisdiction, and that it has none over accounts consisting of but one item on a side; while the power of the law court embraces both extremes. So, equity has no jurisdiction over accounts, however numerous and important the charges, where there is no mutuality of dealing, and discovery is not required; but law has. At what point between single mutual items, and dealings swelled to great complexity, the right of a court of equity to take cognizance of the matter begins or ends, has not been denoted with certainty, and, from the nature of the subject, can never be very clearly defined. As we recede from the two extremes and approach the line of commencing or terminating jurisdiction, much must necessarily be left to the discretion of the chancellor; he must decide each case upon its own peculiar fea-

tures. It may, however, be safely stated, that in matters of account which are mutual and complicated, or where a discovery is required, or a multiplicity of suits will be avoided, or the remedy at law is not full and adequate, or fraud, accident, or mistake is connected with the subject, equity has jurisdiction; on the contrary, where none of these characteristics are present, the mutual dealings of parties result in causes of action or matters of set-off, or other defense, cognizable only at law."

In Iowa, where the statute authorizes compulsory references in actions requiring the examination of mutual accounts, or when the account is on one side only, and it appears that "it is necessary that the party on the other side should be examined as a witness to prove the account,"—it is held that compulsory references are limited to cases of equitable cognizance. *McMartin v. Bingham*, 27 Iowa, 234, 1 Am. Rep. 265; *Grant v. Bulles*, 69 Iowa, 525, 29 N. W. 439; *Tufts v. Norris*, 115 Iowa, 250, 88 N. W. 367; *Frick v. Kabaker*, 113 Iowa, 494, 90 N. W. 498; *Faville v. Lloyd*, 140 Iowa, 501, 118 N. W. 871.

In *McMartin v. Bingham*, 27 Iowa, 234, 1 Am. Rep. 265, the court, in reversing a judgment denying the right to a jury trial under the Iowa statute, said: "Courts of equity have a general jurisdiction where there are mutual accounts, and also where the accounts are on one side, but a discovery is sought and is material to the relief. But where the accounts are all on one side, or where there is a single matter on the one side and mere set-offs on the other, and no discovery is sought or required, courts of equity have not jurisdiction. . . . In this case there are fourteen items under eight different dates, and two credits. The account is all on one side, and no discovery sought. The defenses are denial, payment, and the statute of limitations. This would not afford a basis for an action of account at the common law, nor for a bill in equity under the former chancery practice. The defendant has a right to a jury trial, of which he cannot be deprived without his consent." Followed in *Grant v. Bulles*, 69 Iowa, 525, 29 N. W. 439.

And in *Galusha v. Wendt*, 114 Iowa, 597, 87 N. W. 512, the court said: "Mere intricacy of the calculations necessary to the determination of the amount of plaintiffs recovery will not justify the trial court in treating the case as one of equitable cognizance. *Grant v. Bulles* and *McMartin v. Bingham*, supra."

In view of these authorities, anything to the contrary in *Blair Town Lot & Land Co. v. Walker*, 50 Iowa, 376, and *Burt v. Harrah*, 65 Iowa, 643, 22 N. W. 910, may be disregarded.

So, in Pennsylvania it is held that where the accounts are on one side and no discovery is sought, equity will decline to take jurisdiction without other equitable reasons for it. *Gloninger v. Hazard*, 42 Pa. 389; *Passyunk Bldg. Assn.'s Appeal*, 83 Pa. 441; *Grubb's Appeal*, 90 Pa. 228; *Pittsburgh & C. R. Co's Appeal*, 99 Pa. 177; *Paton v. Clark*, 156 Pa. 49, 27 Atl. 116; *Graham v. Cummings*, 208 Pa. 516, 57 Atl. 943; *Holland v. Hallahan*, 211 Pa. 223, 60 Atl. 735 (where discovery was merely incidental).

The same has been held in Tennessee (*Pearl v. Nashville*, 10 Yerg. 179); and in West Virginia (*Grafton v. Reed*, 26 W. Va. 437.)

In *Lafever v. Billmyer*, 5 W. Va. 33, the court, after referring to the authorities, says: "It seems to me that the views, thus given at length, of such eminent jurists, cannot be ignored, and that they conclusively settle the doctrine that courts of equity have jurisdiction of matters of account (1) where there are mutual demands, and *a fortiori* when complicated; (2) where the accounts are on one side and a discovery is sought that is material to the relief; and (3) equity, having taken jurisdiction for discovery, will, to avoid multiplicity of suits, administer suitable relief. The reason for the doctrine is not that the law affords no remedy, but that it is more complete and adequate in equity. By virtue of this general jurisdiction, and as incident to accounts, courts of equity take a concurrent cognizance, among many other things, not only of the administration of personal assets, and distribution of the residue, but also of the conduct of executors and administrators. 3 Bl. Com. 437, cited in 1 Story, Eq. Jur. § 453. But it is equally as well settled that courts of equity decline jurisdiction in matters of accounts (1) where the demands are all on one side, and no discovery is claimed or necessary; (2) where on one side there are demands, and on the other mere payments or set-offs, and no discovery is sought or required. The reason is, that the peculiar remedial process or functions of a court of equity are not necessary in such cases (1 Story, Eq. Jur. § 450), there being an ample remedy at law." The reader will see that the court in this case has read Story's Eq. Jur. correctly, in distinction from the misreading of it shown in several cases where it is cited on this subject.

In *Smith v. Marks*, 2 Rand. (Va.) 449, it was held that to give equity jurisdiction in matters of account, there must be mutual demands, citing Kent, Chancellor, in *Porter v. Spencer*, 2 Johns. Ch. 169.

But it is possible that the court meant to go further in *Coffman v. Sangston*, 21 Gratt. 263, where it said: "The jurisdiction of courts of equity in matters of ac-

count involving the transactions and dealings of trustees and agents is now well established. Not that the bare relation of principal and agent justifies the interference of the court in every case; but whenever it appears that a discovery is necessary, or there are mutual accounts between the parties, or the remedy at law is not plain, simple, and free from difficulty, the equitable jurisdiction attaches."

4. Indecisive or doubtful cases.

In *Farmers' & M. Bank v. Polk*, 1 Del. Ch. 167, where the account seems to have been only on one side, the chancellor said: "Is this such a case that the parties should be decreed to account? Upon that point I have no doubt. These transactions are so complicated, so long and intricate, that it is impossible for a jury to examine them with accuracy. They will require time, assiduous attention, and minute investigation, and are involved in so much confusion and difficulty that no other tribunal, by reason of the forms of proceeding of the courts of law, can afford the plaintiff a remedy." His decree, however, was reversed on page 176, on the ground that, as the defendants had been absolved by the laches of the complainant, there was no necessity for an accounting.

In Kansas, where compulsory references under the statute have been several times sustained on the ground that there were mutual accounts (*Williams v. Elliott*, 17 Kan. 523; *Galbraith v. McCormick*, 23 Kan. 706; *Smith v. Scully*, 66 Kan. 139, 71 Pac. 249), it was held, in *Weakley v. Cherry Twp.* 62 Kan. 867, 63 Pac. 433, that an action by a township against its treasurer and his bondsmen was properly referred, the court giving no reason but that of voluminous book accounts.

In *Watt v. Conger*, 13 Smedes & M. 412, when the account seems to have been only on one side, the court said: "Equity has concurrent jurisdiction with courts of law, in reference to numerous and complicated matters of account. The fact that there may be a remedy at law less convenient, and less subservient to the ends of justice, does not deprive the court of chancery of its right to interpose. In matters of account extending over a variety of transactions, the remedy in equity is deemed more ample and complete, and tends to prevent a multiplicity of suits. 1 Story, Eq. Jur. 439."

In New York, we have the statement above referred to of Chancellor Kent in *Porter v. Spencer*, supra, that there must be mutual demands.

Whether any different view was intended by Finch, J. in his opinion in *Marvin v. Brooks*, 94 N. Y. 71, seems not clear. He there said, in sustaining the jurisdiction where there was the fiduciary relation of a quasi trustee: "The basis and extent of the equitable jurisdiction over matters of account appears to have been seldom considered in our courts, but often discussed in the English authorities. We have been

referred to many of these, but they seem to us not harmonious, and occasionally difficult to reconcile. . . . The best considered review of the authorities puts the equitable jurisdiction upon three grounds, *viz.*: The complicated character of the accounts; the need of a discovery; and the existence of a fiduciary or trust relation. 1 Story, Eq. Jur. § 459, and note 5. The necessity for a resort to equity for the first two reasons is now very slight, if it can be said to exist at all, since a court of law can send to a referee a long account, too complicated for the handling of a jury, and furnishes by an examination of the adverse party before trial, and the production and deposit of books and papers, almost as complete a means of discovery as could be furnished by a court of equity. But the jurisdiction of the latter court over trusts and those fiduciary relations which partake of that character remains, and in such cases the right to an accounting seems well established. But the existence of a bare agency is not sufficient."

In *Uhlman v. New York L. Ins. Co.* 109 N. Y. 421, 4 Am. St. Rep. 482, 17 N. E. 363, the court, while not deciding that complexity alone would give jurisdiction, stated that considering the fact as stated by Finch, J., in *Marvin v. Brooks*, that the plaintiff had now all the facilities for examining a complicated account at law that he would have in equity, in case of oppression or great inconvenience to the defendant, equity would not take jurisdiction.

d. Danger of unlimited jurisdiction.

There being no logical difference between jurisdiction of mutual accounts and of those on one side, it is an easy thing to make a general broad principle that equity will take cognizance of all accounts of every kind which are complicated. Those English cases in which reluctance is shown to follow a broad rule in the matter indicate the doubts and difficulties felt by judges especially experienced in chancery courts, lest the rights of the plaintiff-at-law are to be summarily cut off by the interposition of equity in all sorts of common-law cases. It would seem that a jurisdiction in equity over all complicated accounts can only be safely intrusted to judges whose great experience will enable them to exercise a wise discretion in refusing to take cognizance in equity of matters which ought to be determined at law.

IV. Miscellaneous.

In *Huston v. Wadsworth*, 5 Colo. 213, where there was no provision in the Constitution of the state as to the trial by jury in civil cases, it was held that there was nothing unlawful in a statute permitting a compulsory reference of a case requiring the examination of a long account on either side, as there was no constitutional provision against it.

In *McMillan v. Wiley*, 45 Fla. 487, 33 So. 993, it was held that a statute author- 39 L.R.A. (N.S.)

izing the court of chancery to enjoin trespasses on timber land and to award an account for damages, so far as such statute concerned the "awarding an account for damages for a mere trespass cognizable at law, and in respect to which the court of equity had no jurisdiction independent of statute, it impairs the right of trial by jury according to the course of the common law and secured by the Constitution."

Where the statute provided for compulsory references in cases where the trial of an issue of fact requires the examination of mutual accounts, or when the account is on one side only, and it shall be made to appear that it is necessary that the party on the other side shall be examined as a witness to prove the account, it was held that these two matters were, in any event, cognizable in equity, and therefore the parties were not entitled as a matter of right to a trial by jury. *Van Trees v. Territory*, 7 Okla. 353, 54 Pac. 495; *Grant County v. McKinley*, 8 Okla. 128, 56 Pac. 1044; *Brewer v. Asher*, 8 Okla. 231, 56 Pac. 714.

So, in *Mills v. Miller*, 3 Neb. 87, the court, after quoting a similar statute, said, in approving a reference in partition to take the account: "A purely legal action cannot be referred except by consent of parties, as neither party can be deprived of the right to a trial by a jury in such cases; and in actions involving an account between the parties, it is only in cases of a purely equitable nature that a reference can be ordered without consent of the parties."

In *Johnson v. Wallace*, 7 Ohio, pt. 2, p. 62, where no statute is referred to, the court, in holding that there was no power to order a compulsory reference in an action of assumpsit, although the account involved was very long on both sides, said that the difficulty might be avoided by a resort to a court of equity. B. B. B.

NEW MEXICO SUPREME COURT.

TERRITORY OF NEW MEXICO

v.

JOSE REFUGIO LUCERO, Appt.

(16 N. M. 652, 120 Pac. 304.)

Evidence — criminal law — flight — presumption of guilt.

No presumption of guilt arises from flight after the commission of a crime.

(December 19, 1911.)

Note. — Flight as creating presumption of guilt.

This note is confined strictly to the question whether flight creates a presumption of guilt, and does not include cases merely bearing on the question whether flight is admissible as a circumstance tending to prove guilt, unless there is a discussion of

APPPEAL by defendant from a judgment of the District Court for Taos County, convicting him of murder in the second degree. Reversed.

The facts are stated in the opinion.

Mr. A. B. Renehan, for appellant:

Flight does not create a presumption of guilt.

Starr v. United States, 164 U. S. 627, 41 L. ed. 577, 17 Sup. Ct. Rep. 223; *Alberty v. United States*, 132 U. S. 499, 40 L. ed. 1051, 16 Sup. Ct. Rep. 864; *Hickory v. United States*, 160 U. S. 408, 40 L. ed. 474, 16 Sup. Ct. Rep. 327; *United States v. Greene*, 146 Fed. 803; *State v. Poe*, 123

Iowa, 118, 101 Am. St. Rep. 307, 98 N. W. 587.

People v. Wong Ah Ngow, 54 Cal. 151, 35 Am. Rep. 69; *State v. Arthur*, 23 Iowa, 430; 22 Am. & Eng. Enc. Law, 1265; 12 Cyc. 395; *Sheffield v. State*, 43 Tex. 378.

Mr. Frank W. Clancy, Attorney General, for the Territory:

Flight raises the presumption of guilt.

State v. Seymour, 94 Iowa, 699, 63 N. W. 661; *State v. Williams*, 54 Mo. 170; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330; *State v. Jackson*, 95 Mo. 623, 8 S. W. 749; *State v. Walker*, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; *State v. Potter*, 108

or at least decision on, the question whether it creates a presumption of guilt; though it should be stated that the courts sometimes fail to observe the distinction.

An innocent person, though conscious of his innocence, may fear the effect of an unfortunate combination of circumstances, or of an unfounded popular prejudice against him; consciousness of guilt, and fear of deserved punishment, are not the only motives that will lead a person to attempt to escape. Accordingly, such attempts are not infrequently made by the innocent as well as by the guilty.

Though the weight of reason may be with this view, yet there is a conflict of opinion, and there are jurisdictions that still follow the ancient rule. And then, also, there are courts that distinguish between "flight as prima facie evidence of guilt," and as "presumptive evidence of guilt." But it would seem that such a distinction is too fine for the average jury, and that the better rule is, that flight is a circumstance from which, taken into consideration with the other evidence in the case, a jury may or may not infer guilt, as the case may be.

The flight or concealment of the accused raises no presumption of law that he is guilty, but it is a fact which may be considered by the jury, and from which they may draw an inference, in connection with other circumstances, and in the absence of an explanation of the reasons or motives which prompted it, that he is guilty; and evidence of flight or concealment is admissible, whether the other evidence of guilt be direct or circumstantial. 12 Cyc. 395.

That flight does not raise a legal presumption of guilt has been held in *United States v. Greene*, 146 Fed. 803; *Hickory v. United States*, 160 U. S. 408, 40 L. ed. 474, 16 Sup. Ct. Rep. 327; *People v. Wong Ah Ngow*, 54 Cal. 151, 35 Am. Rep. 69; *Smith v. State*, 106 Ga. 673, 71 Am. St. Rep. 286, 32 S. E. 851, 11 Am. Crim. Rep. 474; *Barnett v. State*, 136 Ga. 65, 70 S. E. 868; *Fox v. People*, 95 Ill. 71; *State v. Arthur*, 23 Iowa, 430; *State v. Williams*, 118 Iowa, 494, 92 N. W. 652, 14 Am. Crim. Rep. 570; *State v. Poe*, 123 Iowa, 118, 101 Am. St. Rep. 307, 98 N. W. 587; *Madison v. Com.* 39 L.R.A. (N.S.)

13 Ky. L. Rep. 313, 17 S. W. 164; *State v. Moncla*, 39 La. Ann. 871, 2 So. 814; *State v. Ah Kung*, 17 Nev. 361, 30 Pac. 995; *State v. Osborne*, 54 Or. 289, 103 Pac. 62, 20 Ann. Cas. 627.

And so, flight or concealment of one accused of manslaughter is not conclusive evidence of his guilt. *Waybright v. State*, 56 Ind. 122.

But in *Wooldridge v. State*, 49 Fla. 137, 38 So. 3, in the prosecution of a school officer for forgery, it was said that defendant's own testimony that he guessed "the reason he assumed (a fictitious name) was to prevent anyone from locating him" warranted the inference that he fled for the purpose of concealment, knowing that his books were being examined.

Presumption of guilt from flight applies only where the crime has been secret, and the connection of accused with it is to be established by circumstantial evidence; and so, where a killing has taken place in a public fight, in the presence of witnesses, when there is no dispute as to who did the act, but the only question is whether the circumstances establish self-defense or a mitigation of the crime to the grade of manslaughter, the flight will have no weight as a presumption of guilt. *State v. Melton*, 37 La. Ann. 77. And this principle and deduction were approved in *State v. Middleton*, 104 La. 233, 28 So. 914.

In *Alberty v. United States*, 162 U. S. 499, 40 L. ed. 1051, 16 Sup. Ct. Rep. 864, an instruction that "flight is a silent admission by the defendant that he is unwilling or unable to face the case against him. It is, in some sense, feeble or strong, as the case may be, a confession," was held erroneous, as laying too much stress upon the fact of flight, and allowing the jury to infer that this fact alone is sufficient to create a presumption of guilt. The court said: "Innocent men sometimes hesitate to confront a jury, not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves."

Mo. 424, 22 S. W. 83; *State v. Milligan*, 170 Mo. 215, 70 S. W. 473; *State v. Hottman*, 196 Mo. 110, 94 S. W. 237.

Roberts, J., delivered the opinion of the court:

The appellant, José Refugio Lucero, was convicted in the district court of Taos county, of murder in the second degree, and was sentenced to serve a term of not less than twenty-five nor more than thirty years in the New Mexico Penitentiary. Appeal was prayed and granted to this court.

Seven grounds of error have been urged by the appellant, but, as we are compelled to reverse the case, because of an erroneous instruction given the jury by the lower

court, we shall discuss only the questions essential to the consideration of the erroneous instruction.

By instruction 16, the court charged the jury as follows: "You are instructed that flight raises the presumption of guilt, and if the jury believe and find from the evidence that after the shooting of the deceased by the defendant, if you find that he did shoot him, that the defendant fled from the territory and tried to avoid arrest, then the jury may take this fact into consideration in determining his guilt or innocence; that is, if you believe that at the time he knew that he had shot and killed the deceased if you find that he did so shoot and kill him." The objection

And an identical instruction was held erroneous in *Starr v. United States*, 164 U. S. 627, 41 L. ed. 577, 17 Sup. Ct. Rep. 223.

In *State v. Baptiste*, 105 La. 661, 37 So. 147, it was said that the following charge, while not incorrect, should have been more full, as the acts from which criminality is sought to be deduced were committed openly: "The legal presumption from flight is against the prisoner, but is not sufficient of itself to authorize a conviction, and it lies upon the defendant to explain or rebut it." The court said it "should have explained that the fact of accused having fled, if proven, was merely a fact in the case, to be taken into consideration by the jury in connection with all the other facts in the case in determining the probabilities for or against the guilt of the accused."

And in *State v. Swindall*, — La. —, 56 So. 702, a prosecution for incest, a charge that flight was to be considered a consciousness of guilt was held objectionable, citing *State v. Baptiste*.

An instruction that flight is a circumstance which, prima facie, is indicative of guilt, was upheld in *State v. Matheson*, 130 Iowa. 440, 114 Am. St. Rep. 427, 103 N. W. 137, 8 Ann. Cas. 430; *State v. Ralston*, 139 Iowa, 44, 116 N. W. 1058; and in *State v. Leonard*, 135 Iowa, 371, 112 N. W. 784; *State v. Richards*, 126 Iowa, 497, 102 N. W. 430, it was said that such an instruction was not erroneous as in effect telling the jury that it was presumptive evidence of guilt.

And so, an instruction that "if you find from the evidence that the defendant, upon being informed that he was suspected of taking the life of . . . [deceased], fled to avoid arrest, and remained away, going under an assumed name, such fact is a circumstance which, prima facie, is indicative of guilt, was held proper in *State v. Seymour*, 94 Iowa, 699, 63 N. W. 661, as there was evidence in the case to establish the facts upon which it was predicated.

But an instruction in a trial of assault with a deadly weapon, that the fact that defendant "saw fit to flee from the state makes a prima facie case which indicates 39 L.R.A. (N.S.)

guilt on his part," was held to constitute reversible error. *State v. Papa*, 32 R. I. 453, 80 Atl. 12.

In *People v. Davis*, 14 Cal. App. 117, 111 Pac. 268, the court had granted an instruction that flight "is not strong presumptive evidence of guilt, as no such presumption could arise from such fact as a matter of law." To this instruction the court added: "But the flight of a person immediately after the commission of an offense with which he is charged is a circumstance to be weighed by the jury as tending in some degree to prove a consciousness of guilt;" and it was said that though such added instruction is justly subject to criticism, it is not sufficient cause for reversal.

And in *People v. Giancoli*, 74 Cal. 642, 16 Pac. 510, an instruction that "the flight of a person suspected or charged with a crime is a circumstance to be weighed by the jury as tending in some degree to prove a consciousness of guilt" was held proper; and an instruction in effect that a flight is by no means an inference of guilt, that many men are naturally of weak nerve and timid, and under certain circumstances the innocent person might seek safety in flight, was properly refused, as apparently drawn rather as an argument in defendant's favor than as a statement of the law upon the matter in hand.

As was said, there are jurisdictions that still follow the ancient rule; and so that flight raises a presumption of guilt was held in *Lewis v. State*, 96 Ala. 6, 38 Am. St. Rep. 75, 11 So. 259; *State v. Williams*, 54 Mo. 170; *State v. King*, 78 Mo. 555; *State v. Barham*, 82 Mo. 67; *State v. Gee*, 85 Mo. 647; *State v. Griffin*, 87 Mo. 608; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330; *State v. Walker*, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; *State v. Moore*, 101 Mo. 316, 14 S. W. 182; *State v. Potter*, 108 Mo. 424, 22 S. W. 89; *State v. Hunt*, 141 Mo. 626, 43 S. W. 389; *State v. Adler*, 146 Mo. 18, 47 S. W. 794; *State v. Garison*, 147 Mo. 548, 49 S. W. 508; *State v. McLaughlin*, 149 Mo. 19, 50 S. W. 315; *State v. Knowles*, 185 Mo. 141, 83 S. W. 1083; *State v. Jagers*, 71 N. J. L. 281, 103 Am. St. Rep. 746, 58 Atl. 101 (*dictum*);

urged against this instruction is that flight does not raise a presumption of guilt, and by the instruction the jury may have reasonably understood that they could convict on proof of flight alone, on the part of the defendant. The fact that the defendant fled from the vicinity where the crime was committed, having knowledge that he was likely to be arrested for the crime, or charged with its commission, or suspected of guilt in connection therewith, may be shown as a circumstance tending to indicate guilt, and may be considered by the jury, with other circumstances tending to connect the defendant with the commission of the crime, to authorize the inference of the guilt of defendant, the *corpus delicti* being proven.

There is general assent to this proposition among the authorities, and it is well settled that evidence of flight is admissible. 1 Bishop, New Crim. Proc. § 1250; Abbott, Trial Brief, 458. There is a broad distinction, however, between an "inference" and a "presumption," and this distinction is clearly pointed out in the case of Cogdell v. Wilmington & W. R. Co. 132 N. C. 852, 44 S. E. 618, where the court says: "An 'inference' is nothing more than a permissible deduction from the evidence, while a 'presumption' is compulsory, and cannot be disregarded by the jury."

The only cases which we have been able to find, approving instructions to the jury that flight raises the presumption of guilt,

State v. Kent (State v. Pancoast) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052.

But flight from a mob raises no presumption of guilt. People v. Easton, 148 Cal. 50, 82 Pac. 840; State v. Ma Foo, 110 Mo. 7, 33 Am. St. Rep. 414, 19 S. W. 222.

And though the rule in Missouri seems to be that flight raises a presumption of guilt, it was held in State v. Evans, 138 Mo. 116, 60 Am. St. Rep. 549, 39 S. W. 462, that the mere fact that defendant was arrested in another state was not sufficient of itself to be the basis of an instruction that flight raises a presumption of guilt.

And also that the mere fact that defendant fled from the place where the homicide was committed, immediately thereafter, and went home, not more than one-half mile distant, did not authorize such an instruction. State v. Hopper, 142 Mo. 478, 44 S. W. 272.

Nor does every going away from the place of a homicide raise a presumption of guilt; an instruction should be so framed as to include all circumstances, that accused may have the benefit of such explanatory facts. State v. Fairlamb, 121 Mo. 137, 25 S. W. 895.

Escape from custody and from a pending indictment raises a conclusive presumption of guilt. Howgate v. United States, 7 App. D. C. 217.

A strong presumption of guilt arises whenever one accused of an offense attempts to escape or evade justice. Benavides v. State, 31 Tex. 579.

But in Sheffield v. State, 43 Tex. 378, a charge that flight is to be regarded as a presumption of guilt is held to be objectionable.

And in Huey v. State, 7 Ga. App. 398, 66 S. E. 1023, in a trial under an indictment for assault with intent to commit rape, it was said that flight may be a slight circumstance tending to show conscious guilt of some offense, but it is not sufficient proof of the particular crime charged.

Flight of one accused of crime is strong evidence of guilt, but not conclusive. State v. Seymour, 7 Idaho. 257, 61 Pac. 1033.

But in State v. Baird, 13 Idaho, 29, 88 Pac. 233, it was said that it would not be
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presumed that defendant fled from a consciousness of guilt, where a reasonable deduction and inference from the fact of flight is that he was alarmed by the remarks of the judge, and, on consultation with his attorney, believed that he would not be given time to prepare his defense, and was afraid that he would be convicted because of not having time to present his defense.

Flight of one accused of crime raises a presumption of guilt, though it is not conclusive; and the application of this rule is not affected by the fact that accused is a slave, and is subject to the orders of his master. State v. Nat, 51 N. C. (6 Jones, L.) 114.

And in McCann v. State, 13 Smedes & M. 471, where defendant, after the discovery of the murder, had fled before he was accused, the court said that a consciousness of innocence would have led him to abide the issue and see whether time would not disclose the real perpetrator.

In Murrell v. State, 46 Ala. 89, 7 Am. Rep. 592, on the question of the admissibility on the second trial, of evidence of escape from custody during a former trial of one accused of murder, the court said: "The escape was an attempt to flee, and it had reference to the charge in this case. Flight in a criminal prosecution is one of the most common grounds for the presumption of guilt; and when the flight is connected with the offense charged, and for which the accused is on trial, it is an act which indicates fear, and this fear points to guilt."

But in Elmore v. State, 98 Ala. 12, 13 So. 427, it was said that, of itself, evidence of a breaking out and escape from jail of one under an indictment for larceny would not warrant conviction of that crime.

And flight, to raise a presumption of guilt, must be actual, not inferential or constructive,—flight from the crime and its surroundings, to avoid arrest and prosecution, and not a mere absence from particular places; for a designing officer might select only those places to visit where he knew accused might not be. Com. v. Roland, 8 Phila. 606.

J. H. B.

are those in Missouri. Such an instruction is sanctioned by the following, among many cases, in that state: *State v. Walker*, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; *State v. MaFoo*, 110 Mo. 7, 33 Am. St. Rep. 414, 19 S. W. 222; *State v. Hunt*, 141 Mo. 626, 43 S. W. 389. The supreme court of Iowa, in the case of *State v. Poe*, 123 Iowa, 118, 101 Am. St. Rep. 307, 98 N. W. 587, in a well-considered case in which all the authorities are reviewed, in speaking of the Missouri rule, says: "The rule in Missouri seems to be peculiar, and we are not inclined to follow it."

In the case of *State v. Poe*, supra, the lower court gave to the jury this instruction: "It is claimed by the state that the defendants Decker and Poe at once fled, and endeavored to escape arrest by such flight. If you find said defendants at once, after the alleged offense, fled to Missouri, and endeavored to avoid arrest and prosecution by such flight, such fact would be presumptive evidence of guilt; and if such fact is unexplained, the jury would be justified in considering such flight as evidence of guilt." In speaking of this instruction, the court says: "On principle and authority, the instruction as to the presumption to be drawn from proof of flight is erroneous, and should not be sustained, unless it is so far sanctioned in the cases in our own state that we are precluded from following the dictates of reason, as illustrated by the weight of authority." After reviewing the various decisions of the Iowa court, the instruction was disapproved, and the cause reversed.

In *Hickory v. United States*, 160 U. S. 408, 40 L. ed. 474, 16 Sup. Ct. Rep. 327, the subject is fully considered, and an instruction is condemned which is characterized as "tantamount to saying to the jury that flight created a legal presumption of guilt so strong and so conclusive that it was the duty of the jury to act on it as an axiomatic truth;" and the court continues as follows: "On this subject, also, it is true, the charge thus given was apparently afterwards qualified by the statement that the jury had a right to take the fact of flight into consideration, but these words did not correct the illegal charge already given. Indeed, taking the instruction that flight created a legal presumption of guilt, with the qualifying words subsequently used, they were both equivalent to saying to the jury that they were, in considering the facts, to give them the weight which, as a matter of law, the court declared they were entitled to have; that is, as creating a legal presumption so well settled as to amount, virtually, to a conclusive proof of guilt."

In *Alberty v. United States*, 162 U. S. 499, 40 L. ed. 1051, 16 Sup. Ct. Rep. 864, the 39 L.R.A. (N.S.)

court approves what was said in the case from which we have just quoted, and with reference to a similar charge says: "The criticism to be made upon this charge is that it lays too much stress upon the fact of flight, and allows the jury to infer that this fact alone is sufficient to create a presumption of guilt. It certainly would not be contended, as a universal rule, that the fact that a person who chanced to be present on the scene of a murder, shortly thereafter left the city would, in the absence of other testimony, be sufficient in itself to justify his conviction of the murder." See also *Starr v. United States*, 164 U. S. 627, 41 L. ed. 577, 17 Sup. Ct. Rep. 223.

It follows that the court erred in giving the instruction above referred to, and a new trial must be ordered.

This cause is therefore reversed.

NORTH CAROLINA SUPREME COURT.

W. G. HALL

v.

W. W. PRESNELL et al.

and

E. F. LOVELL, Appt.

(157 N. C. 290, 72 S. E. 985.)

Bills and notes — extension by attorney for collection — effect on surety.

A slight indulgence by an attorney charged with the collection of a note to the maker, not authorized or ratified by the holder, will not release the sureties on the instrument, if no security for the payment of the note is thereby lost or impaired.

(November 27, 1911.)

Note. — Extension of time by attorney as discharging surety.

Two questions arise in connection with the discharge of a surety on account of an extension of time by an attorney; the one, whether an attorney, by virtue of his employment, has authority to enter into a contract extending the time for the performance of an obligation in favor of his client; the other, whether the contract entered into is a valid contract for such extension of time. If either of these questions is answered in the negative, the surety is not discharged. It is assumed that the attorney has no express authority to enter into such a contract.

In *Roberts v. Smith*, 3 La. Ann. 205, an attorney in whose hands a note had been placed for collection was held to be without power to give an extension of time by an agreement made out of court with the principal obligor, when the immediate legal

APP^EAL by defendant Lovell from a judgment of the Superior Court for Watauga County, in plaintiff's favor, in an action on a note. Affirmed.

The facts are stated in the opinion.

No appearance for plaintiff.

Mr. Edmund Jones for defendant.

Walker, J., delivered the opinion of the court:

There is but one question in this case. On November 5, 1906, G. W. Presnell made his note to W. G. Hall for \$135.96, payable May 1, 1907, and indorsed by W. W. Presnell and E. F. Lovell as sureties. This note was deposited by Hall with the Bank of Blowing Rock as collateral security for a debt he owed the bank. Presnell, at the request of Lovell, gave a mortgage to Hall for \$120.70 on a pair of horses to secure the debt and indemnify his sureties, and it was duly registered. The note and mortgage were placed in the hands of an attorney for collection, and he immediately pressed the defendants for payment. Lovell requested the attorney to take immediate steps to secure possession of the horses, for the purpose of selling them, we assume, under the power contained in the mortgage, and gave him \$5 to pay his expenses. The attorney demanded the horses of Presnell, the debtor, who asked indulgence for several days, so that he might dispose of the horses and pay the debt, which was granted, and Presnell paid the attorney \$5 for his expenses. The attorney afterwards sold the horses, but did not realize enough to pay the debt, and meanwhile Presnell left the state. W. G. Hall had no knowledge of the transactions between the attorney and the bank, and, of course, did not authorize the extension of time, nor did the bank. It was simply a slight accommodation given by the attorney to Presnell on his own responsibility, and without any express authority for

any ratification afterwards of his act. It does not appear whether or not Presnell was solvent at the time the attorney granted the slight indulgence to him, and has remained so to this time, nor does it appear distinctly that the attorney extended the time for paying the debt, but it rather appears that the short extension was restricted to the time of seizing and selling the horses under the mortgage. Upon the facts admitted by the parties, the court rendered judgment for the plaintiff, and the defendant Lovell appealed.

We think the decision of the court below was right. It is not clear to us how the appellant was injured by the transaction of which he complains, but assuming that it was such an extension of the time for paying the note as would have discharged him, as surety, if it had been given by the plaintiff, we are of the opinion that the attorney had no express or implied authority to bind his client, the bank, or Hall, the payee, by the agreement. He was retained to collect the debt, and not to release it or any party liable to Hall or the bank for its payment; and anyone dealing with him was fixed in law with notice of this lack of authority. As said in *Bank of Morganton v. Hay*, 143 N. C. 326, 55 S. E. 811: "There is a general rule that, when one deals with an agent, it behooves him to ascertain correctly the scope and extent of his authority to contract for and in behalf of his alleged principal, for, under any other rule, it is said every principal would be at the mercy of his agent, however carefully he might limit his authority. The power of an agent is not unlimited unless in some way it either expressly or impliedly appears to be so; and the person who proposes to contract with him as agent for his principal should first inform himself where his authority stops or how far his commission goes before he closes the bar

consequences of such extension would be a release of the sureties from all liability on their obligation.

So, in *Varnum v. Bellamy*, 4 McLean, 87, Fed. Cas. No. 16,886, an attorney was held to have no authority to make an agreement with a debtor on a note sent him for collection, to accept accounts to apply in payment of the note, and to withhold suit thereon. It was further held in this case that there was no binding agreement for the extension of time.

In *Givens v. Briscoe*, 3 J. J. Marsh. 529, an attorney at law was held not to have authority, by virtue of his office, to extend the time for levying an execution, so as to release the sureties of the execution debtor. A similar holding appears in *Savings Inst. v. Chinn*, 7 Bush. 539, where an attorney ordered the return of an execution.

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In *Union Bank v. Govan*, 10 Smedes & M. 333, where an attorney had directed the sheriff to stay an execution, the sureties were held not released, because no binding agreement had been entered into.

Likewise, in *Jerauld v. Trippett*, 62 Ind. 122, where the attorney had ordered the sheriff not to levy an execution, the sureties were held not discharged, because there was no agreement, but a mere indulgence, as to the time for issuing the execution.

In *Phillips v. Rounds*, 33 Me. 357, a case not precisely in point, an attorney retained to manage a proceeding to procure a disclosure of a debtor on execution was held to have authority to apply for a continuance of the same, although the effect was to release a surety on the debtor's relief bond, because of its extension beyond the time prescribed in such bond. W. A. E.

gain with him. *Briggs v. North Carolina Home Ins. Co.* 88 N. C. 141; *Ferguson v. Davis & R. Mfg. Co.* 118 N. C. 946, 24 S. E. 710." No one could reasonably suppose that it was within the scope of an attorney's authority to release a debt or any party to a note, or to do anything which would have that effect, when his commission extended only to the collection of the debt. It is stated in the books that an attorney has no implied authority to work any discharge of a debtor, but upon actual payment of the full amount of the debt, and that in money. He cannot release sureties or indorsers, nor enter a retraxit, when it is a final bar (*Lambert v. Sandford*, 2 Blackf. 137, 18 Am. Dec. 149), nor release a witness (*Wood v. Hopkins*, 3 N. J. L. 689; *Campbell v. Kincaid*, 3 T. B. Mon. 68), nor a party in interest (*Weigel's Succession*, 18 La. Ann. 49). It is a general rule that an attorney, who is in many respects considered as a mere agent, cannot waive any of the substantial rights of his client without the latter's consent, and in such a case he is not barred thereby without ratification, or something which amounts to an estoppel, to deny his attorney's authority. These principles will be found to be sustained by the following authorities: *Weeks, Attorneys at Law*, § 219, and cases cited in the notes; *Savings Inst. v. Chinn*, 7 Bush. 539; *Ireland v. Todd*, 36 Me. 149; *Givens v. Briscoe*, 3 J. J. Marsh. 529; *Union Bank v. Govan*, 10 Smedes & M. 333, and cases cited; *Tankersley v. Anderson*, 4 Desauss. Eq. 44; *Terhune v. Colton*, 10 N. J. Eq. 21.

It was directly held in *Roberts v. Smith*, 3 La. Ann. 205, that an attorney at law in whose hands a note has been placed for collection has no power by an agreement made out of court, without authority of his client, to give an extension of time to the principal obligor, which would have the legal effect, if the act were valid, to relieve or discharge a surety on the note. Of like effect is *Varnum v. Bellamy*, 4 McLean, 87, Fed. Cas. No. 16,886. In *Savings Inst. v. Chinn*, 7 Bush, 539, it was held to be well settled that an attorney at law employed to collect a debt has not authority to release the sureties upon his client's claim, either directly or indirectly, nor to do any act with reference thereto, prejudicial to his interest. "No implied power [of an attorney] exists, under a general retainer, to grant additional time to a client's debtor" (4 Cyc. 945), nor has an attorney the implied power to release his client's claim; and where there is security for the demand, he cannot surrender it to his client's detri-

ment, nor has he implied authority to release sureties on an obligation to his client. 4 Cyc. 949, and the numerous cases cited. In *Kellogg v. Gilbert*, 10 Johns. 220, 6 Am. Dec. 335, the sheriff, upon the request of the plaintiff's attorney, permitted the defendant in custody on a ca. sa. to go at large for the purpose of securing money with which to pay the debt. It was held that the attorney had no authority to order the release of the defendant without the plaintiff's consent or a previous satisfaction of the debt, and that the sheriff was therefore liable for an escape. See also *Lewis v. Gamage*, 1 Pick. 347, and cases cited; *Simonton v. Barrell*, 21 Wend. 362; *Jackson ex dem. M'Crea v. Bartlett*, 8 Johns. 361. Justice Patteson said, in *Savory v. Chapman*, 11 Ad. & El. 829: "It is clear that the attorney could not, of his own authority, without payment, discharge the defendant out of custody as a matter of indulgence; nor, indeed, is it contended that he could. Either the money must have been actually paid, or the plaintiff [himself] must have chosen to show favor; that would be his act. The plea does not allege either fact. It is true that, if the attorney has power to receive the money, he may, having received it, order a discharge; but then, in pleading the discharge, it should be shown that the money was paid. So, if the plaintiff chose to dispense with the further detention, it should have been alleged that he authorized the attorney to discharge." And Justice Coleridge, in the same case, said: The party "is bound to know the legal qualifications of persons filling certain employments. The question, therefore, turns on the authority of the attorney; and there is nothing here to show that he had any, either in his general character, or with reference to the circumstances of the suit. He could, as it appears here, be only an agent *de facto*; and there is nothing shown to make him one for the present purpose." It seems, therefore, to be the generally accepted doctrine that an attorney charged with the collection of a debt has no power in virtue of his general authority to do any act which will either release his client's debtor, or his surety, or substantially jeopardize his interests in any way.

The cases cited by the learned counsel of the appellant are not in point. There the question was as to the authority of an attorney in the actual conduct of a suit in court, whether in prosecution or defense, and in matters of practice and procedure, as in *Beck v. Bellamy*, 93 N. C. 129, the case cited by appellant's counsel. Chief Jus-

tice Smith thus refers to the subject: "The conduct of the case by caveators' counsel would, in the absence of connivance, be binding upon their clients, and it would be a dangerous innovation in judicial proceedings to hold otherwise. In the words of Nash, J., in reference to the authority of counsel retained in a case: 'By his acts and agreement made in the management of the cause the plaintiff was bound.' *Greenlee v. McDowell*, 39 N. C. (4 Ired. Eq.) 485. Not less explicit is the language of Merrimon, J., in *Branch v. Walker*, 92 N. C. 89, where he says of an attorney that, 'as soon as he is duly retained in an action or proceeding, he has, by virtue of his office, authority to manage and control the conduct of the action, on the part of his client, during its progress, and subject to the supervision of the court,' etc. 'As between the client and opposite party, the former is bound by every act which the attorney does in the regular course of practice, and without fraud or collusion, however injudicious the act may be.' *Weeks, Attorneys at Law*, § 222, and cases cited." We add *Pierce v. Perkins*, 17 N. C. (2 Dev. Eq.) 250. But this is far from saying that he can release a debt or any part of it, or relinquish substantial or important rights, without the consent of his client. An attorney cannot compromise his client's case without special authority to do so (*Moye v. Cogdell*, 69 N. C. 93), and, this being so, how can he release it, or any part of it? "A power to collect," says this court, "does not authorize an assignment or any disposition other than full payment." *Bradford v. Williams*, 91 N. C.

Nor do we think the case of *Kesler v. Linker*, 82 N. C. 456, cited also by counsel, is pertinent to this case. There is no evidence that the plaintiff agreed to look after the security and see that it was applied to the debt. On the contrary, he did not know that the mortgage or lien on the horses had been taken, nor does it appear that the attorney, whether he had authority or not to act in that behalf for his client, made any agreement which bound the plaintiff to active diligence for the preservation of the security. Nor does it appear that the security or any part thereof has been lost or impaired. The horses were seized, sold, and the proceeds applied to the debt. What more could the surety ask to be done?

Our conclusion is that the defendant Lovell, as surety to the note, was not discharged by anything done by the attorney, nor did he latter intend to release him.

No error.

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WISCONSIN SUPREME COURT.

WESTLEY SIGL, Respt.,

v.

GREEN BAY TRACTION COMPANY,
Appt.

(— Wis. —, 135 N. W. 506.)

Carrier — closed street car in motion — attempt to board — negligence.

One is negligent as matter of law in attempting to board a street car when the vestibule doors are closed and it is in motion, so that all that he can do is to stand on the step and maintain his position by clinging to the hand-holds.

(April 3, 1912.)

APPEAL by defendant from a judgment of the Circuit Court for Brown County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

Statement by Barnes, J.:

Plaintiff brought this action to recover damages for injuries sustained while attempting to board one of defendant's interurban cars in the city of Green Bay. The complaint alleged that the car in question was proceeding in a northerly direction on Webster avenue, after having stopped at the corner of Porlier street and Webster avenue; that plaintiff approached the car from the south, and at the same time signaled to the motorman to indicate that he desired to get on; that the car proceeded very slowly up to the point where plaintiff met it, and, as he was about to board the front end, started with a jerk, materially increasing its speed, and plaintiff was thrown to the ground and rolled against the trucks of the car. The answer put in issue the material allegations of the complaint. By its answers to questions submitted on a special verdict, the jury found that plaintiff was injured by falling from one of defendant's cars while attempting to get on; that his fall was caused by the car being jerked forward by a sudden increase of speed after plaintiff had gotten hold of the hand rails and had his foot on the lower step; that the motorman was negligent in so increasing the speed of the car; that a man of ordinary intelligence

Note. — As to negligence of passenger in getting on or off moving street car, see notes to *Jagger v. People's Street R. Co.* 38 L.R.A. 786, and *Fosnes v. Duluth Street R. Co.* 30 L.R.A. (N.S.) 270. For a similar question with respect to railroad trains, see note to *Hovlman v. Kanawha & M. R. Co.* 22 L.R.A. (N.S.) 741.

and prudence in the motorman's position should reasonably have foreseen that suddenly increasing the speed of the car would cause some injury to the plaintiff; that no want of ordinary care on the part of the plaintiff contributed proximately to his injury; and that plaintiff was damaged in the sum of \$569. On such verdict judgment was entered. Defendant appeals.

Messrs. Greene, Fairchild, North, & Parker, for appellant:

No negligence proximately causing plaintiff's injury was shown.

Bukowski v. Milwaukee Electric R. & Light Co. 142 Wis. 517, 125 N. W. 912; **Wickert v. Wisconsin C. R. Co.** 142 Wis. 375, 125 N. W. 943, 20 Ann. Cas. 452; **Bachrach v. Nassau Electric R. Co.** 35 App. Div. 633, 54 N. Y. Supp. 958; **Woodan v. Seattle Electric R. Co.** 5 Wash. 460, 32 Pac. 103; **Cook v. Rice Lake Mill & Power Co.** 146 Wis. 535, 32 L.R.A.(N.S.) 1225, 130 N. W. 935, 132 N. W. 346; **Chicago City R. Co. v. Morse**, 197 Ill. 327, 64 N. E. 304; **Barry v. Union Traction Co.** 194 Pa. 576, 45 Atl. 321; **Nellis, Street Railroad Acci. Law**, 100; **Paulson v. Brooklyn City R. Co.** 13 Misc. 387, 34 N. Y. Supp. 244; **Weber v. New Orleans & C. R. Co.** 104 La. 367, 28 So. 892; 30 Cyc. 1485, 1486.

Plaintiff was guilty of contributory negligence *per se*.

Nellis, Street Railroad Acci. Law, 203; **Baltimore Traction Co. v. State**, 78 Md. 409, 28 Atl. 397; **Fosnes v. Duluth Street R. Co.** 140 Wis. 455, 30 L.R.A.(N.S.) 270, 122 N. W. 1054; **Paulson v. Brooklyn City R. Co.** 13 Misc. 387, 34 N. Y. Supp. 244; **Taylor v. South Covington & C. Street R. Co.** 14 Ky. L. Rep. 355, 20 S. W. 275; 36 Cyc. 1486.

Messrs. Minahan & Minahan, for respondent:

If a motorman, seeing a man about to board the car, suddenly accelerates the speed, the jury may well draw from such facts the inference of negligence.

Otto v. Milwaukee Northern R. Co. 148 Wis. 54, 134 N. W. 157; **Curtis v. Detroit & M. R. Co.** 27 Wis. 158; **Lucas v. Milwaukee & St. P. R. Co.** 33 Wis. 41, 14 Am. Rep. 735; **Woodward v. West Side Street R. Co.** 71 Wis. 625, 38 N. W. 347; **Dehaoy v. Milwaukee Electric R. & Light R. Co.** 110 Wis. 412, 85 N. W. 973; **Meyer v. Milwaukee Electric R. & Light Co.** 116 Wis. 336, 93 N. W. 6; **Masterson v. Cross-town Street R. Co.** 201 N. Y. 499, 94 N. E. 1086; 3 Thomp. Neg. 886.

A strong active man thirty-five years of age, unencumbered with parcels and lightly attired, is not guilty of contributory

negligence, as a matter of law, in boarding a street car moving but 2 to 4 miles per hour.

Citizens' Street R. Co. v. Spahr, 7 Ind. App. 23, 33 N. E. 446; **Fosnes v. Duluth Street R. Co.** 140 Wis. 455, 30 L.R.A.(N.S.) 270, 122 N. W. 1054; **Hemmingway v. Chicago, M. & St. P. R. Co.** 72 Wis. 42, 7 Am. St. Rep. 823, 37 N. W. 804; **Eppendorf v. Brooklyn City & N. R. Co.** 69 N. Y. 195, 25 Am. Rep. 171; **Sahlgard v. St. Paul City R. Co.** 48 Minn. 232, 51 N. W. 111; 3 Thomp. Neg. 886, 887; 6 Cyc. 664.

Barnes, J., delivered the opinion of the court:

The following facts are undisputed: The car was in motion when plaintiff attempted to board it. It had stopped at a usual stopping place, and had just started. The signals which the plaintiff made to the motorman were made before the car started. It was evident to the plaintiff that the motorman either did not see the signals or that he did not intend to pay any attention to them. The attempt to board the car was made when it was being speeded up. The front vestibule door of the car was closed, so that plaintiff was notified to stay out, rather than invited to come in. It was not only closed, but was locked by means of the trapdoor being down, although the plaintiff did not know this fact. Still he had as much right to assume that it was locked as he did to assume that it was unlocked. The bottom of the door came close to the top of the platform. When the door was closed, it was nearly, if not quite, flush with the step leading to the platform. Or, stated in another way, the outer edge of the step was almost on a line drawn perpendicularly from the door to the step. There was a foothold on the step, but plaintiff could retain his position thereon only by hanging to the hand-holds, and he could not open the door, if it were unlocked, except by using one of his hands. Under these facts, we conclude that plaintiff was guilty of contributory negligence as a matter of law. **Champane v. La Crosse City R. Co.** 121 Wis. 554, 99 N. W. 334; **Fosnes v. Duluth Street R. Co.** 140 Wis. 455, 30 L.R.A.(N.S.) 270, 122 N. W. 1054; **Paulson v. Brooklyn City R. Co.** 13 Misc. 387, 34 N. Y. Supp. 244; **Phillips v. Rensselaer & S. R. Co.** 49 N. Y. 177.

Having reached this conclusion, it is unnecessary to consider any other errors that are assigned. There was no evidence of gross negligence to go to the jury. The evidence of ordinary negligence was, to say the least, slight. It may be that the accident would have happened if the vestibule door had been open; but it would not have

happened if the plaintiff had not negligently attempted to board the car. It follows that the court should have directed a verdict for the defendant.

The judgment of the Circuit Court is reversed, and the cause is remanded, with directions to dismiss the complaint.

WASHINGTON SUPREME COURT.
(Dept. No. 1.)

DAVID M. HOFFMAN and Wife
v.

GEORGE L. DICKSON et al.

(65 Wash. 556, 118 Pac. 737.)

Covenant — to warrant and defend — liability for costs.

1. A grantor is not, under his covenant to warrant and defend title against all lawful claims, liable for costs of a successful defense against an attempt by a stranger to establish a lien on the property.

Damages — covenant against encumbrances — set-off of benefits.

2. A grantor is not, in a suit for breach of covenant against encumbrances, because of the enforcement against the property of a lien for a share of the cost of a party wall between the property conveyed and that adjoining it, entitled to set off the value to the property of the easement rights acquired by the grantee in the adjoining property because of the party-wall agreement.

(November 9, 1911.)

Note. — Liability of covenantor in conveyance of real property for expenses of successful defense.

HOFFMAN v. DICKSON seems to be in accord with the weight of opinion that the covenantee who has successfully defended against a claim of adverse title cannot recover from the covenantor the costs and expenses of such defense.

And to the same effect were *Rittmaster v. Richner*, 14 Colo. App. 361, 60 Pac. 189 (covenants of title and to defend against claims), and *Gleason v. Smith*, 41 Vt. 293 (covenant to defend against claims).

And in *Smith v. Parsons*, 33 W. Va. 644, 11 S. E. 68, it was held that the sale of land with a covenant of general warranty did not bind the warrantor to stand good for expenses in the defense of assaults by inferior title, and so recovery for costs expended by the covenantee in a successful defense of a suit by an adverse claimant was denied.

So, in *Thorne v. Clark*, 112 Iowa, 548, 84 Am. St. Rep. 356, 84 N. W. 701 (covenant to defend title), where, in an action to quiet title, a claim of title was interposed by heirs of the widow of the grantor, in whom, so far as the records disclosed, 39 L.R.A. (N.S.)

CROSS APPEALS from a judgment of the Superior Court for Pierce County, entered upon findings in favor of plaintiffs upon one cause of action, and dismissing another cause of action after a trial on the merits before the court, without a jury, in an action brought to recover damages for an alleged breach of a covenant of warranty; plaintiffs appealing from so much of the judgment as sustained the demurrer to and dismissed their first cause of action; defendants appealing from so much as sustained the demurrer to and dismissed their affirmative defense. Affirmed.

The facts are stated in the opinion.

Mr. Theo D. Powell, for plaintiffs:

The Hawkes agreement constituted a lien on the property.

Olson v. Title Trust Co. 58 Wash. 602, 109 Pac. 49; *Re Clifford*, 37 Wash. 463, 107 Am. St. Rep. 819, 79 Pac. 1001; *Seattle v. Northern P. R. Co.* 21 Wash. Dec. 69; *Smith v. Auld*, 31 Kan. 262, 1 Pac. 626.

The covenantee can recover from his covenantor for reasonable counsel fees and expenses incurred in defending the action.

Potwin v. Blasher, 9 Wash. 460, 37 Pac. 710; *Taylor v. Holter*, 1 Mont. 688, 3 Mor. Min. Rep. 322; *Staats v. Ten Eyck*, 3 Caines, 111, 2 Am. Dec. 254; *Dalton v. Bowker*, 8 Nev. 190; *Hoffman v. Bosch*, 18 Nev. 360, 4 Pac. 703; *Bevan v. Muir*, 53 Wash. 59, 32 L.R.A. (N.S.) 588, 101 Pac. 485.

Messrs. Johnston, McMenamin, & Swindells for defendants.

her dower interest vested, it was held that the warrantor was not responsible for the costs and expenses of a successful defense against such claim, as a covenant of warranty does not run against appearances, but only against substantial defects.

And in *Ex parte Lynch*, 25 S. C. 193 (covenant to defend title), where, after a mortgagor had, upon advice of counsel, determined not to defend against claims of a third person, a mortgagee, with consent of court, defended against such claims, and succeeded in defeating them, it was held that the fees paid to the attorney by the mortgagee for defending the title could not be recovered from the mortgagor, and this though a benefit had accrued to the mortgagor.

But where the vendor gave to the vendee a bond conditioned to indemnify the vendee against any claim or encumbrance affecting the premises conveyed, and to defend such estate "against any person claiming any estate or interest in law or equity to the same or any part thereof, and to pay all costs, charges, or expenses necessary to defend the said premises against any such claims," it was held that the amount paid for counsel fees and other necessary expenses of defending an unsuccessful eject-

Parker, J., delivered the opinion of the court:

The plaintiffs seek recovery of damages from the defendants for alleged breach of a covenant of warranty contained in a deed of conveyance from the defendants to the plaintiffs for lots 21 and 22, in block 1104, of New Tacoma, Washington territory, now a part of the city of Tacoma. The grounds upon which relief is sought are set forth in the plaintiffs' complaint in two separate causes of action. The first relates to the title to lot 21, and the second relates to the title to lot 22. The questions here presented arise upon the rulings of the trial court in sustaining the defendants' demurrer to the plaintiffs' first cause of action, and the sustaining of the plaintiffs' demurrer to the defendants' affirmative defense to the plaintiffs' second cause of action. The parties stood upon these pleadings and declined to plead further. The trial court thereupon dismissed the plaintiffs' first cause of action, and also dismissed the defendants' affirmative defense, and proceeded to the trial of the plaintiffs' second cause of action upon issues raised only by the denials made by the defendants. Findings and judgment followed in favor of plaintiffs upon their second cause of action. The plaintiffs have appealed from the rulings sustaining the demurrer to and dismissing their first cause of action. The defendants have appealed from the rulings sustaining the demurrer to and dismissing their affirmative defense. We will notice these appeals in this order.

The facts stated in the plaintiffs' first

cause of action which are necessary for us to notice are, in substance, as follows: In April, 1906, the plaintiffs commenced an action in the superior court for Pierce county against the defendants, for specific performance of a contract, wherein they agreed to convey to the plaintiffs lots 21 and 22, in consideration of \$75,000. In that action the plaintiffs prayed, among other things, that a just deduction from the purchase price be made on account of an encumbrance against lot 21, which they alleged was created by a certain party-wall agreement, and one of the questions at issue in that action was whether or not that agreement constituted a lien upon lot 21 to secure the payment of one half the cost of the party wall constructed in pursuance thereof upon the line between lots 21 and 20, to the north thereof. The defendants appeared in that action, and a trial thereof resulted in findings and judgment, determining that that agreement constituted a lien upon lot 21, as contended by the plaintiffs, which judgment, however, denied the deduction prayed for, though it decreed specific conveyance of the property. Thereafter both the plaintiffs and the defendants appealed from that judgment to this court (47 Wash. 431, 125 Am. St. Rep. 907, 92 Pac. 272, 93 Pac. 523, 15 Ann. Cas. 173), where it was determined that the party-wall agreement constituted a lien upon lot 21 for one half the cost of the wall, but that said encumbrance could not then be removed, and affirmed the judgment of the superior court. By that judgment, the defendants were required to specifically per-

form could be recovered (Robinson v. Bakewell, 25 Pa. 424); the court pointing out that the condition in the bond differed to a marked degree from the covenant of warranty in the deed.

In Meservey v. Snell, 94 Iowa, 222, 58 Am. St. Rep. 391, 62 N. W. 767, the facts were that land, title to which was derived from the United States, was conveyed to another by deed containing a covenant to warrant and defend said premises against the lawful claims of all persons whomsoever; such grantee thereafter, by warranty deed, conveyed the same land to another; subsequently the entry acquired by the first grantor was illegally set aside and the muniments of title were issued to a third person by the United States Land Office, and such outstanding title was purchased by such second grantee to prevent ejectment, who then commenced an action against his grantor, to recover damages for breach of warranty to him, which action such grantor successfully defended by establishing that the first grantor's entry had been wrongfully canceled; and it was held that such first grantee could recover the costs and expenses of defending such action. The court said: "We are of

the opinion that they should be allowed in this case. They were absolutely necessary to protect the real against the apparent title. They were made necessary by a defect in the legal title which the defendant had warranted. Unless they are recoverable, the warranty of the grantee is of no practical value in such a case as this." And the court further said that this case is peculiar and distinguishable from most others by the fact that the general government, the source from which the title emanated, with power in the first instance to determine its grantees, had apparently set aside all acts and proceedings by which the first title was created, and had issued muniments of title to another grantee. Though that may be true, it seems to be rather a harsh rule to require an original grantor to pay the costs of defending against an illegal claim, even though resulting from the acts of the government, instead of a private individual.

This note is confined strictly to actions to recover upon a covenant contained in conveyances of land; and so, cases involving a breach of covenant contained in sales of personalty have been excluded.

J. H. B.

form their agreement, and to convey the property to the plaintiffs by deed containing general covenants of warranty. Thereafter, in January, 1903, the defendants, upon payment of the consideration of \$75,000, conveyed to the plaintiffs the property, covenanting as follows: "That they are the owners in fee simple of said premises, and that they are free from all encumbrances, and that they will warrant and defend the title thereto against all lawful claims whatsoever." The party wall having been constructed some time previous to the making of the agreement to convey and the conveyance made in pursuance thereof, thereafter, in October, 1908, the one half of the cost of the wall secured to be paid to one Hawkes, the owner of lot 20, and the party to said agreement who constructed the wall, became due and payable under the terms of that agreement. Thereafter, in October, 1908, Hawkes commenced, in the superior court for Pierce county, against the plaintiffs, a suit to foreclose his lien on lot 21 for one half the cost of the wall. Thereupon the plaintiffs notified the defendants of the pendency of that action, and requested them to defend the same, which defendants neglected and refused to do. The plaintiffs employed counsel and defended the action, and upon trial in the superior court judgment of foreclosure was rendered, subjecting lot 21 and the plaintiffs' interest therein to the lien created by the party-wall agreement for one half the cost of the wall, amounting to \$1,630.66, and interest, and sale thereof was decreed accordingly. The plaintiffs thereupon appealed from that judgment to this court (56 Wash. 120, 24 L.R.A. (N.S.) 1038, 105 Pac. 156), and upon hearing thereof this court in all respects reversed that judgment. These plaintiffs necessarily paid out in the defense of that action in the superior court, and in prosecuting the appeal therefrom in this court, for attorneys' fees and other necessary expenses, the sum of \$524.99, for which they pray judgment against the defendants.

No claim is made that the plaintiffs paid out any sum to extinguish the lien. Indeed, the facts pleaded show that the litigation in which they incurred this expense finally resulted in their favor, and adjudicated their title to be superior to and free from the lien of the party-wall agreement. Whether their title was so freed from this lien because of want of notice thereof to them or some grantee under mesne conveyance from Hawkes, or was so freed from the lien because of discharge thereof before the commencement of this action by someone other than the plaintiffs, does not appear by the facts stated in their first cause of action. This, however, we think is not material, 29 L.R.A. (N.S.)

since the application of some well-settled principles of law will show that it is enough to defeat the plaintiffs' recovery in this case to know that their title was superior to and not encumbered by the lien of the party-wall agreement at the time of the commencement of this action, and that they incurred no expense in removing such lien. The facts alleged clearly show that the plaintiffs are here attempting to recover upon the covenant of warranty, alleging damages consisting only of expenses incurred in successfully defending an unlawful claim made against their title to lot 21. Counsel for the plaintiffs has called our attention to several decisions in support of the general rule that expenses incurred by a grantee under covenants of warranty, in the defense of an action assailing his title, are an element of damage recoverable against the grantor, as well as damage resulting from loss or impairment of title. Such was the holding of this court in *Potwin v. Blasher*, 9 Wash. 460, 37 Pac. 710. That decision, however, as well as all others relied upon by counsel for the plaintiffs, involved encumbrances or titles superior to that of the grantor, which actually impaired the title of the grantee. We have seen that the defendants only agreed to warrant and defend the title "against all lawful claims." We have also seen that the claim of lien made against the plaintiffs in the suit in which they incurred these expenses was not a lawful claim against the plaintiffs' title. Under such circumstances, the rule seems to be well settled that no recovery can be had against the grantor upon his covenant of warranty. Indeed, it seems inconceivable that the unsuccessful assertion of an unlawful claim should constitute a breach of a covenant of warranty to defend against lawful claims. We find, in the case of *Smith v. Parsons*, 33 W. Va. 644, 11 S. E. 68, remarks of the court peculiarly applicable to this state of facts, as follows: "It is true that Smith, in his sale to Parsons, stipulated for a conveyance with general warranty, but the ejectionment resulted in favor of the title sold by Smith, and showed that it was the paramount title. A covenant of general warranty is not broken until there is an eviction under a paramount title, or what is equivalent. *Rex v. Creel*, 22 W. Va. 373; 2 Minor, Inst. 643; 2 Lomax, Dig. 355; 2 Rob. New Pr. 87; 2 Sutherland, Damages, 279; Rawle, Covenants, §§ 127, 131; Yancey v. Lewis, 4 Hen. & M. 390. Why, then, should Smith pay costs expended in defending this action? He sold a good and valid title as shown by the result of the action of ejectionment, and did no wrong in so doing, and by no reasonable view can it be claimed that he was to stand good for expenses in

defense of assaults by inferior title. He did not warrant that no one should ever sue Parsons for the land, or in any manner bind himself to refund expenses incurred in defending the land against anyone who might think he had a valid claim to the land, and bring a suit for it. Had Parsons lost the land, then Smith, upon his covenant, would have been bound for the land lost, and costs expended in an unsuccessful defense of the title. *Threlkeld v. Fitzhugh*, 2 Leigh, 451; 2 *Sutherland, Damages*, 302; *Rawle, Covenants*, § 197. But the covenantee is clearly not entitled to demand of the covenantor expenses in defending a suit which sustains the title as valid, for the covenant does not bind for any outlays necessitated by the simple existence or assertion of an adverse claim. The covenant does not protect against any but lawful claims, which negate the title that the deed purports to convey." See also *Norton v. Schmucker*, 83 Tex. 212, 18 S. W. 720; *West v. Masson*, 67 Cal. 169, 7 Pac. 452; *Rittmaster v. Richner*, 14 Colo. App. 361, 60 Pac. 189. No decisions have come to our attention holding contrary to this view, and we think there are none such.

Counsel for appellants insist that the question of the party-wall agreement being a lien upon lot 21 was settled adversely to the defendants in the specific performance suit, and thereby became *res judicata*, estopping the defendants to now assert to the contrary. Conceding, for argument's sake, that the facts pleaded in the plaintiffs' first cause of action show an established lien upon lot 21 by the judgment in the specific performance suit, as against the defendants, it by no means follows that such lien existed or continued to exist as against the plaintiffs, or that the title they acquired from the defendants was not freed from the lien before the commencement of this action. That was the real question at issue, and determined finally in the plaintiffs' favor, in the suit in which they incurred the expense which they now seek to recover from the defendants upon their covenant of warranty. The question here concerning us is not the bald question of what kind of title the defendants possessed, or as to what extent it was burdened with liens. But the question now is, What kind of title did the plaintiffs acquire? Was it a good title? Was it free from this lien? It is easy to see how lot 21 might be subject to the lien as against the defendants or others holding mesne conveyances from Hawkes, who was the owner entering into the party-wall agreement, and still be free from any such lien that could in the least impair the title acquired by the plaintiffs. And, since it has been finally adjudicated that this lien did not exist as

against the plaintiffs' title, and did not in the least impair the plaintiffs' title, it becomes quite immaterial as to what extent the title of the defendants and prior owners may have been burdened by such lien. We are of the opinion that the facts stated in the plaintiffs' first cause of action do not entitle them to any relief as against the defendants. It follows that the sustaining of the demurrer to that cause of action was not error, and, since they elected to stand thereon and not plead further, the order of dismissal was proper. That order is therefore affirmed.

The facts alleged in the plaintiffs' second cause of action need only be noticed sufficiently to render easily understood the defendants' affirmative defense thereto, since it is only the demurrer to that defense which is here involved. The allegations of this cause of action are of the same nature as the first cause of action, except they relate to the covenant of warranty of title to lot 22, contained in the same conveyance; to a party-wall agreement of the same nature, made by a prior owner of lot 22 with the owner of lot 23, adjoining upon the south, and a wall constructed upon the line of the lots in pursuance thereof; and to a judgment of foreclosure, by which the plaintiffs were compelled to pay the lien upon lot 22 created by that agreement for one half the cost of the wall. The following allegations of the defendants' affirmative defense will sufficiently show its nature: "That the said party walls were so constructed that they could be used as the side walls of a building to be erected upon the said lots, and plaintiffs purchased said lots with the intention of building, and did build, on said lots, a four-story brick building, and made use of the party wall situated upon lot twenty-one (21) to the full height of the four stories thereof, without constructing any additional wall or support in connection therewith, and made use of the wall standing in part upon lot twenty-two (22) the full height of three stories, without making any additional wall or support thereto, and erected on the top thereof a fourth story at an expense to them of \$160. That these party walls, as they stood at the time of the said purchase and conveyance as aforesaid, were erections of a permanent nature, having, by the terms of the agreements under which they were constructed, mutual easements of support obligatory upon the owners of the adjoining lots on which they stood, and were of such a nature and character that they could not be removed from said lots by the defendants herein; said easements running with the land. That the plaintiffs, by the construction of the said four-story building and their use of the said walls in which to in-

sert the joists of said building, voluntarily accepted the benefits of, and bound themselves to the burdens imposed by, the dominant and servient easements created by the said party-wall agreements, and the said benefits and burdens so imposed were mutually beneficial to the respective owners of said lands; the burdens being offset by the benefits conferred. That, should it be found by this court that the plaintiffs have paid the amount of the judgment mentioned and referred to in the plaintiffs' alleged second cause of action, and the costs connected therewith, and should the court further find that the plaintiffs have paid the amount of the judgment as set forth in paragraph 19 of their alleged cause of action, and the amount of attorney and counsel fees and other charges and expenses, as set forth in paragraph 20, and that the same constitute a reasonable charge against these answering defendants, defendants say that the existence of the said party walls and the existence of the said party-wall agreements, taken as a whole, and the rights accruing to plaintiffs thereunder, conferred upon the plaintiffs benefits greatly in excess of the payment which they have been compelled to make by reason of the allegations contained in their amended complaint herein, and that, notwithstanding the said payments so made by them (if the court should so find), there has not been any depreciation in value of the lands so purchased by the plaintiffs by reason of the said encumbrance, or by reason of the said alleged breach of covenant. That, by the existence of the said party walls and their right to make use of the same in the construction of their said four-story building upon the said lots in question, of the size and character required by the building ordinances of the city of Tacoma in force at the time of the construction of said building, and the other benefits conferred by the dominant servitudes vested in them by the said party-wall agreements, the plaintiffs were enabled to save, and did save, a large amount of money, greatly in excess of the amount of money which they allege they had paid out by reason of the things set forth in their amended complaint herein, and which may be more specifically set forth as follows, to wit:

"This is the substance of the defense which the defendants were precluded from making by the sustaining of the plaintiffs' demurrer thereto.

This branch of the controversy has to do only with the question of the measure of damages. The contention of counsel for the defendants is that they are entitled to have offset against that part of plaintiffs' damage consisting of the payment they were compelled to make to free lot 22 from the lien

the benefits resulting to the plaintiffs by reason of the easement acquired by them in lot 23 for the support of the wall. This contention is rested upon the theory that when the breach of a covenant of warranty consists of an encumbrance in the nature of an easement, which impairs the grantee's title to the premises, and cannot be removed by him as a matter of right by the payment of money, his damages will be measured by the diminished value of the premises thereby occasioned; and that, if the easement be of such nature that the owner of the premises acquired some benefit therefrom as owner of the premises, although it may also impair his title, then that the value of such benefit, whatever it may be, is to be offset against the diminished value of the premises, resulting from the existence of the easement encumbrance, considered only as impairing his title to the premises. It is argued that the party wall constructed as here shown results in mutual concurrent easements in favor of the owner of each lot; that while the plaintiffs' lot is encumbered by this easement, there is indissolubly connected with such encumbrance a like easement upon the other lot for the support of the wall, resulting in a benefit which must be considered and allowed to the extent of its actual value as a set-off in measuring the damage resulting to the plaintiffs' lot by reason of the easement encumbrance upon it. It is not argued that the court can say, as a matter of law, that one equally balances the other, so as to result in nominal damages only to the plaintiffs; but that each shall be valued independently of the other, and the plaintiffs' damages diminished accordingly. In support of this view, our attention is directed to the following authorities: 8 Am. & Eng. Enc. Law, 2d ed. 179; *Wetherbee v. Bennett*, 2 Allen, 428; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Richmond v. Ames*, 164 Mass. 467, 41 N. E. 671; *Mitchell v. Stanley*, 44 Conn. 312; *Hubbard v. Norton*, 10 Conn. 422. None of these cited cases involved mutual easements for support of a party wall; nor do they involve a lien arising out of a party-wall agreement, securing the payment of part of the cost of the wall. While their logic may lend support to the theory of counsel for defendants, if we should view the measure of damages entirely independent of the lien for the payment of one half the costs of the wall, we do not think it follows that the lien is so connected with the easements that it cannot be considered apart from the mutual burdens and benefits flowing from each of the owners to the other solely by reason of the mutual easements.

The only authority relied upon by counsel for the plaintiffs as being directly in point

is *Mackey v. Harmon*, 34 Minn. 168, 24 N. W. 702. It may be conceded that that decision lends support to counsel's contention. The party-wall agreement there involved seems to have been substantially the same as the one before us, except that one half the cost of the wall was not secured by a lien upon the lot, as in this case; but the use of the wall could be had only upon payment of one half the cost thereof. In that case the trial court held that the easements being mutually beneficial and compensating to the respective owners, no such encumbrance was thereby created as would constitute a breach of the covenant against encumbrance. Upon appeal, the supreme court held that the easement upon the plaintiffs' lot did constitute an encumbrance amounting to a breach of the covenant, and granted a new trial for the purpose of ascertaining the plaintiffs' damages. Touching the measure of damages, the court said only the following: "This brings us to the question of damages. The encumbrance in this case, that is to say, the servitude to which plaintiffs' land is subjected, has not been removed, and it is not in the power of the plaintiffs to force its removal, as it would be if the encumbrance were a matured mortgage. Only by the consent of Hurlburt or his successors in interest can the servitude be purchased in, or in any way discharged. This case is, then, one in which the necessary measure of damages is compensation for the depreciation in value of plaintiffs' land, occasioned by the encumbrance. *Fagan v. Cadmus*, 46 N. J. L. 441. The agreement between Hurlburt and Harmon is to be read as a whole. So read, while it confers upon Hurlburt's land an easement in plaintiffs' land, it in the same breath confers upon plaintiffs' land a like and equal easement in Hurlburt's land. As respects actual damages, the plaintiffs are therefore entitled to such sum as will compensate them for the depreciation in the value of their land, occasioned by the agreement as a whole. The question is, When Harmon executed the deed to Mackey, how much less was plaintiffs' lot worth with the mutual easements or servitudes created by the agreement as a whole, than it would have been without them? The plaintiffs are, of course, entitled to nominal damages, at least, for the formal breach of the covenant against encumbrances."

Limiting these observations of that learned court as applicable only to the mutual easements in the respective lots for the support of the wall, apart from the obligation to pay one half the cost thereof from one lot owner to the other, we would have but little trouble in adopting this view of the law. But when we come to consider the obligation of one lot owner to pay to the other 39 L.R.A. (N.S.)

one half of the cost of the wall upon making use thereof, whether such obligation be secured by the right to withhold the use of the wall until paid for, as in that case, or by a lien upon the lot, as in this case, we are constrained to entertain a different view. We cannot escape the conclusion that such an obligation becomes an encumbrance upon the lot of such a nature that it is to be considered entirely apart from the mutual easement rights of the respective lot owner; that is, it is in effect a separate encumbrance, to be discharged only by the payment of money. We think this is particularly true in this case, since the easement rights of the parties did not depend upon the payment of one half the cost of the wall; such payment being secured by a lien upon the lot, which was actually foreclosed as such. We are of the opinion that the defendants were not entitled to have the value of the party-wall easement rights acquired by the plaintiffs in lot 23 offset against the amount they were compelled to pay in the removal of this lien encumbrance, though they may have been entitled to have the value of such easement rights offset against the damage caused by the easement encumbrance upon their lot, which breached the defendants' covenant of warranty. It follows that the demurrer to the defendants' affirmative defense was properly sustained by the trial court. Other matters discussed by counsel need not be noticed by us, since they would in no event change the result.

The judgment is affirmed. Neither party will recover costs in this court.

Dunbar, Ch. J., and Mount, Fullerton, and Gose, JJ., concur.

Petition for rehearing denied.

OKLAHOMA SUPREME COURT.

PERRY WATER, LIGHT, & ICE COMPANY, Plff. in Err.,

v.

CITY OF PERRY.

(29 Okla. 593, 120 Pac. 582.)

Municipal corporation — indebtedness — limitation.

1. Section 538 of the Statutes of Okla.

Headnotes by WILLIAMS, J.

Note. — Liability of municipality or other public corporation on implied contract.

This note is supplemental to a note in 27 L.R.A. (N.S.) 1117.

As to the liability of a municipality on

oma Territory of 1893 (Comp. Laws 1909, § 647) limits the power of a city council to contract for personalty at one purchase in excess of the sum of \$500.

(a) A contract for one purchase of items of personalty aggregating a sum in excess of \$500, without first being authorized by a majority vote of the qualified electors resident of said city, is void.

Appeal — changing position — right.

2. Where the aggregate value of such personalty received and accepted by the officers of a municipality under one transaction or purchase, or received with the consent of the owner of such personalty, and applied to its use, exceeds the sum of \$500, the authority not being first had by the approval of a majority of the electors resident of such municipality, no liability therefor is created against such municipality.

(a) The case having been tried in the lower court upon the theory that the ques-

tion as to the want of power of the municipality to make such contract was properly raised, plaintiff in error will not be permitted in this court to procure a reversal on the ground that it was not, when there is no contention that such authority by an approval of a majority of the electors was first had.

(November 14, 1911.)

ERROR to the District Court for Noble County to review a judgment in defendant's favor in an action brought to recover the contract price of certain merchandise. Affirmed.

The facts are stated in the opinion.

Messrs. Harris & Nowlin, for plaintiff in error:

Plaintiff was entitled to show and recover upon a *quantum meruit*, regardless

an implied contract for labor performed or services accepted by it, see note in 27 L.R.A.(N.S.) 1125, and also note appended to *State ex rel. Morris v. Clark*, ante, 43.

It is well settled that a municipality may be liable upon an implied contract, as where services are performed or material furnished at the request of proper officers, although no express contract was ever entered into, the subject-matter of the contract being within the authority of such officers (*Stivers v. Cherryvale*, 86 Kan. 270, 120 Pac. 361), and a county may be liable on an implied contract, although no contract can be implied against it unless it is one which the county is by law empowered to make; hence, general assumpsit lies against a county within the range of its contractual powers, just as it does against an individual. *Montgomery County v. Pruett*, — Ala. —, 57 So. 823. And where a board of trustees of a city have the power to provide for such current expenses as those for coal to be used in operation of waterworks owned and operated by a municipality, coal furnished under a contract with the trustees may be recovered for although no provision has been made by the council for the payment thereof (*Martin-Strelau Co. v. Dubuque*, 149 Iowa, 1, 127 N. W. 1013); and this is true although there were irregularities in the making of the contract (*Laird Norton Yards v. Rochester*, — Minn. —, — L.R.A.(N.S.) —, 134 N. W. 644). So, a city may be liable upon an implied contract for property obtained under a contract void because not entered into as required by statute, if the city obtains and uses the property, and receives the avails and collects the value of it from property owners by means of an assessment. *Mixer v. Adam*, 66 Misc. 238, 121 N. Y. Supp. 31. And the value of material received under a contract with the officers of a school district, irregular merely because the officers, at the time of the execution of the contract, were not in session as a board, may nevertheless be recovered, al-

though the contract itself is not enforceable. *Watkins v. School Dist. No. 104*, 85 Kan. 760, 118 Pac. 1069. But in *North v. Huron County*, 30 Ohio C. C. 145, 10 Ohio C. C. N. S. 462, it is held that no implied contract arises for the value of labor and material furnished in piking a highway under a contract with county commissioners, invalid because no record has been made of the commissioners' meeting, and no auditors' certificate filed or recorded, as required by law.

The late cases are conflicting as to whether a city may be held upon an implied contract for the benefits received under a contract invalid for failure to comply with statutory requirements designed to secure competition in bidding. It has been held that where a city has general power to repair its streets, it is liable on an implied contract for the hire of an asphalt plant used in making such repairs, although in making the contract for hiring the plant the municipality did not comply strictly with the provisions of the city charter by advertising for bids and contracting for the work with the lowest bidder, it being impossible for the city, at the time the repairs were made, strictly to comply in these respects with the requirements of the statute. *Nebraska Bitulithic Co. v. Omaha*, 84 Neb. 375, 121 N. W. 443: And see also *Des Moines v. Welsbach Street Lighting Co.* 110 C. C. A. 540, 188 Fed. 906, holding that a contract for street lighting which is within the scope of the power of the city to make, but is irregular because entered into in an irregular manner (without advertising for bids, as required by statute), when fully executed by one party, and the city has received and accepted the full benefit of the contract, and cannot restore what it has received, is enforceable, since the city is estopped to assert the irregular execution, and otherwise the ends of justice would be defeated.

But in most jurisdictions where the delegation of power to a municipality or other

of a failure to show an express contract binding upon the city.

El Reno Electric Light & Teleph. Co. v. Jennison, 5 Okla. 773, 50 Pac. 144; Remy v. Olds, 88 Cal. 537, 26 Pac. 355; Central Bitulithic Paving Co. v. Mt. Clemens, 143 Mich. 259, 106 N. W. 888; Lincoln Land Co. v. Grant, 57 Neb. 70, 77 N. W. 349.

Defendant, having admitted the receipt of the property for the value of which plaintiff sued to recover, and having pleaded payment for such property by the performance of an alleged contract concerning same, admitted plaintiff's cause of action, and placed the burden of proof upon itself.

Mohr v. Barnes, 4 Colo. 350; Matosky v. Frosh, 9 Tex. 610; Doolittle v. Gavagan, 74 Mich. 11, 41 N. W. 846; Liesemer v. Burg, 106 Mich. 124, 63 N. W. 999.

Plaintiff is entitled to recover from the defendant upon a *quantum meruit* the value of plaintiff's property taken and appropriated by defendant to its own use and benefit.

Allsman v. Oklahoma City, 21 Okla. 142, 16 L.R.A.(N.S.) 511, 95 Pac. 468, 17 Ann. Cas. 184; Lawson v. Lawson, 16 Gratt. 230, 80 Am. Dec. 702; San Francisco Gas Co. v. San Francisco, 9 Cal. 453; Lime Rock Bank v. Plimpton, 17 Pick. 159, 28 Am. Dec. 286; Argenti v. San Francisco, 16 Cal. 273; Lincoln Land Co. v. Grant, 57 Neb. 70, 77 N. W. 349; Central Bitulithic Paving Co. v. Mt. Clemens, 143 Mich. 259, 106 N. W. 888; Higgins v. San Diego, 118 Cal. 524, 45 Pac. 824, 50 Pac. 670.

public corporation to contract contains provisions as to the manner of the exercise of this power, which especially are designed to secure competition in bidding, any contract must follow the essential requirements of the statute, otherwise no liability on the contract exists against the municipality, nor can it be held on an implied contract for benefits received thereunder. Thus, a contractor, after having entered into a contract in writing with the city, invalid because failing to comply with charter provisions designed to secure competition, after completing the work described in the contract (paving certain streets), and after the acceptance of such work by the city, cannot recover upon an implied assumption the reasonable value of the work done and materials placed in the street. Cawker v. Central Bitulithic Paving Co. 140 Wis. 25, 121 N. W. 888.

Or where by statute certain contracts of municipalities are forbidden, a contract entered into to evade these provisions of the statute, although for the purpose of lighting the streets of the city, creates against the city no express or implied obligation to pay for any benefits received thereunder. Edison Electric Co. v. Pasadena, 102 C. C. A. 401, 178 Fed. 425.
39 L.R.A.(N.S.)

Mr. L. L. Cowley also for plaintiff in error.

Mr. A. N. Whiteside for defendant in error.

Williams, J., delivered the opinion of the court:

The plaintiff in error, as plaintiff, instituted its action in the lower court, against the defendant in error, as defendant, declaring in its petition in part as follows: "That on and prior to the 1st day of July, 1903, the said defendant was the owner of a waterworks system in said city. That on the said 1st day of July, 1903, for the purpose of conducting and supplying said waterworks system with coal for fuel, oil, etc., the said city purchased of this plaintiff a large amount of merchandise. That at said time the said city was the owner and operator of a light system for the purpose of furnishing light for the use of said city and its inhabitants. That on the said 1st day of July, 1903, the said city purchased of this plaintiff a large amount of merchandise, such as carbons, lamps, coal, oil, repairs, and supplies. That at the time of the purchase of said articles it was agreed between plaintiff and defendant that the same should be listed, and a complete inventory made thereof, and the said goods inspected and delivered to said city, all of which was done by the agents of plaintiff and defendant. That a true and exact account and inventory of all the said property and merchandise so purchased by defendant

So, where the city is authorized to contract only in writing, stating the consideration, and contracts otherwise entered into are declared void, a city is not liable for the value of goods received as extras to a written contract, although pursuant to an oral agreement, or without any contract. W. W. Cook & Son v. Cameron, 144 Mo. App. 137, 128 S. W. 269.

And a claim against a county is invalid where based upon the right to recover for material furnished under a contract invalid because in amount in excess of the power of the county to contract. Garrison v. Perkins, 137 Ga. 744, 74 S. E. 541. Neither may money be recovered from the county where borrowed to pay for material thus purchased. Ibid.

Neither is there resting upon a municipality any implied obligation to pay for benefits received under a contract with some officer of the municipality not authorized to make the contract in question. Bartlett v. Lowell, 201 Mass. 151, 87 N. E. 195 (gravel furnished to repair streets); Floyd County v. Owego Bridge Co. 143 Ky. 693, 137 S. W. 237 (construction of bridges for county).

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from plaintiff, and delivered in accordance with the agreement and arrangement between plaintiff and defendant, showing the description of each item and the price which the said defendant was to pay therefor, and which was the reasonable and actual value thereof at said time and place, is hereto attached, marked 'Exhibit A,' and made a part hereof. Plaintiff further says that said contract, agreement, and arrangement was verbal, and not in writing, but that the same was fully executed, and the property mentioned and described in said Exhibit A was then and there delivered by plaintiff to defendant, and the said defendant has used and consumed, and ever since retained and appropriated, said property to its exclusive use and benefit. Plaintiff further says that said defendant has often been requested to pay for said property, but that said payment has not been made, and defendant has positively refused and neglected to pay for the same, after a proper and formal bill and demands had been presented to said city and the officers thereof. That no part of said claim or demand has been paid. Wherefore plaintiff prays judgment against said defendant for the amount of said indebtedness in the sum of \$206.21, with interest thereon from the 1st day of July, 1903, at the rate of 7 per cent per annum, for the costs of this action, and all other proper relief." On November 28, 1906, the defendant demurred to the petition, which was overruled, and exceptions saved. On December 11, 1906, the defendant answered by general denial, and, further, by averring that "all articles received of plaintiff and mentioned in plaintiff's petition were purchased by said city from said plaintiff under and by virtue of a written contract executed by plaintiff and defendant, bearing date of June 27, 1903," and that same had been paid for. On September 6, 1908, plaintiff filed its reply, denying each and every allegation of said answer, except admitting the execution of the written contract, but averred "that said contract was for the purchase and sale of the electric light, ice, and power plant therein referred to, and with the exceptions therein specified, and was not intended to include or cover the property and items set forth in the plaintiff's petition, such as supplies, coal, etc., not in use, or never having been in use, in connection with said light, water, and power plant, and at the time of executing and entering into the said written contract this plaintiff fully understood and believed that said written contract had nothing to do with the articles," etc. On October 12, 1908, the plaintiff filed a motion for judgment on the pleadings, which was denied. A jury be-

ing waived, said cause was tried to the court. The defendant objected to the introduction of any evidence under the petition, for the reason that the same failed to state facts sufficient to constitute a cause of action, which was overruled and exceptions saved. After the evidence was introduced on the part of the plaintiff, the defendant interposed a demurrer to the same, in part, *in hæc verba*: 'The city further demurs, for the reason that the evidence of the plaintiff shows that the goods purchased were personal property, and the contract price was more than \$500, and fails to show that it was ever submitted to a vote of the people of the city of Perry.' The record then further recites:

Thereupon counsel for the respective parties argued the said demurrer to the court.

Mr. Harris: The plaintiff now, pending the consideration of the demurrer to the evidence, offers to remit all with the exception of \$500 of the amount claimed, and demands judgment for \$500 and costs.

Mr. Johnson: That don't help him as a matter of law.

Mr. Harris: With interest from the date of the taking of the property.

Mr. Whiteside: If any of it is void, it is all void.

The court: Yes; I think so.

Thereupon counsel for the respective parties continued to argue the said demurrer.

The court: Demurrer sustained.

Mr. Harris: Exception.

The court: Do you desire to stand on the demurrer, Judge Harris, and take time?

Mr. Harris: I think I better file a motion for a new trial. I will prepare it right away.

The undisputed evidence in this record on the part of the plaintiff in error shows that all of this property was received under a verbal contract by one purchase, and that not only the value, but also the agreed price, exceeded \$500.

Section 2 (538), art. 1, chap. 14, Statutes of Oklahoma Territory 1893, provides: "All cities governed by the provisions of this act shall be bodies corporate and politic, and shall have power to sue and be sued, to purchase and hold real and personal property for the use of the city, to sell and convey any real or personal property owned by the city, and make such order respecting the same as may be conducive to the best interests of the city, to make all contracts and do all other acts in relation to the property and affairs of the city, necessary to the good government of the city, and to the exercise of its corporate and administrative powers, to have and use a corporate seal, and

alter the same at pleasure, and to execute such other and further powers as are, or may be, conferred by law; Provided, however, that no real estate shall be bought or sold, nor shall any personal property, where the value of the personal property, contracted for at one purchase, exceeds \$500, until the purchase or sale be authorized by a majority vote of the electors, resident of the city or village." This section was construed by the supreme court of Oklahoma territory in *Fire Extinguisher Mfg. Co. v. Perry*, 8 Okla. 429, 58 Pac. 635, wherein it was held that it limited the purchase of fire apparatus to \$500; that a contract made for the purchase of apparatus in excess of \$500 is void, and no recovery can be had thereon.

It is insisted by counsel for the plaintiff in error that the question of such contract being void by virtue of said section, requiring all purchases of personal property in excess of \$500 to be approved first by the electors of such municipality, was not raised in the lower court, but from the foregoing excerpt it would seem that the court below, as well as the parties thereto, treated this question as properly raised. Such being the case, the plaintiff in error will not be permitted to change front in this court, and insist that such question was neither properly raised nor properly before the trial court. *Harris v. First Nat. Bank*, 21 Okla. 189, 95 Pac. 781; *Queen Ins. Co. v. Cotney*, 25 Okla. 125, 105 Pac. 651; *Wattenbarger v. Hall*, 26 Okla. 815, 110 Pac. 911; *Gann v. Ball*, 26 Okla. 26, 110 Pac. 1067; *St. Louis & S. F. R. Co. v. Key*, 28 Okla. 769, 115 Pac. 875.

Counsel for plaintiff in error in their brief say: "Counsel doubtless had in mind, at the time of interposing this demurrer, the case of *Fire Extinguisher Mfg. Co. v. Perry*, supra, and, if the plaintiff's claim in this case was founded and proven solely upon the theory that the city was liable upon an express contract for the contract price of the property purchased, the statutory limitation upon the authority of the council to contract for personal property in excess of \$500 without first submitting the question to a vote of the people of the city might be a material question in this case." Counsel thus assume, at least, if not concede, that the question was properly raised in the lower court. He pleads that the property was delivered to the city under a verbal contract. The evidence that he offers to sustain his petition tends to sustain that allegation. He seeks, however, in the face of his petition, to waive the express verbal contract and recover under *quantum meruit*, which is an action in assumpsit, or upon an implied contract.

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Not only in the record, but also in the briefs, it appears to be conceded that the question as to the purchase of said personalty was not submitted to the electors of said municipality for their approval. Such being the case, if such contract for said reason was void, and no recovery could be had, either on said contract or in *quantum meruit*, which is an action in assumpsit, this court would do a useless thing by reversing this case and remanding it for another trial. For the defendant, after the cause was remanded, would certainly be permitted to amend its pleadings and set up that said property was delivered either under an express or implied verbal contract, in violation of § 538, supra, and that therefore no recovery could be had in *quantum meruit*. Under such conceded facts, this court should pass on the question on the theory that it was properly raised before the trial court. *Kuchler v. Weaver*, 23 Okla. 420, 100 Pac. 915, 18 Ann. Cas. 462. The only objection made as to the want of authority not being pleaded in the answer was as to the mayor and certain aldermen not being authorized by the council to make the contract of purchase.

In *Fire Extinguisher Mfg. Co. v. Perry*, 8 Okla. 429, 58 Pac. 635, paragraph 3 of the syllabus is as follows: "Where a city council purchases fire apparatus at one purchase, and agrees to pay the sum of \$1,100 therefor, no election having been held to authorize such purchase, the contract is void, and the city council cannot validate such illegal contract by splitting the sum into three parts of less than \$500 each, and executing warrants therefor, and the payment of warrants so executed may be defeated by the city." At page 433 of 8 Okla. the court said: "Section 538 is intended to limit the power of the city council in the purchase of personal property at one time to sums of \$500 and less, unless such purchase shall be authorized by a majority vote of the electors resident of the city. If the council deem it advisable to make a purchase of personal property the value of which is in excess of \$500, it becomes their duty to submit the question as to whether such purchase shall be made to a vote of the resident voters of the city, and the power to make such purchase can only be exercised when a majority vote of the electors voting on such proposition has authorized the council to make it."

This language applies equally to a claim under *quantum meruit*. In *Salt Creek Twp. v. King Iron Bridge & Mfg. Co.* 51 Kan. 520, 33 Pac. 303, Justice Horton, in speaking for the court, said: "Upon the facts disclosed in the record, and the provisions

of the statute authorizing, under certain circumstances, township officers to build and pay for bridges, we think the bridge and manufacturing company cannot recover. It seems to be conceded that the company cannot recover upon its contract. The only claim made is that the township is estopped, and should be required to pay the reasonable value of the bridge. At the time of the execution of the contract, and also at the time the bridge was constructed, the public records of Salt Creek township showed that its officers had no power or authority to make any contract for the bridge or to issue any bonds. The proposition submitted to the people for the building of a bridge did not receive three fifths of their votes. It therefore was defeated. The statutory limitation of indebtedness in the township, as prescribed in paragraph 413, was also an inhibition against the making of the contract. The township board, and, possibly, the bridge and manufacturing company, mistook the law. In any event, the township officials acted in direct conflict with the provisions of the statute prescribing their duties and limiting their powers. The records of the township were public, open to all, and the bridge and manufacturing company was not, and could not have been, misled. The bridge was constructed upon a public highway within the township, but used by the people generally. It is a well-settled rule that township or other municipal officers cannot do by indirection that which they might not do directly. *State ex rel. Reed v. Marion County*, 21 Kan. 419. If township officers may disregard all of the statutory provisions concerning the construction of and payment for bridges, and create a liability against the people of a township by accepting bridges or other work without any power so to do, and thereby make the township liable, then the provisions of the statute defining how bridges should be built and paid for have no force whatever. Under such a rule, the township officers may at any time build and accept bridges and create liabilities against the people of the township without a vote and without limit. As the contract between the township officers and the bridge and manufacturing company is void under the statute, we do not think the other facts disclosed show the township is estopped from asserting the want of power on the part of the township officers, or from defending against any liability for the bridge. There is no innocent holder of bonds in this case, and, in fact, no innocent parties. The township officers, as well as the bridge and manufacturing company, are presumed to know the law. The statute clearly declares

the conditions upon which a municipal township may obtain bridges; but if the provisions of the statute are overlooked, or voluntarily cast aside by the parties, with full knowledge of all the facts, no estoppel of any kind can be created. There is a seeming hardship in refusing to pay for the bridge after the money of the company has completed it, and it is in use upon a regular laid-out public highway. But the want of legal authority to contract was known, or ought to have been known, by the company before it expended any of its money. Therefore it is at fault. Those dealing with a township must see to it that its officers have power to act. In this case nothing was concealed, and all the facts appear upon the public records. A township or other municipality can only act by the mode prescribed by law. Any other rule leaves the taxpayer at the mercy of the officers of the township and contractor, and would render all statutory provisions of limitation of power nugatory. *Lewis v. Bourbon County*, 12 Kan. 186; 15 Am. & Eng. Enc. Law, 1124; *Daly v. San Francisco*, 72 Cal. 154, 13 Pac. 321; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Newbery v. Fox* (1887) 37 Minn. 141, 5 Am. St. Rep. 830, 33 N. W. 333; *Reichard v. Warren County*, 31 Iowa, 381; *Brady v. New York*, 2 Bosw. 187; *Law v. People*, 87 Ill. 385."

In *Allsman v. Oklahoma City*, 21 Okla. 142, 16 L.R.A.(N.S.) 511, 95 Pac. 468, 17 Ann. Cas. 184, the plaintiff sued for the recovery of the unearned portion of certain money paid to the city for a liquor license, which had failed on account of the repeal of the statute under which it was issued. In that case there was no question of the municipality acting beyond its authority, or in express violation of a statutory or constitutional prohibition.

In *Oklahoma City v. T. M. Richardson Lumber Co.* 3 Okla. 5, 39 Pac. 386, no question of the want of authority of the municipality to purchase said lumber was involved. The provisional government for the regulation and management of the affairs of the cities and towns of the territory of Oklahoma which were established prior to the act of Congress approved May 2, 1890 (act May 2, 1890, chap. 182, 26 Stat. at L. 81), being merely voluntary associations of the people living in such city, purchased lumber from the Jones-Richardson Lumber Company. The lumber was applied to constructing sidewalks upon the streets, and for other public improvements for the city. The unpaid account for the lumber was assigned for value to the defendant in error, the T. M. Richardson Lumber Company. Afterwards the plaintiff

in error, the city of Oklahoma City, was legally incorporated, and, coming into possession of said streets, used said lumber. It had authority then to purchase said lumber without any reference to the voters. The court properly held it was liable in *quantum meruit* or assumption; there being no statute prohibiting such purchase.

In *Doyle v. School Dist. No. 38*, — Okla. —, 118 Pac. 386, by Robertson, Commissioner, it was held that where the majority of the members of a board of a school district employed a law firm to defend the board in a suit brought against it, at an agreed fee of \$75, though the board may have failed to meet in an official capacity and authorize such employment, yet, if the service was actually rendered, and the contract became an executed one, and was of the reasonable value claimed, to wit, \$75, and the school district received the benefit therefrom, the board was estopped from pleading the irregularity of said employment. This holding is in line with *Allman v. Oklahoma City*, and *Oklahoma City v. T. M. Richardson Lumber Co. supra*. The school board had the authority to make the contract of employment without the approval of the electors of said district or any other independent agency. The vice complained of went to the want of action of the school board as to what it was empowered to do, and did not consist of a violation of any statute or constitutional provision placing a limitation upon its powers.

In *State v. Pullman*, 23 Wash. 583, 83 Am. St. Rep. 836, 63 Pac. 265, Chief Justice Dunbar, in speaking for the court, said: "It is claimed, however, by the appellant, that, having received the benefits of the contract which the city entered into, it ought to be estopped from denying its validity; also, that it had ratified the contract by receiving the benefits. It is well established that the power to ratify is coextensive only with the power to contract, and that an act which was illegal for want of authority on the part of the contracting powers cannot be ratified. There has been a conflict of opinion on same branches of this question, but an investigation of the authorities will show, we think, that where courts have estopped municipalities from interposing the plea of *ultra vires*, and from escaping the responsibility of their acts, it has been where there has been a defect in the execution of the contracts, as in the issuance of bonds, etc., and not where there has been an absolute want of power on the part of the municipality to contract. The most of the cases cited by the appellant, as we indicated before, were cases of private corporations. The appellant cites *Hitchcock v.*

Galveston, 96 U. S. 349, 24 L. ed. 661, in support of this contention. This is a case which falls within the rule announced above, and the city was proceeding within its powers, but in an irregular manner. In speaking of the claim that the city had exceeded its power, the Supreme Court of the United States, in its opinion, says: 'Another objection to the validity of the contract urged by the city is founded upon a provision of the charter that the council shall not borrow for general purposes more than \$50,000; and it is said the contract, if valid, creates a liability of the city exceeding that sum. This, however, does not appear in the contract itself, and this, perhaps, is a sufficient answer to the objection. But the limitation is upon the power to borrow money, and to borrow it for general purposes. It implies that there may be lawful purposes which are not general in the sense in which that word is used in the charter. An examination of the whole instrument, and of the numerous and large powers conferred upon the council, as well as duties imposed, makes it evident that the provision could not have been intended to prohibit incurring an indebtedness exceeding the sum named. It is in no sense a limitation of the debt of the city.' There are some remarks in this opinion that give color to the contention of the appellant; but that the Supreme Court of the United States did not intend to lay down the rule that, when a city exceeded its powers in a contract made by the authorities, the plea of *ultra vires* could not be successfully interposed, is made evident by a subsequent case from the same court, viz., *Salt Lake City v. Hollister*, 118 U. S. 256, 30 L. ed. 176, 6 Sup. Ct. Rep. 1055, wherein is pointed out the distinction between actions arising on contracts made by a corporation in excess of its corporate powers, and actions against corporations for injuries caused by tortious acts done by its agents in the course of its business, and of their employment in excess of its powers. In that case it was held that the city could not escape taxes due on its property, whether acquired legally or illegally; and could not make its want of legal authority to engage in a particular transaction or business a shelter from the taxation imposed by the government on such business. And in answer to the contention of appellant in that respect the court said: 'It remains to be observed that the question of the liability of corporations on contracts which the law does not authorize them to make, and which are wholly beyond the scope of their powers, is governed by a different principle. Here the party dealing with the corporation is under no obligation to enter into the contract. No force or restraint or fraud is practised on

him. The powers of these corporations are matters of public law, open to his examination, and he may and must judge for himself as to the power of the corporation to bind itself by the proposed agreement. It is to this class of cases that most of the authorities cited by appellants belong,—cases where corporations have been sued on contracts which they have successfully resisted because they were *ultra vires*.' It is true that the court, continuing, says: 'But even in this class of cases the courts have gone a long way to enable parties who had parted with property or money on the faith of such contracts to obtain justice by recovery of the property or the money specifically, or as money had and received to plaintiff's use,'—citing *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Louisiana v. Wood*, 102 U. S. 294, 26 L. ed. 153; *Chapman v. Douglas County*, 107 U. S. 348, 27 L. ed. 378, 2 Sup. Ct. Rep. 62. But an examination of those cases shows that the general rule announced by the court above had not been impinged upon.

'The law is announced by Mr. Dillon in his work on *Municipal Corporations*, 4th ed. vol. 1, § 457, in a manner so concise and explicit that we cannot do better than to give it room in this opinion. It is as follows: 'The general principle of law is settled beyond controversy that the agents, officers, or even city council of a municipal corporation cannot bind the corporation by any contract which is beyond the scope of its powers, or entirely foreign to the purposes of the corporation, or which (not being legislatively authorized) is against public policy. This doctrine grows out of the nature of such institutions, and rests upon reasonable and solid grounds. The inhabitants are the corporators. The officers are but the public agents of the corporation. The duties and powers of the officers or public agents of the corporation are prescribed by statute or charter, which all persons not only may know, but are bound to know. The opposite doctrine would be fraught with such danger, and accompanied with such abuse, that it would soon end in the ruin of municipalities, or be legislatively overthrown. These considerations vindicate both the reasonableness and necessity of the rule that the corporation is bound only when its agents or officers, by whom it can alone act, if it acts at all, keep within the limits of the chartered authority of the corporation. The history of the workings of municipal bodies has demonstrated the salutary nature of this principle, and that it is the part of true wisdom to keep the corporate wings clipped down to the lawful standard. It results from this doctrine that contracts not authorized by the

charter or by other legislative act—that is, not within the scope of the powers of the corporation under any circumstances—are void, and in actions thereon the corporation may successfully interpose the plea of *ultra vires*, setting up as a defense its own want of power under its charter or constituent statute to enter into the contract,'—citing authorities too numerous to reproduce. And if anything were wanting to elucidate the wisdom of the text announced, or to show the pernicious results of tolerating the practice indulged in by municipal authorities to exceed their legal powers, the history of the cities of the Pacific coast furnishes the instance, where, under the stimulus of rivalry in the growth of cities, obligations have been incurred which have bankrupted the cities and impoverished the inhabitants by excessive taxation rendered necessary to meet such obligations.

'In *Brady v. New York*, 16 How. Pr. 432, it was held that, where the contract under which work was done was void because entered into in violation of the charter, the contractor could not recover for the work in any form, neither under the contract nor as upon a *quantum meruit*; and that the subsequent ratification of the contract by the common council, whether before or after the work was done, did not make it binding on the corporation. It was further held that, where the officers of a corporation do an act in excess of the corporate power, the corporation is not bound, and when the statute under which the corporation acts restricts its action to a particular mode, none of the agents through whom the corporation acts can bind it in any other than the mode prescribed. This is a very instructive and well-considered case. In *Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535, it was held that a person dealing with agents who act under a special or express authority, whether written or verbal, is bound at his peril to know what the power of the agent is, and to understand its legal effect; and, if the agent exceeds the boundary of his legal powers, the act, as far as it concerns the principal, is void. The authorities are collated and distinguished in this case, and in answer to the plea of hardship the court quotes from *Lee v. Munroe*, 7 Cranch, 370, 3 L. ed. 374, where it is said: 'It is better that an individual should now and then suffer by such mistakes than to introduce a rule against an abuse of which, by improper conclusions, it would be very difficult for the public to protect itself.' In fact, the rule is so universal that it seems unnecessary to cite further authority.

'But we are not without precedent in our own decisions. In *Arnott v. Spokane*, 6

Wash. 442, 33 Pac. 1063, it was held, in common with universal authority, that, wherever a person enters into a contract with an agent of a municipal corporation, he must, at his peril, ascertain the extent of such agent's authority; and, if he fails to do so, he alone must suffer the consequences. It was also said: 'The power to ratify a particular contract presupposes the power to make it in the first instance; and, if it is such that it would not be made originally except in a certain prescribed mode, where that mode is disregarded the power to ratify does not exist. A contract which is invalid because not authorized by law cannot be made valid and binding retroactively by any subsequent action of the corporate body, and a liability be thereby fastened upon the corporation.'—citing *Zottman v. San Francisco*, 20 Cal. 97, 81 Am. Dec. 96; *Nicolson Pav. Co. v. Painter*, 35 Cal. 704; *McPherson v. Foster*, 43 Iowa, 48, 22 Am. Rep. 215; *Bryan v. Page*, 51 Tex. 532, 32 Am. Rep. 637. In *Chehalis County v. Hutcheson*, 21 Wash. 82, 75 Am. St. Rep. 818, 57 Pac. 341,—a case where a great hardship was worked upon the appellant by the application of this rule, where the appellant was a school superintendent for Chehalis county, and had visited schools under a statute which allowed a certain compensation therefor, but which statute was afterwards pronounced unconstitutional by this court, it was held that the county would not be estopped from disputing the validity of the warrants which had been issued in payment of such claims, for the reason that the contract would be void *ab initio* by virtue of the original lack of authority upon the part of the commissioners. The court announced as the reason of the rule which governs the decision in this case that the acts of the officers were unauthorized and void, and that one dealing with them was bound to take notice of the extent of their powers,—citing 2 *Herman, Estoppel*, p. 1365, to the effect that 'the true principle in such case is well settled that one cannot do indirectly what cannot be done directly; and, where there is no power or authority vested by law in officers or agents, no void act of theirs can be cured by aid of the doctrine of estoppel. Where there is power, and it is irregularly exercised, or there are defects and omissions in exercising the authority conferred by law, the doctrine of equitable estoppel may well be applied by courts.' In the case at bar there was no power on the part of the municipality to enter into this contract. The power was conferred upon the voters. The city had authority only to put the machinery in motion which would elicit and determine the will of the voters. The discretion

and authority were conferred upon the voters, and not upon the officers of the city."

The question involved in *State v. Pullman*, 23 Wash. 583, 83 Am. St. Rep. 836, 63 Pac. 265, was, the municipality being prohibited from contracting for the extension of its water system without the approval of its citizens, whether *quantum meruit* or *assumpsit* would lie on account of the benefits received. This case is in point, and sustains the judgment of the lower court. In *Wiegel v. Pulaski County*, 61 Ark. 74, 32 S. W. 116, it is said: "Can the county court authorize the letting of a contract to construct a turnpike road, without an appropriation first made therefor? The statute itself answers this question in the negative in § 1279, *Sandels & Hill's Dig.*, which provides that 'no county court or agent of any county shall hereafter make any contract on behalf of the county unless an appropriation has been previously made therefor, and is wholly or in part unexpended.' This is the act of March 19, 1879. Construing this act, this court held in the case of *Fones Bros. Hardware Co. v. Erb*, 54 Ark. 645, 13 L.R.A. 353, 17 S. W. 7, that the county court could not make a contract for the building of a bridge across the Arkansas river at the city of Little Rock without an appropriation having been first made therefor. In this case the court said: 'It is the policy of the act to require the concurring judgment of the levying court and of the county judge that a bridge should be built, before a contract for building it can be made. When the levying court makes an appropriation to pay for one, that signifies its favorable judgment, and the county judge may afterwards signify his by letting the contract. . . . While we think that a contract cannot be made before there is an appropriation for it, we do not think that, when an appropriation has been made, the contract will be limited to the amount appropriated. When the levying court appropriates any sum for the work, that signifies their judgment that the work should be done, and the county judge may then proceed to contract for it without further consulting them; the only limitation upon his power being found in other directions.' We hold upon this statute and the authority of this case that without some appropriation made therefor by the quorum or levying court, the county judge has no power to let a contract to construct a turnpike road. Though he has jurisdiction to let such a contract, he must do so, if at all, within the limitations imposed by law upon the exercise of such jurisdiction. Otherwise there would be no restraint upon the extent of his power to contract, based upon the fact, simply, that he is invested with

jurisdiction to make the contract. Such unlimited exercise of his jurisdiction to make such contracts might involve the county in hopeless bankruptcy; and the limitation is but a wholesome safeguard against the abuse of the power to make contracts binding the county. While the county court is invested with jurisdiction of roads and highways, to have them 'laid out, opened, and repaired,' by § 28, art. 7, of the Constitution, and by § 1173 of Sandels & Hill's Digest, conferring upon the county court exclusive original jurisdiction in 'all matters relating to county taxes, in all matters relating to roads,' etc., and by § 6746 of Sandels & Hill's Digest, still the extent and exercise of this jurisdiction are limited and controlled by law. The counsel for appellant contends that the validity of the contract with the county is *res judicata*, because the work under it was accepted and approved by the county, and allowances were made the contractor upon the work. But we think otherwise. There was no jurisdiction, without an appropriation first made, to make the contract upon the part of the county, and without such an appropriation it was void, and no adjudication could make it valid. If there was no power to make the contract, it was not, and could not be, ratified by the county's acceptance of the work done under it. . . . If this were not true, the county court would be above the law, and could make contracts without the authority of law, and then ratify them, and bind the county, and thus the law would be set at defiance. 'It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication.' . . . There is not only no express or implied power in the county court to make such a contract without an appropriation first made for the work to be done, but, as we have seen, there is a positive inhibition against it in the statute quoted above."

In *Moss v. Sugar Ridge Twp.* — Ind. App. —, 67 N. E. 460, it was held that "a municipal corporation does not become liable for a debt by substituting the fiction of an implied contract for an express contract, void for noncompliance with the terms of a statute not penal." See also *Berka v. Woodward*, 125 Cal. 119, 45 L.R.A. 420, 73 Am. St. Rep. 31, 57 Pac. 777; *Ohio Life Ins. & T. Co. v. Merchants' Ins. & T. Co.* 11 Humph. 1, 53 Am. Dec. 742; *Superior Mfg. Co. v. School Dist. No. 63*, 28 Okla. 39 L.R.A. (N.S.)

293, 37 L.R.A. (N.S.) 1054, 114 Pac. 328; *Bass v. Smith*, 12 Okla. 485, 71 Pac. 628.

The judgment of the lower court is affirmed.

All the Justices concur.

OKLAHOMA SUPREME COURT.

GEORGE COGGESHALL, Plff. in Err.,

v.

THOMAS W. CONNER.

(— Okla. —, 120 Pac. 559.)

Officer — compensation by individual.

A public officer cannot recover compensation from third persons for the performance of acts within the scope of his official duty, even though the acts were performed at their request, or though they may have expressly promised to pay him.

This rule applies to an attorney acting as special prosecutor for the state, the regular county attorney being disqualified, by appointment by order of the district court.

(January 9, 1912.)

ERROR to the County Court for Kiowa County to review a judgment in plaintiff's favor in an action brought to recover a fee for legal services. Reversed.

The facts are stated in the opinion.

Mr. E. W. McIntosh, for plaintiff in error:

Plaintiff was, at all times during which he rendered services in the prosecution of John C. Stanfill, county attorney, either by election or appointment, and therefore had no legal right to contract for or accept fees or pay from individuals for services rendered during the time he was such county attorney, either by election or appointment.

Mahaffey v. Territory, 11 Okla. 220, 66 Pac. 342.

Mr. W. A. Phelps for defendant in error.

Headnote by WILLIAMS, J.

Note. — Right of prosecuting attorney to compensation from individual.

This note does not include cases as to the authority of a county or other political unit to employ an assistant or special prosecuting attorney, and his resultant right to compensation.

The case of *COGGESHALL v. CONNER* is decided upon the broad, general principle that underlies this whole question, and upon which most cases of this kind rest, namely, that a special prosecuting attorney, being a public officer whose salary or compensation is fixed by law, and is payable out of the public treasury, cannot recover com-

Williams, J., delivered the opinion of the court:

This proceeding in error is to review the judgment rendered in favor of the defendant in error, as plaintiff, against the plaintiff in error, as defendant, in the county court of Kiowa county, in an action for the recovery of a fee in the sum of \$125 for the prosecution of John C. Stanfill, charged with arson. Plaintiff's claim was resisted on the grounds (1) that the defendant had neither expressly nor impliedly employed plaintiff, and (2) such services in such prosecution were performed by said plaintiff whilst he was the duly elected and qualified county attorney of Kiowa county, territory of Oklahoma, and (3) after he went out of office as such officer, the services were performed by him under special appointment by the district court of the state for said county.

The defendant requested the following instruction: "You are instructed that if you find that the plaintiff did the services claimed while he was acting in the capacity of county attorney, either by election or by appointment by the district court, then you should find for the defendant." This instruction was refused and exceptions saved. We think that in this the court erred. A person who accepts an office to which no compensation is attached is presumed to undertake to serve gratuitously (Wortham v. Grayson County Ct. 13 Bush, 53), and cannot recover anything from the

state or county, upon the ground of an implied contract to pay what the service was reasonably worth. *White v. Levant*, 78 Me. 568, 7 Atl. 539; *Talbot v. East Machias*, 76 Me. 415; *Sikes v. Hatfield*, 13 Gray, 347; *Walker v. Cook*, 129 Mass. 578; *Greer County v. Watson*, 7 Okla. 174, 54 Pac. 441. This presumption is in favor of the state or county. *Greer County v. Watson*, supra; *Throop*, Pub. Off. 1892, § 449; *Cole v. White County*, 32 Ark. 45; *Wortham v. Grayson County Ct.* 13 Bush, 53. Where services are to be performed by officers for private parties, as, for instance, where a clerk files papers at the instance of private litigants, this presumption does not obtain. *Bohart v. Anderson*, 24 Okla. 82, 103 Pac. 742, 20 Ann. Cas. 142; *Throop*, Pub. Off. 1892, § 449.

A public officer whose salary or compensation is fixed by law, and is payable by, or made a charge against, the public, cannot recover compensation from third persons for the performance of acts within the scope of his official duty, even though the acts were performed at their request, or though they may have expressly promised to pay him. *Hatch v. Mann*, 15 Wend. 44; *Brophy v. Marble*, 118 Mass. 548; *Evans v. Trenton*, 24 N. J. L. 764; *Pool v. Boston*, 5 Cush. 219; *New Haven & N. Co. v. Hayden*, 117 Mass. 433; *Andrews v. United States*, 2 Story, 202, Fed. Cas. No. 381; *Converse v. United States*, 21 How. 463, 16 L. ed. 192.

It was an offense at common law for a

person from a private individual for the performance of acts within the scope of his official duty, even though the acts are performed at the request of such individual, or even under an express promise by him to pay therefor.

Where attorneys were employed by settlers to test title to certain land, and suits were brought by permission in the name of the United States to vacate certain patents to the land, and later the settlers, having paid only a small amount for the services, abrogated the agreement on the ground that if the suits were successful, the land would revert to the United States, and therefore the United States ought to pay the expense, but such payment was refused on the part of the government, in an action to compel payment it was held that a promise to pay for such services can be implied only when they are rendered under such circumstances as authorize the party performing them to entertain a reasonable expectation of their payment by the party benefited, and that that was not true of this case. *Coleman v. United States*, 152 U. S. 96, 38 L. ed. 368, 14 Sup. Ct. Rep. 473.

A county attorney may not recover upon a contract with a superintendent of schools for prosecuting a civil action in which the county is interested, for it is his duty to

prosecute such action without compensation in addition to his regular salary, but he may recover for such services rendered after his term of office as county attorney has expired. *Money v. Beard*, 136 Ky. 219, 124 S. W. 282.

Where a watchman, while performing his duties as such, discovered one setting fire to a building, and, instead of reporting the case to the authorities, chose to prosecute it himself, and thereby obtained a conviction, it was held that he was not entitled to the reward offered by the city for such conviction, for he could not, by prosecuting the case himself, subject the city to a liability to which it would not have been subject had he given notice to some city officer, as he naturally should have done. *Pool v. Boston*, 5 Cush. 219.

As to the right of a public officer to claim reward for arrest generally, see note to *Somerset Bank v. Edmund*, 11 L.R.A. (N.S.) 1170.

Although a prosecuting attorney is not bound to prosecute criminal actions in a magistrate's court, he may do so voluntarily, and the fact that a citizen requests him to do so, and he complies, will not raise an implied contract on the part of such citizen to compensate him for such services. *Cincinnati, S. & C. R. Co. v. Lee*, 37 Ohio St. 479.

member of a municipality to refuse to take upon himself an office in such corporation to which he had been appointed. *Rex v. Bower*, 2 Dowl. & R. 842, 1 Barn. & C. 585, 1 L. J. K. B. 110; *Rex v. Lone*, 2 Strange, 920; *Rex v. Jones*, 2 Strange, 1146; Throop, Pub. Off. 1392, § 167.

If the defendant in error rendered any services in this prosecution between the 16th day of November, 1907, the date on which his term of office as county attorney of Kiowa county, Oklahoma territory, terminated, and the 8th day of January, 1908, the date on which he was appointed, by order of the district court, to prosecute said case, he would be entitled to recover a reasonable value therefor, provided the plaintiff in error requested him to continue such prosecution; for, if he made such request, and the services were rendered, the law would imply a contract to pay a reasonable compensation therefor.

It is against public policy for a public officer to be allowed private compensation for the performance of any duty as a public officer. The very moment that the plaintiff was appointed by the district court as a special prosecuting officer to prosecute this case, for the purposes of that case he then and there became a public officer, and for any service rendered in that appointment he would not be entitled to recover as against a private individual. As to whether there is a provision of law for him to be

compensated out of the public treasury, that is not essential here to be determined. It may be that there is no provision of law for such compensation out of the public treasury, but it is certainly against sound public policy to permit an attorney to be appointed as a special prosecutor when the regular county attorney is disqualified, and to receive private compensation for such services.

When the state seeks to bring one of its citizens to the bar of justice, and a special prosecutor is appointed, his sense of duty should be impelled only by that of a public prosecutor receiving only the compensation or emoluments, if any, from the sovereignty or subdivision thereof. It would be a dangerous policy for private parties to employ and pay private counsel, and then have them commissioned by the state as special public prosecutors, and thus, in the name of the state, frequently be empowered to wreak vengeance at the instance of private parties. When a private prosecutor is employed by private parties, and he assists in the prosecution without any appointment by the court, he is subject to the guidance and control of the regular prosecuting attorney, and does not come within this restriction.

It follows that the judgment of the lower court is reversed and the cause remanded, with instructions to grant a new trial and proceed in accordance with this opinion.

All the Justices concur.

In the case of *State v. Kent*, 4 N. D. 577, 2 L.R.A. 686, 62 N. W. 631, in discussing the right of interested private parties to employ counsel to assist the public prosecutor, when such public prosecutor and the trial judge deem such a course proper, it is said by the court that the state's attorney is not allowed to receive any fee or reward from or on behalf of any private prosecutor or other individual, for services in any prosecution or business to which it is his official duty to attend.

Under the Oregon statutes of 1898, the state is deemed a party defendant in any suit for the dissolution of the marriage contract, and in the fourth judicial district, which comprises Multnomah county, the district attorney is allowed a fee for defending the same on behalf of the city, and the plaintiff is required to deposit such fee with the clerk of the court before the complaint is filed. *State ex rel. Fitzgerald v. Moore*, 37 Or. 536, 62 Pac. 28.

But under the act of 1899, placing district attorneys on a salary, and cutting off all fees and other compensation, in all judicial districts other than the fourth, the district attorney fee in divorce cases need not be paid. *Howard v. Clatsop County*, 41 Or. 149, 68 Pac. 425. It seems, however, in contrast with the general rule, that where a town has a special

interest in the prosecution of offenders beyond that of the general public, as, for example, where a town receives all fines imposed for offenses committed within its limits, it may assign its attorney to assist the state's attorney in such prosecutions, and pay him therefor. In this case, although the precise question did not arise, it seems clearly implied that such an attorney would have a right to claim such compensation. *People v. Warren*, 14 Ill. App. 296.

So, a county prosecuting attorney may recover reasonable compensation for services rendered a school district at its own request, in defending an action brought against it, where there is no agreement that he is to render the services as county attorney, or without charge, and where such services are not required of county attorneys by statute. *Bates v. School Dist. No. 10*, 45 Wash. 498, 88 Pac. 944.

As to right of public to fees unlawfully collected by an officer, including a United States attorney, see note to *State ex rel. McNary v. Dunbar*, 20 L.R.A. (N.S.) 1015.

As to recovery back of fees exacted by public officer for performing act for which he was not entitled to demand compensation, see note to *Trower v. San Francisco*, 15 L.R.A. (N.S.) 183, H. C. Sh

UNITED STATES CIRCUIT COURT
OF APPEALS, FIRST CIRCUIT.

ALLIS-CHALMERS COMPANY, Implead-
ed, etc., Appt.,

v.

CENTRAL TRUST COMPANY OF NEW
YORK.

CLARA E. MULLEN et al., Exrs., etc., of
James B. Mullen, Deceased, Impleaded,
etc., Appts.,

v.

SAME.

(111 C. C. A. 428, 190 Fed. 700.)

**Mechanics' lien — owner — mortgagee
out of possession.**

1. A mortgagee out of possession is not an "owner" within the meaning of a statute permitting a mechanics' lien for lumber and materials furnished by consent of the owner, so as to charge his interest with a lien in case he knowingly permits materials to be furnished without protest.

**Note. — Mortgagee as owner within me-
chanics' lien laws.**

The question of priority as between a mortgage and a mechanics' lien is not within the scope of this note, except so far as it turns upon the question whether the mortgagee is an "owner" within the terms of a mechanics' lien statute.

The mortgagee is an owner neither within the meaning of a statute giving a lien for labor and materials furnished at the instance of the owner, nor within the spirit of the rule that one of two joint tenants or cotenants may make proper and reasonable repairs on buildings on an estate in which they have a community interest, and be entitled to contribution from the other. *Reid v. Bank of Tennessee*, 1 Sneed, 262; followed, at least as to the result, in *Pride v. Viles*, 3 Sneed, 125.

Mortgagees of a leasehold estate in mining property are not owners of the leasehold, before the mortgagor in possession has defaulted; and therefore their interest cannot be subjected to a mechanics' lien for work contracted for by the mortgagor without their consent and before default. *Broman v. Young*, 35 Hun, 173.

A mortgagee is but a creditor holding a lien under the mortgage; and he can in no sense be held to occupy the position of an owner, so as to subject his interest to a mechanics' lien for improvements contracted for by the mortgagor; nor is his position any different by reason of the fact that originally he, as owner, conveyed by a warranty deed to another, who mortgaged it back, and the parties entered into a written agreement reciting the conveyance and the mortgage, and that the latter was made in contemplation of the erection of improvements by the mortgagor, and of an advance of money by the mort-
39 L.R.A., (N.S.)

**Estoppel — mortgagee — consent to im-
provement of property — liens.**

2. That funds for the improvement of property were raised by mortgage thereon does not estop the mortgagees from asserting a priority of lien over persons claiming liens for lumber and materials supplied for the improvement.

**Lien — equitable right — lumber and
materials.**

3. One who furnishes material or performs labor for improving property which he knows to be subject to a recorded mortgage has no equity to have his claims made superior to that of the mortgagee which will justify a court of equity in displacing vested liens or broadening the language of mechanics' lien statutes by construction, so as to afford a priority.

**Mortgage — priority — advance of
money.**

4. That the money had not actually been paid on bonds secured by mortgage on real estate before work was done on the property which would support a mechanics' lien does not postpone the mortgage to the lien

gauge to the mortgagor, in consideration of the mortgage and the price of the land, and providing that, upon default by the mortgagor, the mortgagee might complete the building at the other's expense, and have the amount so expended secured by the mortgage; and that any liens claimed on the property might be settled by the mortgagee, who might charge the sum so paid as advances under the mortgage. *Ettridge v. Bassett*, 136 Mass. 314.

A mortgagee has neither *jus in re* nor *jus ad rem*, but a mere right to have his debts paid out of the proceeds of a sale of the mortgaged property; it is a right which will pass by simple assignment, but will in no case pass by a conveyance of the land alone. The mortgagee's interest, therefore, is not within the meaning of a provision of the mechanics' lien law that every improvement constructed upon lands with the knowledge of the owners or the person having or claiming any interest therein shall be held to have been constructed at the instance of him or them; and that the interest owned or claimed shall be subject to any lien given by the statute, unless such owner or person having or claiming any interest shall, after he obtains knowledge of the making of the improvement, give notice that he will not be responsible for the same; and this is especially true in view of the fact that another section of the statute deals specifically with the respective rights of mortgagees and mechanics' lienors. *Williams v. Santa Clara Min. Asso.* 66 Cal. 193, 5 Pac. 85. This case was followed in *Capital Lumber Co. v. Ryan*, 34 Or. 73, 54 Pac. 1093, which also holds that a mortgagee does not come within the meaning of a provision of the mechanics' lien law, that the interest of "the owner or the person having or claiming any interest" in the property shall be subject to

claimants, if, prior to the origin of the alleged lien, binding agreements had been made to improve the property in consideration of a transfer of the bonds, and to pay the contractor cash for his interest in them.

Lien — subcontractor — priority over mortgage.

5. The lien rights of a subcontractor do not relate back to the time of the execution of the principal contract, so as to give him a priority over a mortgage upon the property, executed to secure bonds delivered to the principal contractor to pay for work to be done by him after the date of the principal contract, where no work was done under the subcontract until after the rights of the mortgagee had become perfected.

(September 22, 1911.)

APPEALS by defendants from decrees of the Circuit Court of the United States for the District of Maine, denying priority

the lien unless he shall give notice that he will not be responsible for the same.

So, in *Tompkins v. Horton*, 25 N. J. Eq. 284, it was held that a subsequent mortgagee was not an owner within the meaning of a provision of the mechanics' lien law requiring notice of lien to be given to the owner; and the court disapproved language stated to have a contrary import, in *Edwards v. Derrickson*, 28 N. J. L. 39, affirmed in 29 N. J. L. 468, 80 Am. Dec. 220, and declared that for many years the practice had been in New Jersey not to require notice to be given to encumbrancers, although the precise question as to whether a mortgagee was an owner had never been raised.

And it was held in *Howard v. Robinson*, 5 Cush. 119, that where the owner of land subject to a mechanics' lien mortgaged it, but was allowed to remain in possession, the mortgagee was not embraced within the meaning of a provision of the statute that the court shall order notice of the filing of the petition to enforce the lien to be given to "the owner of the land," and especially where other sections of the statute show that the word "owner" is used to designate the primary debtor; that is, the party who procures the work to be done. And it was further held that a provision of the statute that if the person indebted in any such contract should die or convey away his estate before the commencement of a suit on the contract, the suit might be commenced against his heirs or whoever should hold the estate which he had in the premises at the time of the making of the contract, did not describe a subsequent mortgagee, the court saying that although, as between the mortgagor and the mortgagee, the instrument is a transmission of the fee which gives the mortgagee a remedy in the form of a real ac-

tion and constitutes a legal seisin, yet, for most other purposes, a mortgage before the entry of the mortgagee was but a pledge, leaving the mortgagor for most purposes the owner.

The facts are stated in the opinion.

Argued before Colt, Circuit Judge, and Aldrich and Brown, District Judges.

Messrs. Benjamin Thompson and Martin & Cook for appellant Allis-Chalmers Company.

Messrs. Moorfield Storey, Robert G. Dodge, and Joseph F. Gould, for appellants Mullen et al.

The mortgagee is an owner.

Morse v. Dole, 73 Me. 351; Shaw v. Young, 87 Me. 275, 32 Atl. 897; Howard v. Houghton, 64 Me. 445; Gilman v. Wills, 66 Me. 273; Anderson v. Robbins, 82 Me. 422, 8 L.R.A. 568, 19 Atl. 910; Brastow v. Barrett, 82 Me. 456, 19 Atl. 916.

The Mullen lien attached to the property before any bonds were certified and issued, and therefore takes precedence of the mortgage.

Farnham v. Richardson, 91 Me. 559, 40 Atl. 553; Peninsular Iron Co. v. Eells, 15 C.

tion and constitutes a legal seisin, yet, for most other purposes, a mortgage before the entry of the mortgagee was but a pledge, leaving the mortgagor for most purposes the owner.

So, the *cestui que trust* named in a deed of land is not the owner within the meaning of the mechanics' lien law, prescribing necessary parties in actions to enforce such liens. *Cornell v. Conine-Eaton Lumber Co.* 9 Colo. App. 225, 47 Pac. 912.

In *Kerrigan v. Fielding*, 47 App. Div. 246, 62 N. Y. Supp. 115, where it appeared that an owner of land conveyed it by a deed absolute in form, but intended merely as security for debts owed to the grantee, the question arose as to whether a notice of lien by one subsequently engaged by the grantor to make improvements was sufficient when given to the grantor, or whether it should also have been given to the grantee; and the court held that the grantor was the owner of the property at the time of the contract for improvements, and that the notice of lien to him was sufficient.

As to mechanics' liens on landlord's interest for the labor or materials furnished a tenant for the building or improvement removable by the tenant, see the note in 6 L.R.A.(N.S.) 485.

As to the power of a lessee or vendee to subject the owner's interest to mechanics' liens, see the note in 23 L.R.A.(N.S.) 601.

As to whether requiring another to make improvements upon land at his own expense is a consent by the owner which will subject his interest to a lien, see the note in 11 L.R.A.(N.S.) 764.

As to the extent of land to which a mechanics' lien will attach see the note in 26 L.R.A.(N.S.) 831.

As to mechanics' liens on buildings distinct from the land, see the note in 62 L.R.A. 360.

L. A. W.

C. A. 189, 32 U. S. App. 348, 68 Fed. 24; *Reynolds v. Manhattan Trust Co.* 27 C. C. A. 620, 55 U. S. App. 96, 83 Fed. 593; *Farmers' Loan & T. Co. v. Canada & St. L. R. Co.* 127 Ind. 265, 11 L.R.A. 740, 20 N. E. 784; *Hewson-Herzog Supply Co. v. Cook*, 52 Minn. 534, 54 N. W. 751; *Wade v. Donau Brewing Co.* 10 Wash. 284, 38 Pac. 1009; *Lord v. Yonkers Fuel Gas Co.* 99 N. Y. 547, 2 N. E. 909; *Germania Trust Co. v. San Francisco*, 128 Cal. 589, 61 Pac. 178; *International Trust Co. v. Davis & F. Mfg. Co.* 70 N. H. 118, 46 Atl. 1054; *Ladue v. Detroit & M. R. Co.* 13 Mich. 380, 87 Am. Dec. 759; *Jewett v. Barnard*, 6 Me. 381; *Copeland v. Weld*, 8 Me. 411; *Carr v. Dole*, 17 Me. 358; *Russell v. Woodward*, 10 Pick. 408; *Hudson v. J. P. Parker Mach. Co.* 173 Mass. 242, 53 N. E. 867; *Re Clark Coal & Coke Co.* 173 Fed. 658; *Peacock, H. & W. Co. v. Thaggard*, 128 Fed. 1005, 64 C. C. A. 490, 129 Fed. 1005.

The mortgagee consented to the furnishing of labor and materials by Mullen.

Norton v. Clark, 85 Me. 357, 27 Atl. 252; *Claffin v. South Carolina R. Co.* 4 Hughes, 12, 8 Fed. 133; *Pierce v. Emery*, 32 N. H. 522; *Fidelity Ins. T. & S. D. Co. v. Shenandoah Valley R. Co.* 32 W. Va. 244, 9 S. E. 180; *Miller v. Rutland & W. R. Co.* 36 Vt. 452; *Kneeland v. Luce*, 141 U. S. 491, 35 L. ed. 830, 12 Sup. Ct. Rep. 32.

The interest of the mortgagee became subject once and for all to the Mullen lien, and no subsequent transfer of the bonds could affect in any way the question of priority.

Kenicott v. Wayne County, 16 Wall. 452, 21 L. ed. 319; *Gale v. Blaikie*, 126 Mass. 274; *D. L. Billings Co. v. Brand*, 187 Mass. 417, 73 N. E. 637; *Jones, Liens*, 2d ed. § 1542; *Vattier v. Hinde*, 7 Pet. 252, 271, 8 L. ed. 675, 682; *Schafer v. Reilly*, 50 N. Y. 61; *Dan. Neg. Inst.* 4th ed. § 834b.

Mesrs. Arthur H. Van Brunt, Joline, Larkin, & Rathbone, and Libby, Robinson, & Ives for appellee.

Brown, District Judge, delivered the opinion of the court:

The appellants allege error in a decree of the circuit court to the effect that a mortgage, dated July 1, 1905, given by the Bodwell Water Power Company to the Central Trust Company of New York, to secure an issue of \$1,000,000 of bonds, constitutes a first lien on the mortgaged property; and that liens for labor and materials claimed by the Allis-Chalmers Company, and by James B. Mullen's executors, respectively, are subject to the superior lien of the mortgage.

In order that a lien may attach for labor 30 L.R.A. (N.S.)

and materials under chapter 93, § 29, Revised Statutes of Maine, they must be furnished "by virtue of a contract with, or by consent of, the owner."

The appellants contend that a mortgagee not in possession is an "owner" within the meaning of the statute, and that consent may be inferred from knowledge that the work is being done, coupled with the failure to give a written notice that the owner will not be responsible therefor, as provided in § 30 of chapter 93.

Upon these propositions the circuit court found against the appellants, and this is assigned as error.

The circuit court was of the opinion that "a mortgagee out of possession was not in equity, and in the state of Maine, in law, 'owner' of the property. The statute does not apply to him by its terms in using the word 'owner.' There is no just reason why it should be extended by construction to apply to him; and the supreme judicial court of Maine has never held directly that it does apply to him. If he takes possession of the property, receives its income, and directs its management, then, of course, he becomes an 'owner' both in equity and at the common law of Maine. Until he does all that, he holds in fact only a lien, as he would in name under the laws of the state of New York and the laws of other states. For all practical purposes, he is no more than the holder of a lien."

See *Atwood v. Moose Head Paper & Pulp Co.* 85 Me. 379, 27 Atl. 259.

The chief reliance of the appellants is *Morse v. Dole*, 73 Me. 351. A careful examination of this case shows that it does not decide, either directly or by implication, that a mortgagee is an "owner" under the statute. The expression quoted from the opinion—"At least the knowledge of the mortgagee must in some way appear before the written notice mentioned in Rev. Stat. chap. 91, § 28 (amended 1876, chap. 140), can be required from him in order to prevent a later claim from taking precedence of the mortgage"—is by no means a clear reference to a mortgagee as an owner. On the contrary, the words "at least" indicate an intention to reserve the question of how much more than mere knowledge of a mortgagee must be shown.

In *Morse v. Dole* there was no evidence that the mortgagee had any knowledge of the rendering of services or delivery of materials. The court held that, without knowledge, consent could not be implied. This rendered unnecessary any consideration of the question now before us.

It is urged "the court clearly proceeds upon the assumption that a mortgagee might subject his interest to a mechanics'

lien if he consents to the furnishing of the labor or materials." If there is such an assumption, it has not the force of a decision of the state court which this court should regard as establishing the law of Maine. It is an assumption for the purposes of a particular case only; it is not a decision of the court upon the point involved, and it is not even a safe indication that it was the view of the learned judge who wrote the opinion that the law of Maine was established as to this point.

Another expression is called to our attention: "The lien can hold against such a mortgagee only in cases where he has become a party to the delivery of the materials, or to the work done, by consent, tacitly or expressly given."

This is by no means definite. It may be that a mortgagee who has become a party to the contract between owner and mechanic, or a guarantor thereof, or who has induced the mechanic or materialman to go on with the work, should be held to subject his own interest as mortgagee to a lien. This we are not called upon to decide. The expression last quoted is, after all, but *dictum* which indicates that under conditions indefinitely described as becoming "a party to the delivery of the materials, or to the work done," the statute might give a lien on the estate of a prior mortgagee out of possession.

We are of the opinion that the appellants have failed to establish the proposition that, under *Morse v. Dole*, or any other decision of the Maine court, it has been settled as the law of Maine that a mortgagee out of possession is an "owner" within the meaning of the statute. The examination of the history of § 29, in connection with *Morse v. Dole*, 73 Me. 351, 353, tends rather to the contrary conclusion. This question, therefore, must be considered as an open question, not concluded by the decisions of the Maine court, and not even discussed upon its merits in the Maine decisions. The brief of neither of the appellants suggests that their construction of the Maine statute is supported by other authority than the inconclusive Maine cases.

On the other hand, the brief for the Central Trust Company cites a number of cases to support its contention that, upon a proper construction of the words "consent of an owner," they are inapplicable to a mortgagee out of possession. *Howard v. Robinson*, 5 Cush. 119; *Ettridge v. Bassett*, 136 Mass. 314; *Tompkins v. Horton*, 25 N. J. Eq. 284; *Cox v. Broderick*, 4 E. D. Smith, 721; *Phillips, Mechanics' Liens*, §§ 67, 68; *Otley v. Haviland*, 36 Miss. 19; *Reid v. Bank of Tennessee*, 1 Sneed, 262; 39 L.R.A. (N.S.)

McDowell v. Rockwood, 182 Mass. 150, 65 N. E. 65; *Lummus, Law of Liens*, § 260.

Upon the brief of the Allis-Chalmers Company are cited the following Maine decisions touching the meaning of the expression "by virtue of a contract with, or by consent of, the owner:" *Norton v. Clark*, 85 Me. 357, 27 Atl. 252; *Shaw v. Young*, 87 Me. 271, 32 Atl. 897; *Farnham v. Richardson*, 91 Me. 559, 40 Atl. 553; *Baker v. Waldron*, 92 Me. 17, 60 Am. St. Rep. 483, 42 Atl. 225; *York v. Mathis*, 103 Me. 67, 68 Atl. 746. These decisions show that the words "by consent of the owner" have given rise to much doubt and to much difficulty in their application, but do not support the proposition that a mortgagee out of possession is an owner.

While the expression would doubtless cover implied or quasi contracts between mechanic and owner, yet, from the opinion in *York v. Mathis*, 103 Me. 67, 76, 68 Atl. 746, quoting *Huntley v. Holt*, 58 Conn. 445, 9 L.R.A. 111, 20 Atl. 469, it would appear that "by consent of the owner" means something different from an agreement with the owner, not requiring such meeting of minds as would be essential to the making of a contract, but enough of a meeting of their minds to make it fairly apparent that they intended the same thing in the same sense.

It is said "that the conduct of the owner, viewed in the light of all the circumstances, should justify an expectation of a lien."

In *Shaw v. Young*, 87 Me. 271, 32 Atl. 897, it is said: "It seems to be assumed by the legislature that the owner of real estate will be vigilant in caring for it, either in person or by agents; that if he leaves it in the possession of agents or tenants, knowing that repairs are necessary to be made from time to time, and makes no provision for them, but leaves them to be made by agents or tenants, and gives no notice of dissent, his consent may be inferred so far as the lien claimants are concerned."

This reason seems entirely lacking in the ordinary case of a mortgagee out of possession. The mere knowledge of a mortgagee that a mortgagor is improving the property, as he has a right to do, makes him in no sense a party to the delivery of the materials or the work done (*Morse v. Dole*); and there can be no just assumption that, like the ordinary owner, a mortgagee out of possession will be vigilant in caring for it, either in person or by agents. *Shaw v. Young*. See also *Hanson v. News Pub. Co.* 97 Me. 99, 53 Atl. 990.

The cases of *Shaw v. Young* and *Hanson v. News Pub. Co.* supra, are very suggestive

as to the meaning which the court attached to the word "owner," as implying at least a relation of immediate control substantially different from the relation of a mortgagee, who is concerned only with the security of the money lent upon the faith of the mortgage, and of his interest. To place upon the ordinary mortgagee a duty to acquire knowledge of the dealings of the mortgagor with the property, or the duty of warning laborers and materialmen that the mortgagee insists upon his rights under his mortgage, would be an innovation of doubtful wisdom. The record of a mortgage is the most practical means of notice of the mortgagee's intent to insist upon his security. To charge him with consent because he fails to give personal notice in writing, in addition to the notice afforded by record of his mortgage, is to unsettle the rights of mortgagees.

While statutes giving liens to laborers and to those who furnish materials are to be liberally construed, yet, in the absence of a clear expression of the legislature, the courts should not adopt, by a construction of doubtful language, a rule that would unsettle the rights of mortgagees, or impair their security. We concur in the view of the learned circuit judge that there is no just reason why the statute should be extended by construction to a mortgagee out of possession. One who contracts with the owner of land to furnish labor and materials, or one who, with his consent, furnishes materials, is assumed to know, if a mortgage is recorded, that the consent of the mortgagor as owner can give a lien only to the extent of the mortgagor's interest. *Morse v. Dole*. He has no reasonable ground for an expectation or belief that a mortgagee who has advanced money upon the security of the land or on the improvements to be made thereon is willing to forego this security, even if the money is advanced for the purpose of placing improvements upon the land.

Nor are the terms of the statute misleading. In ordinary usage the term "owner" is never applied to an ordinary mortgagee out of possession, and would not be so understood.

These appellants had no contract with the owner, and were well advised by the statute that their right to a lien was dependent, not upon express contract, but upon consent, of the owner.

Apparently the framers of the statute did not contemplate the impairment of the ordinary relation of mortgagor and mortgagee. The fact that the bonds were issued for the purpose of raising funds to improve the mortgaged property does not create an equitable estoppel against the

mortgagee and bondholders to prevent them from claiming that their mortgage gives a prior lien. *Dunham v. Cincinnati, P. & C. R. Co.* 1 Wall. 254, 17 L. ed. 584; *Thompson v. White Water Valley R. Co.* 132 U. S. 69, 33 L. ed. 256, 10 Sup. Ct. Rep. 29; *Porter v. Pittsburg Bessemer Steel Co.* 120 U. S. 649, 30 L. ed. 830, 7 Sup. Ct. Rep. 1206; *Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 296, 33 L. ed. 905, 10 Sup. Ct. Rep. 905; *Jones, Liens*, § 1458.

Whoever undertakes construction work upon property subject to a recorded mortgage must be assumed to have relied upon the personal responsibility of the other party to the contract, and upon such liens as the statute grants in definite terms, and not upon the expectation of displacing the priority of mortgage liens. The argument that there is some sort of superior equity in claims for work and materials over liens for money previously advanced upon mortgage is without merit, and the chancellor cannot apply such a principle either to displace vested liens or to broaden a lien statute by a construction which disregards absolutely the rights in a mortgage security. *Kneeland v. American Loan Co.* 136 U. S. 89, 97 et seq., 34 L. ed. 379, 383, 10 Sup. Ct. Rep. 950.

The next contention is that though the mortgage was recorded upon July 24, 1905, it was of no effect until the bonds were certified and issued, and that by reason of delay between the recording of the mortgage and the issue of bonds the Mullen lien attached prior to the lien of the mortgage. Before the record of the mortgage, however, the Bodwell Water Company and the Milford Construction Company had, by contract of July 19th, entered into a construction contract which provided *inter alia* for payment to the Milford Company of \$700,000 of the mortgage bonds. On the same date, July 19th, the Milford Company accepted the offer of Farson, Leach, & Company to purchase the \$700,000 of mortgage bonds at 90 per cent and interest. On July 28th the Milford Company voted to forward to the complainant for certification \$500,000 of these bonds, at which time it had received from the Bodwell Company the entire mass of \$700,000 of bonds.

In other words, the Bodwell Company, before any rights accrued to Mullen, had delivered \$700,000 of bonds to the Milford Company in pursuance of the contract of July 19th.

The Mullen claimants attach great weight to the decision of the circuit court of appeals for the eighth circuit in *Reynolds v. Manhattan Trust Co.* 27 C. C. A. 620, 55 U. S. App. 96, 83 Fed. 593, wherein it was held that a recorded railroad mortgage was

not superior to mechanics' liens that attached before any bonds were issued or any mortgage debt was created.

This case, however, does not afford us assistance in deciding whether, upon the facts above set forth, a mortgage debt was created to which the security of the mortgage attached at once. For the purposes of the present case, we need not consider the correctness of this decision, for it is limited to a state of facts where no bonds had been sold and no debt created, and does not discuss the question now before us. We are of the opinion that the record of the mortgage was notice to Mullen of all the substantial equities between the mortgagor and the construction company.

We agree with the learned circuit judge that, though lacking in formalities, the sale of the bonds was complete. As the Bodwell Company had parted with all interest in the entire issue of bonds, the trustee held the mortgage title, not as agent of the Bodwell Company, which by the sale had lost all right of revocation which would destroy the subject-matter of the contract, but as trustee for the security of the bonds.

We find no error in the decision of the circuit court that the mortgage lien attached prior to the earliest date at which it is claimed the Mullen lien took effect.

The deed of trust securing the payment of the bonds was an incident, and accessory to them. The transfer of the bonds carried with it to the transferees the benefit of the security. *New Orleans Canal & Bkg. Co. v. Montgomery*, 95 U. S. 16, 18, 24 L. ed. 346, 347.

It is contended that Farson, Leach, & Company are not bona fide purchasers because they did not make payment before the Mullen contract was made. It is urged that the fact that they had agreed to purchase is immaterial and does not give priority. *Dresser v. Missouri & I. R. Constr. Co.* 93 U. S. 92, 23 L. ed. 815; *Little v. Lansing*, 147 U. S. 59, 37 L. ed. 73, 13 Sup. Ct. Rep. 254, are cited. In the first of these cases there was notice of fraud, which made it the duty of the purchaser to withhold further payment. In the second case the bonds were void, and notice given the purchaser before payment and while he might have repudiated the purchase.

But these cases are not in point. There was no invalidity in the subject-matter of the contract and no fraud. Neither was there any right in the Milford Construction Company or in Farson, Leach, & Company to repudiate their contracts.

At the time of the purchase of the bonds there was, of course, knowledge that construction work would be performed; but

this affords no reason why a contract for a first lien on all the mortgage property should not be upheld. Here is no element of fraud, nor is there any element of inequity in the fact that the bondholders sought a lien that should precede all possible future liens. A valid obligation arose to pay for the bonds, and the subsequent fact that Mullen entered into a subcontract and began work afforded no ground for repudiating this obligation.

The claim of the Allis-Chalmers Company to priority rests upon its attempt to date its lien, not from the time it entered into its first contract with the Milford Construction Company, August 16, 1905, but from the date of the main contract between the Bodwell Water Power Company and the Milford Construction Company. It is urged that a lien claim relates back to the day when each contract for labor and materials was made, even though delivery of materials or performance of work is later. See *Morse v. Dole*, 73 Me. 351; *Farnham v. Richardson*, 91 Me. 559, 40 Atl. 553.

Whether the doctrine of these cases is here applicable is very doubtful. The Allis-Chalmers Company and Mullen had no contract with the owner, but subcontracts with the construction company. They must stand upon the provision which gives a lien for labor or materials furnished by consent of the owner. As pointed out in *Norton v. Clark*, 85 Me. 357, 27 Atl. 252, this is "alternative" to a contract with the owner.

If, as is urged, consent is to be inferred from knowledge that the work is being done, coupled with a failure to give the notice provided for in § 30, there is difficulty in carrying the date of the lien back to an earlier time than the beginning of work under the subcontract, unless, perhaps, it can be proved that express consent of the owner preceded and induced the making of a subcontract,—a point which we need not decide, for we may assume, for the purposes of this case only, that the right to a lien arose contemporaneously with the incurring of a obligation to furnish labor or materials.

The Allis-Chalmers Company incurred no such obligation until after the mortgage had completely attached, and all questions as to the formalities of the bond issue had disappeared.

That the original construction contract may be regarded as evidence of the consent of the Bodwell Water Power Company is established by *Norton v. Clark*, 85 Me. 357, 27 Atl. 252. But this decision is to the effect that the subcontractor is not entitled to his lien merely by substitution to the rights of the principal contractor, but that

it arises from the performance of the work as a direct right under the statute,—a right which overrides a provision in the main contract that no lien should exist.

This seems inconsistent with the reasoning of the court in *Glass v. Freeburg*, 50 Minn. 386, 16 L.R.A. 335, 52 N. W. 900, relied upon by the Allis-Chalmers Company. In Massachusetts the words of a statute, "the contract under which the lien is claimed," were held to mean the contract of the party claiming the lien, and not the contract of a prior contractor for whom the claimant is working. *Savoy v. Dudley*, 168 Mass. 538, 47 N. E. 424; *Batchelder v. Hutchinson*, 161 Mass. 462, 37 N. E. 452; *Bowen v. Phinney*, 162 Mass. 593, 44 Am. St. Rep. 391, 39 N. E. 283; *Friedman v. Hampden County*, 204 Mass. 494, 504, 90 N. E. 851. Neither can the words of the statute, "by virtue of a contract with the owner," be so liberally interpreted as to cover everything done by virtue of subcontracts made with the builder or materialman who has the main contract with the owner. Were the reasoning of *Glass v. Freeburg* applied to this case, there would be a complete defense in the fact that the Milford Company had been paid in full. The doctrine of subrogation to the rights of an original contractor would not avail the claimant. *Norton v. Clark* goes only so far as to hold that the original contract may be evidence of consent.

If we apply the analogy of implied contracts or agreements, as was suggested in *York v. Mathias*, 103 Me. 67, 68, 68 Atl. 746, the earliest date for a lien is the date of action upon the owner's consent. We are of the opinion that both of these appellants entered into their subcontracts with notice of a recorded mortgage, which was a valid security for a debt existing before the date of the earliest subcontract. In point of time, the mortgage has priority over the liens claimed by these appellants. We are further of the opinion that, according to the natural and just interpretation of the Maine lien statute, it does not cut under the rights of a mortgagee out of possession, and that the construction of the statute for which the appellants contend is strained and unnatural.

The adoption of a construction which makes a mortgagee out of possession an "owner," and also subjects him to indefinite rules as to "consent of the owner," would ignore the substantial difference in the relation to the property of mortgagor in possession and mortgagee out of possession, and tend to unsettle the law as to the rights of mortgagees. We find nothing in the Maine decisions which supports the contention that such a result would be 39 L.R.A. (N.S.)

equitable. We agree with the conclusion of the circuit court.

The decree of the Circuit Court is affirmed, and the appellee recovers its costs of appeal.

FLORIDA SUPREME COURT.

W. A. FISHER and Wife, Appts..

v.

ENRIQUE VILLAMIL et al.

(— Fla. —, 56 So. 559.)

Mortgage — mistake — reformation after foreclosure.

1. Where the owner of two lots of land intended to execute a mortgage upon a certain lot, but described therein a different lot, after foreclosure of the mortgage and a sale of the property described therein, a court of equity may cancel the master's deed to the property actually mortgaged, sold, and conveyed, and reform the mortgage, upon sufficient showing, so as to embrace the land intended to be mortgaged.

Same — rights of purchaser.

2. When a mortgage misdescribes the property intended to be mortgaged, the mistake may be corrected by a proper proceeding before judicial foreclosure; but if the mistake has been carried into a bill filed for the purpose of foreclosure of such mortgage, into the decree ordering foreclosure, into the advertisement, and into the deed, the purchaser at such foreclosure sale cannot maintain a bill in equity to correct the description of the land as contained in the mortgage, in the decree, and in the deed.

(October 17, 1911.)

Headnotes by PARKHILL, J.

Note. — Reformation of mortgage after foreclosure.

The weight of authority appears to be with *FISHER v. VILLAMIL*, in holding that where a mistake in a mortgage has been carried through proceedings for foreclosure and sale, the proper method of relief is to reform the mortgage and permit it to be foreclosed as reformed, instead of reforming the judicial proceedings and the deed received under the foreclosure proceedings.

Reformation of judicial proceedings.

Some of the cases merely deny the right to correct the mistake in the mortgage and subsequent proceedings on foreclosure, without giving or pointing out any other relief.

Thus, in *Dial v. Gambrel*, 126 Ala. 551, 28 So. 1, it was held that a decree of foreclosure was final after the term, and that the mortgagee, who purchased the land at the foreclosure, could not have the sale set aside and the purchase money returned to him, although the mortgage was so errone-

A PPEAL by defendants from a decree of the Circuit Court for Hillsborough county in complainants' favor in a suit to reform a mortgage. Reversed.

The facts are stated in the opinion.

Messrs. Wall & McKay and H. P. Baya for appellants.

Messrs. Dozier A. De Vane and H. S. Hampton for appellees.

Parkhill, J., delivered the opinion of the court:

The appellees filed their bill in equity, alleging that the defendants, Fisher and wife, desiring to obtain a loan of \$1,100 from complainants, at request of defendants, the complainants went with W. A. Fisher to what he alleged to be his dwelling

house and improvements, and Fisher pointed out and ran the lines of the property which he alleged belonged to him, and which he desired to offer as security for said loan; that the property so pointed out were lots 1 to 8 and lot 13 of block 1 of East Nebraska Heights subdivision of S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 7, Tp. 29 S. R. 19 E.; that, the defendants having title deeds to said property, complainants requested them to execute a mortgage showing the correct description of the property; that a mortgage was executed, the land being described therein as all of block 1 of Benjamin's third subdivision, as per plat recorded in Plat Book No. 2, p. 21, records of Hillsborough county, Florida; that the said mortgage was duly executed by de-

ously drawn as to cover the land of the mortgagee, instead of that of the mortgagor.

And the reason upon which this class of cases is based is well stated in *Stephenson v. Harris*, 131 Ala. 470, 31 So. 445, where it was held that while a mistake in the description in a mortgage may be corrected before foreclosure, nevertheless, after the mistake has been carried through foreclosure proceedings, it cannot, after the term, be corrected in the mortgage, in the decree, in the sale and deed made by the register, and in the register's report of sale, as to do so "would result in giving to complainant a title by decree, to land that was not described in the bill to foreclose, not decreed to be sold, and not advertised and sold, nor conveyed by the register to him under the foreclosure decree."

And in *Stewart v. Wilson*, 141 Ala. 405, 10 Am. St. Rep. 33, 37 So. 550, it was held that no additional reason for allowing the description in the mortgage and foreclosure proceedings to be corrected so as to include and omitted was afforded by the fact that the register had included the disputed lands in his sale, as his power to sell was bounded by the decree.

In *Miller v. Kolb*, 47 Ind. 220, it was held that the description in a mortgage and subsequent proceedings on foreclosure could not be corrected after judicial foreclosure and sale, though the sheriff in making the sale pointed out the land actually intended to be sold.

In *Angle v. Speer*, 66 Ind. 488, the correction of a mistake in a mortgage after foreclosure was denied to a purchaser under the foreclosure, as against persons claiming by intermediate deed and mortgage by the same mortgagor.

And in *Runnels v. Kaylor*, 95 Ind. 503, reformation was denied to a subsequent purchaser under the foreclosure decree, though the mistake in the mortgage was discovered, and reformation asked and granted, at the time of foreclosure, but, through error of the clerk, the correction was not shown, and the erroneous description was carried into the decree.

2 L.R.A. (N.S.)

In some cases, however, no objection is found to correcting a mistake which has been made in a mortgage and carried through foreclosure proceedings.

Thus, in *Quivey v. Baker*, 37 Cal. 465, it was held that a mistake made in a mortgage as to the description of the land, and carried through foreclosure into the sheriff's deed, would be corrected all the way through by a court of equity, the court saying in answer to the contention that such correction could not be made: "We have been referred to no authorities in support of this proposition, and, on principles of reason and justice, we do not perceive why a court of equity may not reform mistakes in judgments or decrees, in like manner as in written instruments. But it is said there was no mistake, either in the decree or sheriff's deed, which followed the description in the mortgage, and could not have done otherwise; and, consequently, there is no mistake to reform in either of them. As well might it be claimed that if there be a mistake in the first of a series of conveyances, which was carried out through all the subsequent conveyances, that the court could only correct the mistake in the first deed; and that, in fact, there was no mistake in the subsequent deeds, which were correctly copied from the first, as they were intended to be. But a court of equity does not administer justice on these narrow principles. It will not only go back to the original error and reform it, but will administer complete justice, by correcting all subsequent mistakes which grew out of, and were superinduced by, the first."

And in *Busey v. Moraga*, 130 Cal. 586, 62 Pac. 1081, *Quivey v. Baker*, is followed, and the court says that it will, after having reformed the mortgage and proceedings down to the sale, direct a new notice and sale if justice requires it.

In *First Nat. Bank v. Wentworth*, 28 Kan. 183, in sustaining the right, where the rights of innocent third parties have not intervened, to correct an erroneous description after foreclosure of the mortgage containing it, the court, in answering the objection that this would be overturning

fendants on December 7, 1907, the consideration was paid to them, the mortgage was duly recorded in Mortgage Book 9, p. 225, records of said county; that, in addition to pointing out the said land, the defendants showed complainants the improvements thereon, consisting of a dwelling house, a barn, several outhouses, fruit trees, and assigned to complainants as additional security as insurance policy on said dwelling house; that thereafter, at maturity of the mortgage, the complainants demanded payment thereof, but payment was not made, and the mortgage was foreclosed, the property described therein was sold under a decree of foreclosure as block 1 of Benjamin's third subdivision, and the complainants bought the said property at the foreclosure

sale for \$800; that said defendants did not bid on same at said sale; that thereafter a deficiency decree was entered against defendants; that said Fisher thereupon complained to complainants that they were taking his home, that was worth the amount of the mortgage, whereupon complainants voluntarily agreed with Fisher and canceled the deficiency decree upon payment by Fisher of \$325; that defendant Fisher led complainants to believe the mortgage they accepted embraced the lots pointed out by him, and which were lots 1 to 8 and lot 13 of East Nebraska Heights subdivision, and, relying upon the knowledge and good faith of the said defendants, complainants believed the land pointed out to them and intended to be mortgaged was all of block

a judgment, says: "But a distinction must be recognized between the mere correction of a mistake and the setting aside of a judgment. Where it appears that a distinct question has been presented to the consideration of a court, its ruling had thereon, and that ruling passed into judgment, it is one thing for a party to apply thereafter to have that judgment set aside, and a different ruling made by the court upon that question; but it is an entirely different thing when a party avers that by some mistake the judgment which was entered does not in fact express the intention of the court in respect to its adjudication of the rights of the parties, or that by mistake a matter has been by the language of the decree apparently adjudicated by the court, to which its attention was not called, and upon which it did not intend to make any ruling."

In *Parker v. Starr*, 21 Neb. 680, 33 N. W. 424, although a mistake in description of mortgaged property was carried all through foreclosure and sale, a purchaser was held to be entitled to reformation, especially as it appeared that the property intended to be mortgaged was that actually appraised and sold, and that the purchaser had entered into possession.

This apparently was the rule in Florida until the cases of *Greeley v. De Cottes*, 24 Fla. 475, 5 So. 239 (where a mortgage containing an error in description, together with all subsequent proceedings, was corrected after foreclosure and purchase thereunder by the mortgagee, and numerous subsequent conveyances), and *Peck v. Osteen*, 37 Fla. 427, 20 So. 549 (where land not belonging to the mortgagor was included, and land intended to be included was omitted, and the mistake running through foreclosure proceedings was corrected), were overruled by *FISHER v. VILLAMIL*.

In *German Mut. Ins. Co. v. Grim*, 32 Ind. 249, 2 Am. Rep. 341, a complaint to correct a mistake made in the description of land and the name of the grantee, and carried into a mortgage and through foreclosure proceedings, was sustained. This case appears to have been in effect overruled by 39 L.R.A. (N.S.)

Miller v. Kolb, *supra*, although it is not mentioned in that case.

Reformation and new foreclosure.

The affirmative relief granted by the court in *FISHER v. VILLAMIL*, of reformation of the mortgage and foreclosure thereof as reformed, is that adopted by a majority of the cases.

Thus, in *Horner v. Bramwell*, 23 Colo. 238, 47 Pac. 462, where a trust deed intended to cover 400 acres belonging to the grantor, by mistake omitted 80 acres, and included another 80 acres not owned by him, and the mistake was not discovered until after sale by the trustee, it was held that the court should have made a decree setting aside the sale, reforming the trust deed, and directing the trustee to proceed to sell under the deed as reformed.

In *Conyers v. Mericles*, 75 Ind. 443, the earlier Indiana cases set out above, refusing to reform foreclosure proceedings, are distinguished, and it is held that under similar circumstances, while the foreclosure proceedings could not be corrected, the mortgage involved could be corrected and foreclosed under a bill drawn for that purpose, the court saying, in speaking of the earlier cases: "No one of these cases was an action to reform and foreclose the mortgage, nor was such question raised or decided. Each was an action to recover the land through such proceedings, and to make them available, it was sought to correct the mistakes. The appellant does not seek to recover the property, nor to correct the mistake in such foreclosure proceedings; but, ignoring such proceedings, he seeks to reform and foreclose his mortgage. This he may do unless its previous foreclosure prevents him. Such foreclosure was by the erroneous description—was, in fact, upon a different parcel of land, one that was not, in fact, mortgaged, nor intended to be mortgaged,—and was therefore a mere nullity. The mortgage, as reformed, is a different instrument, embraces a different parcel of land, and one against which no foreclosure has been had. The judgment of

1 of Benjamin's third subdivision, at the time complainants accepted the mortgage and made the loan; that after the cancellation of the deficiency decree, it was discovered that the mortgage did not embrace the lots pointed out by defendants as intended to be mortgaged, but embraced a different tract of land; that defendants knew at the time they pointed out said land that its correct description thereof was not block 1 of Benjamin's third subdivision, and they knew at the time of the execution of the mortgage, and at the time of the sale and the cancellation of the deficiency decree, that such was not the correct description, and they fraudulently concealed the same for the purpose of defrauding complainants; that said W. A. Fisher is now the owner of

lots 1 to 8 and lot 13 of East Nebraska Heights subdivision, and said property is clear of encumbrance; that complainants tender to defendants a proper deed of conveyance of said block 1 of Benjamin's third subdivision, and allege that defendants should be required to convey to complainants the last-described lots in block 1 of East Nebraska Heights subdivision; that the lots actually mortgaged are worth about \$300, for which complainants have paid \$1,350, and the lots intended to be mortgaged are worth about the sum complainants have paid; that defendant Fisher has no property out of which a judgment for the value of the land sought hereby could be satisfied.

The bill prayed the court to order and de-

foreclosure upon the land described did not adjudge that the land in dispute was not mortgaged by such instrument, and omitted therefrom by mistake, and therefore 'the question of description' is not *res judicata*, nor does such judgment form any obstacle to the reformation and foreclosure of the mortgage."

And in *Jones v. Sweet*, 77 Ind. 187, which was a suit to reform a mortgage as to an erroneous description and date, and to foreclose it as reformed, it was held that the fact that the erroneous mortgage had been foreclosed was no bar to the suit.

Sanders v. Farrell, 83 Ind. 28, follows *Conyers v. Mericles*, and holds that the erroneous mortgage was not so merged in the former decree of foreclosure as to forbid its reformation and foreclosure in this suit.

These cases are followed by *Burkam v. Burk*, 96 Ind. 270; and see also *McCasland v. Etna L. Ins. Co.* 108 Ind. 130, 9 N. E. 119.

In *Armstrong v. Short*, 95 Ind. 326, it is held that the remedy adopted in *Conyers v. Mericles* applies only when the mistake was one of fact merely, and not if the description was as intended, but insufficient in law.

And in *Ray v. Ferrell*, 127 Ind. 570, 27 N. E. 159, the right to reform and foreclose a mortgage was again recognized, but it was further held that, inasmuch as the land actually covered by the erroneous description was sold under the foreclosure for the full amount of the judgment, the mortgage was extinguished and there was nothing to reform.

In *Carrigg v. Mechanics' Bank*, 136 Iowa, 281, 111 N. W. 329, it is held that if it be necessary to correct a mortgage to make a sheriff's deed given on foreclosure cover land omitted from the mortgage by mistake, then there must be another foreclosure and sale.

In *Davenport v. Sovil*, 6 Ohio St. 459, where, by mistake, a total misdescription of the property intended to be mortgaged was carried through foreclosure and sale, it was held that the purchaser was entitled to have the mortgage reformed and foreclosed as reformed.

In *Marks v. Taylor*, 23 Utah, 470, 65 Pac. 30 L.R.A. (N.S.)

203, a former decree, reported in 23 Utah, 152, 63 Pac. 897, in which reformation of an erroneous description was corrected in the mortgage and all subsequent proceedings, was modified so as to require foreclosure of the mortgage as reformed, because, while plaintiff, who bid in the property, believed that the property described was that actually intended to be mortgaged, it did not appear that others might not have bid higher had the description been correct.

Other remedies.

In *Waldron v. Letson*, 15 N. J. Eq. 126, where, through error in the description in a mortgage, the purchaser on foreclosure did not receive conveyance of all the land supposed to be included in the mortgage, although he paid the full price and was put into possession of the whole, relief was granted by restraining the mortgagor's devisee from proceeding at law, and requiring him to release his title in the premises to complainant.

But in *Schwickerath v. Cooksey*, 53 Mo. 75, a petition by a purchaser under foreclosure, to have the title to property erroneously omitted from the mortgage, divested out of defendants and vested in himself, was denied.

Foreclosure under power of sale.

Where the foreclosure of a mortgage containing an error was under a power of sale, the objection to correction of the mortgage and deed because of an intervening judicial foreclosure does not apply, and in *Lester v. Johnston*, 137 Ala. 194, 33 So. 880, and *Greer v. Watson*, 170 Ala. 334, 54 So. 487, reformation of the description contained in a mortgage and deed given in foreclosure under power of sale was permitted.

But in *Haley v. Bagley*, 37 Mo. 363, reformation of a mistake in the description contained in a mortgage was denied to a purchaser at a sale under a power contained in the mortgage, on the ground that he bought at his peril.

cree the land intended to be included in the mortgage to be lots 1 to 8 and lot 13 of block 1 of East Nebraska Heights subdivision, and defendants to convey to complainants the said land upon execution by complainants of a deed conveying all of block 1 of Benjamin's subdivision, and, in event defendants fail so to do, the complainants be decreed to hold all right, title, interest, and claim of said defendants to said land. There was a prayer also for general relief.

The defendants filed an answer.

Testimony was taken and a final decree was entered as follows:

"The above-entitled cause coming on this day for hearing upon the pleadings and the master's report, and the court having heard argument of counsel, and considered the record and the testimony, and being advised that it has jurisdiction of the parties and of the subject-matter of this cause, and the court being of opinion that whether it was the intention of the defendants at the time the mortgage mentioned in the bill of complaint was made, to include in said mortgage the property which the complainants claim should have been included therein, to wit: Lots one (1) to eight (8) and lot thirteen (13) of block one (1) of East Nebraska Heights subdivision of the east half of the southwest quarter of the southeast quarter of the northwest quarter of section seven (7), in township twenty-nine (29) south, range nineteen (19) east, or whether it was the intention of the said defendants at the time the said mortgage was made, to give to the complainants a mortgage upon the property actually described in the said mortgage, and mislead and deceive the complainants into accepting the mortgage upon the property last mentioned, under the belief that they were obtaining a mortgage upon the property hereinabove particularly described, or whether it was the intention of all the parties that said mortgage should describe the lands hereinabove particularly described, but was made to describe other lands through mutual mistake, makes no difference in a court of equity, for the reason that the defendant

W. A. Fisher should not be permitted in this court to take advantage of his own wrong.

"It is thereupon, upon consideration thereof, ordered, adjudged, and decreed that the defendants, within five days from the date hereof, pay or cause to be paid to the complainants the amount of the decree mentioned in the bill of complaint, with attorneys' fees and costs therein mentioned, and with interest upon the total of said sums, less the sum of three hundred and twenty-five (\$325) dollars paid by the defendant W. A. Fisher to the complainants, as alleged in the bill of complaint; and that upon failure to make the said payment within the time fixed as aforesaid, the said W. A. Fisher and L. M. Fisher, his wife, and all persons claiming by, through, or under them subsequent to the commencement of this suit, are hereby barred and forever foreclosed of all right, title, and equity of redemption or interest whatsoever in and to the lands hereinabove particularly described.

"It is further ordered, adjudged, and decreed that in the event the said defendants fail to pay to the complainants the amount of money adjudged to them in the preceding paragraph, within the time aforesaid, the final decree of foreclosure in the cause mentioned in the bill of complaint, wherein E. Villamil and J. B. Jackson were complainants, and W. A. Fisher and L. M. Fisher, his wife, were defendants, as recorded in Book 13, page 294, minutes of this court, be corrected and reformed, and the master's deed, made and executed on the 3d day of November, A. D. 1908, by W. T. Martin, master, to the complainants in this cause, and recorded in Deed Book 102, page 7, records of Hillsborough county, Florida, and the mortgage described in the bill of complaint herein made by the defendants to the complainants, and as recorded in the records of Hillsborough county, Florida, in Mortgage Book 19, page 225, and all proceedings in said foreclosure suit above described, be and they are hereby reformed and corrected as to the description of the property

Effect of reformation on right to redeem.

In *Blodgett v. Hobart*, 18 Vt. 414, a mortgage which omitted part of the property intended to be described was reformed after foreclosure and sale, and the mortgagor was given an opportunity to redeem the whole premises, the court saying that it would not do to create a mortgage and foreclose the equity of redemption at one and the same time.

In *Provost v. Rehman*, 21 Iowa. 419, the court recognizes a right on the part of a mortgagee to have a mortgage reformed after foreclosure, so as to supply an omission

in the description, and that such reformation might revive the mortgagor's right to redeem.

But *McKissick v. Mill Owners' Mut. F. Ins. Co.* 50 Iowa, 116, holds that the correction of a misdescription in a mortgage after foreclosure does not revive the right to redeem, distinguishing *Provost v. Rehman*, on the ground that, in the latter, property not actually described in the mortgage was inserted by the reformation, while, in the present case, the property was included, but erroneously described.

R. L. S.

mentioned therein as the mortgaged premises, as that the same shall read as follows: Lots one (1) to eight(8) and lot thirteen (13) of block one (1) of East Nebraska Heights subdivision of the east half of the southwest quarter of the southeast quarter of the northwest quarter of section seven (7); township twenty-nine (29) south, range nineteen (19) east.

"It is further ordered, adjudged, and decreed that within five (5) days from this date, the complainants do make, execute, and deliver to the defendants a deed conveying the interest of said complainants to said defendants in the following lands situate in Hillsborough county, Florida, to wit: Block one (1) of Benjamin's third subdivision, according to the plat thereof as recorded in the public records of Hillsborough county, Florida; and upon the failure of said complainants to make, execute, and deliver the said deed, then and in that event this decree shall operate as a conveyance of said real estate from the complainants to the defendants, and that the said complainants and all persons claiming by, through, or under them subsequent to the commencement of this suit, be and they hereby are forever barred and foreclosed of all right, title, and interest whatsoever in and to the said last-mentioned lands."

Assuming that the testimony in this cause would authorize a reformation of the mortgage given by the defendants to the complainants, on the ground of mistake or fraud, we think the chancellor erred in decreeing a reformation of the decree of foreclosure and the deed executed by the master in pursuance of the foreclosure proceedings, and in decreeing that the defendants pay the amount stated in the decree, and that, upon failure so to do, the defendants be debarred and forever foreclosed of all right and title and equity of redemption in and to certain described lots of land in East Nebraska Heights subdivision, which land was not included in the mortgage foreclosed, and had not been ordered to be sold, and was not in fact sold or conveyed to the complainants.

As the court very clearly pointed out in *Marks v. Taylor*, 23 Utah, 470, 65 Pac. 203, the decree of the chancellor, if affirmed by this court, would invest the complainants with the title to property which was neither ordered to be sold, advertised, or offered for sale, or sold by the master to them. It may be true that the complainants thought the property intended to be mortgaged was the property offered for sale, and evidently bid

in the property with that understanding; but it does not appear that other bidders, if any other were present at the sale, had the same understanding. The property intended to be mortgaged was not offered for sale, but another, and a much less valuable, parcel of land covered by the mortgage, was offered for sale and sold. If the more valuable property intended to be mortgaged had been offered for sale by the master, it is not improbable that a higher bid than the complainants' bid would have been made by some other person. But, be that as it may, the people of this state have declared in their Constitution that no person shall be deprived of property without due process of law. Even though the defendants may have intended to mortgage the land in East Nebraska Heights subdivision, the giving of a mortgage does not vest the legal estate in the mortgagee. A mortgage cannot be a present conveyance of the legal title; however, it may become so by breach of conditions and the action of the courts. The title is transferred, as we said in *McMahon v. Russell*, 17 Fla. 698, in pursuance of the contract embraced in the mortgage, by a judicial sale decreed for the enforcement of the specific lien. Also see *Louisville & N. R. Co. v. Wang*, 61 Fla. 299, 55 So. 73. The mortgagor remains, until a sale, seised in fee. There has never been a decree for the enforcement of the lien on the property in East Nebraska Heights subdivision, nor a judicial sale thereof.

Undoubtedly the mortgage, upon sufficient showing, may be reformed so as to embrace the land in East Nebraska Heights subdivision, instead of the land in Benjamin's third subdivision, and the mortgage as reformed may be foreclosed. The master's deed to the property that was actually embraced in the mortgage and sold and conveyed to the complainants may be canceled. Thus, the parties will be placed in the position they should occupy, if the facts and the law justify. But, where the incorrect description of the lands intended to be embraced in the mortgage, or, in other words, the wrong land, has been carried into the mortgage, the decree, notice of sale, and master's deed, such proceedings may not be corrected, as is attempted to be done here.

The question involved here has been considered by the courts many times. In a note by Mr. Freeman, in *Stewart v. Wilson*, 109 Am. St. Rep. 33, text 36, he says the cases are in hopeless conflict on this question. "Perhaps the better rule," says Mr. Freeman, "is that maintained by the cases

which decide that such conveyances cannot be reformed in equity. . . . The majority of the cases maintain that when a mortgage misdescribes the property intended to be mortgaged, the mistake may be corrected by a proper proceeding before judicial foreclosure; but if the mistake has been carried into a bill filed for the purpose of foreclosing such mortgage, into the decree ordering foreclosure, into the advertisement, and into the deed, the purchaser at such foreclosure sale cannot maintain a bill in equity to correct the description of the land as contained in the mortgage, in the decree, and in the deed. *Stephenson v. Harris*, 131 Ala. 470, 31 So. 445; *Rogers v. Abbott*, 37 Ind. 138; *Miller v. Kolb*, 47 Ind. 220; *Angle v. Speer*, 66 Ind. 488; *Conyers v. Mericles*, 75 Ind. 443; *Davenport v. Sovil*, 6 Ohio St. 459."

In *Stephenson v. Harris*, 131 Ala. 470, 31 So. 445, the court said: "In the case in hand, if the relief prayed were granted, it would result in giving to complainant a title by decree to land that was not described in the bill to foreclose, not decreed to be sold, and not advertised and sold, nor conveyed by the register to him under the foreclosure decree. That part of it which was sold under the decree was, no doubt, well sold, and may have been of comparatively small value to that not sold, and which complainant now proposes to take under a decree to be herein rendered. To do this, amendment and reformation from the beginning of the case under which the decree of foreclosure was entered would have to be made, in the bill, mortgage, decree, sale, conveyance, and confirmation of the decree. The judicial sale cuts this all off from the power of the court to deal with in this case."

We are not unmindful of the decisions by this court in *Greeley v. De Cottes*, 24 Fla. 475, 5 So. 239, and *Peck v. Osteen*, 37 Fla. 427, 20 So. 549. We think these cases differ in the facts from the instant case; but, if the rule there announced differs from the views we express here, we do not approve it. As the decree must be reversed, and we do not know what facts may develop, or what questions may present themselves in the proceedings to reform the mortgage, we will content ourselves with what we have said.

The decree is reversed.

Taylor and Hocker, JJ., concur.

Whitfield, Ch. J., and Shackelford and Cockrell, JJ., concur in the opinion.
39 L.R.A.(N.S.)

LOUISIANA SUPREME COURT.

STATE OF LOUISIANA, Appt.,

v.

N. K. PARRISH.

('129 La. 547, 56 So. 503.)

Perjury — unnecessary oath.

To falsely make oath before a notary public in order to obtain a saloon license is not perjury, when the law governing the issuance of such licenses does not require such an oath. An oath must be administered in accordance with the law before perjury can be charged.

(November 13, 1911.)

Headnote by BREAUX, Ch. J.

Note. — Perjury: false swearing where no oath, or the particular one administered, was not required, as perjury.

This note does not cover cases where there was merely an irregularity in administering the oath, such, for example, as *People v. Parent*, 139 Cal. 600, 73 Pac. 423, holding that the omission of the words "so help you God" constituted no defense to a prosecution for perjury, nor cases in which the defense set up was that the particular officer who administered the oath was not empowered to do so. (As to sufficiency of averment in indictment as to jurisdiction or authority to administer oath, see note in 32 L.R.A.(N.S.) 142.)

It is a general rule that perjury cannot be predicated of an oath which is not required by law. *United States v. Dupont*, 176 Fed. 823; *Foreman v. Union & A. Co.* 83 Hun, 385, 31 N. Y. Supp. 947; *State v. Wyatt*, 3 N. C. (2 Hayw.) 56; *People v. Fox*, 25 Mich. 492.

In the last case the information charging perjury did not show that the affidavit alleged to be false was made for any authorized purpose. The court said: "Perjury is committed 'when a lawful oath is administered by any that hath authority, to any person in any judicial proceeding, who sweareth absolutely and falsely in any matter material to the issue or cause in question.' 3 Co. Inst. 164; 4 Bl. Com. 137. There must be an oath authorized by law, an issue or cause to which facts were material, and a false statement regarding such facts upon such issue, or in such cause. Such would be the case at the common law; and if it be claimed that this is statutory perjury, the information is not aided, for, by the statute, it must appear that the oath is one required or authorized by law (Comp. Laws, 1857, § 5821); and this will not appear unless the purpose for which the affidavit was made is shown. Perjury, therefore, is not well assigned, whether it be at the common law or by statute."

The general rule that perjury cannot be predicated of an oath not required by law was applied in the following cases in which

APPPEAL by the State from an order of the Judicial District Court for the Parish of Acadia, quashing an indictment charging defendant with perjury. Affirmed.

The facts are stated in the opinion.

Mr. G. A. Gondran, with Mr. Walter Gulon, Attorney General, and Mr. John J. Robira, for the State.

Messrs. Story & Pugh, for appellee:

An oath lawfully taken is the essential thing to be charged in an indictment for perjury, and in case perjury is assigned on a nonjudicial oath, it is insufficient to maintain a prosecution, if the person who administered the oath was not legally authorized to administer that particular oath.

State v. Theriot, 50 La. Ann. 1187, 24 So. 179; State v. Dreifus, 38 La. Ann. 877;

it was held that perjury could not be based upon:

—an oath verifying a bill in equity which was not required to be verified by oath. *People v. Gaige*, 26 Mich. 30; *Silver v. State*, 17 Ohio, 365;

—an oath by an officer of a corporation to an answer filed by the corporation to a bill in equity, where the answer was not required to be sworn to. *Beecher v. Anderson*, 45 Mich. 543, 8 N. W. 539;

—an oath to exceptions to the sufficiency of bail in error which were not required to be sworn to. *Linn v. Com.* 96 Pa. 285;

—a voluntary affidavit made at the request of fire insurance adjusters, as to the correctness of the books of the insured and the amount of stock on hand at the time of the fire. *Metzger v. Manchester Fire Assur. Co.* 102 Mich. 334, 63 N. W. 650;

—an unauthorized oath as to competency of applicants for marriage licenses. *Com. v. Williamson*, 4 Gratt. 554; *State v. Theriot*, 50 La. Ann. 1187, 24 So. 179;

—an affidavit of an applicant for naturalization, relative to his previous residence, as to which the act expressly excluded his oath. *State v. Helle*, 2 Hill, L. 290;

—an affidavit of one making application to commute his homestead entry to a cash entry, referring to his residence, and containing statements not required or authorized to be made. *United States v. Howard*, 37 Fed. 666;

—an oath by a pre-emptionist which did not contain what was required by statute, but contained matter not required to be sworn to. *United States v. Bedgood*, 40 Fed. 54;

—an oath to proof for obtaining the fishing bounty, which was not required to be made under oath. *United States v. Nicholson*, 3 Woods, 215, Fed. Cas. No. 15,877;

—an unauthorized affidavit made to an account, to prepare it for a set-off or a trial. *Waggoner v. Richmond*, Wright (Ohio) 173.

—an unauthorized oath by a person concerning the qualifications of a voter. *Com. v. Polluck*, 6 Pa. Dist. R. 559;

—a voluntary oath to a protest taken before a notary public as part of the proofs in a case of marine loss. *People v. Travis*, 4 Park. Crim. Rep. 213;

State v. Wymberly, 40 La. Ann. 460, 4 So. 161; 2 Wharton, Crim. Law, 9th ed. § 1269.

Breaux, Ch. J., delivered the opinion of the court:

The indictment charged the defendant with having appeared on the 16th day of December, 1910, before a notary public, and taken the oath to answer the following question:

"Q. Have you ever been charged with violating any of the laws of the state or municipality?"

To which he answered:

"No."

It was further charged in the indictment that twice before the date he took the oath he had been tried and sentenced in the par-

fore a notary public as part of the proofs in a case of marine loss. *People v. Travis*, 4 Park. Crim. Rep. 213;

—a voluntary affidavit concerning a wager, made before a justice of the peace before whom no cause was pending. *Shaffer v. Kintzer*, 1 Binn. 37, 2 Am. Dec. 488;

—a voluntary oath taken in a matter verbally submitted to arbitrators. *Mahan v. Berry*, 5 Mo. 21;

—a memorandum of a surety's property, made under his justification and affidavit. *Klug v. McPhee*, 16 Colo. App. 39, 63 Pac. 709;

—an oath to an account, authorized under an act permitting a party to prove his own accounts by oath or affirmation, where the account did not show that it was made within a specified time after the first article charged, as required by the act. *Warner v. Fowler*, 8 Md. 25.

And where a statute requires an affidavit of one becoming a qualified elector after the completion of registration to state the facts showing his qualification and disqualification, perjury cannot be assigned on an affidavit which fails to state the facts, but states merely that he was not, at the time of registration, a qualified elector, but became such subsequently. *State v. Lloyd*, 77 Wis. 630, 46 N. W. 898.

And under the statutes regulating the crime of perjury and false swearing, it is generally held that an offense cannot be predicated upon an oath not required or authorized by law.

Thus, under a statute making it punishable as perjury wilfully to swear or affirm falsely in regard to any material matter respecting which such oath or affirmation "is authorized or required," one who swears falsely to a bond and oath as to the value of his property, to induce the county treasurer to deposit in a certain bank, cannot be convicted of perjury, where no such bond or oath is authorized or required by law. *Collins v. State*, 33 Fla. 446, 15 So. 220. The court said: "One of the vital essentials of the crime, to be alleged and made out under this section of the statute, is, that the oath charged to have been falsely taken

ish of Caddo for selling liquor without a license. The indictment charged that the oath taken was "corrupt perjury." (We use the words of the indictment.)

The record in the case before us for decision discloses that the defendant addressed a petition to the mayor and board of aldermen of the city of Crowley, applying for a permit to conduct a barroom within the limits of that city, and the oath in question was taken in connection with the application for the permit, and in support of the petition.

A petition is required by act 176, § 8, of 1908, known as the "Gay-Shattuck law."

must be such an oath as is authorized or required by law to be taken under the circumstances by which it is surrounded when taken. The indictment here, though it alleges that the oath it charges to have been falsely taken was authorized and required by law to be taken, shows upon its face, as matter of law, that such oath was not in fact either authorized or required by any law to be taken for the purposes and under the circumstances set forth in the indictment."

In *Territory v. Weller*, 2 N. M. 470, where the statute punished as perjury false swearing in cases where an oath was required, the lower court held that an oath was not required of sureties on appeal, and that therefore perjury could not be predicated upon such an oath; but, on appeal, the case was reversed on the ground that an oath was required of such sureties.

It is not false swearing within the meaning of a statute punishing false swearing in matters as to which an oath is required by the laws of the United States for one who has served as a witness to make a false oath as to the distance traveled by him, where no such oath was required by law. *United States v. Babcock*, 4 McLean, 113, Fed. Cas. No. 14,488.

And where the statute regulating applications for patents does not require the applicant to swear that he is the "sole" inventor, and the statute punishes as perjury false swearing in matters as to which the laws of the United States require an oath, one who makes a false oath that he is the "sole" inventor cannot be convicted of perjury, although a departmental order authorized such an oath. *Patterson v. United States*, 104 C. C. A. 434, 181 Fed. 970.

So, where the laws of the United States did not require an affidavit as to the non-mineral character of the land upon which a homestead was taken, it was held that one making a false oath as to such fact could not be convicted of perjury under a statute punishing as perjury the taking of false oaths in cases where the law authorized an oath to be administered, although, by a departmental regulation, such oath was required. *United States v. Maid*, 116 Fed. 650.

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The defendant filed a motion to quash the indictment. The motion was sustained by the district court, and the indictment quashed. The state appealed, to the end of having the indictment declared legal and the case reinstated for prosecution.

The license required of retail liquor dealers may be obtained without the necessity of such a broad and sweeping oath as that required of defendant to obtain a permit.

Section 8 of the act reads: "This petition must be accompanied by the affidavit of two reputable citizens of this state, domiciled at the place where such applicant desires to locate his establishment, vouch-

And in *United States v. Lamson*, 165 Fed. 80, it was held that perjury could not be predicated under such statute upon an oath by a dealer in oleomargarin as to names of customers, goods sold, etc., since such an oath was not required by the laws of the United States, or by any regulation having the force of law.

And under a statute punishing as perjury false swearing in proceedings where an oath is required by law, or in which an oath may lawfully be administered, an oath to an application for a loan, taken before a justice of the peace, which it not required by law, cannot be made the basis of a charge of perjury. *State v. McCarthy*, 41 Minn. 59, 42 N. W. 599.

And where an act provided that to make a case of perjury the oath or affidavit must be made or taken under or by virtue of the law relating to the naturalization of aliens, perjury cannot be based upon an oath as to the applicant's residence, which is not required by such law. *United States v. Grottkau*, 30 Fed. 672.

And under a statute providing that a person is guilty of perjury who testifies falsely upon an oath legally administered in any proceeding before a public officer, or on an oath prescribed by any law of the state, one is not guilty of perjury if he swears falsely as to the parents' consent to a marriage, where no such oath was authorized by the statute. *State v. Carpenter*, 164 Mo. 588, 65 S. W. 255.

And such a case is not within the provisions of another statute providing that one who wilfully makes "any false certificate, affidavit, or statement of any nature, for any purpose," before any officer authorized to administer oaths, shall be guilty of a misdemeanor, since such statute only covers instruments in writing. *Ibid*.

And a voluntary oath falsely made for the purpose of influencing a stockholder in the payment of a gambling wager is not punishable under a statute applying to corrupt oaths "for any purpose," since such an oath is neither authorized nor required by law, but is one made in furtherance of an illegal transaction. *State v. Miller*, 44 Mo. App. 159.

So, where a statute provides that one who takes a lawful oath or affirmation in any

ing for the truth of all the allegations contained in applicant's petition, as herein specified."

No law prescribes the taking of such an oath. It follows there was no perjury. *State v. Wymberly*, 40 La. Ann. 460, 4 So. 161. Perjury is the crime expressly charged. No power is granted to any officer to administer such an oath. Whatever may be the oath required of the applicants for permits, they do not include the oath that one has not violated any law of the state or of a municipality. In order to hold that the lawmaker intended that such an oath should be taken, the intention must clearly

appear. The oath must be administered in accordance with the law in order that perjury may be charged. Rev. Stat. § 857. One may violate a municipal ordinance, and yet not be guilty. He may even violate some public statutes, without thereby committing a felony or a misdemeanor which disqualifies him from opening a liquor saloon. Such is the conclusion at which we have arrived.

We are of opinion that the question was properly decided below.

For reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from is affirmed.

matter in which, by law, an oath or affirmation may be required, shall be guilty of perjury if he wilfully swears falsely, one who makes an affidavit such as required where a prosecution for bastardy is commenced is not guilty of perjury where it is not required unless such proceeding is commenced, and it does not appear that such a proceeding was instituted. *Smith v. State*, 125 Ind. 440, 25 N. E. 598.

And where a statute provides that "if any person of whom an oath shall be required by law shall wilfully swear falsely in regard to any matter or thing respecting which such oath is authorized or required, such person shall be deemed guilty of perjury," perjury cannot be predicated upon sworn statements of one subpoenaed to appear before a justice of the peace before whom no complaint had been made concerning the offense to which they related. *People v. Titmus*, 102 Mich. 318, 60 N. W. 693.

And where it does not appear from the indictment that the sale of whisky was a public offense, one cannot be legally sworn to testify concerning a supposed sale, and cannot therefore be convicted under a statute punishing false swearing in a matter in which one can be legally sworn, or on which he is required to be sworn. *Kerfoot v. Com.* 89 Ky. 174, 12 S. W. 189.

But in *Com. v. Turner*, 98 Ky. 526, 33 S. W. 88, it was held that it was not necessary under the latter provision that the subject on which the witness swears falsely should be one on which he could legally be sworn, but that it was sufficient that he was required to be sworn; and it was held that the fact that the witness was required to testify as to matters which might incriminate him would not exempt him from punishment for false swearing. The court said: "The penalty attaches to false swearing on any subject 'on which he is required to be sworn,' and there is no denial that the witness was, in this case, required by the court, in the exercise of its judgment, to be sworn. Nor does this mean simply on a subject on which he is required by law, or legally required, to be sworn. The sentence immediately preceding this provides expressly for those cases 'in which he can legally be sworn,' and the fact that it is immediately followed by this other sen-

tence, in the disjunctive, 'or on which he is required to be sworn,' shows clearly, as we think, a purpose on the part of the lawmakers to provide for two different and distinct states of case. One of these relates to subjects only 'in which he can legally be sworn,' while the other relates to those 'on which he may be required to be sworn.' To give any effect whatever to this latter clause it must be construed to cover a class of cases not embraced by the former clause, and this, in our opinion, is the true construction.

"In this case appellee was 'required to be sworn' by the court in which he was testifying as a witness, and, having recognized the authority of the court to require it, and having sworn on this subject, he was liable to the penalty prescribed by the statute if he swore falsely."

And where a statute provides that "every person who shall wilfully, corruptly, and falsely, before any officer authorized to administer oaths, under oath or affirmation, voluntarily make any false certificate, affidavit, or statement of any nature, for any purpose, shall be deemed guilty of a misdemeanor," one may be convicted for making a voluntary false affidavit before an authorized officer, for use at an investigation, stating that a certain person had attempted to persuade him to be corruptly influenced in respect to a public office. *State v. Boland*, 12 Mo. App. 74.

And where a statute punishes as perjury false statements to which an oath is required by law, and punishes as false swearing the making of false statements under a voluntary oath legally administered, one may be convicted of false swearing for taking a false oath as to the age of an applicant for a marriage license, although such an oath is not required by law. *Davidson v. State*, 22 Tex. App. 372, 3 S. W. 662.

And under such statute a statement made under oath after the accused had waived examination may form a basis for a prosecution for false swearing, but not for perjury, where only a voluntary unsworn statement is authorized. *Biard v. State*, 54 Tex. Crim. Rep. 440, 113 S. W. 275.

J. T. W.

IOWA SUPREME COURT.

MARY A. THARP

v.

C. E. JAMISON, Sheriff, et al., Appts.

(— Iowa, —, 134 N. W. 583.)

Evidence — burden of proof — alteration of instruments.

1. One seeking to avoid the effect of a deed because of an alleged alteration has the burden of showing that it was made after delivery.

Same — copy of signature — effect.

2. That an impression of the name of the grantee indorsed on the back of a deed, from which an initial had been erased, which was accidentally made upon a blank space on the paper, by exposure to the weather, soon

after the deed was delivered, shows the initial to be missing, is strong corroborative evidence that the erasure was made before delivery.

(February 13, 1912.)

A PPEAL by defendants from a decree of the District Court for Van Buren County in plaintiff's favor in a suit to set aside a sheriff's sale, and to enjoin the issuance of the sheriff's deed thereunder to certain real estate. **Affirmed.**

Statement by Evans, J.:

Suit in equity against a sheriff and an execution plaintiff to set aside a sheriff's sale, and to enjoin the issuance of the sheriff's deed thereunder to certain real estate. The

Note. — Presumption as to time of alteration in written instrument and its effect on burden of proof.

I. Introduction and general principles, 100.

II. Alteration apparent on face of instrument.

a. General rules and their ordinary application.

1. Presumption in favor of instrument, 103.

2. Presumption against instrument, 107.

3. No presumption, 112.

b. Special circumstances and cases.

1. Suspicious alteration, 113.

2. Act of public officer, 114.

3. Alteration immaterial to issue, 115.

III. Alteration not apparent on face of instrument, 115.

I. Introduction and general principles.

This note does not include cases of alterations in wills; the burden of explaining erasures or alterations appearing on the face of a will being discussed in the note to *Scott v. Thrall*, 17 L.R.A. (N.S.) 184.

And see discussion of question of presumption as to alteration of typewritten instrument made in duplicate, in note to *Stromberg-Carlson Teleph. Mfg. Co. v. Barber*, 18 L.R.A. (N.S.) 680.

This note does not go into the question as to what constitutes a material alteration, nor as to the effect upon the instrument of such an alteration when proved.

There are several different rules entirely inconsistent with each other, as will appear below. These opposing rules are in part grounded upon broad principles of reason, and in so far as that is true, the conflict is real and natural, but it seems that in many cases the conflict is more apparent than real, because of different interpretations of terms and different assumptions underlying the decisions.

Thus, as will be seen, the courts generally agree that a "suspicious" alteration

casts the burden of explanation upon the holder of the instrument or the one claiming under it, but they do not agree as to what a suspicious alteration is, some courts going upon the theory that every apparent alteration is calculated to arouse suspicion, and others requiring peculiar circumstances of suspicion patent upon the face of the instrument; and this requirement leads off into a maze of ramifications incapable of classification. See *McCormick v. Fitzmorris*, 39 Mo. 24.

In *McKenzie v. Barrett*, 43 Tex. Civ. App. 451, 98 S. W. 229, it was said that the rule that if no suspicion is aroused by the alteration, the presumption will be that it was made prior to or contemporaneous with the execution of the instrument, modifies the general rule that an alteration apparent upon the face of an instrument must be explained by the party offering the same in evidence.

Again, some confusion arises from the fact that in speaking of a "presumption," some courts mean a presumption of law and others mean a presumption of fact, and they do not always make clear which is meant. When the presumption is one of law, that the alteration was subsequent to the execution of the instrument, it is held that the party producing the paper must explain the apparent alteration before it can be given to the jury, the court assuming to decide upon inspection of the instrument, that it is *prima facie* invalid. Other authorities, not admitting such a presumption of law, have held that the instrument should be given in evidence to the jury for their inspection, leaving both parties to offer such evidence as they may think proper touching the alteration; and these authorities are again divided upon the question whether it is *prima facie* valid or void, that is, whether the presumption of fact is that the alteration was made before or after execution, and consequently putting the burden of proof, at least in the sense of going forward with the evidence, sometimes upon one party and sometimes upon the other, to convince the jury by a preponderance of evidence.

plaintiff alleged that she was the owner of such real estate, whereas it was levied upon by the sheriff as the property of her husband under an execution against him. There was a decree for the plaintiff, and the defendants appeal.

Messrs. Walker & McBeth for appellants.

Messrs. Robert Sloan, H. B. Sloan, and J. C. Calhoun, for appellee:

An alteration apparent on the face of the writing raises no presumption that it was made after delivery and without authority, and the burden of proof is upon the defendant to prove that the alterations were made after delivery and without authority.

But, perhaps, the greatest confusion arises from the loose or careless use of the term "burden of proof." While certain presumptions of fact may arise during the trial of a case, these presumptions do not ordinarily change the burden of proof in the sense of the necessity of establishing the point by a preponderance of evidence. It still remains as in the beginning, upon him who has the affirmative of the issue. The burden of proof in this sense does not change, but the weight of evidence may, according to the nature and strength of the proofs offered on the trial, assisted by the presumptions arising therefrom.

To illustrate: If the court takes the view that the presumption is that the alteration was made before delivery of the instrument, it is apt to add, as if it were a mere corollary or complementary proposition, that the burden of proving that it was made after delivery rests on the other party. Strictly, however, the burden of proof, at least in the sense of the necessity of proving the point by a preponderance of evidence, as distinguished from the burden of proof in the sense of the necessity of going forward with the evidence, rests upon the party having the affirmative of the issue, and is not shifted by the indulgence of a presumption in his favor, although it may relieve him in the first instance of the necessity of producing evidence to sustain his point. For another phase of the distinction between presumption and burden of proof, see note in 16 L.R.A. (N.S.) 527, in relation of doctrine of *res ipsa loquitur* to burden of proof.

Before proceeding to a discussion of the rules and the generally recognized exceptions, note will here be made of several distinctions suggested in various cases as affecting the rules, but not generally accepted or followed. It has been thought that the presumption or burden of proof might be affected by the question whether the alteration is beneficial to the maker of the instrument or otherwise; whether it is in the same ink and handwriting or different; whether it is noted in the attestation clause or at the foot of the instrument or not; 16 L.R.A. (N.S.)

Hagan v. Merchants' & B. Ins. Co. 81 Iowa, 321, 25 Am. St. Rep. 493, 46 N. W. 1114; **McGee v. Allison**, 94 Iowa, 527, 63 N. W. 322; **Gibbs v. Farmers' & M. Bank**, 123 Iowa, 736, 99 N. W. 703.

Evans, J., delivered the opinion of the court:

The controversy in this case turns upon a question of fact. Was the plaintiff the owner of the real estate in question, or was her husband the owner thereof?

One or the other of them acquired the title by warranty deed from one John Miller, on November 24, 1903. This deed was lost before it was recorded, and was not found until after the beginning of this action. It was found before the trial, and was

whether it is simply the correction of an apparent mistake, or an actual change in the context; whether it is plainly in accordance with the manifest intention of the parties as shown by the rest of the instrument or not; whether it is an interlineation, an erasure, or the filling in of a blank; whether the alteration is in printed or in written words; whether it is in the body of the instrument or in the acknowledgment, indorsement, or some other attached writing; whether, if allowed to stand as a fraudulent alteration, it would absolutely avoid the instrument or not; and whether it is in an ancient document (over thirty years old) or in one not so old. No one of these suggestions has been followed as a basis for any general rule, but they have evidently affected the result in individual cases, and will be noted in connection with those cases.

Thus, it is said that where the alteration is of such a character as to defeat entirely the operation of the instrument for any purpose, as in the case of an erasure of the signature and seal to a deed, so that, admitting all to be true that appears upon the instrument when produced, it will be void in law, it should be explained in the first instance before it should be permitted to go to the jury. In other cases the instrument should be given in evidence, and should go to the jury upon the ordinary proof of its execution, although an alteration may appear in it, leaving the parties to such explanatory evidence as they may choose to offer. **Stoner v. Ellis**, 6 Ind. 152.

And in **Smith v. McGowan**, 3 Barb. 404, the court makes the following observations: "There is no principle of the common law which requires a deed to be written throughout with the same colored ink. The fact that ink of different colors is used may or may not afford evidence of a fraudulent alteration of an instrument. It may often be an important item of evidence on that question. And it may be consistent with the utmost honesty. There is nothing in the fact, considered in itself, which will require the court to exclude the instrument for that reason, as matter of law. . . . There is

introduced in evidence. Such deed on its face runs to the plaintiff as grantee. Such deed, however, shows upon its face that since it was first written there was a change or erasure of the first initial in the name of the grantee. The plaintiff's name is "Mary A. Tharp." Her husband's name is "W. M. Tharp." The name of the grantee appearing in the deed is "M. Tharp." The contention of the defendants is that the name as originally written was "W. M. Tharp," and that it was altered after delivery by the erasure of the "W." The contention of the plaintiff is that the name of the grantee was orig-

inally written in the deed as "M. M. Tharp" (this was the name of a former wife of the plaintiff's husband); that, upon discovery of the mistake, the first initial was eliminated by erasure by the grantor, Miller, before delivery. Miller died before the trial. That an erasure of an initial was made in the deed after it was written is apparent upon its face, and is not disputed by either side.

The crucial question is, Was the erasure made before delivery or after? The burden was upon the defendants to prove that the apparent alteration was made after delivery.

no law requiring a deed to be free from interlineations, dots, or erasures, though it is conceded that such plénignes may cast suspicion on the instrument. . . . In early times, when few, and perhaps none, of the jurors could read or write, and when deeds were drawn only by men of a particular profession, and when the rules of pleading required the actual production of the deed, corresponding in all respects with the proffer, there was some propriety in the strictness contended for. But that extremely rigorous rule is not adapted to modern times. . . . The rules of evidence should conform themselves to the customs and wants of society. It is this plastic principle which modifies or dispenses with a rule where the reason for the rule requires it, that imparts to the common law its highest value. A large proportion of deeds are drawn by the parties or their neighbors, who are not professional men; and if the doctrine of Pigot's Case, 11 Coke, 26, and the Touchstone, should be rigorously applied to every erasure, interlineation, or obliteration, titles, would be disturbed to an incalculable amount. This would certainly be the case, if we are to presume that every alteration or erasure was fraudulent-ly made after the execution of the deed"

So, in *Jordan v. Stewart*, 23 Pa. 244, the court remarks: "When we look at a written instrument containing an interlineation or erasure without reference to contested rights, the natural and fair presumption doubtless is that the alteration was made before signature, because if altered after execution, it would be forgery, which is never to be presumed. Instruments of writing executed with the solemnities appointed by law are, like the men who made them, to be presumed innocent, until some circumstance is shown to beget a counter presumption. But when a contest occurs, the question at once arises whether the alteration is beneficial to the party offering it; if it be not, as in the instance of a bond or note altered to a less sum, the prima facie presumption is unchanged; if it be, . . . we do not presume a forgery, but we hold the party offering it in evidence, and seeking advantage from it, bound to explain the alteration to the satis-

faction of a jury. The initiative and the burden of proof are thrown on him. If the interlineation or erasure have been noted in the attestation clause as having been made before signature, this is sufficient; or if the similarity of ink and handwriting, or the conduct of the parties, or other facts proved, shall persuade a jury that it was so made, the instrument is relieved from suspicion, and the party offering it is entitled to the benefits of it. So long as any ground of suspicion is apparent on the face of the instrument, the law presumes nothing, but leaves the question as to the time when it was done, to be ultimately found by the jury upon proofs to be adduced by him who offers it in evidence."

"Many authorities, however, while admitting that the general rule is that the law presumes that an alteration in an instrument is a legitimate part of it, until the contrary appears, hold that this rule does not extend to negotiable securities. . . . The reasons usually assigned for applying to negotiable paper a rule different from that applied to other instruments are, substantially and briefly, two: First. As notes and bills are intended for negotiation, and as payees would not receive them when clogged with impediments to their circulation, there is a presumption that such an instrument starts fair and untarnished, which stands until it is repelled. Second. That, without such a presumption to sustain him, the maker would be defenseless, as he cannot be expected to account for what happened after the paper left his hands. The first of these reasons, it seems to us, rather begs the question; and whatever force it might have possessed in times when the use of so-called negotiable instruments was confined to strictly commercial paper, it can have but little weight now, when such instruments are taken and given by all classes of people, in the most informal manner, as mere evidences of indebtedness, and without reference to their subsequent negotiation. . . . The second reason might have had much force when parties were not competent witnesses, but very little now, when they may testify in their own behalf. No one can better known than the maker what condition an instrument was in when it left

Such fact being proved, the burden of explanation would then fall upon the plaintiff. An erasure or alteration apparent upon the face of the instrument raises no presumption that it was made after delivery. *Hagan v. Merchants' & B. Ins. Co.* 81 Iowa, 21, 25 Am. St. Rep. 493, 46 N. W. 1114; *McGee v. Allison*, 94 Iowa, 527, 63 N. W. 322. The contention of the appellant at this point is that the only burden upon him is to show that an alteration was in fact made, and that the burden is then cast upon the plaintiff to show that such alteration was made before delivery, or otherwise to ex-

plain or excuse. There are some jurisdictions where this rule is maintained. *Jordan v. Stuart*, 23 Pa. 244. Appellant cites the following cases in support of his contention: *Robinson v. Reed*, 46 Iowa, 220; *Smith v. Eals*, 81 Iowa, 235, 25 Am. St. Rep. 486, 46 N. W. 1110; *Conger v. Crabtree*, 88 Iowa, 536, 45 Am. St. Rep. 249, 55 N. W. 335; *Shroeder v. Webster*, 88 Iowa, 627, 55 N. W. 569; *First Nat. Bank v. Zeima*, 93 Iowa, 140, 61 N. W. 483; *Maguire v. Eichmeier*, 109 Iowa, 301, 80 N. W. 395; *Rambousek v. Supreme Council*, M. T. 119 Iowa, 263, 93 N. W. 277. None of these

his hands." *Wilson v. Hayes*, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754. 42 N. W. 467.

Not only is there a conflict as between jurisdictions, but often there is an apparent conflict between cases in the same jurisdiction. This can usually be explained, however, by reference to the above remarks as to interpretation of terms and suggested distinctions. In all these cases it is important to keep in mind which party sets up the alteration as a defense, or which party claims under it.

With regard to an alteration apparent on the face of an instrument, three general rules have grown up: First, that, in the absence of evidence to the contrary, it will be presumed to have been made before execution or delivery; second, that, in the absence of evidence to the contrary, such an alteration will be presumed to have been made after execution or delivery; and, third, that an alteration raises no presumption either way, but the question as to when it was made must be left for the jury to determine. The cases generally agree, however, in holding that when the instrument is the act of a public officer, or when the alteration is absolutely immaterial to the issue, such an alteration will be presumed to have been made before execution, and that when it is of such a character as to brand the instrument with marks of suspicion, it will be presumed to have been made after execution. In the case of alterations alleged to have been made after the execution of the instrument, but not apparent upon the face of the instrument, the burden is upon the party alleging such alterations, to prove them.

II. Alteration apparent on face of instrument.

a. General rules and their ordinary application.

1. Presumption in favor of instrument.

In a large number of jurisdictions, the rule is laid down that, in the absence of evidence to the contrary, and in the absence of all suspicious circumstances, an alteration apparent on the face of an instrument will be presumed to have been made
9 L.R.A. (N.S.)

before the execution of the instrument. This presumption favors the validity of the instrument, and naturally makes it incumbent upon the party alleging that the alteration was made subsequent to execution, to produce evidence to that effect, though, even then, as above suggested, the burden of proof in the strict sense will not change. Under this rule, the instrument will be admitted in evidence without any prior explanation upon the part of the one offering it, but if the other party sets up the alteration as a defense, the party relying upon the altered instrument must, notwithstanding the original presumption in his favor, prove his case before the jury by a preponderance of evidence.

"The rule that the alteration raises a presumption against the instrument cannot be indulged without conflicting with the general proposition that fraud is never presumed, and with another general proposition that the burden of proof is upon the party who pleads an affirmative defense. If it is put in issue by the pleadings, it is a fact in the case to be determined by the jury, subject to the same rule of presumption as any other fact to be proven in the case." *Wolferman v. Bell*, 6 Wash. 84, 36 Am. St. Rep. 126, 32 Pac. 1017.

An alteration before execution does not affect validity, but if after and without consent of the maker, it constitutes a crime, and the law never presumes a crime in the absence of proof. The only presumption the law indulges in such cases is in favor of the honesty and good faith of what appears to have been done. *Franklin v. Baker*, 48 Ohio St. 296, 29 Am. St. Rep. 547, 27 N. E. 550.

Especially should this rule control where a very large percentage of the deeds are never seen by a lawyer until some question of title is raised, where they are written often by men who know little or nothing of legal rules, who are not expert penmen, and the materials used frequently not of the best. A rule should be adopted tending to preserve and sustain titles acquired by such deeds. *Wicker v. Jones*, — N. C. —, 74 S. E. 801.

"It is obvious that the rule of proof in regard to an alteration at common law, and under the English stamp act, need not necessarily be the same. The object of the

cases sustain appellant's contention in this respect. Some of them are cases wherein the alleged alteration was shown to have been made after delivery, and where the burden of explanation was thereby thrown upon the party offering the instrument. But none of them dispense with the necessity that it be made to appear that the alleged alteration was made after delivery before any presumption of fraud can arise therefrom.

An erasure or interlineation appearing upon the face of an instrument is not an alteration in a legal sense, unless made after delivery. This discrimination, however, is not always observed in the use of such terms, and the word "alteration" is often used in the books as synonymous with the

word "erasure" or "interlineation." If there is any inconsistency in the language of our cases at this point, it will be found to arise from the double sense in which the word "alteration" is sometimes used.

Turning now to the question of fact, the evidence is very conflicting. If the instrument itself had not been produced in evidence, the testimony on behalf of the defendants would be quite persuasive. The widow of Miller and the notary public both testified that W. M. Tharp was the grantee in the deed as originally drawn. Miller himself took the deed when it was drawn. The only direct evidence of its actual condition at the time he delivered it is that of the plaintiff and her husband. They testify that it is in the same condition now that it

common-law rule of proof would be to protect one party from the fraud of the other; that of the statute rule, to protect the revenue from the fraud of all the parties. . . . One rule of evidence might, perhaps, be necessary to protect the interests of the government, while another might be quite sufficient for the preservation of those of the parties. And for the detection of fraud upon the revenue, and to prevent its recurrence, a more stringent rule of proof may be required in England, by considerations of public policy, than justice to the parties would otherwise demand. . . . I think this rule is demanded by the actual condition of the business transactions of this country, and especially of this state,—where a great portion of the contracts made are drawn by the parties to them, and without great care in regard to interlineations and alterations. To establish an invariable rule, such as is claimed in behalf of the defendant, that the party producing the paper should in all cases be bound to explain any alteration by extrinsic evidence, would, I apprehend, do injustice in a very great majority of the instances in which it should be applied. Such a rule might be tolerated,—might perhaps be beneficially adopted,—in a highly commercial country like that of Great Britain, in regard to negotiable paper, which is generally written by men trained to clerical accuracy, and is upon stamped paper, the very cost of which would induce special care in the drawing of it; but I am persuaded its application here could not be otherwise than injurious. It is not often that an alteration can be accounted for by extraneous evidence; and to hold that, in all cases, such evidence must be given, without regard to any suspicious appearance of the alteration, would, I think, in many instances, be doing such manifest injustice as to shock the common sense of most men." *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775.

"The doctrine that the presumption of law is that the alteration was made after delivery, and that the burden is on the holder in the first instance to explain it,

seems to us to be unsound as well as harsh. Presumptions of law, if indulged in, should be in favor of innocence rather than guilt. . . . Now, it is a matter of common knowledge that at the present day every man is, to a certain extent, his own lawyer, and that laymen frequently draw their own contracts, without much regard to form, in which erasures and interlineations are the rule rather than the exception. Indeed, the same thing is unfortunately true of many instruments which come from the hands of lawyers. It is also a matter of common knowledge that printed blanks are now in general use for almost all kinds of contracts, and that it is the common practice, even with many lawyers, in case the blank does not conform to the actual agreement of the parties, to erase and interline, without making any notation that this was done before execution. Whatever might have been the fact formerly, when but few men could write, and when contracts were usually drawn by skilled conveyancers or scribes, with great care, and wholly in their own proper handwriting, the rule under consideration is wholly unsuited to the business habits or usages of this country at the present day. The mere existence of an interlineation or erasure in an instrument would not naturally or ordinarily produce an inference in the minds of men that it had been fraudulently altered after execution. Indeed, unless the alteration was of such a suspicious character as to furnish intrinsic evidence to the contrary, we think the natural inference would be that it was a legitimate part of the instrument, and was made at or before its execution." *Wilson v. Hayes*, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 42 N. W. 467.

This rule, that an alteration apparent on the face of an instrument will be presumed to have been made before execution, is supported by the following cases:

U. S.—*Malarin v. United States*, 1 Wall. 282, 17 L. ed. 594 (grant of land); *Little v. Herndon*, 10 Wall. 26, 19 L. ed. 878 (patent to land); *Hanrick v. Patrick*, 119 U. S. 156, 30 L. ed. 396, 7 Sup. Ct. Rep.

was at the time of the delivery, and that the erasure was explained by Miller. The case turns upon the truth or falsehood of this testimony as to the actual condition of the deed at the time of delivery. The circumstances are such that this testimony should be scrutinized carefully in the light of the whole record, and we have subjected it to that process. It is not necessarily inconsistent with the testimony of Mrs. Miller and of the notary public. Good reasons are also shown why the deed should have been made to Mrs. Tharp rather than to her husband. The husband had formerly owned this property. He had originally purchased it in 1901 subject to a mortgage. The mortgage was held by Miller. Miller foreclosed the mortgage, and sold the property at exe-

cution sale, and took a sheriff's deed therefor in September, 1903. Tharp was then in failing circumstances, and was owing his wife several hundred dollars for money received from her about the time of their marriage. Miller agreed to convey the property for the amount of his debt plus expenses. This amount was received from Tharp by certain notes, under an arrangement between him and his wife that it was to apply upon the indebtedness to her. After the property was acquired, however, it was included by Tharp in his return to the assessor, and it was assessed to him. He also rented it and collected the rent in his own name. We will not stop now to deal with the explanation given of this circumstance. The explanation given is not

147 (deed); *Cox v. Palmer*, 1 McCrary, 431, 3 Fed. 16 (mortgage; alteration in same handwriting as instrument and only making clear the evident intent of the parties); *Rosenberg v. Jett*, 72 Fed. 90 (acknowledgment to mortgage); but see II. a, 2.

Fla.—*Stewart v. Preston*, 1 Fla. 11, 44 Am. Dec. 621 (mortgage); *Harris v. Bank of Jacksonville*, 22 Fla. 501, 1 Am. St. Rep. 201, 1 So. 140 (draft, acceptor bringing action to have it canceled on ground of alteration); *Kendrick v. Latham*, 25 Fla. 819, 6 So. 871 (deed); *Orlando v. Gooding*, 34 Fla. 244, 15 So. 770 (bond; alteration in same ink and handwriting and consistent with rest of instrument); *Cross v. Abt*, 55 Fla. 311, 45 So. 820 (deed).

Ga.—*Tedlie v. Dill*, 2 Ga. 128 (note; case decided under judicial act of 1799, providing that where defendant in suit on note does not deny on oath in his answer, plaintiff, suing on it as altered, need not explain); *Printup v. Mitchell*, 17 Ga. 558, 63 Am. Dec. 258 (receipt); *Vickery v. Benson*, 26 Ga. 582 (certificate to deed; alteration in same ink and handwriting); *Thrasher v. Anderson*, 45 Ga. 538 (receipt); *Banks v. Lee*, 73 Ga. 25 (deed); *Thompson v. Gowen*, 79 Ga. 70, 3 S. E. 910 (bond); *Westmoreland v. Westmoreland*, 92 Ga. 233, 17 S. E. 1033 (deed; alteration serving to render instrument consistent with itself according to its import in the main body); *Collins v. Boring*, 96 Ga. 360, 23 S. E. 401 (deed, registered, being admissible under the Code without further proof); *McConnell Bros. v. Slappey*, 134 Ga. 95, 67 S. E. 440 (deed); but in *Wheat v. Arnold*, 36 Ga. 479, it was held that the party offering an altered note must explain the alteration; and in *Hill v. Nisbet*, 58 Ga. 586, it was held that under the Code the burden was on the party claiming under an altered deed to explain the alteration; and in *Planters' & M. Bank v. Erwin*, 31 Ga. 371, where a bank director's minute book was altered in different handwriting, it was said that the law presumes nothing, but that the question was for the jury. So, in *Winkles v. Guenther*, 98 Ga. 472, 25 L.R.A. (N.S.)

S. E. 527, in the case of an altered note where the defendant filed a sworn statement alleging the alteration, it was held that the burden was on the holder to show when the alteration was made, but that the jury should decide; and the same rule was applied in *Hill v. Cole Bros. Lightning Rod Co.* 7 Ga. App. 64, 66 S. E. 280, in the case of an altered contract.

Ind.—*Stoner v. Ellis*, 6 Ind. 152 (deed); *Cochran v. Nebeker*, 48 Ind. 459 (note); *Fudge v. Marquell*, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895 (note); *Runnion v. Crane*, 4 Blackf. 466 (being the case of an altered note, where the defendant admitted the execution of the note by defaulting, and upon an inquiry to assess damages, it was held that the jury might consider the note as altered, although the alteration was not explained).

Kan.—*Neil v. J. I. Case & Co.* 25 Kan. 510, 37 Am. Rep. 259 (note; the court saying that in the last instance the question of the time of the alteration was for the jury); but in *State v. Roberts*, 37 Kan. 437, 15 Pac. 593, where there was a partial erasure upon a recognizance, and the plaintiff sued on it as if altered, in which case only it would be valid, it was held that the plaintiff must prove that the alteration was made prior to execution.

Ky.—*James v. Holdam*, 142 Ky. 450, 134 S. W. 435 (deed); *Pike County v. Sowards*, —Ky.—, 143 S. W. 745 (title bond); *Gunkel v. Seiberth*, 27 Ky. L. Rep. 455, 85 S. W. 733 (deed).

Md.—*Wickes v. Caulk*, 5 Harr. & J. 36 (deed; names of attesting witnesses erased, attesting witnesses not being necessary to the validity of the instrument).

Mich.—*Munroe v. Eastman*, 31 Mich. 283 (deed); *Sirrine v. Briggs*, 31 Mich. 443 (chattel mortgage); *Newland v. First Baptist Church Soc.* 137 Mich. 335, 100 N. W. 612 (deed); but see II. a, 2.

Mo.—*Matthews v. Coalter*, 9 Mo. 705 (contract); *Finney v. Turner*, 10 Mo. 208 (note; indorsement erased); *Whitmer v. Frye*, 10 Mo. 348 (sealed instrument); *Lubbering v. Kohlbrecher*, 22 Mo. 596 (note); *Burnett v. McCluey*, 78 Mo. 676

altogether plausible, but it is by no means impossible.

The most important corroborating fact in our judgment is the appearance of the deed itself. This deed was undoubtedly lost shortly after its delivery. There was no motive for its concealment at that time. Nor is it apparent that there was any pressing motive at that time for a fraudulent alteration of the deed. There was nothing to prevent a conveyance by the husband to the wife. The question naturally arises in the mind whether this alteration was recently made and after this controversy had come into view. The judgment against Tharp upon which the execution sale was made was entered in 1907. The sheriff's sale was had in April, 1909. And on the

day of the sale plaintiff caused notice of her ownership to be served upon the defendants. In August of the same year she brought this action. Some months later her deed was found under circumstances free from suspicion. It was found accidentally in the folds of the "carpet seat" of an old rocking chair which had been exposed to the weather. With this deed when so found was another instrument, and both were folded together "double." They were weather-stained. The trial court found that the appearance of the instrument was quite conclusive that the erasure was made long ago, and could not have been made after its exposure to the weather and after its discovery. It appears, also, that the deed was folded in the usual way, and that the

(note); *Paramore v. Lindsey*, 63 Mo. 63 (erasure in a deed); *Holton v. Kemp*, 81 Mo. 661 (deed); *Stillwell v. Patton*, 108 Mo. 352, 18 S. W. 1075 (note); *Kilpatrick v. Wiley*, 197 Mo. 123, 95 S. W. 213 (erasures and interlineations in a contract); *Noah v. German Ins. Co.* 69 Mo. App. 332 (fire insurance policy); *Paul v. Leeper*, 98 Mo. App. 515, 72 S. W. 715 (interlineation in a note, same ink and handwriting, alteration being in favor of the maker and against the interest of the holder); but in *State ex rel. Jackson County v. Chick*, 146 Mo. 645, 48 S. W. 829, in the case of an altered bond, the defense being *non est factum*, it was said that the burden is on the plaintiff to show that the alteration was made before execution, that the position of the parties should not be changed by indulging in presumptions. And the same rule was applied in *Powell v. Banks*, 146 Mo. 620, 48 S. W. 664, a case of an alteration in a deed of trust, in different ink and different handwriting. And in *Hays v. Bayliss*, 82 Mo. 209, a case of partnership books, it was said that when one member of a partnership has full control of its books, their presentation to the court upon a settlement of its affairs, in a mutilated, torn, erased, and scratched condition, will warrant every inference favorable to the other member.

Neb.—*Hodge v. Scott*, 1 Neb. (Unof.) 619, 95 N. W. 837 (note and mortgage); *Bank of Cass County v. Morrison*, 17 Neb. 341, 52 Am. Rep. 417, 22 N. W. 782 (erasure of printed matter in a note, with no interlineation, the court adding that it is a question for the jury); *Goodin v. Plugge*, 47 Neb. 284, 66 N. W. 407 (note; also left to jury); *Colby v. Foxworth*, 80 Neb. 239, 114 N. W. 174, rehearing denied in 80 Neb. 244, 115 N. W. 1076 (bond); *Barbar v. Stromberg-Carlson Telenh. Mfg. Co.* 81 Neb. 517, 18 L.R.A. (N.S.) 680, 129 Am. St. Rep. 703, 116 N. W. 157 (alteration in ribbon copy of contract); *Dorsey v. Conrad*, 49 Neb. 443, 68 N. W. 645 (deed). This case overrules *Johnson v. First Nat. Bank*, 28 Neb. 792, 45 N. W. 161, which required explanation from one offering a note altered 39 L.R.A. (N.S.)

in the date of its indorsement, that being in issue; and also overrules *Courcamp v. Weber*, 39 Neb. 533, 58 N. W. 187, which required an explanation from the holder of an altered note.

N. C.—*Pullen v. Shaw*, 14 N. C. (3 Dev. L.) 238 (bond altered in handwriting of obligee and prejudicial to him); *Nordleet v. Edwards*, 52 N. C. (7 Jones, L.) 455 (note with the scroll containing the word "seal" scratched out, thereby changing the character of the instrument from a deed to a note, the court holding that it should be presumed that the alteration was made for the very purpose of determining and fixing its character, that is, before execution, and adding that where the interest of the parties is in accordance with their manifest intent, the maxim, *Omnia presumuntur rite acta*, must prevail); *Wicker v. Jones*. — N. C. —, 74 S. E. 801 (deed changed to a note by erasing the seal, as in the preceding case).

N. D.—*First Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. 473 (erasure in a note); *Cass County v. American Exch. State Bank*, 9 N. D. 263, 83 N. W. 12 (erasure in signatures to bond); *Riley v. Riley*, 9 N. D. 580, 84 N. W. 347 (deed).

Ohio.—*Huntington v. Finch*, 3 Ohio St. 445 (erasure in bill of exchange and warrant of attorney to confess judgment); *Franklin v. Baker*, 48 Ohio St. 296, 29 Am. St. Rep. 547, 27 N. E. 550 (note); *Newman v. King*, 54 Ohio St. 273, 35 L.R.A. 471, 56 Am. St. Rep. 705, 43 N. E. 683 (note); *Dempsey v. Moran*, 9 Ohio Dec. Reprint, 212 (check).

Okl.—*Richardson v. Fellner*, 9 Okla. 513, 60 Pac. 270 (note).

S. D.—*Moddie v. Breiland*, 9 S. D. 506, 70 N. W. 637 (note); *Foley-Wadsworth Implement Co. v. Solomon*, 9 S. D. 511, 70 N. W. 639 (contract); *Landauer v. Sioux Falls Improv. Co.* 10 S. D. 205, 72 N. W. 467 (alteration in guaranty on back of note); *National Bank v. Feeney*, 12 S. D. 156, 46 L.R.A. 732, 76 Am. St. Rep. 591, 80 N. W. 186 (writing on margin of note. This was the opinion on second rehearing); *Ernst v. Christianson*, 24 S. D. 103, 123

name of grantor and grantee were "briefed" in the usual form on the back of the folded deed. When the deed was lost, it was again folded "double," so that the upper end, where the "briefing" was, rested against the blank space at the lower end. The names of grantor and grantee, which were briefed upon the upper end, were thereby impressed or "copied" upon the blank space below. This impression or "copy" shows the name "M. Tharp." The present appearance of the deed, as described by the trial court in a written opinion filed, is as follows: "The first initial letter whether 'W.' or 'M.' was erased in the body of the deed and in the briefing on the back, shortly after its execution. The erasure was done by someone who knew how to do

this kind of work, and so perfectly done that it is now impossible to tell from the deed itself what the first initial really was. Tharp and wife both testify that the deed is now just as it was when it came into their hands. There is no evidence rebutting this. The deed seems to have been folded and laid away. The briefing on the back has been copied on the bottom of the back where it was folded against the top, with the first initial missing. This is a circumstance tending to corroborate Tharp and his wife that the deed is now as when received by them. It is evident from the deed itself that there is no recent change in it, and not a change made for the purpose of this suit." The foregoing statement of the trial court is not challenged, nor is the

N. W. 711 (deed, especially where it is admitted that one claiming under it received it from the maker in its altered condition).

Tex.—Thompson v. Thompson, 12 Tex. 227 (interlineation in deed, noted in attestation clause); Rodriguez v. Haynes, 76 Tex. 225, 13 S. W. 296 (mortgage); Houston v. Jordan 82 Tex. 352, 18 S. W. 702 (change in deed to correct error); Howell v. Hanrick, 88 Tex. 383, 29 S. W. 762, motion for reargument on certain other points granted in 88 Tex. 398, 30 S. W. 836, but no record of the reargument, motion for rehearing overrule in 88 Tex. 403, 31 S. W. 611 (alteration in protocol of title, noted at foot of paper); Parshall v. Clark, — Tex. Civ. App. —, 77 S. W. 437 (appeal bond); McKenzie v. Barrett, 43 Tex. Civ. App. 451, 98 S. W. 229 (contract and building contractor's bond); but see II. a. 2.

Vt.—Beaman v. Russell, 20 Vt. 205, 49 Am. Dec. 775 (note).

Wash.—Wolferman v. Bell, 6 Wash. 84, 56 Am. St. Rep. 126, 32 Pac. 1017 (alteration in note with different pen and ink from certain signatures, but same as others, no fraud shown, presumption that the alteration was made when the last-named signatures were affixed); Yakima Nat. Bank v. Knipe, 6 Wash. 348, 33 Pac. 834 (note); Fairhaven v. Cowgill, 8 Wash. 686, 36 Pac. 303 (bond); Kleeb v. Bard, 12 Wash. 140, 41 Pac. 733 (bond); Blewett v. Bash, 22 Wash. 536, 61 Pac. 770 (guaranty); Slyfield v. Willard, 43 Wash. 179, 86 Pac. 392 (chattel mortgage). But this presumption gives way to positive proof to the contrary. Stockand v. Hall, 54 Wash. 106, 102 Pac. 737 (tax deed).

Eng.—The ancient doctrine of the English common law was that an interlineation in a deed, if nothing appear to the contrary, would be presumed to have been made at the time it was executed. Trowel v. Castle, 1 Keble, 21, and this case is cited as law in 12 Vin. Abr. 58, and in Fitzgerald v. Fauconberge, Fitzg. 207.

Of ancient time, if the deed appeared to be raised or interlined in places material, the judges adjudged, upon their view, the L.R.A. (N.S.)

deed to be void; but, of latter time, the judges have left that to the jurors to try whether the raising or interlining was before the delivery. Co. Litt. 225 b.

In a note in Hargrave & Butler's ed. of Coke's Littleton, it is said: "Tis to be presumed that the interlining, if the contrary is not proved, was made at the time of making the deed."

This rule is followed in Doe ex dem. Tatum v. Catomore, 16 Q. B. 745, 20 L. J. Q. B. N. S. 364, being the case of an altered deed.

But in London B. & S. C. R. Co. v. Fairclough, 2 Mann. & G. 674, 3 Scott. N. R. 68, 2 Railw. Cas. 544, 10 L. J. C. P. N. S. 133, the case of an altered deed, it was held that the one claiming under it must account for the alteration. See also II. a. 2.

Ont.—Graystock v. Barnhart, 26 Ont. App. Rep. 545 (mortgage).

2. Presumption against instrument.

Another rule, also supported by many authorities and directly opposed to the one stated above, is to the effect that, in the absence of proof to the contrary, an alteration apparent upon the face of an instrument will be presumed to have been made after the execution of the instrument. This presumption lies against the validity of the instrument, and requires explanatory evidence from the party producing the same or claiming under it, before it will be allowed to go to the jury. However, in the jurisdictions that follow this rule, it is generally held that after the instrument is admitted in evidence, the actual determination as to when the alteration was made is a question for the jury upon all the evidence in the case.

In Walters v. Short, 10 Ill. 252, it was said: "Written instruments are supposed to be the repositories of the intentions of the parties, but they would surely be very unsafe repositories of such intentions, if the party having possession of the instrument was at liberty to alter it at pleasure, and then call upon the other party to show that the alteration was made after its execution,

original deed presented to our view. We deem the circumstance of great importance as strongly corroborative of the direct testimony of the plaintiff and her husband. In the light of this circumstance, we think the testimony of the plaintiff and her husband should be accepted, to the effect that the erasure in question was made before deliv-

ery. Such fact being found, it controls the case, regardless of the subsequent conduct of the plaintiff's husband in collecting the rent in his own name. This was the conclusion reached by the trial court.

The decrees entered below must therefore be affirmed.

or else be bound by its contents. Admitting that a note has been altered after its execution, how is the maker to show that fact? The note has, of course, been in possession of the payee,—is often in his handwriting, and it will be a mere accident if the maker can procure evidence to show how the note was written. Which is the more reasonable, to require the holder of an instrument which has been altered to explain the alteration, or to require that he who executed it, and never saw it afterwards, should show that the alteration had been made since its execution? It is easy for a party taking an instrument that has been interlined or altered, to have the interlineation or alteration noted in the attestation clause, so as to show its existence at the time of execution, while it is very difficult for a party who has been out of possession of the instrument to prove that the interlineation was made after he signed it."

And in *Hodge v. Gilman*, 20 Ill. 437, it is said that "this presumption arises from business convenience, the security of parties, and the necessities of the case. The law must presume either that it was made before or after it was executed; and if the former, no man would ever be safe in signing any paper, no matter how fairly drafted, for the holder, having it in his possession and control, could interline it at pleasure, and then call upon the maker to show that the alterations were made after its execution, which, if the alterations were made by the same hand that wrote the body of the instrument, it would, in most cases, be impossible for him to do. . . . It is true that the complainant in this case must take the affirmative, to show that the instrument has been altered since he signed it. . . . That, we say, as matter of law, is done by showing to the court that the instrument has been interlined in a material part, which changes the onus, and imposes the duty upon the other side, to show that the alteration was in fact made before it was executed."

It is probable that many of these alterations were actually considered suspicious by the courts, and that the application of the rule was determined by that fact. But the cases where the decision was placed specifically upon the ground of the suspicious circumstances are collected under II. b.

This rule, that an alteration apparent on the face of an instrument will be presumed to have been made after the execution of the instrument, was adopted in the following cases:

U. S.—*Abbe v. Rood*, 6 McLean, 106, Fed. 39 L.R.A. (N.S.)

Cas. No. 6 (erasure of signature upon notes); *Barnsdall v. Boley*, 119 Fed. 191 (lease); *The Richard Vaux*, 20 Fed. 654 (shipping articles; presumption indulged in order to protect the rights of illiterate seamen); but see II. a, 1.

Ala.—*White v. Hass*, 32 Ala. 430, 70 Am. Dec. 548 (note); *Wisdom v. Reeves*, 110 Ala. 418, 18 So. 13 (deed); *Gulf Red Cedar Co. v. Crenshaw*, 169 Ala. 606, 53 So. 812 (alteration made in a deed after recordation, and presumed to have been made after delivery, the court placing the burden of proof upon the one claiming the benefit of the alteration, to show that the registration was so conditional as not to amount to a delivery); but the opposite presumption was indulged in *Sharpe v. Orme*, 61 Ala. 263 (alterations in a deed merely curing an imperfect description of land, and in accord with all the purposes and objects of the conveyance, and in the same handwriting as the body of the instrument); also in *Lewis v. Watson*, 98 Ala. 479, 22 L.R.A. 297, 39 Am. St. Rep. 82, 13 So. 570 (interlineation in a deed in the handwriting of the grantor, as was also the body of the instrument, and manifestly in accord with the purposes and objects of the instrument); also in *Alabama State Land Co. v. Thompson*, 104 Ala. 570, 53 Am. St. Rep. 80, 16 So. 440 (alterations in a deed fully explained by the context); also in *Ward v. Cheney*, 117 Ala. 238, 22 So. 996 (alteration in an assignment for the benefit of creditors, made in the same handwriting as the body of the instrument); and in *Hart v. Sharpton*, 124 Ala. 638, 27 So. 450 (alteration in a note and mortgage, not beneficial to the party claiming under them, and self-explanatory); but see II. a, 3.

Ark.—*Chism v. Toomer*, 27 Ark. 108 (note, holding that a plea by the maker setting up the defense of alteration throws the burden upon the holder to show that the alteration was made before delivery or by consent, the court remarking, however, that in general the presumption is that bills and notes start fair and untarnished, and that this presumption stands until repelled); *Decker v. Laws*, 74 Ark. 286, 85 S. W. 425 (check; defense payment in full, plaintiff denying that words "in full payment" were in the check when signed; the court saying that the burden on the whole case remained with the plaintiff, but that the burden was on the defendant, who produced and relied upon the instrument, to show that the words were in when plaintiff indorsed); *Smith v. Weatherford*, 92 Ark. 6, 121 S. W. 943 (check introduced for same purpose as one in preceding case, and same ruling); but

in *Gist v. Gans*, 30 Ark. 285, a case of an altered note, it was held that the burden was on the defendant, setting up the alteration as a defense, to show that it was made after execution; and in *Klein v. German Nat. Bank*, 69 Ark. 140, 86 Am. St. Rep. 183, 61 S. W. 572, a case of an altered note, it was held that there was no presumption of law, but that it was a question for the jury.

Cal.—*Galland v. Jackman*, 26 Cal. 79, 85 Am. Dec. 172 (deed); *Roberts v. Unger*, 39 Cal. 676 (deed); *Sedgwick v. Sedgwick*, 56 Cal. 213 (note; the court stating that under the California Code the party producing a written instrument as genuine, which appears to have been altered after execution, must account for the alteration, or he cannot give it in evidence); *Miller v. Lugo*, 50 Cal. 257, 22 Pac. 195 (tax deed); *Manuel v. Flynn*, 5 Cal. App. 319, 90 Pac. 463 (contract); but in *Corcoran v. Doll*, 32 Cal. 82, a case of an altered note, the alteration not appearing to have been made after execution, it was held that it should be presumed to have been made before.

Del.—*Herdman v. Bratten*, 2 Harr. (Del.) 396 (replevin bond); *Warren v. Layton*, 3 Harr. (Del.) 404 (note); but in *Curry v. May*, 4 Harr. (Del.) 173, where a contract under seal had been altered in handwriting of the plaintiff, and was unexplained, and where it appeared that the defendant had a copy, but refused to produce it, a nonsuit was refused; and in *Welsh v. Coulborn*, 3 Houst. (Del.) 647, it is said that if nothing appears to the contrary, it will be presumed that an alteration in a receipt was made at the time of its execution. And this rule is quoted and approved in *Hollis v. Vandergrift*, 5 Houst. (Del.) 521.

Hawaii.—*Kahai v. Kamai*, 8 Haw. 694 (deed).

Idaho.—*Mulkey v. Long*, 5 Idaho, 213, 47 Pac. 949 (note, a decision apparently controlled by a statute providing that a party offering an altered instrument must explain).

Ill.—*Gillett v. Sweet*, 1 Ill. 475 (note); *Walters v. Short*, 10 Ill. 252 (note); *Hodge v. Gilman*, 20 Ill. 437 (power of attorney attached to a note, alteration to the palpable detriment of the maker, and manifestly to the advantage of the holder, inconsistent with the terms of the note, and harsh and unjust); *Montag v. Linn*, 23 Ill. 551 (deed); *Pyle v. Oustatt*, 92 Ill. 260 (deed); *McAllister v. Avery*, 17 Ill. App. 568 (interlineation in note in same ink and handwriting); *Sisson v. Pearson*, 44 Ill. App. 81 (bond); but the opposite presumption was indulged in *Hodge v. Gilman*, supra, where a power of attorney attached to a note had been altered to make it correspond with the terms of the note to which it was attached, and to which it referred (this was a second alteration, distinct from the one referred to above); and in *Russell v. Peyton*, 4 Ill. App. 473, where a declaration of trust had been altered in same ink and handwriting as the body of the I.R.A. (N.S.)

the instrument, which was over forty years old. But see II. a, 3.

La.—It is the rule of the civil law that an alteration apparent upon the face of an instrument is presumed to be false, but it is not a presumption *juris et de jure*; it may yield to contrary proof. *McMicken v. Beauchamp*, 2 La. 290 (alteration in acceptance to bill of exchange in different ink); *Wheadon v. Turregano*, 112 La. 931, 36 So. 808 (a case of a lease where plaintiff's copy showed erasure, defendant's did not, and the burden was placed upon the plaintiff to show that alteration was made before signing or with the other's consent); *Pipes v. Hardesty*, 9 La. Ann. 152, 61 Am. Dec. 202 (interlineation in deed in same ink and handwriting).

Mich.—*Sheldon v. Hawes*, 15 Mich. 519 (interlineation in note in different ink and peculiar in appearance); *Ehrenkrook v. Webber*, 100 Mich. 314, 58 N. W. 665, 60 N. W. 761 (certificate of deposit); but in *Comstock v. Smith*, 26 Mich. 306, a case of an altered deed, a somewhat different rule was laid down, where it was held that the party claiming under the instrument has the burden of proof on the whole case, to establish the genuineness of the writing by a preponderance of evidence, and that therefore there cannot be any presumption of law that the alleged alteration is seasonably made, for that would make out a *prima facie* case for the plaintiff without the aid of any evidence whatever, and would shift the burden of proof upon the defendant; and the court concludes that there is no presumption of law, but that it is a question of fact for the jury. And the same rule is laid down in *Willett v. Shepard*, 34 Mich. 106, which was a case of an altered note. See II. a, 1.

N. H.—*Hills v. Barnes*, 11 N. H. 395 (note; the court saying this rule is necessary for the security of the maker, who must otherwise take evidence of the appearance of the note when it is delivered, in order to protect himself against alterations subsequently made without his privity); *Humphreys v. Guillo*, 13 N. H. 385, 38 Am. Dec. 499 (note); *Dow v. Jewell*, 18 N. H. 340, 45 Am. Dec. 371 (deed); *Burnham v. Aver*, 35 N. H. 351 (mortgage); *Cole v. Hills*, 44 N. H. 227 (alteration in note to correct a mistake, the court saying that this presumption is one of fact to be exercised by the jury, and not one of law to be applied by the court, so that the instrument is admissible without explanation; and if no evidence is given it all, the presumption will be that the alteration was made after execution, but that the whole question was for the jury).

N. Y.—In New York, the party claiming under an altered instrument must explain, or the alteration will be presumed to have been made after execution. *Taylor v. Crowinshield*, 5 N. Y. Leg. Obs. 209 (mortgage); *Herrick v. Malin*, 22 Wend. 388 (deed, *dictum*); *Ridgeley v. Johnson*, 11 Barb. 527 (deed, although it be over thirty

years old); *Gowdey v. Robbins*, 3 App. Div. 353, 3 N. Y. Anno. Cas. 231, 38 N. Y. Supp. 280 (note); *Re Pinkerton*, 49 Misc. 363, 99 N. Y. Supp. 492 (note); *Brinn v. Cohen*, 107 N. Y. Supp. 37 (receipt); *Kelly v. Indemnity F. Ins. Co.* 38 N. Y. 322 (book of account, held inadmissible without explanation of alteration, if objected to); *Jackson ex dem. Collier v. Jacoby*, 9 Cow. 125 (alteration in deed not noted upon the instrument and made in darker ink, the court saying that it is perhaps sufficient to call for explanation).

But after the explanation is given, the whole question is for the jury. *Pringle v. Chambers*, 1 Abb. Pr. 58 (contract); *Acker v. Ledyard*, 8 Barb. 514 (lease); *Pease v. Barnett*, 27 Hun, 378 (bond); in *Rankin v. Blackwell*, 2 Johns. Cas. 198, it was said that the alteration in a note alone, unsupported by other evidence, was not competent as a defense, but if there be other evidence of fraud or forgery, the alteration would be a strong corroborating circumstance, if not decisive proof.

But in *Maybee v. Sniffen*, 2 E. D. Smith, 1, a case of an altered release, it was held that no presumption should be indulged, but that the question was for the jury; and in *Hughes's Estate*, 18 N. Y. S. R. 395, 3 N. Y. Supp. 201, a case of an erasure in a voucher, it was held that it should be presumed to have been made before filing with the account, when the evidence was conflicting and left a reasonable doubt as to when it was made; and in *Rosenbloom v. Finch*, 37 Misc. 818, 76 N. Y. Supp. 902, where an assignment of a claim had been altered by simply interlining the name of the assignee, which had been inadvertently omitted, it was held that there was no burden on the party offering it to show that it had been made before execution; in *Jefferson Bank v. Frankenstein*, 110 N. Y. Supp. 1104, where notes had been altered, and where the defendants, who were indorsers, alleged that the alteration was made by the maker after indorsement, but where the facts showed that the maker had had no opportunity to do so, the presumption was indulged that the alteration was made before indorsement; in *Barker v. Stroppel*, 124 N. Y. Supp. 865, where a lessor asked cancellation of an alleged alteration in a lease in apparently different ink, it was held that the burden was on him to show that it had been made after execution.

Or.—Under the Oregon Code, a party offering a written instrument in evidence, which bears an alteration in a material part apparent upon its face, must explain such alteration. *Dolph v. Barney*, 5 Or. 191 (record of deed, especially where party offers it to contradict a certified copy); *Simpkins v. Windsor*, 21 Or. 382, 28 Pac. 72 (alteration in deed in same handwriting, but different ink); *Nickum v. Gaston*, 28 Or. 322, 42 Pac. 130 (tax receipt, but explanation may be made even after it is admitted in evidence, over the objection of the other party); *Galloway v. Bartholomew*, 44 Or. 75, 74 Pac. 467 (note). 39 L.R.A. (N.S.)

Pa.—*Barrington v. Bank of Washington*, 14 Serg. & R. 405 (bond, burden on holder, but question for jury); *Heffelfinger v. Shutz*, 16 Serg. & R. 44 (alteration in deed in different handwriting, the question being for the jury; this presumption may be removed by very slight circumstances, as, for example, if the alteration is against the interest of the one offering the instrument, and in such a case this presumption will be replaced by another and stronger one, that the alteration was made at the time of execution); *Churchman v. Smith*, 6 Whart. 146, 36 Am. Dec. 211 (book of entries); *Morris v. Venderen*, 1 Dall. 64, 1 L. ed. 38 (holding that an interlineation in a deed will be presumed to have been made after execution, unless otherwise proved); but in *Jordan v. Stewart*, 23 Pa. 244, it is said that this is a harsh rule, and that it has not been followed; but that now it is a question for the jury on all the circumstances of the case; *Simpson v. Stackhouse*, 9 Pa. 186, 49 Am. Dec. 554 (note); *Kennedy v. Lancaster County Bank*, 18 Pa. 347 (note); *Clark v. Eckstein*, 22 Pa. 507, 62 Am. Dec. 307 (alteration in note, the court saying that if no explanation is given, it should not go to the jury); *Jordan v. Stewart*, 23 Pa. 244 (interlineation in a deed, but not shown in the record, resembling in handwriting and ink the body of the instrument; the court holding it a question for the jury as to when made); *Heffner v. Wenrich*, 32 Pa. 423 (note); *Robinson v. Myers*, 67 Pa. 9 (deed, burden placed on the holder, but no presumption of law, leaving the question to the jury); *Burgwin v. Bishop*, 91 Pa. 336 (lease, alteration not noted in attestation clause; same ruling as in preceding case); *Nagle's Estate*, 134 Pa. 31, 19 Am. St. Rep. 669, 19 Atl. 434 (alteration in check in handwriting of payee); *Hartley v. Corboy*, 150 Pa. 23, 24 Atl. 295 (note); *Nesbitt v. Turner*, 155 Pa. 429, 26 Atl. 750 (bond); *McIlale v. McDonnell*, 175 Pa. 632, 34 Atl. 966 (assignment of life insurance policy); *Cornog v. Wilson*, 231 Pa. 281, 80 Atl. 174 (note, the court saying that the rule is more stringent when applied to commercial paper, where there is no presumption of innocence, than when applied to other written instruments); *Winters v. Mowrer*, 1 Pa. Super. Ct. 47 (note, alteration in same handwriting and ink, burden on holder, but question for the jury); *Gettysburg Nat. Bank v. Gage*, 4 Pa. Super. Ct. 505 (note, alteration in same handwriting and ink, not interlined, but in blank spaces, and not crowded; the court holding the presumption weak, and a question for the jury); *Potter's Estate*, 16 Pa. Super. Ct. 576 (note); *Sunday v. Dietrich*, 16 Pa. Super. Ct. 640 (note); *Carbondale School Dist. v. Tuttle*, 2 Pa. Dist. R. 33 (contract, burden on holder, but question for the jury); *Todd v. Lederach*, 4 Pa. Dist. R. 173 (note); *Mechling v. Hartzell*, 4 Pennyp. 500 (judgment note, alteration in different ink); *Van Dusen v. Thomas*, 10 W. N. C. 190 (note, burden on holder, but question for jury).

But in *Paine v. Edsell*, 19 Pa. 178, where a note was disfigured by a blot on which one of the figures was made, this was held not to be such an alteration as to require explanation; and in *Zimmerman v. Camp*, 155 Pa. 152, 25 Atl. 1086, where a deed was interlined in same handwriting and ink, and the alteration was prejudicial to the holder, its admission without explanation was held not reversible error.

S. C.—*Horry Dist. v. Hanion*, 1 Nott & McC. 554 (bond, question for jury); *Porter v. Doby*, 2 Rich. Eq. 49 (sealed note, with the seal carefully cut out, leaving a mere filament by which it was attached, and found among the papers of the payee after his death); *Vaughan v. Fowler*, 14 S. C. 335, 37 Am. Rep. 731 (note); *Kennedy v. Moore*, 17 S. C. 464 (note).

But in the absence of all other evidence, the appearance of the alteration may itself be explanatory; in other words, the internal evidence offered by the instrument itself may show that the alteration preceded the execution, as where the name in the prefatory statement has been erased and another written in to correspond with the name given in the body of the bond. *Wicker v. Pope*, 12 Rich. L. 387, 75 Am. Dec. 732.

And in *Burton v. Pressly*, *Cheves*, Eq. 1, this rule was applied in a case where a mortgage had its blank for the date filled in with the same ink as the affidavit, but different from the body of the instrument; this was presumed to have been done at the time of the execution. So, also, with an alteration in the affidavit referring to interlineations in the body of the mortgage, and also with the interlineations in the mortgage in the same ink and handwriting as the body, and corresponding with the provisions of a copy.

Tex.—*Jacoby v. Brigman*. — Tex. —, 7 S. W. 366 (deed of trust); *Park v. Glover*, 23 Tex. 469 (alteration in assignment of bond in different ink); *Deweese v. Bluntzer*, 70 Tex. 406, 7 S. W. 820 (contract); *Kaltner v. Mitchell*, 102 Tex. 390, 132 Am. St. Rep. 889, 117 S. W. 792, affirming — Tex. Civ. App. —, 110 S. W. 462 (deed of trust); *Bullock v. Sprowls*, — Tex. Civ. App. —, 54 S. W. 657, affirmed in 93 Tex. 388, 47 L.R.A. 326, 77 Am. St. Rep. 849, 54 S. W. 661, but this point not discussed (deed); *Matson v. Jarvis*, — Tex. Civ. App. —, 133 S. W. 941 (contract); *Davis v. State*, 5 Tex. App. 48 (bond); *Kiser v. State*, 13 Tex. App. 201 (bail bond); *Heath v. State*, 14 Tex. App. 213 (bail bond); *Collins v. State*, 16 Tex. App. 274 (bail bond); but see II. a, 1.

Va.—*Priest v. Whitacre*, 78 Va. 151 (contract; under this rule, that the party offering the instrument must explain, when the instrument is produced by plaintiff's witnesses upon demand of the defendant, and the plaintiff does not claim under it, the plaintiff need not explain); *Elgin v. Hall*, 62 Va. 680 (receipt); *Hodnett v. Pace*, 54 Va. 873, 6 S. E. 217 (bond); *Slater v. Moore*, 86 Va. 26, 9 S. E. 419 (check, the court saying that every such alteration

renders the instrument suspicious. See II. b.); *Consumers' Ice Co. v. Jennings*, 100 Va. 719, 42 S. E. 879 (contract, party offering must establish his case before the jury by preponderance of evidence); *Ramsey v. McCue*, 21 Gratt. 349 (bond, the court saying there is no presumption of law that the alteration was made after execution, but that it is a question of fact for the jury).

W. Va.—*Piercy v. Piercy*, 5 W. Va. 199 (bond); but an altered note may go to the jury without explanation on the question as to whether there was a mutilation or not, which is for them to decide. *Conner v. Freshman*, 4 W. Va. 693.

Wis.—*Low v. Merrill*, 1 Pinney (Wis.) 340 (note); but in *Maldaner v. Smith*, 102 Wis. 30, 78 N. W. 140, where a note had been altered in the same handwriting and ink, it was held that there was no presumption that the alteration was made after execution, but that the opposite presumption would control in the absence of evidence to the contrary.

Eng.—This, it would seem, was the earlier rule at common law in England as to deeds and similar instruments; but its inconvenience was such as to cause it to be abandoned as early as the time of Lord Coke. *Franklin v. Baker*, 48 Ohio St. 296, 29 Am. St. Rep. 547, 27 N. E. 550 and cases cited. See II. a, 1.

In England, this rule has been adopted as to commercial paper, but this results from the provisions of their stamp act. This act provides that bills and notes must be stamped before they can be used as evidence, and that if a bill is altered after it issues, no matter by whom, it becomes another bill and requires a new stamp in order to make it evidence. Accordingly, when a negotiable instrument is offered in evidence in which an alteration appears, the court will pronounce it void *per se* as a fraud upon the revenue, unless it is twice stamped or unless the party offering it will show that the alteration was made before it was complete. The court, in *Franklin v. Baker*, *supra*, remarks that decisions based upon such considerations, not applicable to our country, are entitled to no weight as authority in our courts; nor are decisions from those of our courts which have simply followed the English decisions as precedents.

This rule therefore applies in England to bills and notes. *Johnson v. Marlborough*, 2 Starkie, 313; *Henman v. Dickinson*, 5 Bing. 183, 2 Moore & P. 289, 7 L. J. C. P. 68, 30 Revised Rep. 565; *Taylor v. Moseley*, 6 Car. & P. 272 (jury must say whether made before or after acceptance); *Desbrow v. Weatherley*, 6 Car. & P. 758, 1 Moody & R. 438; *Knight v. Clements*, 8 Ad. & El. 215, 3 Nev. & P. 375, 7 L. J. Q. B. N. S. 144, 1 W. W. & H. 280, 2 Jur. 395; *Clifford v. Parker*, 2 Mann. & G. 909, 3 Scott. N. R. 233, 10 L. J. C. P. N. S. 227.

In *Cariss v. Tattersall*, 2 Mann. & G. 890, 3 Scott. N. R. 257, 10 L. J. C. P. N. S. 187, it is said that, although the party seeking to enforce a bill or note must explain any

alteration apparent on the face of the instrument, the evidence may warrant the inference that the alteration was made with the consent of the other party. But see II. a, 1.

3. No presumption.

A third rule now being adopted in many jurisdictions is that an alteration apparent upon the face of an instrument, in the absence of all other evidence, and not suspicious in its character, raises no presumption as to the time when it was made. At first sight this would seem to be merely a compromise between the other two rules, adopted to avoid the necessity of supporting either one as against the other, but upon examination it is seen to be grounded upon reasoning cogent and convincing, and perhaps is the most consistent rule of the three. One difficulty found in the cases which follow this third rule is that in many of them it is said that such an alteration is in itself suspicious, and requires explanation by the party offering it. This makes explanation necessary after the instrument is in evidence, and weakens the force and effect of the rule, rendering such cases almost indistinguishable from many cited under the second rule above.

Thus, in *Dodge v. Haskell*, 69 Me. 429, it is said the holder of an altered instrument has the burden of proof; but the paper itself, unaided by other evidence, may satisfy the jury or it may not. All depends upon circumstances. Whether the instrument presents indications of fraud or not is a question of fact. It cannot be a question of law to decide whether a note is signed in two inks or one, or in two handwritings or one, or why so written. It is said that an alteration *prima facie* indicates fraud, but it is sure that it does not in all cases. On the other hand, it is said that fraud is not to be presumed, but it would be extreme to say that the instrument might not be so altered as to show upon its face the grossest attempt at forgery. Therefore, what alteration, or degree or kind of alteration, may exist without being suspicious enough to demand explanation, is for the jury to settle. There is no presumption of law either way. There can be no difficulty practically in the rule as as here stated. It will rarely happen that a case is to be tried without evidence *aliunde* the note, and it cannot be a matter of much consequence which side proceeds first.

This rule is well supported by reason and authority, and is in harmony with the rule that the law does not presume guilt. To presume against the writing, or that the alteration was before delivering, is to indulge in presumptions without evidence to support them. If either of two opposite presumptions are equally inferable from an established fact, it cannot be said that the fact tends to prove either. *Hagan v. Merchants' & B. Ins. Co.* 81 Iowa, 321, 25 Am. St. Rep. 493, 46 N. W. 1114.

But in dealing with this question as one 39 L.R.A. (N.S.)

of fact for the jury, the court generally requires that the alteration shall be explained by the party claiming the benefit of the paper. *Reed v. Kemp*, 16 Ill. 445; *Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 72 Am. St. Rep. 216, 54 N. E. 214.

This rule finds support in the following cases:

Ala.—*Davis v. Carlisle*, 6 Ala. 707 (note); *Tyree v. Rives*, 57 Ala. 173 (note); *R. D. Burnett Cigar Co. v. Art Wall Paper Co.* 164 Ala. 547, 51 So. 263 (contract); but see II. a, 2.

Conn.—*Bailey v. Taylor*, 11 Conn. 531, 29 Am. Dec. 321 (note); *Hayden v. Goodnow*, 39 Conn. 164 (bill of exchange).

D. C.—*Portsmouth Sav. Bank v. Wilson*, 5 App. D. C. 8 (note); but where an alteration in a deed was in different handwriting and ink, explanation was required. *Peugh v. Mitchell*, 3 App. D. C. 321.

Ill.—*Reed v. Kemp*, 16 Ill. 445 (bond); *Milliken v. Marlin*, 66 Ill. 13 (power of attorney); *Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 72 Am. St. Rep. 216, 54 N. E. 214 (deed); *DeLong v. Soucie*, 45 Ill. App. 234 (note); *Grand Lodge, A. O. U. W. v. Young*, 123 Ill. App. 628 (receipt); but see II. a, 2.

Iowa.—*Harlan v. Berry*, 4 G. Greene, 212 (note); *Jones v. Ireland*, 4 Iowa, 63 (alteration in note in different ink and handwriting, but no interlineation or erasure); *Ault v. Fleming*, 7 Iowa, 143; *Wilson v. Harris*, 35 Iowa, 507; *Hagan v. Merchants' & B. Ins. Co.* 81 Iowa, 321, 25 Am. St. Rep. 493, 46 N. W. 1114 (fire insurance policy); *THARP v. JAMISON* (deed).

Accordingly, in this jurisdiction the party alleging an alteration in an instrument since execution must prove it. *Van Horn v. Bell*, 11 Iowa, 465, 79 Am. Dec. 506 (mortgage); *Odell v. Gallup*, 62 Iowa, 253, 17 N. W. 502 (note); *Shroeder v. Webster*, 88 Iowa, 627, 55 N. W. 569 (note); *McGee v. Allison*, 94 Iowa, 527, 63 N. W. 322 (deed, alteration in different colored ink); *THARP v. JAMISON* (deed).

But in two Iowa cases, it was held that the burden of explaining such alteration was upon the party offering the instrument in evidence. *Maguire v. Eichmeier*, 109 Iowa, 301, 80 N. W. 395 (note); *Rambousek v. Supreme Council*, M. T. 119 Iowa, 263, 93 N. W. 277 (receipt).

Me.—*Gooch v. Bryant*, 13 Me. 386 (note); *Crabtree v. Clark*, 20 Me. 337 (note, part of writing in one hand and part in another); *Belfast Nat. Bank v. Harriman*, 68 Me. 522 (note); *Dodge v. Haskell*, 69 Me. 429 (note); *Crosswell v. Labree*, 81 Me. 44, 10 Am. St. Rep. 238, 16 Atl. 331 (note).

Mass.—*Ely v. Ely*, 6 Gray, 439 (mortgage); *Simpson v. Davis*, 119 Mass. 269, 20 Am. Rep. 324 (bill of exchange); *Newman v. Wallace*, 121 Mass. 323 (note).

Minn.—*Wilson v. Hayes*, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 42 N. W. 467 (note, alteration in different colored ink.)

Miss.—In Mississippi, the whole question

of alteration is for the jury, but in the absence of any evidence which will satisfy their minds, the presumption of fact will be that the alteration was after execution. *Wilson v. Henderson*, 9 Smedes & M. 375, 48 Am. Dec. 716 (note; but such a presumption must be very much weakened, if not destroyed, when the alteration operates prejudicially to the holder); *Commercial & R. Bank v. Lum*, 7 How. (Miss.) 414 (note); *Croft v. White*, 36 Miss. 455 (note).

But this presumption of fact against the instrument will not arise when the alteration is only an interlineation in a contract in different ink and handwriting, and only a repetition of another phrase in the body of the instrument not interlined (*Ellison v. Mobile & O. R. Co.* 36 Miss. 572); nor when the same situation arises in respect to a deed (*Gordon v. Sizer*, 39 Miss. 805). And in *Jackson v. Day*, 80 Miss. 800, a case of an altered note, it was said that the burden was on the party asserting a subsequent alteration, to prove it.

N. J.—*Sayre v. Reynolds*, 5 N. J. L. 737 (note, no presumption of forgery, especially where the debtor has made several payments upon it); *Cumberland Bank v. Hall*, 6 N. J. L. 215 (note); *Den ex dem. Farlee v. Farlee*, 21 N. J. L. 279 (deed); holder need not explain where the alteration is against his interest, and, if no evidence to the contrary, it will be presumed to have been made at or before execution); *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232 (note); *Hoe v. Jarman*, 39 N. J. L. 523 (deed).

b. Special circumstances and cases.

1. Suspicious alteration.

Although, as shown above, the courts are in direct conflict as to the general rules, diverging upon three lines (II. a, 1, 2, and 3); yet, starting, as they do, with these opposing presumptions in the abstract sense, when applying the rules to certain concrete situations, they all arrive at the same conclusion. Thus, they all agree that a suspicious alteration will be presumed to have been made after the execution of the instrument.

In jurisdictions committed in general to the presumption against the instrument (II. a, 2), the result in the class of cases now under consideration may be referred to the application of the general rule; but in jurisdictions committed in general to the presumption in favor of the instrument (II. a, 1), or in jurisdictions which in general indulge no presumption (II. a, 3), the result in these cases is to be attributed to an exception to the general rule.

In general, whenever an instrument labors under suspicion from an apparent alteration, in the legal sense of that term, the presumption is that the alteration was made subsequent to execution, and the party claiming under or offering the instrument a evidence is required to explain and re-

move such suspicion and overcome the presumption. Under this rule the explanation is sometimes required before the instrument is admitted in evidence, but often it will be admitted, and the explanation will be received before the jury. See also II. a, 2.

In *Cox v. Palmer*, 1 McCrary, 431, 3 Fed. 16, after stating that he thinks the conflict in authority upon this point is apparent only, and not real, McCrary, Ch. J., goes on to state the one rule that in his opinion governs in all these cases, as follows: "If the interlineation is in itself suspicious, as, if it appears to be contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words; or if it is in a handwriting different from the body of the instrument, or appears to have been written with different ink,—in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution. On the other hand, if the interlineation appears in the same handwriting with the original instrument, and bears no evidence on its face of having been made subsequent to the execution of the instrument, and especially if it only makes clear what was the evident intention of the parties, the law will presume that it was made in good faith, and before execution."

"In addition to these two leading and opposing views, different courts have adopted certain intermediate or compromise rules, none of which need be here referred to, except one, seemingly adopted by some very eminent courts, to wit, that the alteration raises a presumption against the instrument when it is suspicious; otherwise, not. But this furnishes no definite rule by which to determine when the burden is upon the holder to explain the alteration, and when it is not. Who is to determine, and by what test, whether the alteration is suspicious? And if held suspicious, when must it be explained,—before or after it is admitted in evidence? Evidence as to when, by whom, and with what intent an alteration was made, may be one or both of two kinds,—extrinsic or intrinsic; the latter being that furnished by the inspection of the instrument itself, such as its appearance, the nature of the alteration, etc. These things, considered in connection with the relation of the parties to the instrument, may often constitute important evidence. And it seems to us that the rule just referred to amounts to nothing more than saying that in some cases this intrinsic evidence may tend to prove that the alteration was made after delivery, and therefore throw the preponderance on that side, unless the holder of the instrument produces extrinsic rebutting evidence. Thus construed, we would find no special fault with the rule. But it is incorrect to call this a presumption of law; it is simply an inference of fact drawn from evidence in the case." *Wilson v. Hayes*, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 42 N. W. 467.

The following cases apply this rule:

U. S.—*Smith v. United States*, 2 Wall. 219, 17 L. ed. 788 (official bond); *Cox v. Palmer*, *supra* (mortgage); *Rogers v. Page*, 72 C. C. A. 164, 140 Fed. 596 (note, alteration in different ink and other suspicious circumstances).

Ala.—*Fontaine v. Gunter*, 31 Ala. 258 (bill); *Hill v. Nelms*, 86 Ala. 442, 5 So. 796 (mortgage); *Glover v. Gentry*, 104 Ala. 222, 16 So. 38 (note); *Alabama State Land Co. v. Thompson*, 104 Ala. 570, 53 Am. St. Rep. 80, 16 So. 440 (deed, alteration with different pen in different manner, and apparently after blanks filled out); *Hart v. Sharpton*, 124 Ala. 638, 27 So. 450 (alteration in note and mortgage obviously beneficial to party offering instrument); *Burgess v. Blake*, 128 Ala. 105, 86 Am. St. Rep. 78, 28 So. 963 (deed).

D. C.—*Offenstein v. Bryan*, 20 App. D. C. 1 (note); *Towles v. Tanner*, 21 App. D. C. 530 (note).

Ill.—*Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 72 Am. St. Rep. 216, 54 N. E. 214 (deed); *Landt v. McCullough*, 206 Ill. 214, 69 N. E. 107, reversing 103 Ill. App. 668 (lease).

Kan.—*Neil v. J. I. Case & Co.* 25 Kan. 510, 37 Am. Rep. 259 (note).

Ky.—*Elbert v. McClelland*, 8 Bush, 577 (note).

La.—*Union Bank v. Brewer*, 2 La. Ann. 835 (note); *Messi v. Frechede*, 113 La. 679, 37 So. 600 (interlineation in deed, note in corner explaining that it was done before signing, all in the same handwriting).

Mass.—*Wilde v. Armsby*, 6 Cush. 314 (interlineation in written guaranty in different ink).

Mo.—*Smith v. Ferry*, 69 Mo. 142 (alteration in indorsement upon note); *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300 (interlineation in contract in different ink and handwriting); *Grimes v. Whitesides*, 65 Mo. App. 1 (interlineation in deed in pencil and different handwriting); *Burton v. American Guarantee Fund Mut. F. Ins. Co.* 96 Mo. App. 204, 70 S. W. 172, s. c. on former appeal, 88 Mo. App. 392 (spoliation of fire insurance policy); *Kalbach v. Mathis*, 104 Mo. App. 300, 78 S. W. 684 (tax deed); *Cox v. Mignery*, 126 Mo. App. 669, 105 S. W. 675 (interlineation in city council minute book, which would destroy validity of legislative act).

N. Y.—*Jackson ex dem. Gibbs v. Osborn*, 2 Wend. 555, 20 Am. Dec. 649 (deed); *Tillon v. Clinton & E. Mut. Ins. Co.* 7 Barb. 564 (written consent of insurance company to change in application, especially where alteration unexplained would absolutely avoid the instrument); *O'Donnell v. Harmon*, 3 Daly, 424 (lease).

Ohio.—*Marshall v. Wilhite*, 4 Ohio C. C. 203, 2 Ohio C. D. 500 (note, erasure, and additional words in same handwriting and ink as rest of written material).

Pa.—*Hill v. Cooley*, 46 Pa. 259 (note).

Tenn.—*Riseden v. Harrison*, — Tenn. —, 42 S. W. 884 (deed).

Tex.—*Collins v. Ball*, 82 Tex. 259, 27 Am. St. Rep. 877, 17 S. W. 614 (Interlinea-
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tion in administrator's deed in different ink).

Wis.—*Page v. Danaher*, 43 Wis. 221 (note, printed words stricken out with different ink); *Bradley v. Dells Lumber Co.* 105 Wis. 245, 81 N. W. 394 (alteration in receipt in different handwriting).

In several such cases it is said that the law presumes nothing, but leaves the whole question for the jury, before whom the explanation must be given. *Welch v. Coulborn*, 3 Houst. (Del.) 647 (receipt); *Hollis v. Vandergrift*, 5 Houst. (Del.) 521 (note); *Wilson v. Hotchkiss*, 81 Mich. 172, 45 N. W. 838 (alteration in note in different ink and handwriting); *Sweitzer v. Allen Bkg. Co.* 76 Mo. App. 1 (erasure with ink and pencil in certificates of deposit); *German-American Bank v. Manning*, 133 Mo. App. 294, 113 S. W. 251 (tax bill, alteration in different handwriting); *Smith v. McGowan*, 3 Barb. 404 (assignment of lease, alteration in different ink and written upon an erasure); *Farnsworth v. Sharp*, 4 Sneed, 55 (note).

But in *Putnam v. Clark*, 33 N. J. Eq. 338, in case of an altered assignment of mortgage, it was said that plaintiff, producing the instrument, and asserting subsequent alteration, and asking its cancelation, must prove his charges; he cannot rest his case upon a technical presumption arising from circumstances of suspicion.

And in *Rollins v. Humphrey*, 98 Wis. 66, 73 N. W. 331, where the name of one surety out of ninety-five had been erased from a bond which was approved by the county judge, the alteration was held to be not so suspicious as to require explanation.

2. Act of public officer.

Practically all the cases, whatever the general rule as to presumptions to which the court is committed, agree that an alteration in an instrument, which is the act of a public officer, will be presumed to have been made before execution,—at least if it has since been in his custody, or the alteration is in his hand. A public officer is presumed to act lawfully and do his duty, and he usually has no personal interest in the transaction.

This rule was applied in the following cases:

Ga.—*Clayton v. May*, 68 Ga. 27 (obliteration in bill of exceptions; certified copy reserved by clerk of court showed obliterated parties left out; presumed that obliteration was made by judge himself before filing); *Smith v. Wrightsville & T. R. Co.* 83 Ga. 671, 10 S. E. 361 (bill of exceptions; alterations presumed to be made before signing by judge); *Bedgood v. McLain*, 89 Ga. 793, 15 S. E. 670 (deed; alteration in same handwriting and ink, by an official); *Collins v. Boring*, 96 Ga. 360, 23 S. E. 401 (tax execution, official entry).

Idaho.—*Dangel v. Levy*, 1 Idaho, 722 (alteration in injunction bond presumed to have been made before bond was submitted to judge for his approval, and before it was filed in the case).

Ind.—French v. State, 12 Ind. 670, 74 Am. Dec. 229 (interlineation in indictment).

Iowa.—Warren v. Chickasaw County, 13 Iowa. 588 (county warrant).

Kan.—First Nat. Bank v. Franklin, 20 Kan. 264 (erasure in order of sale).

Ky.—Welch v. Chandler, 13 B. Mon. 420 (interlineation in certificate of acknowledgment of deed in county clerk's record book, in different handwriting, record made by deputy, interlineation by clerk himself; presumed to have been made before deed first delivered out of his office).

La.—State v. Boisseau, 1 Rob. (La.) 388 (interlineation in bail bond in same ink and handwriting, on printed form, because of lack of space upon the lines for all the writing).

Me.—Boothby v. Stanley, 34 Me. 515 (alteration in officer's return in same ink and handwriting).

Mass.—Wilbur v. Wilbur, 13 Met. 405 (levy of execution).

Mich.—Hommel v. Devinney, 39 Mich. 522 (interlineation in public record of deed); Brand v. Johnrowe, 60 Mich. 210, 26 N. W. 883 (appeal bond).

Mo.—McCormick v. Fitzmorris, 39 Mo. 4 (sheriff's deed); Holladay-Klotz Land & Lumber Co. v. J. T. Moss Tie Co. 87 Mo. App. 167 (sheriff's deed).

N. J.—North River Meadow Co. v. Christ Church, 22 N. J. L. 424, 53 Am. Dec. 258 (assessment).

N. Y.—People ex rel. Stone v. Minck, 21 N. Y. 539 (original statement of return of votes made by proper officials); Lazier v. Westcott, 26 N. Y. 146, 82 Am. Dec. 404 (remplification of the record of a judge of a foreign court, verified by initials of clerk); Devoy v. New York, 35 Barb. 264 (certified copy of oath of office, never in custody of party executing it).

N. C.—Sloan v. Stanly, 33 N. C. (11 Ind. L.) 627 (officer's return of levy).

Or.—Crossen v. Oliver, 37 Or. 514, 61 Pa. 885 (sheriff's return).

Pa.—Stevens v. Martin, 18 Pa. 101 (interlineation in patent to land); Xander v. Com. 102 Pa. 434 (erasure in guardian's bond).

S. D.—Northwestern Mortg. Trust Co. v. Letzow, 23 S. D. 562, 122 N. W. 600 (tax deed).

Tex.—Miller v. Alexander, 13 Tex. 497, 53 Am. Dec. 73 (alteration in sheriff's deed in different ink); Peveler v. Peveler, 64 Tex. 33 (bond).

Wash.—Baylis v. Kerrick, 64 Wash. 410, 116 Pac. 1082 (deed executed by a county treasurer, erasure apparent, none on official word, and no fraud suggested).

3. Alteration immaterial to issue.

In a few cases, where the alteration was shown to be absolutely immaterial to the question at issue, the instrument has been admitted in evidence without any explanation on the part of the one offering it. Fletcher v. Cavalier, 4 La. 267 (copy of

baptismal register); Hatch v. Hatch, 9 Mass. 307, 6 Am. Dec. 67 (alteration in deed to correct a name); First Nat. Bank v. Mack, 35 Or. 122, 57 Pac. 326 (alteration in indorsement on note, but not material in suit by indorsee against maker, who admitted its execution); Miller v. Reed, 27 Pa. 244, 67 Am. Dec. 459 (alteration in note in same handwriting and ink); Parker's Estate, 19 Pa. Co. Ct. 606 (interlineation in acknowledgment of copy of lease); Frey v. Weasner, 1 Woodw. Dec. 145 (alteration in note in different handwriting, but not affecting rights of parties, who were indorser and indorsee); Bashaw v. Wallace, 101 Va. 733, 45 S. E. 290 (bond); Williams v. Starr, 6 Wis. 534 (erasure in note of printed words to make room for other words, self-explanatory); Sibley v. Fisher, 7 Ad. & El. 444, 2 Nev. & P. 430, W. W. & D. 711, 7 L. J. Q. B. N. S. 2, 1 Jur. 866 (alteration in bill of exchange, but its execution admitted, the only issue being on the indorsement); Falmouth v. Roberts, 9 Mees. & W. 469, 1 Dowl. N. S. 633, 11 L. J. Exch. N. S. 180 (contract).

III. Alteration not apparent on face of instrument.

In the case of an alleged alteration which is not apparent on the face of the instrument, the burden is on the party alleging it, to prove it. The presumption is that, if there has been any alteration, it was made before execution.

U. S.—United States v. Linn, 1 How. 104, 11 L. ed. 64 (bond); First Nat. Bank v. Liewer, 109 C. C. A. 70, 187 Fed. 16 (note).

Ala.—Barclift v. Treece, 77 Ala. 528 (promissory note under seal); Montgomery v. Crosstwait, 90 Ala. 553, 12 L.R.A. 140, 24 Am. St. Rep. 832, 8 So. 498 (note); Bouldin v. Barclay, 121 Ala. 427, 25 So. 827 (note).

Colo.—Houston v. Plato, 3 Colo. 402 (bill of sale).

Ill.—Dewey v. Merritt, 106 Ill. App. 156 (note).

Ind.—Insurance Co. of N. A. v. Brim, 111 Ind. 281, 12 N. E. 315 (fire insurance policy).

Iowa.—Potter v. Kennelly, 81 Iowa, 96, 46 N. W. 856 (mortgage); Re Brown, 92 Iowa, 379, 60 N. W. 659 (check).

Kan.—J. I. Case Threshing Mach. Co. v. Peterson, 51 Kan. 713, 33 Pac. 470 (note).

Ky.—Thacker v. Booth, 9 Ky. L. Rep. 745, 6 S. W. 460 (note); Marion Nat. Bank v. Russell, 13 Ky. L. Rep. 332 (note).

La.—Oakey v. Hennen, 18 La. 435 (note).

Me.—Pullen v. Hutchinson, 25 Me. 249 (note); Buck v. Appleton, 14 Me. 284 (note).

Mo.—Hatch v. Bayless, — Mo. —, 146 S. W. 839 (contract).

Neb.—McClintock v. State Bank, 52 Neb. 130, 71 N. W. 978 (note); Anderson v. Chicago & N. W. R. Co. 88 Neb. 430, 129 N. W. 1008 (written order for cars in carrier's order book);

Pa.—Feig v. Meyers, 102 Pa. 10 (deed); Gettysburg Nat. Bank v. Gage, 4 Pa. Super. Ct. 505 (note).

S. D.—Cosgrove v. Fanebust, 10 S. D. 213, 72 N. W. 469 (note).

Tenn.—Douglass v. Brandon, 6 Baxt. 58 (note); Brown v. Phelon, 2 Swan, 629 (bill single); Bumpass v. Timms, 3 Sneed, 459 (note); Smith v. Parker, — Tenn. —, 49 S. W. 285 (deed).

Tex.—Wells v. Moore, 15 Tex. 521 (bond); Muckleroy v. Bethany, 27 Tex. 551 (note); First Nat. Bank v. Pritchard, 2 Tex. App. Civ. Cas. (Willson) 130 (note).

Wis.—Gorden v. Robertson, 48 Wis. 403, 4 N. W. 579 (note); Maxwell v. Hartman, 50 Wis. 680, 8 N. W. 103 (mortgage).

In Agawam Bank v. Sears, 4 Gray, 95, where alteration in a note was not apparent except upon close inspection, the instruction to the jury that plaintiff need not show that the alteration was made before signing by the defendant was said to be sufficiently favorable, at least to the plaintiff.

In Ohio Nat. Bank v. Gill Bros. 85 Neb. 718, 124 N. W. 152, where the alteration in a note was not apparent, and the defendant alleged that a portion was erased when executed, but had been reincorporated since execution, it was held that the plaintiff must show that the words were actually therein at the time of execution, and had not then been marked out. H. C. Sh.

MASSACHUSETTS SUPREME JUDICIAL COURT.

BAR ASSOCIATION OF THE CITY OF BOSTON

v.

PETER J. CASEY.

(211 Mass. 187, 97 N. E. 751.)

Judge — qualification — disbarment proceedings — membership in bar association.

That a judge is an honorary member of a bar association does not disqualify him

Note. — Membership in bar association as disqualification of judge to preside at disbarment proceedings instituted by association.

A search has disclosed but two cases previous to BAR ASSO. v. CASEY, where the question of the disqualification of a judge by reason of his membership in a bar association, to preside at disbarment proceedings instituted by such association, has been decided. Both of these decisions are in accord with the result reached in BAR ASSO. v. CASEY, to the effect that such membership does not constitute a disqualification.

Thus, in Ex parte State Bar Asso. 92 Ala. 113, 12 L.R.A. 134, 8 So. 768, it was held that the membership of a judge in a state bar association did not disqualify him to

to sit in proceedings instituted by the association for the disbarment of an attorney.

(February 29, 1912.)

EXCEPTIONS by respondent to rulings of the Superior Court for Suffolk County made during the trial of a proceeding for his disbarment which resulted in an order of disbarment. Overruled.

The facts are stated in the opinion.

Messrs. J. S. Richardson and P. J. Casey for respondent.

Messrs. A. D. Hill and A. G. Grant, for petitioner:

Membership in the bar association did not disqualify the judges from acting on this petition.

Ex parte State Bar Asso. 92 Ala. 113, 12 L.R.A. 134, 8 So. 768; Bowman's Case, 67 Mo. 146.

The interest which disqualifies a judge cannot be a mere possible, contingent interest in the general subject to which the matter relates; it must be certain and demonstrable,—a relation by which the judge would gain or lose something by the result of the proceedings.

Northampton v. Smith, 11 Met. 390; Com. v. Ryan, 5 Mass. 90; Com. v. Emery, 11 Cush. 406; Pearce v. Atwood, 13 Mass. 324.

Hammond, J., delivered the opinion of the court:

This was a petition filed in the superior court by the Bar Association of the City of Boston for the disbarment of the respondent for alleged misconduct therein set forth. In response to an order of notice, the respondent appeared and filed an answer. There was a hearing on the merits, and on April 9, 1906, an order of disbarment was entered. The respondent appealed, and at his request the case was reported to this court for the determina-

tion. The question presented is whether the disbarment of an attorney, although the association might be liable for the costs if defeated. The court said: "This corporation is not a commercial or financial concern. It is not capitalized; its members are not stockholders. Its purposes are social, ethical, and public, and not pecuniary or private. Its scheme involves no element of gain or loss pecuniarily to its membership. It is supported by fixed annual dues exacted from its members, and these would neither be increased nor diminished by any possible result of this litigation. It has authority to acquire and hold property within certain limits of value. Whether it has acquired any property does not appear from the return, and if the respondent seeks any advantage by reason of

tion of the question whether, under the findings of fact made by the judge, "the order of disbarment was justified as a matter of law." After full argument in this court the order of disbarment was affirmed. 196 Mass. 100, 81 N. E. 892. Thereupon the respondent filed in the superior court a motion to vacate the order of disbarment and in arrest of judgment, and afterwards a motion for a new trial and several other motions which were heard and determined adversely to the respondent; and upon appeals, seven in number, the respondent again brought the case to this court, where, after due hearing, the orders appealed from were all affirmed and it was ordered that judgment be entered in the superior court in accordance with the order of disbarment of April 9, 1906. 204 Mass. 331, 90 N. E. 584. After the issue of the rescript and before final judgment in the superior court, the respondent filed there a motion to set aside all orders, decisions, and findings theretofore made in that court, and also a motion in arrest of judgment.

At the hearing on these motions it appeared that Mr. Justice Fessenden, who issued the original order to show cause, Mr. Justice Fox, who heard the cause on the merits and made the finding thereon and the order of disbarment of April 9, 1906, and Mr. Justice Pierce, who made a certain order as to the disbarment, were respectively, at the times in which they thus acted, honorary members of the Bar Association of the City of Boston, in whose name the petition was filed. The respondent in substance asked the court to rule

that these several judges, being such members, were thereby disqualified to sit in the case. The court refused so to rule, and ruled that upon all the evidence neither of these judges "was disqualified to act and find as . . . [he] did find, by reason of interest or otherwise." The respondent also asked for a ruling "that all the orders and findings in the proceedings in the said petition are null and void." This also the court refused to give, and denied the motion. To these refusals to rule and to the ruling actually made the respondent excepted. It is doubtful whether this last request, fairly construed, is intended to cover any other ground for the nullity of the acts of the court except that arising from the alleged disqualification of the judges. The respondent's brief, however, touches upon some other reasons why the acts are null and void; but even if he relies upon any such other reasons, they raise only such questions as have been heretofore determined in this case, or such as are no longer open to him at this stage. The only question open to him now is whether the judges, being honorary members of the incorporated bar association, were thereby disqualified to act.

It is urged by the prosecution that even this is not now open to him; that, notwithstanding his affidavit that he was ignorant of the relation until after the last rescript from this court, he has not shown due diligence in ascertaining the facts about the association and the relation of the judges to it. But we are not inclined to decide the case upon so narrow a ground, even if it were possible to do so. The ques-

tion of ownership of property, his interest in which as a member would be affected by any judgment that might be rendered in this cause, it was upon him to return the fact. But conceding that we must assume that the association did own property to the limits of its power in that respect, and conceding, further, that the interest of members in that property was such that, upon the dissolution of the corporation, each member would be entitled to a distributive share of it,—a proposition unsupported by authority,—still this interest would be entirely too remote and speculative to disqualify the member from sitting as judge or juror in a case to which the corporation is a party. The interest which will disqualify must be a pecuniary one, or one affecting the individual rights of the judge. The fact that dues which he pays to the association may have to be appropriated to the satisfaction of a judgment for costs cannot constitute such interest, since the dues are paid for that purpose, among others, whether in contemplation of such judgment or not, and the amount of his liability in that respect is not affected by the rendition of 35 L.R.A. (N.S.)

a judgment for costs against the association. Moreover, 'the liability of pecuniary gain or relief to the judge must occur upon the event of the suit, not result remotely, in the future, from the general operation of law upon the status fixed by the decision.' 12 Am. & Eng. Enc. Law, 45 et seq. The diminution of a member's distributive share in the corporate property, depending upon a dissolution which may never occur, or never during his life or membership, or relief from such result, is certainly entirely too remote to be considered in any sense as occurring 'upon the event of the suit.' It is, on the contrary, if possible at all, a result of the remote future, 'from the general operation of law on the status fixed by the decision.'

And in *Bowman's Case*, 67 Mo. 146, it was held that the fact that a judge was an honorary member of the bar association of St. Louis did not disqualify him from sitting at a trial of a case of disbarment instituted by a committee of such association, since he had not a particle of pecuniary interest involved.

J. T. W.

tion is likely to arise in the future, and for the information and guidance of the members of the courts who may be called to act in similar cases, it is better that it should be squarely met, duly considered, and finally settled.

There is substantially no dispute about the material facts. The association was incorporated under the laws of this commonwealth. Stat. 1886, chap. 22. This statute (§ 1) provides that the members of the Bar Association of the City of Boston, heretofore an unincorporated association, and all persons who shall hereafter be associated with them, shall be a body corporate under the same name, "for the purpose of promoting social intercourse among the members of the bar, of insuring conformity to a high standard of professional duty, and of making the practice of the law efficient in the administration of justice;" that (§ 2) for attaining the objects and carrying into effect the purposes of the corporation, it may acquire, receive, and hold real and personal estate, including a suitable building, library, and furniture, not exceeding \$500,000 in value; that (§ 3) it may adopt a constitution, by-laws, and rules for the admission, government, suspension, and expulsion of its members, the collection of fees, the election of officers, and defining their duties, and for the management of the affairs of the corporation; and that (§ 4) all interest of any member shall terminate and vest in the corporation upon his ceasing to be a member "by death, resignation, expulsion, or otherwise."

By the constitution it appears (article 3) that every member must be an attorney. The constitution further provides (article 4) for the appointment of various officers and committees, among which is a committee on grievances, and defines their respective duties; also that (article 6) there shall be an admission fee and an annual fee. The method of dealing with a person accused of professional misconduct, whether or not he be a member of the association, is set out partly in the constitution and partly in the by-laws. So far as material to this case it is substantially as follows: The complaint is not laid before the association, but is referred to the committee on grievances, consisting of seven members, who, after such hearing as they deem expedient, shall report the facts and their recommendations to the council, a larger committee consisting of at least twenty-one regular members, including the president, vice president, treasurer, and secretary, and shall thereupon institute such proceedings against offenders as the council may order. The committee on grievances shall keep a record of their proceedings, which shall not

be shown to any person not a member of the association, "except that any member of the bar not a member of the association shall be entitled to an examination of any proceedings of the committee affecting him." All meetings of the committee on grievances and of the association shall be private, and the cost of all proceedings before this committee shall be paid by the treasurer of the corporation, on the order of the chairman of the committee. By-law No. 3. The committee shall institute and carry on such proceedings against offenders, whether or not members of the association, and to such extent as the council or the association may order, and shall employ suitable counsel or agents for that purpose, the cost of such proceedings to be paid as in the case of the cost of hearings before the committee on grievances. Const. art. 4, § 7, pt. 3.

One of the purposes of the incorporation was "to insure conformity to a high standard of professional duty," and one of the methods adopted to this end is a systematic course of procedure for the detection and disbarment of unworthy attorneys, whether members of the association or not. Without stopping to dwell upon the features of this system, it is sufficient to say that in devising and pursuing it the association is engaged in a praiseworthy work, and that the system seems well calculated as well to protect the reputation of the person against whom an unjust complaint is made, as to detect and expose the person justly accused.

The association has a large library and commodious rooms. Among its active members are many of the prominent members of the bar in this vicinity. There are no shares of stock and no pecuniary profits. The relation of honorary members is thus set forth in article 3 of the constitution: "Any member of the association who may become a judge or justice of any court of record, and all other members of the supreme judicial and superior courts, shall be, while they shall hold such office, honorary members of the association, and shall be entitled to all its privileges, except that of voting, and shall be exempt from payment of dues." Such is the association and such is its method of procedure on charges of unprofessional conduct. Such also is the relation which the honorary members sustain to it.

The petition in this case was filed in the name of this association. The heading is as follows: "Bar Association of the City of Boston v. Peter J. Casey. Petition for Disbarment." It alleges that the respondent was duly admitted to the bar, that he has been guilty of gross misconduct, giving a detailed account of the same, and ends with the prayer "that the said Casey

be removed from the office of attorney at law in this commonwealth, or that the court may make such further order in the premises as it shall deem expedient in the interests of the public welfare;" and it is signed "Bar Association of the City of Boston, by" its attorneys. It was the petition of the association, and there is no dispute that it was drawn up and filed under its authority.

Under these circumstances the respondent contends that every honorary member of this association was disqualified to act in this case. In support of that contention he says that this is a case in which the parties are two, the association on one side and he on the other; that every member of the association, whether regular or honorary, is therefore interested in the result, and is in substance a plaintiff, and that no man can be both judge and party in the same case.

It may be at once conceded that if the respondent's premises were correct, his conclusion would be the natural logical sequence. But the premises are not correct. They are based upon an entire misconception of the nature of the proceeding. This is not a proceeding between two parties where the court is asked to adjudicate conflicting claims as to some right, corporeal or incorporeal, and where a decision favorable to one party is necessarily to that extent unfavorable to the other. It is rather in the nature of an inquest or inquiry as to the conduct of the respondent. In the result of this inquiry the association has no interest. It can gain nothing, nor can it lose anything, whatever may be the result. It simply calls the attention of the court to the alleged misconduct of an attorney, not for the purpose of obtaining redress of any grievance suffered by itself, but only that the court, if so disposed, may inquire into the charge and act accordingly. Such this petition plainly is upon its face. It sets forth no wrong done to it; it asks for no relief. The prayer at the end of the petition does not ask for such a decree as justice and equity may require as between the association and respondent, but in substance for such an order as the court shall "deem expedient in the interests of the public welfare."

And such is the proceeding in reality. An attorney at law is not merely a member of a profession practising for personal gain, nor is he on the other hand a public officer. He is an officer of the court. *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366; *Splane's Petition*, 123 Pa. 527, 540, 16 Atl. 481. The court, by reason of the necessary and inherent power vested in it to control the conduct of its own affairs, and to maintain its dignity, has a summary jurisdiction to deal with the alleged misconduct of an attorney.

A proceeding for disbarment is simply the exercise of jurisdiction over an officer, an inquiry into his conduct, not for the purpose of granting redress to a client or other person for wrong done, but only for the maintenance of the purity and dignity of the court by removing an unfit officer. As stated by Andrews, Ch. J., in *Fairfield County Bar v. Taylor*, 80 Conn. 11, 15, 13 L.R.A. 787, 22 Atl. 441, 442: "[The proceedings are] an investigation by the court into the conduct of one of its own officers, not the trial of an action or suit." In that case a petition or complaint was filed by a committee of the Fairfield county bar, and the following language was used by Andrews, Ch. J.: "Neither the whole bar of Fairfield county nor its committee were parties to an action in any proper sense. They were not prosecuting any matter of their own. They were not plaintiffs. They were performing their sworn duty to the court by bringing to its knowledge the misdoings of one of its agents." This is an accurate statement of the relation sustained to this case by the petitioner. It has no control over the proceedings, nor any rights as to them, not even to an order of notice. The question whether any action shall be taken on the petition, and, if so, what, is entirely within the discretion of the court. From the moment of the filing of the petition, the petitioner in law dropped completely out of the case, and the matter was entirely in the hands of the court to make the inquest on its own account, and to such extent as it saw fit. And Mr. Hill in his subsequent acts, either in the preparation of the evidence, in putting it in at the hearing, or in addressing the court, was in law not acting for and in behalf of the association, but as an officer of the court, by the authority expressly or impliedly conferred by it upon him. And that is so although the formal order authorizing Mr. Hill "to prosecute the inquiry and proceedings in relation to said petition, such authorization to take effect from the date of the filing of the petition," was not entered upon the record until February 25, 1907. The expenses of the hearing were payable out of the county treasury (*Rev. Laws*, chap. 165, § 44; *Borraga v. Bristol County*, 210 Mass. 299, 96 N. E. 719), and they were so paid.

"Usually . . . [proceedings for disbarment] are commenced by rule to show cause or by an attachment or summons to answer; but these are issued on motion or bare suggestion to the court, or even on the knowledge which the court may acquire of the doings of an attorney by their own observation. No formal or technical description of the act complained of is deemed requisite to the validity of such a proceeding. Sometimes they are founded on affidavit of the

facts to which the attorney is summoned to answer, in other cases by an order to show cause why he should not be stricken from the roll; and when the court judicially know of the misconduct of an attorney, they will, of their own motion, order an inquiry to be made by a master without issuing any process whatever, and, on the coming in of his report, will cause his name to be stricken from the roll." Bigelow, Ch. J., in *Re Randall*, 11 Allen, 473, 479, citing *Bacon*, Abr. Attachment, A, Attorney, H, and cases therein cited; *Rex v. Southerton*, 6 East, 143, 2 Smith, 305, 8 Revised Rep. 428; *Re Elsam*, 3 Barn. & C. 597, 5 Dowl. & R. 389; 3 L. J. K. B. 75. See also *Ex parte Wall*, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569; *Ex parte Steinman*, 95 Pa. 220, 40 Am. Rep. 637; *Randall v. Brigham*, 7 Wall. 523, 19 L. ed. 286.

The nature of the present proceeding is not affected by the fact that through all its stages it has been entitled "*Bar Association of the City of Boston v. Casey*." This is a mere matter of designation common in such a case in this commonwealth. See *Cowley v. O'Connell*, 174 Mass. 253, 53 N. E. 1001, 54 N. E. 558; *Bar Asso. v. Greenwood*, 168 Mass. 169, 46 N. E. 508; *Boston Bar Asso. v. Hale*, 197 Mass. 423, 83 N. E. 885; *Bar Asso. v. Scott*, 209 Mass. 200, 95 N. E. 402. In other jurisdictions a case for disbarment may be entitled either *Ex parte* or *In re* or *In the Matter of*,—followed by the name of the accused. And such a title seems preferable as indicating more accurately the real nature of the proceeding.

We entertain no doubt that the several justices of the superior court, whose right to sit has been challenged by the respondent, of their own motion, upon information giving them reasonable cause to believe that the respondent had been guilty of professional misconduct, could have conducted an inquiry into the matter either through a master or in open court, and that it is immaterial upon the question of their qualification that the information came by the petition, or from whatever way it reached them.

Exceptions overruled.

Orders affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

MINNIE G. COCHRAN

v.

CITY OF BOSTON.

(211 Mass. 171, 97 N. E. 1100.)

Damages — personal injury — interest.

Interest cannot be allowed as damages for 39 L.R.A.(N.S.)

a personal injury, even as compensation for delay in settlement.

(February 29, 1912.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by a defect in a highway. Overruled.

The facts are stated in the opinion.

Messrs. Fowler, Bauer, & Kenney, for plaintiff:

The court erred in refusing to allow the jury to consider the delay as affecting the amount of damages. The question is not whether interest should be allowed, or whether the jury must give damages for delay, but merely whether the jury have a right to consider the delay, if in their judgment the circumstances call for it.

Frazer v. Bigelow Carpet Co. 141 Mass. 126, 4 N. E. 620; *Ainsworth v. Lakin*, 180 Mass. 397, 57 L.R.A. 132, 91 Am. St. Rep. 314, 62 N. E. 746; *Atwood v. Boston Forwarding & Transfer Co.* 185 Mass. 557, 71 N. E. 72; *Peabody v. New York, N. H. & H. R. Co.* 187 Mass. 489, 73 N. E. 649; *District of Columbia v. Robinson*, 180 U. S. 92, 108, 45 L. ed. 440, 448, 21 Sup. Ct. Rep. 283; *Washington & G. R. Co. v. Hickey*, 12 App. D. C. 269; *Larsen v. Home Teleph. Co.* 164 Mich. 324, 129 N. W. 894; *Zipperlein v. Pittsburgh, C. & St. L. R. Co.* 8 Ohio S. & C. P. Dec. 587; *Louisville & N. R. Co. v. Wallace*, 91 Tenn. 35, 14 L.R.A. 548, 17 S. W. 882; *Smith v. East Mauch Chunk*, 3 Pa. Super. Ct. 495; *Central R. Co. v. Sears*, 66 Ga. 502; *Western & A. R. Co. v. Young*, 81 Ga. 397, 12 Am. St. Rep. 320, 7 S. E. 912; *Walrath v. Redfield*, 18 N. Y. 457; *Duryee v. New York*, 96 N. Y. 477.

Inasmuch as the jury was not allowed to exercise its discretion in reference to the matter of delay, the plaintiff should be given a new trial on the question of her damages only.

Morrison v. Richardson, 194 Mass. 370, 80 N. E. 468; *Thomson v. Pentecost*, 203 Mass. 505, 92 N. E. 1021; *Opinion of Justices*, 207 Mass. 608, 94 N. E. 846.

Mr. George A. Flynn, for defendant:

Interest cannot be allowed as damages in personal injury cases.

Western & A. R. Co. v. Young, 81 Ga. 397, 12 Am. St. Rep. 320, 7 S. E. 912; *Ratteree v. Chapman*, 79 Ga. 574, 4 S. E. 684; *Texas & N. O. R. Co. v. Carr*, 91 Tex. 332, 43 S. W. 18; *Lester v. Highland Boy Gold Min. Co.*

Note.—The general subject of the right to interest on unliquidated damages is treated in the note to *Fell v. Union P. R. Co.* 28 L.R.A.(N.S.) 1, and see later case, *New York, C. & St. L. R. Co. v. Roper*, 36 L.R.A.(N.S.) 952.

27 Utah, 470, 101 Am. St. Rep. 988, 76 Pac. 341, 1 Ann. Cas. 761; Missouri & K. Teleph. Co. v. Vandervort, 71 Kan. 101, 79 Pac. 1068, 6 Ann. Cas. 30; Green v. Garcia, 3 La. Ann. 702; Damhorst v. Missouri P. R. Co. 32 Mo. App. 350; Pittsburgh Southern R. Co. v. Taylor, 104 Pa. 306, 49 Am. Rep. 360.

In addition to any general rule refusing a plaintiff the right to collect damages for delay in personal injury cases, the right of recovery is limited by the statute to bodily injuries, and this has been construed to prevent recovery for loss of consortium and for medical expenses.

Harwood v. Lowell, 4 Cush. 310; Nestor v. Fall River, 183 Mass. 265, 67 N. E. 248.

Rugg, Ch. J., delivered the opinion of the court:

This is an action for personal injuries received by the plaintiff while a traveler, from a defect in a highway. The only question to be decided is whether in such an action the plaintiff is entitled to an instruction to the effect that in ascertaining damages the jury have a right to add to the fair compensation interest by reason of delay. The plaintiff relies on *Frazer v. Bigelow Carpet Co.* 141 Mass. 126, 4 N. E. 620, where it was held that in an action for injury to property "the jury, in their discretion, and as incident to determining the amount of the original loss, may consider the delay caused by the defendant." This case has been followed in other cases of tortious injury to property. *Ainworth v. Lakin*, 180 Mass. 397, 57 L.R.A. 132, 91 Am. St. Rep. 314, 62 N. E. 746; *Atwood v. Boston Forwarding & Transfer Co.* 185 Mass. 557, 71 N. E. 72; and *Peabody v. New York, N. H. & H. R. Co.* 187 Mass. 489, 493, 73 N. E. 649. The rule in substance adopted in these cases is that, while interest is not allowed as matter of right, the time for which the plaintiff has been kept out of the use of his property, or the damage occasioned by the wrong of the defendant, may be considered, and an amount not exceeding the legal rate of interest may be included therefor in the verdict if necessary in order to give adequate compensation. This principle is applicable to cases where there has been a definite injury to specific property. The reason is that stated by Chief Justice Shaw in *Parks v. Boston*, 15 Pick. 198, in laying down the rule for the computation of interest where property is taken by eminent domain. The injury occurs and is finished in its results on a particular day, and can then best be ascertained, and exact justice would be done by a contemporaneous determination of the loss. An action for personal injuries is essentially different in its 39 L.R.A. (N.S.)

nature. The damages are not complete and ended on the day of the accident, but continue for a greater or less period thereafter. The extent and magnitude of the injury are not infrequently unappreciated and incapable of reasonable ascertainment on the day it is received. Its degree of permanence is often deceptive at the first, and commonly the determination of conditions requisite for recovery is materially assisted by the perspective of time. The most helpful aids in learning the nature and degree of actual injury may be events occurring after the event complained of.

There is no fixed standard by which the compensation to be awarded can be measured. Its general rules have been stated many times. The sum of money fixed upon must be such as fairly compensates the injured person for the loss of time, the physical pain, and the mental suffering, both that undergone in the past and likely to occur in the future, and also money reasonably expended and to be expended in assuaging pain and in restoration to health. Elements that are past and also those which are to come must be considered. Most of them are not capable of mathematical computation. They can be settled only by the sound judgment and conscience of the tribunal by which they are assessed, and they are peculiarly within its province. The damages are to be determined, moreover, as of the day of the trial. It is apparent that interest, or considerations akin to interest, have no place in an inquiry of this sort. Interest is compensation for the use of money which is due. But the money which the wrongdoer is required by law to pay for the future suffering, expense, or loss of time of one whom he has injured, is not due until judgment is made up. It is not a debt, and does not become a definite obligation until a verdict or finding has been finally entered. It is composed to divers elements, together making up a gross sum, many of which may not have sprung into being on the day when the tort was committed, although directly traceable to it as a cause. If interest were properly chargeable on that which has already accrued, discount should be allowed upon that which relates to the future. Such a method of computing damages would be wholly impracticable. The amount of damages recoverable in actions of this sort as well as those under certain branches of the employers' liability act and under penal statutes for causing death, is limited to definite amounts. Plainly no interest can be allowed in instances of maximum injury.

It has been the practice in this commonwealth not to extend the rule of *Frazer v. Bigelow Carpet Co.* supra, to cases of this sort. Although the custom has been firmly

established and continuous not to allow enhancement of damages by reason of delay, and personal injury actions have been very numerous for many years, the question has never been presented before for consideration. The grounds against such an extension of allowance of interest appear conclusive. This view is supported by the great weight of authority in other jurisdictions. *Louisville & N. R. Co. v. Wallace*, 91 Tenn. 35, 14 L.R.A. 548, 17 S. W. 882; *Burrows v. Lowndsale*, 66 C. C. A. 650, 133 Fed. 250; *Jacobson v. United States Gypsum Co.* 150 Iowa, 330, 130 N. W. 122-125; *Arkansas & L. R. Co. v. Stroude*, 82 Ark. 117-127, 100 S. W. 760; *Fell v. Union P. R. Co.* 32 Utah, 101-111, 28 L.R.A.(N.S.) 1, 88 Pac. 1003-1006; 13 Ann. Cas. 1137; *Ratteree v. Chapman*, 79 Ga. 574-581, 4 S. E. 684; *Sargent v. Hampden*, 38 Me. 581; *Western & A. R. Co. v. Young*, 81 Ga. 397, 12 Am. St. Rep. 320, 7 S. E. 912; *Missouri & K. Teleph. Co. v. Vandervort*, 71 Kan. 101, 79 Pac. 1068, 6 Ann. Cas. 30; *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. 306, 49 Am. Rep. 580; *Texas & N. O. R. Co. v. Carr*, 91 Tex. 332, 43 S. W. 18; *Bommarius v. New Orleans R. & Light Co.* 123 La. 615, 49 So. 213. See also *Tilghman v. Proctor*, 125 U. S. 161, 31 L. ed. 672, 8 Sup. Ct. Rep. 894; *Shafer Fruit & Cold Storage Co. v. E. M. Upton Cold Storage Co.* 133 App. Div. 796, 118 N. Y. Supp. 8.

Exceptions overruled.

NEW JERSEY COURT OF ERRORS AND APPEALS,

JOSEPH TAYLOR

v.

NEW YORK & LONG BRANCH RAILROAD COMPANY, Plff. in Err.

(80 N. J. L. 282, 78 Atl. 169.)

Railroad — policeman — duties.

1. The duties of a railway policeman appointed on the application of a railroad

Headnotes by PITNEY, Ch. J.

Note. — Liability of private person or corporation for acts of special police officer appointed by public authority.

This note is supplementary to the notes appended to *McKain v. Baltimore & O. R. Co.* 23 L.R.A.(N.S.) 289, and *Pennsylvania R. Co. v. Kelly*, 30 L.R.A.(N.S.) 481.

The weight of authority seems to be that a corporation is liable for a wrongful assault or unlawful arrest made, or caused to be made, by a detective or peace officer employed by it in the course of its business as a watchman or detective, although he has 39 L.R.A.(N.S.)

company, and commissioned by the governor, pursuant to the "Act Concerning Carriers" (P. L. 1904, p. 322, § 4), are confined to criminal cases.

Same — liability for acts.

2. If railway policemen appointed and commissioned under the act (P. L. 1904, p. 322, § 4) are employed in matters aside from their duties under the statute, the employer may be held answerable for what they do, the same as in other cases of agency.

(November 14, 1910.)

ERROR to the Monmouth County Circuit of the Supreme Court to review a judgment in favor of plaintiff in an action brought to recover damages for alleged false imprisonment. Affirmed.

The facts are stated in the opinion.

Messrs. John S. Applegate & Son, for plaintiff in error:

The handcuffing of Taylor did not constitute a cause of action.

3 Cyc. 896; *Newell, Malicious Prosecution*, pp. 72, 73.

In assisting an officer executing a warrant, civil or criminal, a third party is protected.

Newell, Malicious Prosecution, 2d ed. 85, 192; 19 Cyc. 341; 12 Am. & Eng. Enc. Law, 2d ed. 770; *Geary v. Stevenson*, 169 Mass. 23, 47 N. E. 508.

The servant of the master cannot bind the master to respond in damages to the plaintiff, unless it be shown that the act which the servant did, which caused the injury, was an act which was expressly, or by necessary implication, within the line of his duty under his employment.

Holler v. Ross, 68 N. J. L. 324, 59 L.R.A. 943, 96 Am. St. Rep. 546, 53 Atl. 472; 31 Cyc. 1584, 1586, and notes; *Tolchester Beach Improv. Co. v. Steinmeier*, 72 Md. 313, 8 L.R.A. 846, 20 Atl. 188; *Mulligan v. New York & R. B. R. Co.* 129 N. Y. 506, 14 L.R.A. 791, 26 Am. St. Rep. 539, 29 N. E. 952; *Milton v. Missouri P. R. Co.* 193 Mo. 46, 4 L.R.A.(N.S.) 282, 91 S. W. 949.

been given police powers by the public authorities, at the request of his employer. *Southwestern Portland Cement Co. v. Reitzer*, — Tex. Civ. App. —, 135 S. W. 237.

A corporation has been held liable for an assault and false imprisonment made by its servant employed as a watchman, who had been appointed by the proper authority as a deputy sheriff of the county. *Southwestern Portland Cement Co. v. Reitzer*, supra, wherein the decision rests on the fact that the wrongful acts of the servant were clearly done in his capacity as watchman, and not in his official capacity.

Mr. Aaron E. Johnston, for defendant in error:

If the plaintiff was arrested under either of the executions produced, it was an illegal arrest.

Melville v. Brown, 15 Mass. 82; Bonesteel v. Bonesteel, 28 Wis. 249; Kerr v. Mount, 23 N. Y. 659; Gold v. Bissell, 1 Wend. 210; Deyo v. Van Valkenburgh, 5 Hill, 242; Newell, Malicious Prosecution, pp. 185, 213; Farmer v. Crosby, 43 Minn. 459, 45 N. W. 566; Chapman v. Dyett, 11 Wend. 31, 25 Am. Dec. 598; Butterfield v. Cooper, 6 Cow. 608; Hallock v. Dominy, 69 N. Y. 241.

If the officer took plaintiff to Long Branch under this warrant without any request on his part, instead of to Freehold, where the writ commanded him to be taken, he did

it without any authority, and it is false imprisonment.

Archbold, Crim. Laws, 254, 255; Francisco v. State, 24 N. J. L. 30; Tidey v. Erie R. Co. 71 N. J. L. 677, 60 Atl. 954.

The special officer who assisted at the arrest was the agent of the defendant.

Rhinesmith v. Erie R. Co. 76 N. J. L. 783, 72 Atl. 15; Baltimore & O. R. Co. v. Strube, 111 Md. 119, 73 Atl. 697; Newell, Malicious Prosecution, pp. 217, 222, ¶ 98, 101.

Pitney, C., delivered the opinion of the court:

This was an action of tort for false imprisonment, wherein the verdict and judgment went in favor of the plaintiff.

And in Brewster v. Interborough Rapid Transit Co. 68 Misc. 348, 123 N. Y. Supp. 992, where the defendant selected the employee, caused him to be designated "special officer," paid his salary, assigned him to work, and required him to do that which it was under a duty to perform, it was held that it was liable for an assault which the officer made upon one of the defendant's passengers. It was said: "It would be preposterous to hold that, because the defendant caused its employee to be designated as a 'special officer,' it was thereby relieved of responsibility for his acts. If, by virtue of his designation as a special officer, Kellerman became a public official, his duty to the public was thereby increased, but the defendant was not relieved from the same responsibility for his acts that it would be under for the acts of any other of its employees. It would, indeed, be an anomaly if the fact that the public power had been used to designate the employee of the defendant a public officer should relieve the defendant of responsibility for the acts which its employee performs in attempting to discharge his duties to it."

So, where a special officer of the defendant corporation, employed to preserve order on the station platform, at the instigation of a private citizen, arrested a passenger, it was held that he was acting in the regular course of his duty in making the arrest, and that the defendant was liable. Parke v. Fellman, 145 App. Div. 836, 130 N. Y. Supp. 361, wherein the court said: "The fact that he was also commissioned as a police officer, if such be the fact, does not relieve his employers for his unlawful acts committed in the course of his duty."

In Hedge v. St. Louis & S. F. R. Co. — Mo. App. —, 145 S. W. 116, where an employee of the railroad company, who was paid by it and charged with certain police duty about the depot, was also a special municipal policeman, but received no pay from the city, and performed no services anywhere except at the station, assaulted a person who had come to the station for the purpose of purchasing a ticket, it was held that the railroad company was liable for

what the employee did, and could not escape on the principle that his act was that of a special policeman, instead of an employee.

In Schultz v. United States Fidelity & G. Co. 201 N. Y. 230, 94 N. E. 601, affirming 134 App. Div. 260, 118 N. Y. Supp. 977, there are *dicta* to the effect that a special police officer whose duty it is to arrest persons committing crimes renders himself amenable to an action if, in the performance of that duty, he makes an unjustifiable or false arrest, acting maliciously, and that his employer will be liable also if the officer's acts are within the scope of his instructions.

But in Philadelphia, B. & W. R. Co. v. Stumpo, 112 Md. 571, 77 Atl. 266, where the policeman appointed under a statute at the instance of a corporation, "for the preservation of peace and good order on the premises of the said company," made the arrest of a discharged employee on a public street of a town, not on the premises of the company, and for an act of which the corporation could not complain, it was held that the latter was not liable for the employee's act, since it was beyond the scope of his employment.

And where the plaintiff, in Buman v. Michigan C. R. Co. — Mich. —, 134 N. W. 972, while wending his way towards the defendant's station, became involved in an altercation with a municipal police officer, and the latter summoned the station night watchman of the railroad, who was also a duly appointed police officer and constable without pay from the city, to assist him in making the arrest, and the latter responded as a police officer, it was held that the railroad company was not liable, since its watchman, for the nonce, was acting outside the scope of his employment.

Likewise, in St. Louis, I. M. & S. R. Co. v. Morrow, 88 Ark. 583, 115 S. W. 173, where the town marshal and his deputy were not employed by the railroad company, but were given a pass over the railroad merely to encourage them to discharge their official duties with reference to the company's property, it was held that the com-

The sole ground relied upon for reversal is the refusal by the trial judge of a motion made at the close of the evidence, that a verdict be directed in favor of the defendant. The proofs tended to show that in July, 1907, the railroad company obtained a judgment against Taylor before a justice of the peace of the county of Monmouth, sitting in the small cause court, in an action of tort, for \$1 damages and \$4.11 costs, and that on July 9, 1908, a writ of execution was issued thereon against the goods and chattels of Taylor, the writ commanding the officer, for want of sufficient goods and chattels, to take the body of Taylor and convey him to the county jail. This writ was placed in the hands of one Wilson, a constable, for execution, and by virtue thereof he took Taylor into custody at the Asbury Park station of the railroad company, being assisted in so doing by one Lankinau. Handcuffs were put upon the prisoner's wrists, but were removed shortly afterwards; and subsequently he was taken by the constable to the office of the superintendent of the railroad company at Long Branch, about 7 miles from Asbury Park. There by order of the superintendent, he was set at liberty. The plaintiff's contentions were that the judgment upon which the execution was issued had been already satisfied, so that the execution was invalid; that, assuming the execution was valid, the use of handcuffs amounted to unreasonable and excessive force; that the arrest was warranted only by want of sufficient goods and chattels out of which to

make the judgment debt, and that Taylor owned and was in visible possession of personal property more than sufficient for this purpose; and that without authority the constable took Taylor to Long Branch, contrary to the direction of the writ of execution, which required him to be taken to the county jail. Without spending time upon the other points, we think the taking of Taylor to Long Branch was clearly in excess of the warrant of the writ. But the railroad company was responsible for this only on the ground that Lankinau participated in it, and that Lankinau was in this behalf an agent of the defendant, acting within the scope of his authority.

It is argued for the plaintiff in error that there was no evidence that Lankinau directed or in any way instigated Wilson to take Taylor to Long Branch. This contention is clearly untenable; there being testimony from which the jury might reasonably infer that Lankinau fully co-operated with Wilson in the arrest, and assented to, if he did not suggest, the taking of Taylor to Long Branch. Lankinau's agency for the railroad company in the matter was not so clearly demonstrated, but we think there was sufficient evidence to require the submission of the question to the jury.

It appeared from the evidence that Lankinau was a "state detective,"—a "state officer." It did not clearly appear, but seems to have been tacitly conceded, that he was a railway policeman appointed on the application of the railroad company, and commis-

sionary of the railroad company. The railroad company was not liable for their unauthorized act of ejecting a trespasser from a train and assaulting him. The court was also of the opinion that, even if the parties were to be specially compensated for special attention to those things which would come in the line of the officers' duties as marshals, it would not constitute them agents of the railroad company.

So, in *Chicago, R. I. & P. R. Co. v. Nelson*, 87 Ark. 524, 113 S. W. 44, a railroad company was held not liable for an arrest ordered by its gate keeper, and made by an ordinary municipal policeman stationed at its depot to arrest offenders and protect life and property, and who was entirely under the control of the municipality, although the railroad company paid half of his salary.

A railway corporation in Massachusetts cannot escape liability for the false imprisonment of a passenger by its employees, even if they act as special police officers, under the provisions of the statute of 1898, § 282, which authorizes their appointment, because § 2 of the statute makes the corporation liable for their official misconduct to the same extent as for their torts when acting as their employees. *Horgan v. Boston Elev. R. Co.* 208 Mass. 287, 94 N. E. 39 L.R.A. (N.S.)

386. But in this case, since the person arrested had voluntarily complied with another statute (Stat. 1905, chap. 384, § 2) in securing his release, which statute expressly provided "that if the person arrested is released at his request, the officer who took him into custody shall not be liable for an illegal arrest or imprisonment," the corporation was held not to be liable either, on the principle that, the tort being joint, the discharge of one of the wrongdoers discharged them all.

It has been held to be a question of fact for the jury whether, when the special policeman performed the acts, he was acting in his capacity as servant or as public officer. *Hirst v. Fitchburg & L. Street R. Co.* 196 Mass. 353, 82 N. E. 10, wherein a police officer employed at a skating rink as a ticket collector, with orders, to maintain order at the rink, injured one while seeking to quell a disturbance caused by the latter.

But where it is so apparent that the person does not act in his capacity as special police officer to the company, as in *Philadelphia, B. & W. R. Co. v. Stumpo*, supra, the court will decide the question as a matter of law. And to the same effect, see *Southwestern Portland Cement Co. v. Reitzer*, supra.

E. M. S.

sioned by the governor, pursuant to P. L. 1904, p. 322, § 4. Assuming, however, that he had such a commission, and by virtue of the statute possessed the powers of a policeman and of a constable in criminal cases, there was still abundant evidence that he was employed by the company in the performance of duties aside from those of a railway policeman. The evidence was to the effect that he was regularly employed by the company, with the duty of seeing that order was preserved about its railroad stations, included in which was the duty of seeing that the hackmen kept their proper places. The plaintiff for ten years or more had been engaged in driving hacks during the summer seasons at Asbury Park. Repeated suits were brought against him by the railroad company in the justice courts during the summer of 1907. The records of four such actions were introduced in evidence, one of which resulted in the judgment upon which the body execution was issued. Lankinau figured as a witness for the company in each of those cases, and it was Lankinau who, in the month of July, 1908, made the necessary affidavit to show that Taylor was not a freeholder, in order that the justice might issue a body execution against him. Lankinau was not only present when Taylor was arrested, but, according to one view of the evidence, he may be deemed to have acted as a volunteer in the arrest, in the sense that he was not requested by the constable to lend assistance. And it was Lankinau who produced the handcuffs, which, as the jury might believe, were not needed, except for their intimidating effect. From this and other evidence the jury might well infer that a somewhat systematic campaign was being conducted by the railroad company in the effort to secure observance by the hackmen at the Asbury Park station, of the company's regulations respecting the mode in which they should ply their trade; that Lankinau was especially charged by the company with the conduct of this campaign; and that the arrest of Taylor was only one step in its prosecution. The duties of a railroad policeman under the act of 1904 (P. L. 1904, p. 322, § 4) are confined to criminal cases. In his official capacity he has nothing to do with arrests under civil process.

The case of *Tucker v. Erie R. Co.* 69 N. J. L. 19, 54 Atl. 557, cited by plaintiff in error, was quite different from the present. There the plaintiffs were arrested upon a criminal charge, although without warrant, 39 L.R.A. (N.S.)

and all that was done by the railway policemen about the arrest and subsequent prosecution was done in the line of their duty, under the governor's commission. The decision was that for their misconduct in arresting and prosecuting the plaintiffs, the railroad company was not responsible, on the ground that, although the policemen were appointed upon the application of the company, they were responsible for the proper discharge of their official duties, not to the company, but to the state. But the opinion of the chief justice who spoke for the supreme court distinctly recognizes that if the prosecution of the plaintiffs had been instigated by the company, or its officers or employees, or if what the railway policemen did had been done by them as agents of the company, and not solely as police officers, the company would have been legally responsible.

In our opinion, if railway policemen appointed and commissioned under the act of 1904 are employed by the railroad company, or any other corporation or person, in matters aside from their duties under the statute, the principal may be held answerable for what they do, the same as in other cases of agency. Their commissions as railway policemen cannot be made a cloak to shield the company from responsibility for what may be done by such agents under the employment of the company, aside from the strict and proper performance of their duties as officers under the act.

There being evidence justifying the inference that in what Lankinau did about the plaintiff's arrest, he was acting within the scope of his authority as agent for the defendant company, and the evidence justifying the further inference that he participated in the act of the constable in taking the plaintiff to Long Branch, in excess of the warrant of the writ of execution, it was proper to submit to the jury the question of defendant's liability to the plaintiff, and the motion for the direction of a verdict in defendant's favor was properly refused.

The judgment under review should be affirmed.

For affirmance—The Chancellor, Chief Justice, Garrison, Swayze, Trenchard, Parker, Bergen, Voorhees, Minturn, Bogert, Vredenburg, Vroom, Dill, Congdon, JJ.

For reversal—None.

OKLAHOMA SUPREME COURT.

CHICAGO, ROCK ISLAND, & PACIFIC
RAILWAY COMPANY, Plff. in Err.,
v.

F. L. ARMSTRONG.

(— Okla. —, 120 Pac. 952.)

Carrier — exclusion of persons from stations.

1. A railway company has the right to exclude from its depots and warerooms persons who come there in an intoxicated condition, and who are turbulent and troublesome and disturb and interfere with the agents and employees of the company in the discharge of their work, and may also exclude therefrom those who are reported to be dishonest, and on account of whose past presence in and about its depots and warerooms freight had been removed without the company's consent, and for which it was compelled to pay the consignee the value thereof.

Headnotes by SHARP, C.

Note. — Right to exclude undesirable hackmen, draymen, etc., from depot.

As to the right to discriminate between hackmen and other solicitors of patronage at depots, wharves, etc., see note to Oregon Short Line R. Co. v. Davidson, 16 L.R.A. (N.S.) 777.

No case besides CHICAGO, R. I. & P. R. Co. v. ARMSTRONG seems to have passed directly upon the question whether or not a railroad company may exclude undesirable hackmen or draymen from its depot where such a hackman or drayman has a contract with a patron of the railroad company to transport either himself or his goods to or from its depot. But the principles upon which the decision in that case is based have been recognized by the courts in numerous instances, as is shown by the illustrative cases hereinafter set out.

As regards the soliciting of business at railroad stations, however, in those jurisdictions which adhere to the rule that the company may lawfully exclude some hackmen or other solicitors of patronage from entering its grounds or station to ply their vocation while it gives to others the exclusive privilege of doing so (for cases so holding see note above referred to), the railroad company could exclude undesirable hackmen, etc., from soliciting business upon its grounds, by granting the exclusive privilege to another, without reference to the element of undesirability; but of course, under this rule, undesirable hackmen, etc., could not be prevented from delivering goods or passengers at the depot. Under the contrary rule (for cases applying the rule see note above referred to) which prohibits discrimination between competing hackmen, etc., however, reliance for grounds of exclusion would necessarily have to be placed upon the fact that the particular solicitor of patronage sought to be excluded was un-

Case — exclusion of drayman from station — dishonesty — defense.

2. In an action for damages on account of the issuance of a letter notifying local shippers that a railway company will refuse to allow plaintiff to haul or handle any more freight from its depot, and to secure another drayman, it is error to strike from the answer allegations charging that it was necessary, in the course of his business, for the plaintiff so excluded to go about its platform and premises unattended by its agents, and to handle and have access to goods other than those for which he had orders; that, while plaintiff was acting as drayman, merchandise had been taken from its depot without its knowledge or consent, and for which it had been compelled to pay consignee; that said plaintiff was frequently at its depot in an intoxicated condition, was contentious, turbulent, troublesome, and disagreeable, disturbed and interfered with its agents and employees in the discharge of their work; had been arrested and convicted of drunkenness a number of times; had been arrested on the charge of

desirable because of misconduct on his part.

But misconduct, if sufficiently gross, would seem to warrant exclusion in all cases; the only room for difference being as to what would constitute misconduct sufficient to warrant exclusion. As before stated, this principle has been recognized in numerous cases, the following being set out as illustrative:

Thus, in *Com. v. Power*, 7 Met. 596, 41 Am. Dec. 465, where, following continued annoyance to passengers resulting from excessive solicitation of patronage, notice had been sent to the local innkeepers that they would thereafter be excluded from the depot platform, the court, in an action for forcibly ejecting an innkeeper who had ignored the notice, said that the jury should have been instructed: "That the opening of depots and platforms for the sale of tickets, for the assembling of persons going to take passage, or landing from the cars, amounts in law to a license to all persons, prima facie, to enter the depot, and that such entry is not a trespass; but that it is a license conditional, subject to reasonable and useful regulations; and, on non-compliance with such regulations, the license is revocable, and may be revoked either as to an individual, or as to a class of individuals, by actual or constructive notice to that effect. That if the platform, as part of the depot, is appropriated to and connected with the entrance of passengers into the cars, and the exit of passengers from the cars, and for the accommodation of their baggage, and if the soliciting of passengers to take lodgings in particular public houses, by the keepers of them or their servants, is a purpose not directly connected with the carriage of passengers by the railroad, on their entrance into or exit from cars; that if, when urged with earnestness and importunity, it is an annoyance of passengers, and interruption to

theft; and all of which facts were at the time known to defendant's agents and employees at its local station, where plaintiff had been engaged in carrying on his drayage business,—such allegations, if proved, being a justification of the company's act, such as will bar a recovery.

(November 14, 1911.)

ERROR to the County Court for Texas County to review a judgment in plaintiff's favor in an action brought to recover damages for alleged wrongful interference with plaintiff's business. Reversed.

Statement by Sharp, C.:

Plaintiff's petition charged that on and prior to April 27, 1908, he was engaged in conducting for hire a general drayage business in the town of Guymon, Oklahoma; that as such drayman he hauled freight and express to and from the depot of defendant company for his customers upon their or-

their proper business of taking or leaving their seats in the cars, and procuring or directing the disposition of their baggage, or if the presence of such persons for such a purpose is a hindrance and interruption to the officers and servants of the corporation, in the performance of their respective and proper duties to the corporation, as passenger carriers,—then the prohibition of such persons from entering upon the platform is a reasonable and proper regulation, and a person who, after actual or constructive notice of such regulation, violates or attempts to violate it, thereby loses his license to enter the depot; that such license as to him may be revoked; and if, upon notice to quit the depot, he refuses so to do, he may be removed therefrom by the [depot] superintendent and the persons employed by him; and if they use no more force than is necessary for that purpose, such use of force is not an assault and battery, but is justifiable. That as to the circumstances of the present case, if the superintendent had issued a circular, giving notice to all innkeepers and landlords that he had prohibited them from entering the depot to solicit persons to go to their respective houses as guests, and if this notice came to Hall [the offending innkeeper], and he afterwards, and after special notice to him personally, had attempted to violate this prohibition, and solicit passengers; . . . and if Power [the depot superintendent] believed that his [the offending innkeeper] intention was to violate a subsisting reasonable regulation,—then he and his assistants were justified in forcibly removing him from the depot."

And an analogous case which directly supports the principles applied in CHICAGO, R. I. & P. R. CO. v. ARMSTRONG is that of *Arkham v. Brown*, 8 N. H. 523, 31 Am. Dec. 299, wherein, in holding that an innkeeper cannot exclude one stagecoach driver

der, and that the services by him rendered were satisfactory; that on April 27, 1908, defendant, acting through its agent and employee, D. P. Bissell, with malicious intent to injure and deprive plaintiff of his usual means of livelihood, and to injure him in his business, and to boycott him, notified plaintiff's customers in writing that defendant company would no longer allow plaintiff to haul or handle any more freight or express; that the order was as follows:

Guymon, Oklahoma, April 27, 1908.

All concerned: We are advised by our special agents to refuse to allow Drayman Armstrong to haul or to handle any more freight or express. You will please secure another drayman.

[Signed] D. P. Bissell, Agent.

That in the serving of said notices, defendant company acted wilfully, maliciously, and without justification, and for the pur-

and admit his rival to solicit business from the inn, if such driver came at a suitable time, in a proper manner, demeaned himself peaceably, and was doing no injury to the innkeeper, the court said: "But the jury should have been instructed that the defendant might forfeit this right by his misconduct, so that the plaintiff might require him to depart, and expel him; and if, by reason of several instances of misconduct, it appeared to be necessary for the protection of his guests or of himself, the plaintiff might prohibit the defendant from entering again, until the ground of apprehension was removed. Thus, if affrays or quarrels were caused through his fault, or he was noisy, disturbing the guests in the house,—interfered with its due regulation, intruded into the private rooms, remained longer than was necessary, after being requested to depart, or otherwise abused his right, as by improper importunity to guests to induce them to take passage with him,—the plaintiff would have a right to reform that, and, if necessary, to forbid the defendant to enter, and treat him as a trespasser if he disregarded the prohibition."

So, in *Kalamazoo Hack & Bus Co. v. Sootsma*, 84 Mich. 194, 10 L.R.A. 819, 22 Am. St. Rep. 603, 47 N. W. 667, the court said that no doubt a hackman wrongfully creating disorder or disturbance upon the depot grounds, or by frauding or deceiving passengers, could be lawfully ejected therefrom, and, persisting in such conduct, be forever debarred therefrom by the railroad company.

And in *McConnell v. Pedigo*, 12 Ky. L. Rep. 750, it was said that a railroad company has no right to discriminate between solicitors of patronage at its station where the discrimination is not necessary to the successful prosecution of its legitimate business.

G. J. C.

pose of injuring and depriving plaintiff of his business, and that the acts done did injure and deprive plaintiff of his business, on which he at the time depended for a livelihood for himself and family; that defendant continued to refuse to deliver freight or express to plaintiff, notwithstanding the written orders held by said plaintiff therefor.

The amended answer of defendant company contains 10 paragraphs. The first is a general denial; the second and third charge in substance that defendant company was at the time a common carrier and maintained at Guymon a depot for storing goods, wares, merchandise, and other property received by freight or for shipment, and that there was at all times contained in said depot a large amount of freight belonging to its patrons, which it held in its custody as a common carrier or as warehouseman; that the freight by it received, whether for shipment from or delivery at Guymon, was unloaded on the platform, and there remained until the same could be stored in its warehouses. Paragraph 9 contains a specific denial of any malice toward plaintiff, in the issuance of said notices; says that the same was done for the protection of defendant's property in its charge and under its control, and for which it was responsible. Paragraph 10 charges that if defendant has sustained any loss of patronage, that it was due to his own conduct and habits, and not by reason of any act or fault of defendant company, its agents or employees.

Paragraphs 5, 6, 7, and 8, in substance, charge that the property of plaintiff's patrons was intermingled upon the platform with the property of other shippers, and that, while acting as drayman, it was necessary for plaintiff to go upon defendant's platform and premises unattended by defendant's employees, and to handle and have access to the goods, other than those for which he had orders; that at various times, while plaintiff had been acting as drayman, packages and boxes of goods, wares, and merchandise had been taken from defendant's depot without its knowledge or consent, and that defendant had been compelled to pay to the consignees thereof the value of such goods by reason of their loss; that plaintiff had frequently been to its depot in an intoxicated condition, and was turbulent, troublesome, contentious, and disagreeable, and disturbed and interfered with its agents and employees in the discharge of their work; that he had been arrested, tried, and convicted of drunkenness a number of times in Guymon during the times mentioned in the amended petition; that the agents and employees of defendant company had been informed that plaintiff was

of bad reputation, reported to be dishonest, untruthful, and unreliable, and that plaintiff had sold and given away packages and boxes of goods, wares, and merchandise from his dray, which he had removed from the depot of defendant company at Guymon without its consent, and that the agents and employees of defendant company believed said charges and reports were true, and that plaintiff was unworthy of confidence, and that such a person should not be permitted to have access to its warehouses; and that a short time prior to the acts complained of in plaintiff's petition plaintiff had been arrested in the town of Guymon on the charge of stealing money, and that defendant's agents and employees at Guymon knew of such charge and report, and that from all the charges concerning said plaintiff, known to the agents and employees of defendant company at the time, it was believed that such plaintiff was untrustworthy and not a suitable and safe person to permit to have access in and around its depot and warehouse, such as was usually accorded to draymen at said depot. Plaintiff thereupon filed a motion to strike from the answer paragraphs 4, 5, 6, 7, 8, 9, and 10, because it was charged that the same did not constitute a defense to the plaintiff's amended petition. This motion was sustained in part, the court striking from the answer paragraphs 5 to 8, inclusive, which action of the court, among others, is assigned in this court as error.

Messrs. M. A. Low, C. O. Blake, E. E. Blake, and H. B. Low, for plaintiff in error:

Plaintiff had no absolute right to go upon the premises to carry on his vocation, and it was the duty of the defendant to protect its patrons from his misconduct, for a failure of which the defendant would be liable in damages.

Hutchinson, Carr. 3d ed. § 989; Donovan v. Pennsylvania Co. 199 U. S. 284, 50 L. ed. 198, 26 Sup. Ct. Rep. 91; Exton v. Central R. Co. 63 N. J. L. 356, 56 L.R.A. 508, 46 Atl. 1099.

Messrs. Wylle & Edens for defendant in error.

Sharp, C., filed the following opinion:

It is indispensable to the successful carrying on of the business of a railway company that passenger and freight depots be maintained at stations along its line. In Oklahoma this is made mandatory by § 26, art. 9, of the Constitution, which provides: "It shall be the duty of each and every railway company, subject to the provisions herein, to provide and maintain adequate, comfortable, and clean depots and

depot buildings, at its several stations, for the accommodation of passengers, and said depot buildings shall be kept well lighted and warmed for the comfort and accommodation of the traveling public; and all such roads shall keep and maintain adequate and suitable freight depots and buildings for the receiving, handling, storing, and delivering of all freight handled by such roads." The liability of a railway company for freight under its charge and in its custody varies from insurance to reasonable care, depending upon whether the relationship existing is that of carrier or warehouseman; but, in either event, there exists on the part of the carrier a duty and attendant liability, dependent upon the facts and the law applicable thereto.

There being imposed upon the carrier the legal duty to provide and maintain a suitable freight depot and building for the receiving, handling, storing, and delivery of all freight received and forwarded by it, for the accommodation of its patrons, as well as for its own benefit, there is impliedly conferred upon it, as a necessary incident of its business, the right to exercise over its depots and station grounds such reasonable control and supervision as is necessary in the discharge of its duty to the public, and for the convenience, comfort, and safety of its patrons, as well as for its own protection. *Donovan v. Pennsylvania Co.* 199 U. S. 284, 50 L. ed. 198, 26 Sup. Ct. Rep. 91. That a railway company, both as the owner of the depot and station grounds connected with the road and as a carrier of freight, has authority to make reasonable and suitable regulations in regard to those making use of its property, and so long as the same remain reasonable and not in violation of some law or some regulation made in pursuance thereof, we think cannot be denied. Such regulations may depend largely upon local conditions. In order to be able to perform these imposed duties, it is requisite that the right to make reasonable rules and regulations for the conduct of its business be given. In the proper discharge of its business, it is not simply empowered, but is bound, to exercise proper control over its property, and the property of others intrusted to its care. This power, which must be conceded, must of necessity be exercised through its officers, agents, and employees, which is the only mode by which a corporation can exercise its powers. While it may be said that by opening the doors to its depots, the company gives an implied license to any and all persons to enter, it may be answered that by so doing, it *prima facie* gives an implied license, but such license is revocable in its nature, and, if actually revoked and due notice given to an individual or

or class of individuals, and they still persist in entering without a license, the owner has the right to exclude them by force, if necessary. *Com. v. Power*, 7 Met. 802, 41 Am. Dec. 465; *Harris v. Stevens*, 31 Vt. 79, 73 Am. Dec. 341.

In *Summitt v. State*, 8 Lea, 413, 41 Am. Rep. 637, it is said in the syllabus: "A railroad company may make and enforce by its agents reasonable and necessary rules for the transaction of its business, and for the proper and orderly management of its depot and other buildings open to the public. These rules, however, must be reasonable, and such as do not unnecessarily infringe upon the rights of the public and others having or carrying on business in connection with railroad traffic and travel."

In *Com. v. Power*, *supra*, it was said by Shaw, Ch. J.: "That if Power had been placed in charge of the depot by the corporation, as superintendent, he had all the authority of the corporation, both as owners and occupiers of real estate, and also as carriers of passengers, incident to the duty of control and management. That this power and authority of the corporation extended to the reasonable regulation of the conduct of all persons using the railroad, or having occasion to resort to the depots, for any purpose. . . . Or if the presence of such persons, for such a purpose, is a hindrance and interruption to the officers and servants of the corporation, in the performance of their respective and proper duties to the corporation, as passenger carriers, then the prohibition of such persons from entering upon the platform is a reasonable and proper regulation, and a person who, after actual or constructive notice of such regulation, violates or attempts to violate it, thereby loses his license to enter the depot; that such license as to him may be revoked."

In *Thurston v. Union P. R. Co.* 4 Dill. 321, Fed. Cas. No. 14,019, it was claimed that the plaintiff, who had purchased a ticket for transportation, was a notorious gambler and was then engaged in traveling on its road for the purpose of plying his calling. The court said: "It would not be obliged to carry one whose ostensible business might be to injure the line; one fleeing from justice; one going upon the train to assault a passenger, commit larceny or robbery, or for interfering with the proper regulations of the company, or for gambling in any form, or committing any crime. . . . As gambling is a crime under the state laws, it is not even necessary for the company to have a rule against it. . . . Whether the plaintiff was going upon the train for gambling purposes, or whether, from his previous course, the defendant

might reasonably infer that such was his purpose, is a question of fact for the jury." 6 Cyc. 550.

Such regulations as will enable a railway corporation to execute its difficult and responsible duties, insure the comfort of its passengers, and protect itself from wrong and imposition, it has an undoubted right to prescribe, provided always that such regulations are reasonable and just. *Hutchinson*, Carr. §§ '989, 1078. In its passenger service, it has the right to require that all passengers shall preserve order; that they shall be seated, and not stand up in the passageways or upon the car platforms, and that they shall abstain from any act which tends to impede or interrupt the conductors and other employees in the transaction of their necessary business. Reasonable regulations may not only be prescribed, but enforced by such reasonable means as the company may have at its command; for, without some use of power to give them effect, such regulations would be of little value. *Hibbard v. New York & E. R. Co.* 15 N. Y. 458. The same rule should be applied with like force to those having business with the carrier concerning freight, and who may have a right to enter the depots or station grounds of the company. Certainly, it would not be said that a railway company, having the admitted right to evict from its train or station grounds those violating its reasonable rules and regulations, and with whom it may be at the time under contract for transportation, cannot exercise a similar authority, on proper occasions and under justifiable circumstances, over one to whom it does not directly have any contract relation, but who is acting independently of the company, either as a contractor, or for hire in serving its local patrons. Undoubtedly the authority exists to exercise the same reasonable control over its warerooms and depots and freight in its charge, whether indoors or upon its platforms, as it has over its equipment used in its passenger service.

In *Decker v. Atchison, T. & S. F. R. Co.* 3 Okla. 553, 41 Pac. 610, it is said: "There is no doctrine of corporation law better settled than the right of a railroad corporation to prescribe reasonable rules and regulations for the government and use of its property. The only restriction under the law is that the rules must be reasonable."

That a railway company has the right to exercise reasonable control over those using for the time being its property must follow as a necessary incident to the right of property. It is not bound to admit to its depots and station grounds those who refuse to obey the company's reasonable rules and 30 L.R.A. (N.S.)

regulations, or who are guilty of gross and vulgar habits or conduct, or who make a disturbance, or are turbulent and troublesome, or those under the influence of liquor, who interfere with the agents and employees of the company in the discharge of their work, or whose reputation for honesty is bad, and which facts are known to the agents and employees at the time; and, *a fortiori*, whose characters are unequivocally bad; nor is it bound to admit to its premises those whose presence would interfere with the interest or patronage of the proprietors, so as to make the business less lucrative to them. *Jencks v. Coleman*, 2 Sumn. 221, Fed. Cas. No. 7,258. In this case, *Story, J.*, said: "I think that the proprietors had a right to inquire into such intent and motives, and to act upon the reasonable presumptions which arose in regard to them. Suppose a known or suspected thief were to come on board. Would they not have a right to refuse him a passage? Might they not justly act upon the presumption that his object was unlawful? Suppose a person were to come on board who was habitually drunk and gross in his behavior, and obscene in his language, so as to be a public annoyance. Might not the proprietors refuse to allow him a passage? I think they might, upon the just presumption of what his conduct would be."

It was said by the court in *Harris v. Stevens*, *supra*, speaking of an implied license to enter the station house of the railway company: "The existence of this right in the corporation would seem to be indispensable to the comfort of passengers in getting to and from the cars, and in transacting that business with the agents of the company which is necessarily done at the stations, and also to the protection of the property intrusted to its care, for the safety of which it is held to the strictest accountability."

It is not necessary that those in charge of the property of a railway company be compelled to wait until some covert act, theft, or other offense be committed, that they may act to prevent the occurrence or recurrence of such act or offense. It is quite important and essential that it have authority to prevent, as the power to stop or repress the commission of wrongful acts, *Vinton v. Middlesex R. Co.* 11 Allen, 304, 87 Am. Dec. 714; *Exton v. Central R. Co.* 63 N. J. L. 350, 56 L.R.A. 508, 46 Atl. 1099; *New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689; *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224.

The objections may be made that the exercise of such power is liable to abuse and may become the instrument of oppression;

but the same is true of many other salutary rules of law. The safeguard against any unjust or unauthorized use of the power is to be found in the consideration that it can never be properly exercised except in cases where it can be satisfactorily proved that the condition or conduct, past or present, of a person, was such as to render it reasonably certain that, if permitted, he would again continue his former course of conduct.

Such being the case, it was error in the trial court to strike from defendant's answer those paragraphs thereof which set up specially and generally the alleged bad character of plaintiff. These were issues that defendant had the right to have tried out. If true, they would justify the defendant in the action of its agent in sending out the letters complained of; while, on the other hand, if, upon the trial, it should be found that the charges so stricken out were in fact untrue, it would go to show that defendant, through its agent, acted without proper justification in the premises.

Having reached this conclusion, we think also it was error for the court to give the fifteenth instruction, as follows: "You are further instructed that plaintiff had a right to receive freight, express, and baggage at the depot of the defendant so long as his customers, the consignees of such goods, were willing for him to haul it; and the fact that the plaintiff was a thief or a drunkard would not in law justify the defendant in refusing him that right." While one known to be a thief or a drunkard has the right to engage in honest employment, it does not follow, as in the case under consideration, that such a person, by reason of such employment, has the absolute and unqualified right to go unattended upon and about the premises of one not his employer, disturbing and interfering with the agents and employees of such third party, while in the discharge of their work.

Counsel for defendant in error in this case are admonished against the use of argument such as made during the trial before us. While, in the heat of argument, attorneys often say things they do not intend, still the language used in this case is of such extreme nature that it is hard for us to believe that the same was not said with the intent to influence the action of the jury, by appealing to that bias and prejudice which so often exists in such cases.

Because of the action of the court in striking paragraphs 5, 6, 7, and 8 from the defendant's amended answer, and in giving instruction No. 15, the judgment of the court below should be reversed, and the case remanded, with instructions to proceed in accordance with this opinion.

cause remanded, with instructions to proceed in accordance with this opinion.

Per Curiam:

Adopted in whole.

KANSAS SUPREME COURT.

NETTIE M. HOLYFIELD

v.

J. W. HARRINGTON et al.

and

G. A. PERKINS et al., Appts.

(84 Kan. 760, 115 Pac. 546.)

Note — alteration — ratification.

1. A material alteration in a promissory note may be ratified by any person affected by it, so as to bind him as fully as though he had authorized it in the first instance.

Same — necessity of consideration.

2. A new consideration is not necessary to support the contract of ratification. Section 5377 of the General Statutes of 1909, § 131 of the negotiable instruments act (Laws 1905, chap. 310), which provides that "where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration

Headnotes by PORTER, J.

Note. — Necessity of consideration to sustain ratification of unauthorized alteration.

This note does not include the ratification of unauthorized signatures, nor the improper filling of blanks. Cases resting upon estoppel are not included, nor those involving forgery. For the subject of ratification of forged instruments, see the note to *Shinew v. First Nat. Bank*, 36 L.R.A. (N.S.) 1006.

No attempt is made to include cases where it might be inferentially argued that there was no consideration.

The great weight of authority is in accord with the decision in *HOLYFIELD v. HARRINGTON*, that a ratification of an alteration in an instrument does not require a consideration. *Montgomery v. Crossstwait*, 90 Ala. 553, 12 L.R.A. 140, 24 Am. St. Rep. 832, 8 So. 498; *Dickson Bros. v. Bamberger*, 107 Ala. 293, 18 So. 290; *Payne v. Long*, 121 Ala. 385, 25 So. 780; *Jackson v. Johnson*, 67 Ga. 167; *Goodspeed v. Cutler*, 75 Ill. 534; *Scott v. Bibb*, 48 Ill. App. 657; *Owens v. Tague*, 3 Ind. App. 245, 29 N. E. 784; *Emerson v. Opp*, 9 Ind. App. 581, 34 N. E. 840, 37 N. E. 24; *Pelton v. Prescott*, 13 Iowa, 567; *Stewart v. First Nat. Bank*, 40 Mich. 348; *Janney, S. & Co. v. Goehring*, 52 Minn. 428, 54 N. W. 481; *King v. Hunt*, 13 Mo. 97; *Evans v. Foreman*, 60 Mo. 449; *State v. Paxton*, 65 Neb. 110, 90 N. W. 983; *Humphreys v. Guillow*, 13 N. H. 385, 38 Am. Dec. 499; *Camden Bank v. Hall*, 14 N. J. L. 533; *Stringfellow v. Petty*, 14 N. M. 14,

and subsequent indorsers," is construed to mean that any one of the parties to such an instrument may assent to a material alteration, so as to make himself liable thereon, without any new consideration, upon the principle that he who may authorize in the beginning may ratify in the end.

Same — indorsement of assent.

3. At the request of the payee, the maker of a promissory note after it had been executed and delivered altered the time of payment from three years to one year. Two of the sureties on the note afterwards indorsed in writing upon the back of the instrument their agreement to the change of time. Held, that they ratified the change, and made themselves liable upon the note without any new consideration.

(May 6, 1911.)

89 Pac. 258; National State Bank v. Rising, 4 Hun, 793; Jacobs v. Gilreath, 45 S. C. 46, 22 S. E. 757; Matson v. Jarvis, — Tex. Civ. App. —, 133 S. W. 941; Kilkelly v. Martin, 34 Wis. 531 (possibly obiter).

In Henry v. Heeb, 114 Ind. 275, 5 Am. St. Rep. 613, 16 N. E. 606, where there was a consideration, the court said: "Where, however, as in the present case, the act ratified is of an ambiguous character, and may as well be attributed to a mistaken assumption of authority as to a purpose to commit a crime, public policy does not forbid the adoption or ratification of the act; nor can it be said to be without consideration, especially where, as in the present case, indemnity has been accepted."

In Pelton v. Prescott, 13 Iowa, 567, the court said: "Suppose the alteration is made to correct a mistake (Chitty, Bills, 207), no new consideration is necessary to support the assent afterward given. And for anything that appears, these changes were made between the payee and the principal to correct a mistake, all of which was subsequently ratified and concurred in by the surety."

Grimstead v. Briggs, 4 Iowa, 559, frequently cited in this connection, rests particularly upon estoppel.

In Janney, S. & Co. v. Goehringer, 52 Minn. 428, 54 N. W. 481 (a case not strictly within the scope of this note as it concerned the filling of a blank), where it was claimed that a lease was erroneously admitted in evidence, as it appeared that when it was executed by the lessor it had a blank which was afterwards filled up, the court was not sure that there were not sufficient circumstances for the inference that the lessor authorized the blank to be filled as was done, but, nevertheless, said that there was evidence sufficient to show a subsequent recognition of and acquiescence in the lease as thus completed, on the part of the lessor and her successor, who was the defendant in the suit.

In First Nat. Bank v. Gay, 63 Mo. 33, 21 Am. Rep. 430, which was also a case without the scope of this note, as it related to an instrument not signed in the first

A PPEAL by defendants Perkins et al. from a judgment of the District Court for Wyandotte County in plaintiff's favor in an action on a promissory note. Affirmed.

The facts are stated in the opinion.

Messrs. James F. Getty and David F. Carson, for appellants:

The note sued on was materially altered for appellee's benefit, and thereby became void as to sureties.

2 Am. & Eng. Enc. Law, 2d ed. 236, 237; McCormick Harvesting Mach. Co. v. Lauber, 7 Kan. App. 730, 52 Pac. 577; Fraker v. Cullum, 21 Kan. 555; Wood v. Steele, 6 Wall. 80, 18 L. ed. 725; Tiedeman, Com. Paper, § 394; First Nat. Bank v. Payne, 19 Ky. L. Rep. 839, 42 S. W.

place by the defendant, the court said: "No independent consideration is required in the case of an accommodation indorser, surety, etc., in the first instance, and it is difficult to see why anything more should be required on subsequent sanction than on original assent."

In State v. Paxton, 65 Neb. 110, 90 N. W. 983, the court said: "A material alteration already made may be ratified and adopted subsequently, and in that case the instrument as altered will be binding. 2 Brandt, Suretyship & Guaranty, § 384. It has been held that such ratification and adoption of the altered instrument is, in substance and effect, a new agreement, and requires a new consideration. Warren v. Fant, 79 Ky. 1; Wilson v. Hayes, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 42 N. W. 467. The weight of authority, however, seems to sustain the position that no new consideration is required. Pelton v. Prescott, 13 Iowa, 567; Montgomery v. Crossthwait, 90 Ala. 553, 12 L.R.A. 140, 24 Am. St. Rep. 832, 8 So. 498; 2 Brandt, Suretyship & Guaranty, § 384. A recognition of the validity of the instrument, with knowledge of the alteration, will suffice. Stewart v. First Nat. Bank, 40 Mich. 348; Jackson v. Johnson, 67 Ga. 167. . . .

We think it is no less clear that sureties upon an official bond which has been delivered, but not yet approved, who desire to have the bond approved, and the principal retained in his office, may, to that end, ratify and adopt generally all alterations which may be required for the purpose."

In Humphreys v. Guillow, 13 N. H. 385, 38 Am. Dec. 499, the court, in holding that, where one of the makers of a promissory note spoke of its alteration, and thereupon gave security for the payment of it, and when he was asked to pay it, stated that it had been altered and he was not bound to pay it, but that it was justly due, and he would pay it, it was held that this was a sufficient ratification. The court said: "The facts proved were certainly such as to justify the inference by the jury that the defendants, when the alteration was brought to their knowledge, assented to it. If so,

736; *Farmers' Nat. Bank v. Thomas*, 79 Hun, 595, 29 N. Y. Supp. 837; *Brannum Lumber Co. v. Pickard*, 33 Ind. App. 484, 71 N. E. 676; *Hamilton v. Wood*, 70 Ind. 306; *Moore v. Hinshaw*, 23 Ind. App. 207, 77 Am. St. Rep. 434, 55 N. E. 236; *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300; *Powell v. Banks*, 146 Mo. 620, 48 S. W. 664; *Horn v. Newton City Bank*, 32 Kan. 518, 4 Pac. 1922; *Richardson v. Fellner*, 9 Okla. 513, 60 Pac. 270; *Davis v. Eppler*, 38 Kan. 629, 16 Pac. 793.

The sureties, by the alteration, were released, and the indorsement on the reverse side of the note by appellants was a new contract, was obtained without any consideration, and is unenforceable.

First Nat. Bank v. Currie, 147 Mich.

then the maxim, *Omnis ratihabitio retro trahitur, et mandato equiparatur*, will apply, and the ratification must be held to be in its effects equivalent to an original authority. If, as before suggested, an assent to an alteration be in substance an authority to make a new instrument, it will bind the parties, for the debt was not discharged by the alteration."

In *Jacobs v. Gilreath*, 45 S. C. 46, 22 S. E. 757, where the question was as to the statute of limitations, and as to an alleged alteration in a note, the court said: "If, as the jury were correctly told, a payment had been made upon the note within the statutory period, that would imply a new promise to pay the amount mentioned in the note, according to its terms; and if those terms were afterwards altered by the consent or with the acquiescence of the defendant, we are unable to understand how that could impair the validity of her previous promise to pay the amount specified in the note. If she, in fact, acquiesced in the change of the terms of the note, her previous promise to pay the amount specified in the note according to its original terms must necessarily be regarded as a promise to pay according to the terms as changed by her acquiescence."

In *Matson v. Jarvis*, — Tex. Civ. App. —, 133 S. W. 941, it was held "that a party to an instrument may ratify or consent to an alteration of it after it has been made, without a new consideration therefor. *Trimstead v. Briggs*, 4 Iowa, 559; *King v. Hunt*, 13 Mo. 97; *Pelton v. Prescott*, 13 Iowa, 567. And a subsequent ratification of the alteration will be equivalent to an original authority to make it. *Humphreys v. Guillow*, supra."

This decision does not, however, refer to *Vilson v. Skaggs*, 10 Tex. 298, a case which should be noted here, though strictly without the scope of this note, where it was held that the jury was correctly charged that, if the defendant authorized anyone to sign his name to the note in the first place, he was liable, and that, if he did not so authorize it, the action could not be brought. 3 L.R.A. (N.S.)

72, 9 L.R.A. (N.S.) 698, 118 Am. St. Rep. 537, 110 N. W. 499, 11 Ann. Cas. 241; *Mulkey v. Long*, 5 Idaho, 213, 47 Pac. 949; *Kilkelly v. Martin*, 34 Wis. 520; *Knoxville Nat. Bank v. Clark*, 51 Iowa, 264, 33 Am. Rep. 129, 1 N. W. 401; 27 Am. & Eng. Enc. Law, 530; *Minnesota Security Bank v. Bell*, 32 Minn. 409, 21 N. W. 470; *Turle v. Sargent*, 63 Minn. 211, 56 Am. St. Rep. 475, 65 N. W. 349; *Brown v. Johnson Bros.* 127 Ala. 292, 51 L.R.A. 403, 85 Am. St. Rep. 134, 28 So. 579; *Merrimack River Sav. Bank v. Curry*, 4 Kan. App. 125, 46 Pac. 204; 2 Cyc. 216h; *Diehl v. Davis*, 75 Kan. 38, 88 Pac. 532, 12 Ann. Cas. 548; *Renville County v. Gray*, 61 Minn. 242, 63 N. W. 635; *Berryman v. Manker*, 56 Iowa, 150, 9 N. W. 103;

simply on a bare promise to pay such a note signed without authority.

In *Kilkelly v. Martin*, 34 Wis. 531, the court said (though it seems that the point was not necessary to the decision): "The rule is well settled that an alteration of an instrument not under seal, by one party, with the assent of the other, will not render void the instrument; and if this be so, then his assent given after the alteration was made, and where knowledge of it was brought to him, ought to have the same effect, and be in all respects equivalent to such assent previously given, or to an original authority granted, according to the maxim, *Omnis ratihabitio retro trahitur et mandato equiparatur*. And upon this question, we find no disagreement among the authorities. *Humphreys v. Guillow*, 13 N. H. 385, 38 Am. Dec. 499; *Perring v. Hone*, 4 Bing 28, 12 J. B. Moore, 135, 2 Car. & P. 401; *Kennedy v. Lancaster County Bank*, 18 Pa. 347; *King v. Bush*, 36 Ill. 142; *Collins v. Makepeace*, 13 Ind. 448."

Reference may be here made to *Canon v. Grigsby*, 116 Ill. 151, 56 Am. Rep. 769, 5 N. E. 362, in which case it was held that, where the maker of a promissory note which has, on his behalf, been delivered in purchase of property, and he receives the property with notice that there has been a change in the rate of interest in the promissory note since he signed it, and makes no offer to rescind the contract, nor to return the property, this is evidence of a ratification of the change.

It may be noted that in *Wester v. Bailey*, 118 N. C. 193, 24 S. E. 9, where a blank for the name of the payee was left in a note under seal, which was filled in before delivery by one maker, the other maker being absent, but assenting to it after delivery, the court said: "The only ground presented by defendant Bailey (Harper did not appeal) is that it was without consideration,—a *nudum pactum*. But this defense cannot benefit the defendant, because, when he acknowledged it, it became his bond, being under seal, and needed no consideration to support it. 'The law conclu-

Hubbard v. Ogden, 22 Kan. 363; Fillmore County v. Greenleaf, 80 Minn. 242, 83 N. W. 157.

Messrs. Daniel J. Maher and Jacob S. Detwiler, for appellee:

The act of appellants in signing the statement on the back of the note as appears therefrom, with full knowledge of the same, was a ratification of the act of Harrington, their principal, in making the change in said note, and no consideration was necessary to be paid by appellee to appellants to fix their liability on said note.

2 Cyc. 172, 173; 2 Am. & Eng. Enc. Law, 2d ed. 205, 259; Holland v. Griffith, 13 Neb. 472, 14 N. W. 387; Winslow v. Jones, 88 Ala. 496, 7 So. 262; Boston v. Benson, 12 Cush. 63; Tucker v. Allen, 16 Kan. 312; Montgomery v. Crossthwait, 90 Ala. 553, 12 L.R.A. 140, 24 Am. St. Rep. 832, 8 So. 498; Commercial Bank v. Warren, 15 N. Y. 577; Pelton v. Prescott, 13 Iowa, 567; King v. Hunt, 13 Mo. 97; Prouty v. Wilson, 123 Mass. 297; Stewart v. First Nat. Bank, 40 Mich. 348; First Nat. Bank v. Gay, 63 Mo. 39, 21 Am. Rep. 430; Needham v. Matthewson, 81 Kan. 340, 26 L.R.A. (N.S.) 274, 135 Am. St. Rep. 374, 105 Pac. 436, 19 Ann. Cas. 146; Stiles v. Steele, 37 Kan. 552, 15 Pac. 561.

Porter, J., delivered the opinion of the court:

Nettie M. Holyfield loaned to J. W. Harrington \$1,000, and took his note for that amount dated December 12, 1907, due three years after date, signed by J. W. Harrington, with Mattie Harrington, G. A. Perkins, and John A. Stark as sureties. Two weeks afterward Nettie M. Holyfield went to the home of Harrington, and informed him that the time of payment was longer than

sively presumes that it was made upon good and sufficient consideration."

Doctrine that consideration is necessary.

In a few cases the view has been taken that a consideration is necessary to a ratification.

In *Mulkey v. Long*, 5 Idaho, 213, 47 Pac. 949, it was held that where a surety upon a promissory note, after learning of an alteration therein, promises to pay it, such promise is of no avail being without consideration.

In *Warren v. Fant*, 79 Ky. 1, the court said, in the case of an alteration after delivery, in a promissory note on which it was sought to charge the surety upon his subsequent promise to pay it: "That the words in the margin were written after the obligation was delivered being admitted, and the jury having found that Warren promised to pay the debt after he was informed that the addition had been made, the 39 L.R.A. (N.S.)

she desired, and Harrington altered the note by scratching out the words "three years," and writing in the words "one year." The note, as changed, reads as follows:

\$1,000.

December 12, 1907.

One year

Three years after date we promise to pay to the order of Mrs. Nettie M. Holyfield, one thousand dollars, at Value received, with 7 per cent from date until paid. Interest payable annually.

No. Due Dec. 12, 1910.

J. W. Harrington.

Mattie Harrington.

G. A. Perkins.

Jno. A. Stark.

A day or two afterwards Nettie M. Holyfield took the note in its changed condition to two of the sureties, Perkins and Stark, and asked them to consent to the note as altered. Thereupon they signed on the back of the note the following memorandum:

We agree to and accept change of time from three years to one year.

G. A. Perkins.

Jno. A. Stark.

In an action brought on the note as altered Nettie M. Holyfield recovered judgment, from which the sureties Perkins and Stark appeal.

The change in the time of payment was a material alteration. Negotiable instruments act (Laws 1905, chap. 310) § 132, Gen. Stat. 1909, § 5378. The contention of the appellants is that there was no consideration for their agreement to be further bound by the note; that the material alteration in the original note released them, and that a new consideration was neces-

sary for decision is whether such promise renders him liable on the obligation, as if the addition had been made before he signed, or afterward with his consent. He was merely a surety, and we think it clear that no subsequent ratification of the addition, or promise to pay the debt, can bind him, unless made upon some new consideration. That he was not bound during the time that elapsed between the making of the alteration and the ratification or promise, all will concede. The alteration released him, and thereafter, before he ratified it or promised to pay the debt, he was no more bound than if he had never signed the obligation at all."

In *Westloh v. Brown*, 43 U. C. Q. B. 402, the court was of the opinion that no subsequent promise to pay a note which was void by reason of an unauthorized alteration could be a ratification; but in that case it was not shown that the defendant, when promising to pay the note, had actual knowledge of the alteration. B. B. B.

sary to support the new agreement. A material alteration in a negotiable instrument made without the consent of a party will discharge him. *Horn v. Newton City Bank*, 32 Kan. 518, 4 Pac. 1022; *Bank of Herington v. Wangerin*, 65 Kan. 423, 59 L.R.A. 717, 70 Pac. 330. But a party who consents to such alteration or authorizes it to be made will be bound by the instrument (Neg. Inst. Act, § 131; Gen. Stat. 1909, § 5377), and it cannot be doubted that such alteration may be ratified by the person affected by it, so as to bind him as fully as though he had authorized it in the first instance. *Stewart v. First Nat. Bank*, 40 Mich. 348; *Goodspeed v. Cutler*, 75 Ill. 534; *First Nat. Bank v. Gay*, 63 Mo. 33, 21 Am. Rep. 430. "It is quite obvious that, where all the parties to a bill or note expressly agree to a change in any of its terms, they cannot complain of such change as an alteration. They have as much right to change as to make a contract. And where all do not consent, those consenting are bound, while the rest are discharged. Consent may be given before the change is made, or it may be given afterward by ratification. It may be express, or it may be implied from custom, or from the acts of the parties." 2 Dan. Neg. Inst. 5th ed. § 1401. See also 3 Randolph, Com. Paper, 2d ed. § 1766; Tiedeman, Com. Paper, § 396. The ratification of such an alteration will be implied where the facts are such as to warrant the implication. *Weed v. Carpenter*, 10 Wend. 403; *Bell v. Mahin*, 69 Iowa, 408, 29 N. W. 331.

It is not necessary in the present case to resort to implication, because the appellants indorsed upon the instrument itself their written consent to the alteration. The real question here is whether a new consideration is necessary to support the contract of ratification. On this there is a slight conflict, but the great weight of authority is against the necessity for a new consideration. As a matter of fact, no independent consideration is required in the case of an ordinary surety or accommodation indorser, and there is no sound reason for requiring one in the case of ratification, where, by some act of the holder, the surety has been released. The following cases are frequently cited as holding that a new consideration is necessary: *Warren v. Fant*, 79 Ky. 1; *Mulkey v. Long*, 5 Idaho, 213, 47 Pac. 949; *Wilson v. Hayes*, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 42 N. W. 467. In the latter case the alteration was fraudulent and amounted to a forgery by the holder, and in the opinion it is said that no case has been found "where it has been held that a forged in-

strument can be ratified so as to give the forger himself a right of action upon it." In the opinion it is further said: "If the alteration was not fraudulent, so that it did not destroy the instrument, or at least did not extinguish the debt, we can see how a subsequent assent to it would create a liability on the instrument as altered. Parties can alter their contract by mutual consent, and this requires no new consideration, for it is merely the substitution of a new contract for the old one, and this is of itself a sufficient consideration for the new. And what a party may assent to when done, he may assent to afterwards, so as to bind himself, if there be a consideration to support it." It is apparent, therefore, that the case is in accord with the weight of authority upon the precise question involved here. Among numerous cases holding that no new consideration is necessary are the following: *Goodspeed v. Cutler*, 75 Ill. 534; *Pelton v. Prescott*, 13 Iowa, 567; *Stewart v. First Nat. Bank*, 40 Mich. 348; *Wester v. Bailey*, 118 N. C. 193, 24 S. E. 9; *Montgomery v. Crossathwait*, 90 Ala. 553, 12 L.R.A. 140, 24 Am. St. Rep. 832, 8 So. 498; *Payne v. Long*, 121 Ala. 385, 25 So. 780; *Kilkelly v. Martin*, 34 Wis. 520; *National State Bank v. Rising*, 4 Hun, 793; *Prouty v. Wilson*, 123 Mass. 297; *First Nat. Bank v. Gay*, 63 Mo. 33, 21 Am. Rep. 430. In the latter case the Missouri court used this language: "There have been many refinements adopted about this doctrine of ratification, refinements which savor more of subtlety than of sound judgment. With some exceptions not necessary to be adverted to here, the general proposition is, however, undoubtedly correct, that he who may authorize in the beginning may ratify in the end. . . . And there is therefore no force in the point urged on our attention that there would have to be a new consideration in order to attach validity to a confirmatory act." Under the title "Alterations of Instruments" the editor of Cyc., after citing the few cases supra to the contrary, says: "But the better rule seems to be that any one of the parties to an instrument who may have become discharged because of an alteration therein may ratify the unauthorized act, so as to make himself liable without any new consideration, upon the principle that he who may authorize in the beginning may ratify in the end." 2 Cyc. 172. See also same title in 2 Am. & Eng. Enc. Law, 259, and 3 Enc. L. & P. 449. And to the same effect is *State v. Paxton*, 65 Neb. 110, 131, 90 N. W. 983, where the altered instrument was an official bond.

Moreover, the question seems to be controlled by § 5377 of the General Statutes

of 1909, the negotiable instruments act, § 131, which expressly provides for the ratification of altered instruments. It reads: "Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration and subsequent indorsers; but when an instrument has been materially altered, and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." No mention is made of any new consideration being required in order to bind the assenting party, but the construction we give to the language is that no independent consideration is necessary to bind any party to the instrument, surety or otherwise, who has himself made, authorized, or assented to a material alteration.

The contention is made that the court erred in directing a verdict, and that appellants were entitled to submit to the jury the question whether they signed the memorandum with knowledge of all the facts, and particularly whether the appellee concealed from them that one of their cosureties, Mattie Harrington, had been released.

The rule is that whether the alteration is material is a question of law for the court, and whether it was made with the consent of the parties is usually a question of fact for the jury. Tiedeman, Com. Paper, § 396, and cases cited. Here the ratification was in writing, signed by the appellants, and its effect was a question of law for the court the same as any other part of the instrument. Besides, both of the appellants testified that they signed the memorandum, intending thereby to give their consent to the alteration, and there was no evidence of any misrepresentations, and neither of the appellants claimed that any had been made. There was no controverted question of fact to submit to the jury, and the court rightly directed a verdict.

The judgment is affirmed.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA

v.

J. J. DAVIS, Appt.

(157 N. C. 648, 73 S. E. 130.)

Usury — household security — classification — misdemeanor.

1. A statute making it a misdemeanor to 39 L.R.A. (N.S.)

take usury on loans secured by household or kitchen furniture is not invalid as tending to deprive persons lending on such security of the equal protection of the laws, since such articles furnish a proper basis for classification in dealing with usurious loans.

Same — shrinkage on sale — effect.

2. That the security did not in fact sell for the amount of the loan does not purge the usury in a transaction by which for a loan of \$10 only \$8.25 of which was advanced, a note is executed for \$16.75 payable in thirty days, and secured on property worth \$25.

(December 20, 1911.)

APPEAL by defendant from a judgment of the Superior Court for Forsyth county, convicting him of taking unlawful interest. Affirmed.

Statement by Hoke, J.:

There was evidence on the part of the state tending to show that on or about October 24, 1910, John Wolff, desiring to borrow \$10, applied to one A. R. Bridgers, who was lending money for defendant; that the said Bridgers, with the knowledge, assent, and direction of defendant, advanced to said Wolff \$8.25, taking his note to himself as attorney for defendant in the sum of \$16.75, payable in thirty days, and to secure same took a chattel mortgage on the household and kitchen furniture of said Wolff; that the property included in the mortgage had originally cost about \$75, and was worth at the time the mortgage was executed about \$25; that Wolff paid on the debt \$3.50, and, default having been made, the property was seized under claim and delivery and sold at public auction for \$10.45. "The auctioneer cost \$1, costs claim and delivery, \$3 or \$4, credit on mortgage about \$4, and, after applying proceeds as indicated, there was balance claimed by defendant of about \$2.50." There was evidence on part of defendant tending to show that there were claims included in the mortgage other than the money loaned, and that the usurious features of the transaction were without the knowledge or approval of the defendant. On a charge correctly stating the law as declared in the statute there was verdict, "Guilty." Judgment, and defendant excepted and appealed.

Mr. L. M. Swink for appellant.

Note. — As to the constitutionality of statutory discrimination as to interest rates, see notes to *Re Sohneke*, 2 L.R.A. (N.S.) 813, and *State v. Sherman*, 27 L.R.A. (N.S.) 898.

Messrs. T. W. Bickett, Attorney General, and George L. Jones, Assistant Attorney General, for the State.

Hoke, J., delivered the opinion of the court:

The statute law of the state more directly relevant to the question presented (Revised 1908, § 3712a), among other things, makes provision as follows: "If any person, firm, or corporation who shall or may loan money in any manner whatsoever by note, chattel mortgage, conditional sale, or otherwise, upon any article or articles of household or kitchen furniture, shall take, receive, reserve, or charge a greater rate of interest than six per cent, either before or after the interest may accrue . . . shall be guilty of a misdemeanor," etc. Under a charge which correctly states the provisions of the statute, the jury have found that usurious interest has been charged by defendant; that the obligation was secured by a mortgage on the household and kitchen furniture of the debtor. There is ample evidence to justify the verdict, and the conviction must be upheld if the statute itself is a valid law. It is insisted for the defendant that the statute is in contravention of the 14th Amendment to the Federal Constitution, in that it "unlawfully divides money lenders into two classes, those lending on household and kitchen furniture and on other kinds of property, and unlawfully discriminates against borrowers, putting borrowers having only one class of property, to wit, household and kitchen furniture, into a class different from the borrower having other kinds of property to offer;" but the position cannot, in our opinion, be maintained. The power of the legislature to make the taking of usury under certain conditions a criminal offense is well recognized (*Ex parte Berger*, 193 Mo. 16, 3 L.R.A. (N.S.) 530, 112 Am. St. Rep. 472, 90 N.W. 759, 5 Ann. Cas. 383; *State v. Wickhoefer*, 6 Penn. [Del.] 120, 64 Atl. 273); and the right of classification, in the enforcement of reasonable and proper police regulations on this and other subjects, is conferred, very largely, to legislative discretion.

In *Orient Ins. Co. v. Daggs*, 172 U. S. 43, 43 L. ed. 554, 19 Sup. Ct. Rep. 282, the Supreme Court of the United States, the court having, with us, the final word on this subject, referred to this right of classification as follows: "It is not necessary to state the reasoning upon which classification by legislation is based or justified. This court has had many occasions to do so, and only lately reviewed the subject in *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594. We said in that case that 'the state may distinguish, select, and classify objects of legislation, and necessarily the power must have a wide range of discretion.' And this because of the function of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary,"—the limitation being that the "classification has been made . . . upon some reasonable grounds,—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection." *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 151, 41 L. ed. 667, 17 Sup. Ct. Rep. 255; *Morris-Scarboro-Moffitt Co. v. Southern Exp. Co.* 146 N. C. 170, 15 L.R.A. (N.S.) 983, 59 S. E. 667, and numerous and repeated decisions of that court are in affirmation and illustration of this principle. *Fifth Ave. Coach Co. v. New York*, 221 U. S. 467, 55 L. ed. 815, 31 Sup. Ct. Rep. 709; *Lindsley v. Natural Carbonic Gas Co.* 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337; *Engel v. O'Malley*, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190; *Assaria State Bank v. Dolley*, 219 U. S. 121, 55 L. ed. 123, 31 Sup. Ct. Rep. 189; *McLean v. Arkansas*, 211 U. S. 540, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; *Heath & M. Mfg. Co. v. Worst*, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114; *New York ex rel. Lieberman v. Van De Carr*, 109 U. S. 532, 50 L. ed. 305, 28 Sup. Ct. Rep. 144; *Soon Hing v. Crowley*, 113 U. S. 704, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730. In *Fifth Ave. Coach Co. v. New York*, 221 U. S. 467, 55 L. ed. 815, 31 Sup. Ct. Rep. 709, it was held: "Classification based on reasonable distinctions is not an unconstitutional denial of equal protection of the laws; and so held that an ordinance of the city of New York, prohibiting advertising vehicles in a certain street, is not unconstitutional as denying equal protection to a transportation company operating stages on such street, either because signs of the owners may be displayed on business wagons, or because another transportation company may display advertising signs on its structure. There is a purpose to be achieved, as well as a distinction, which justifies the classification." In *Lindsley v. Natural Carbonic Gas Co.* the court said: "The equal protection clause of the 14th Amendment admits of a wide exercise of discretion, and only avoids classification which is purely arbitrary, being without reasonable basis. Nor does a classification having some reasonable basis offend because not made with mathematical

Ct. Rep. 594. We said in that case that 'the state may distinguish, select, and classify objects of legislation, and necessarily the power must have a wide range of discretion.' And this because of the function of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary,"—the limitation being that the "classification has been made . . . upon some reasonable grounds,—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection." *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 151, 41 L. ed. 667, 17 Sup. Ct. Rep. 255; *Morris-Scarboro-Moffitt Co. v. Southern Exp. Co.* 146 N. C. 170, 15 L.R.A. (N.S.) 983, 59 S. E. 667, and numerous and repeated decisions of that court are in affirmation and illustration of this principle. *Fifth Ave. Coach Co. v. New York*, 221 U. S. 467, 55 L. ed. 815, 31 Sup. Ct. Rep. 709; *Lindsley v. Natural Carbonic Gas Co.* 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337; *Engel v. O'Malley*, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190; *Assaria State Bank v. Dolley*, 219 U. S. 121, 55 L. ed. 123, 31 Sup. Ct. Rep. 189; *McLean v. Arkansas*, 211 U. S. 540, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; *Heath & M. Mfg. Co. v. Worst*, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114; *New York ex rel. Lieberman v. Van De Carr*, 109 U. S. 532, 50 L. ed. 305, 28 Sup. Ct. Rep. 144; *Soon Hing v. Crowley*, 113 U. S. 704, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730. In *Fifth Ave. Coach Co. v. New York*, 221 U. S. 467, 55 L. ed. 815, 31 Sup. Ct. Rep. 709, it was held: "Classification based on reasonable distinctions is not an unconstitutional denial of equal protection of the laws; and so held that an ordinance of the city of New York, prohibiting advertising vehicles in a certain street, is not unconstitutional as denying equal protection to a transportation company operating stages on such street, either because signs of the owners may be displayed on business wagons, or because another transportation company may display advertising signs on its structure. There is a purpose to be achieved, as well as a distinction, which justifies the classification." In *Lindsley v. Natural Carbonic Gas Co.* the court said: "The equal protection clause of the 14th Amendment admits of a wide exercise of discretion, and only avoids classification which is purely arbitrary, being without reasonable basis. Nor does a classification having some reasonable basis offend because not made with mathematical

nicety, or resulting in some inequality." And in *Engel v. O'Malley*, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190, it is said, approving the same statement in *Heath & M. Mfg. Co. v. Worst*, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114: That "legislation which regulates business may well make distinctions depend upon the degree of evil, . . . and although, when size is not an index, a law may not discriminate between the great and the small, proper regulations based thereon, when size is an index of the evil to be prevented, do not offend the equal protection clause of the 14th Amendment." In *McLean v. Arkansas*, 211 U. S. 540, 53 L. ed. 315, 29 Sup. Ct. Rep. 206, a regulation establishing a different method of mining coal, by which the wages of laborers were to be ascertained, between mines when less than ten miners were employed and those having a larger number, was upheld. And on this very subject of usury and in *Berger's Case*, 193 Mo. 16, 3 L.R.A.(N.S.) 530, 112 Am. St. Rep. 472, 90 S. W. 759, 5 Ann. Cas. 383, differing penal provisions were upheld in case of ordinary usury and when the charge was greater than 2 per cent per month. And in *Wickenhoefer's Case*, 6 Penn. (Del.) 120, 64 Atl. 273, between loans not exceeding \$100 and loans of that sum or greater. If these various classifications have been sustained by our highest court, assuredly a law designed and intended to protect and maintain the home of the citizen should be upheld. If the schools of thought which tend to corrupt and undermine—if the forces which make for disorder and anarchy—should ever be able to combine and so far increase as to threaten our social fabric, it is the home, the influences that hallow and emanate from it, which will arise and be potent to save. Referring to this subject as a proper basis for classification, our attorney general in his argument before us has well said: "Prior to the adoption of the present Constitution, household and kitchen furniture to the value of \$200 was exempt from execution. The lawmaking power of this state has always realized that the loss of those articles necessary for comfortable and decent living entails great suffering upon women and children, frequently resulting in the breaking up of a home, and in the creation of conditions which are a menace to the public health and to the public prosperity. The statute under consideration is a logical and lawful extension of the protection which it has always been the policy of the law to afford this peculiar class of property. The general assembly knew that the man who mortgages his household goods does so because he has nothing else to mortgage. He is the poor man, 39 L.R.A.(N.S.)

the illiterate man, and his poverty and his ignorance make him the easy prey of the usurer. The general assembly also knew that in some of the cities of the state there were springing up a class of men who were selling money, like furniture, on the instalment plan. It was to save the things necessary to the existence of a home from the grasp of such men that the act of 1907 was passed. We submit that the statute tends to preserve the domestic peace, to promote the family health and prosperity, and is a valid exercise of the police power of the state. It is not class legislation. It operates alike on all who take mortgages on household and kitchen furniture. It regulates a business, and does not create a class."

It was further contended that, inasmuch as the property on its sale had not repaid the actual amount of the loan, no usury had been received, and therefore no violation of the statute had been established,—citing *Rushing v. Bivens*, 132 N. C. 273, 43 S. E. 798. That was an action by the debtor to recover a penalty allowed by the statute of "twice the amount of usury paid;" and the court held, in effect, that, to justify a recovery, it must be made to appear that usurious interest had been paid in money or money's worth, and a note of the debtor, given therefor, did not amount to such payment. The case does not apply here, when the statute makes it a misdemeanor to take, receive, reserve, or charge a greater rate than 6 per cent. The evidence of the state tends to establish that "for a loan of \$10 a note of \$16.75 was taken, secured by a mortgage on household and kitchen furniture, worth at least \$25," which would constitute a usurious transaction within the meaning of the statute (5 Am. & Eng. Enc. Law, 2d ed. 886), citing *Merchants' Exch. Nat. Bank v. Commercial Warehouse Co.* 49 N. Y. 635; and, in any event, it appears, further, that on a loan of \$10 for thirty days, \$1.75 was reserved at the time the money was supplied. There is no error, and the judgment must be affirmed.

No error.

WISCONSIN SUPREME COURT.

ADOLPH KANNEBERG et al., Appts.

v.

EVANGELICAL CREED CONGREGATION, Respt.

(146 Wis. 610, 131 N. W. 353.)

Religious society — attempted diversion of property from trust — liability for counsel fees.

The trustees and majority members of a

religious corporation who in good faith have attempted to make a use of the property which the minority allege to be a diversion from the trust for which it was acquired may bind the corporation for counsel fees in defending their position against the attack of the minority, although the minority are successful and the contemplated diversion is enjoined.

(Winslow, Ch. J., and Timlin, J., dissent.)

(May 2, 1911.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Milwaukee County in defendant's favor in an action brought to recover a balance on account for services rendered defendant as attorneys and counselors at law, and for expenses. Reversed.

Statement by Marshall, J.:

Action on contract to recover compensation for services rendered defendant.

The complaint was in the usual form. The amount claimed was \$3,869.25 as a balance on account for services as attorneys and counselors at law and expenses. Defendant pleaded as follows, in effect: The services were rendered individual members of the corporation in an action brought by other members, to prevent the former from, as alleged, diverting defendant's property from the legitimate purposes of the corporation. The action of the church congregation in employing, or attempting to employ, plaintiffs, was had on Sunday when less than a majority of the membership was present. Defendants in such action wrongfully and in bad faith defended, and in so doing employed plaintiffs to that end, and to create such corporate liabilities as would deprive the adverse members of the corporation of any benefit from the litigation in case of their being, in form, successful. It was judicially determined that the conduct complained of in such action was wholly illegal and void. The services were in fact rendered to trustees of defendant as individuals, to sustain them in usurpatious proceedings.

The trial was without a jury, resulting

in a decision, so far as need be stated here, to this effect:

(1) The action in which the services for which compensation is claimed were rendered involved property of defendant, and it was determined that the defendants therein were attempting to divert such property to a denominational use, inconsistent with the trust for which it was acquired by the congregation and held by the trustees.

(2) Such action was necessary to prevent such trustees from wrongfully changing the corporate name and the faith which it represented, taught, and for which it was maintained by the congregation, so such corporation would stand for a materially different faith than that for which it was organized.

(3) Plaintiffs in such action were successful, it being held that the conduct of defendants therein was wholly without authority.

(4) The minister and a majority of the congregation supported such defendants, and by a majority vote authorized, so far as that could be done, the defending trustees to employ plaintiffs herein, which they did. Pursuant thereto the services in question were rendered and the disputed expenses incurred.

(5) The reasonable value of such services, including the expenses, less payments made, is \$2,548.70.

(6) Plaintiffs really served the trustees, and such members of the congregation as participated in the wrongful course aforesaid, as individuals, not the corporation, though the employment was ostensibly in the latter's behalf.

(7) Neither the congregation nor its trustees possessed power to employ attorneys to aid in furthering an attempt to divert its property from the legitimate use thereof.

(8) To allow judgment in plaintiffs' favor would partially accomplish, by indirection, that which was held could not legally be done.

(9) The litigation grew out of an honest difference of opinion between the control-

Note. — A careful search for additional authority confirms the statement that KANNEBERG v. EVANGELICAL CREED CONGREGATION is, apparently, one of first impression upon the question of the right of the trustees and majority members of a religious corporation to bind the corporation for counsel fees which they, in good faith, incur, in defending unsuccessfully an action brought by the minority shareholders.

Nor has any case been discovered involving the question, generally, of liability for the expenses of litigation between rival fac-

tions in a religious society. Upon this latter point, however, there are cases arising within private corporations, some of which are cited in the dissenting opinion of the KANNEBERG CASE. No reason is perceived why the principles there applied are not applicable to religious corporations.

For notes on various other points involving religious corporations, attention is called to the notes mentioned under the title "Religious Societies," in the Index to Notes to this series.

ling membership of the church corporation and the minority, with reference to the construction of the corporate constitution, and persistence of the majority in carrying out their ideas without first obtaining judicial or other authoritative construction; thus rendering it necessary for the minority to seek judicial assistance to prevent usurpation. The resulting litigation was not a friendly contest, but was resisted by the majority with determination to prevail over the minority.

Upon such facts the court decided as matter of law that plaintiffs had no legitimate claim against the corporation for services and expenses. Judgment was therefore rendered dismissing the cause, with costs.

Mr. Frank H. Hannaford, for appellants:

A church corporation having capacity to sue and be sued necessarily has the right to employ attorneys.

3 *Thomp. Corp.* (2d ed.) 1079; *Lowe v. Ring*, 115 Wis. 581, 92 N. W. 238.

The fact that the legal services were rendered in the furtherance of an *ultra vires* act is no defense to the corporation.

Pixley v. Western P. R. Co. 33 Cal. 183, 91 Am. Dec. 623; *National Bank v. Earl*, 2 Okla. 617, 39 Pac. 391; *Kelly v. Ning Yung Benev. Asso.* 2 Cal. App. 460, 84 Pac. 321; *McElroy v. Minnesota Percheron Horse Co.* 96 Wis. 317, 71 N. W. 652; *Interior Woodwork Co. v. Prasser*, 108 Wis. 557, 84 N. W. 833.

Messrs. Boden & Beuscher, for respondent:

The trustees cannot claim reimbursement for any expenses except those incurred in preserving the property, or in foreclosing, unless the additional expense is authorized by the court.

Cook, Corp. 1908, ed. ¶ 879, pp. 3156, 3160, 3161; *Cowdrey v. Galveston, H. & H. R. Co.* 93 U. S. 352, 23 L. ed. 950; *Pickering v. Stephenson*, L. R. 14 Eq. 322, 41 L. J. Ch. N. S. 493, 26 L. T. N. S. 608, 20 Week. Rep. 654; *Wickersham v. Crittenden*, 106 Cal. 329, 39 Pac. 603; *Alexander v. Atlanta & W. P. R. Co.* 113 Ga. 193, 54 L.R.A. 305, 38 S. E. 772.

Marshall, J., delivered the opinion of the court:

The question presented for decision is this: If a corporation—by a majority of its members acting at a time and in a manner which would be binding in a matter within its corporate power—in good faith decides a subject in controversy, and a minority of members, acting in like good faith, resort to judicial proceedings against

the officers and the corporation to prevent such determination from being effectuated, upon the ground of its being a threatened usurpation, and the majority, in good faith believing in the integrity of their position, take corporate action, valid in form, by which the organization assumes the defense, authorizing such officers to employ attorneys to appear accordingly and conduct such defense, and the litigation goes on, both sides acting in good faith, to a final determination in favor of the minority, have the attorneys so employed by the corporation any valid claim against it?

The trial court answered the question in the negative, the idea being, seemingly, that if one takes employment from a corporation in respect to any matter,—in good faith thought by its dominant membership and executive officers, charged with the duty of carrying on its affairs, to be within the scope of the corporate authority,—yet he runs the chance of being denied compensation for his labor, if the disputable matter in respect to such authority be decided in the negative. If there be such a rule, applicable so broadly as the trial court supposed, there is a serious peril in working for corporate organizations which, we may safely say, is not appreciated by the great mass of mankind who are interested in or serve such artificial entities.

There are some principles to be taken into account in deciding the question presented which are plain, simple, and so familiar that discussion of them and support thereof by reference to authorities are unnecessary. They need only be briefly mentioned.

The rule is common that a corporation has no power except such as is expressly or impliedly given by the charter; that for any act outside the scope thereof, though *ultra vires*, the state only can interfere, or some party actually injuriously affected without his own fault; and no one can interfere to the prejudice of a person who has performed, in good faith, a contract with the corporation, in respect to such contract, unless it is contrary to public policy or prohibited by statute. A corporation has, inherently, by necessary implication, the right, within the scope of its powers, to be governed by its dominant membership or representatives, and, in case of necessity, to defend against judicial interference in respect to the matter, and also authority to incur all the reasonable expense to that end, such as that for counsel and other ordinary expenses of litigation.

What is within the scope of corporate power is ordinarily an administrative ques-

tion, determinable, primarily, by the governing authority of the organization. If such authority reaches a wrong conclusion, so far as concerns contractual matters affecting third persons acting in good faith and reasonably, the corporation is bound within the limitations aforesaid.

Whenever the right of a corporation, or its duty constituted representatives, to do a particular thing proposed to be done, is challenged by an opposing minority of its members or representatives, acting reasonably and honestly, such majority and officers have the moral and legal right to stand by their judgment in the matter, and it is their duty to the corporation to do so if they reasonably and in good faith suppose the interests of the organization require it, and if that brings upon the corporation and its governing officers, or the major portion of them, an efficient challenge to defend in court, it is their right and duty to respond to the attack. Such defense is unavoidable unless the dominating membership and representatives, whenever their authority may be challenged by the minority, submit to the latter.

Can there be any fair controversy about the foregoing? It must follow that when the corporation and its officers were attacked by the action in which the services in question were rendered the right to defend existed, and the duty also, since it seems there was a fair difference of opinion, and defendants in such action firmly believed in the right of their position. The right to defend, as indicated, included the right to employ attorneys to conduct the defense. The right to employ counsel necessarily carried with it the duty to pay counsel for their services, regardless of the outcome of the litigation. Such right, all acting in good faith, quite plainly did not depend upon who was right in the controversy.

How can it be said that whether the corporation and its officers were right or wrong rules the question of whether the services appellants in good faith rendered must be paid for or not? In any event, under the circumstances, the acts of usurpation perpetrated or threatened did not include the contract with counsel. There was no usurpation about that. It is the undoubted right of a corporation and of its managing officers, acting in good faith, to employ counsel by whom to respond to a challenge to judicial combat. That right gives character to the claim of appellants, not the result of the litigation. That seems to be so obvious on principle, it is not to be wondered at that counsel have not been able to cite instances to the court where the subject has been directly in-

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volved and decided. The indications are that the logic of such situations furnishes little or no room for controversy, and therefore no one has ventured to raise the question presented now and persist to a determination of it in a court of last resort.

We do not overlook the fact that the trial court found the plaintiffs' services were rendered in fact for the trustees of the corporation as individuals. That was a mere conclusion supposed to follow necessarily, from the *ultra vires* nature of the acts sought to be prevented or corrected. The record plainly shows that the corporation, through its trustees, and by express authority of its members, employed appellants; that the contract of employment was fully executed on their part to their damage in the amount they claim, in case they cannot recover, and to the benefit of the corporation in the sense that it received the services rendered and needed under the circumstances. Whether it was pecuniarily enriched or not is beside the case. Moreover, the managing officers of a corporation have a right, as before indicated, to employ counsel to stand for it when challenged in court without any special authorization. 4 Thomp. Corp. 4866.

From the last foregoing it seems plaintiffs are entitled to recover, as counsel contend, even if the contract of employment be *ultra vires*. There was no bad faith at any point. The contract was fully executed, respondent receiving the services as stated. In such circumstances a corporation cannot successfully plead *ultra vires* to avoid performance on its part. John V. Farwell Co. v. Wolf (John V. Farwell Co. v. Josephson) 96 Wis. 10, 37 L.R.A. 138, 65 Am. St. Rep. 22, 70 N. W. 289, 71 N. W. 109; McElroy v. Minnesota Percheron Horse Co. 96 Wis. 317, 71 N. W. 652; Security Nat. Bank v. St. Croix Power Co. 117 Wis. 211, 94 N. W. 74; Eastman v. Parkinson, 133 Wis. 375, 13 L.R.A. (N.S.) 921, 113 N. W. 649.

The doctrine as found in the above and many other decisions in this and other courts is thus stated in Eastman v. Parkinson, 133 Wis. 375, 381, 13 L.R.A. (N.S.) 921, 113 N. W. 649, 651, 652:

"An *ultra vires* contract, one not within the scope of the corporate authority to make under any circumstances, which is no longer executory, and is not tainted by fraud, or clearly prohibited by statute, or condemned by sound public policy, cannot be impeached by the corporation or anyone representing it."

The court in this case, as we have seen, acquitted plaintiffs of everything in the nature of bad faith. There is no express statute prohibiting a corporation from em-

ploying attorneys to conduct its defense, or the defense of its officers, in the pursuit of what is honestly deemed to be within the corporate authority, nor any rule of sound public policy condemning such employment.

We are at a loss to see why the facts of this case, as found by the trial court, do not fall clearly within the doctrine stated. It is based on equitable estoppel. The idea is that, as between the aggregate stockholders of a corporation, and a person under contract with the organization, acting by its officers, regularly chosen and held out to the world as having authority to represent it, the stockholders, through the corporation, should lose rather than such person. The thought should not be indulged in that such equitable rule is based on the circumstances of the corporation being enriched at the expense of the person dealing with it in good faith. It is the loss which such person would otherwise suffer which renders the rule active. It applies to prevent such loss even though the services to the corporation prove to have been to its disadvantage. As stated in *5 Thompson, Corporations*, at § 6017:

"The principle, properly understood and applied, extends to every case where the consideration of the contract has passed to the corporation from the other contracting party, which consideration may, on well understood principles, consist either of a benefit to the corporation or of a prejudice or disadvantage to the other contracting party. It is therefore not strictly necessary to the proper application of the principle that the corporation has received a benefit from the contract, but it is sufficient that the other party has acted on the faith of it to his disadvantage."

That doctrine is new comparatively, but it has been so generally adopted as to be properly considered a part of the common law of this country. The doctrine of *ultra vires*, as formerly applied to corporate transactions, proved, in time to be unadaptable to the new conditions created by the widely adopted method of doing almost all kinds of business by uniting a few or a large number of individuals into a single artificial person. Under present conditions, the ancient doctrine of *ultra vires*, and application thereof to transaction between corporations and those with which they deal, would be productive of incalculable injustice.

It may be that the modern doctrine is productive of injustice now and then, but courts cannot recognize one class or particular corporation to be subject to it and others not. It applies to religious corporations in their business transactions, the

same as to banking or manufacturing corporations. There is no difference. It also applies the same when the corporation is small and the amount involved is large, as where the corporation is so large and the amount involved so small that the enforcement of the contract would have no appreciable pecuniary effect upon the organization. Absolute equality before the law applies to corporations the same as individuals.

True, this case seems to be one of great hardship,—the taking of a balance to make over \$3,000, from a small corporation, a religious body, probably having very little, if any, property, except that used in the religious services of the congregation: moreover, being a moderate collection of individuals, we may well suppose only in moderate circumstances, as a rule; but that is a misfortune which the courts cannot take notice of for the purpose of turning a well-settled rule of law aside or make a new one. Cases of great hardship too often tend to influence the bending of legal principles to satisfy the facts of a particular situation so as to effect a supposed just result, giving judicial administration the cast of mere arbitration. We cannot escape the conclusion that the appellants have a legal right to recover for their services, leaving the corporation to deal with its officers if they committed any remediable wrong to it.

The judgment is reversed, and the cause remanded for judgment in favor of plaintiffs for the balance of their account as found by the trial court, with interest and costs.

Winslow, Ch. J., dissents.

Timlin, J., dissenting:

I acquiesced in the decisions *Marion v. Evangelical Creed Congregation*, 132 Wis. 650, 113 N. W. 66, and *Id.*, 140 Wis. 31, 121 N. W. 604, deferring largely to the judgment of my associates upon the questions of creed with which I was quite unfamiliar. In those cases it was decided that the plaintiffs were right, and that the other faction, which included the majority of the members of the congregation, who therefore had control of the corporate offices and the church property, were in the wrong, and engaged in attempting to divert the church property from the uses for which it had been acquired to the inconsistent and antagonistic uses of an Evangelical Lutheran church. I think we should stand by those decisions.

From this viewpoint, the question here presented is: Can this majority, frustrated by these decisions in their attempt to do

an act *ultra vires* the corporation, nevertheless charge the corporate property with the fees of their lawyers, earned in attempting to justify and uphold these *ultra vires* acts? Can they do so by employing these lawyers for and in the name of the corporation? A kindred question was examined apparently with thoroughness in *McCourt v. Singers-Bigger*, 76 C. C. A. 73, 145 Fed. 103, 7 Ann. Cas. 287. There certainly shareholders prosecuted for the corporation, to recover from defendants, funds of the corporation, and prevailed. They asked for an allowance, and got it, upon the authority of Internal Improv. Fund v. Greenough, 105 U. S. 527, 26 L. ed. 107. In the case cited from the Federal Reporter, the court said: "The same reasons which justify an allowance out of the fund in favor of complainant for expenses incurred in restoring it require us to approve of the disallowance of such claims in favor of the defendants. . . . No authorities are cited by counsel or found thus sustaining defendants' claim, and we certainly shall not be the first to reward obstructionists out of a restored fund in proceedings necessarily and vigorously prosecuted to regain that fund."

Even if a majority of the stockholders in a stock corporation consent to ratify an illegal use of its funds, their assent would not bind a dissenting minority. *Von Schim v. American Tube Works*, 188 Mass. 74 N. E. 680. Directors and officers are personally liable for *ultra vires* acts. *Stock, Corp.* 6th ed. § 682. When the majority enters into litigation with the minority, costs are not to be paid by the majority out of the corporate funds. *Pickering v. Stephenson*, L. R. 14 Eq. 322, 41 J. Ch. N. S. 493, 26 L. T. N. S. 608, 1 Week. Rep. 654. See also *Wickersham v. Crittenden*, 106 Cal. 327, 39 Pac. 602. I think it conflicts with these cases to hold that the majority of members who are in charge of the corporate assets and affairs may bind the corporation, by the employment of attorneys to act in the corporate name, to uphold the wrongful acts of such majority. It is not a corporate expense. The result of deciding the doctrine in point in favor of one faction and perverting the other and heretical faction to serve the corporation with the fees of attorneys in effect gives the property, in which the factions are contending, to the lawyers. This is a sort of equity I do not understand. I think the decision in this case is opposed to principle and without precedent. I do not think the law is with reference to *ultra vires* contracts and the disability of the corporation. (L.R.A. (N.S.))

tion to repudiate the same has any relevancy to the questions here presented.

Petition for rehearing denied October 3, 1911.

ILLINOIS SUPREME COURT.

PEOPLE OF THE STATE OF ILLINOIS
v.

WILLIAM CONNORS et al., Plffs. in Err.

(253 Ill. 266, 97 N. E. 643.)

Assault — intent to kill — alternative intent.

1. One is guilty of assault with intent to kill who points a loaded revolver at another to compel him to do a specified act which the assailant has no right to demand, under threat to kill him if he does not comply with the demand, although death may be avoided by such compliance.

Evidence — assault — prior threats — identity of parties.

2. Upon a prosecution for assault with intent to kill evidence is admissible that some days before the assault, threats had been made to the victim, if there is evidence tending to show that the persons making the threats were in the party which committed the assault.

Same — alibi — sufficiency.

3. An alibi sought to be established by one accused of crime on April 20, by showing that he had been taken ill about the middle of March and could not leave the house until after April 20, may be rejected where he is shown to have voted at elections on April 4 and 11, and subsequently, on cross-examination, fixed the time of his illness as beginning in December.

(February 23, 1912.)

Note. — Forcing one to do an act under threat to kill as an assault with intent to kill.

The few cases disclosed are in accord with the decision in *STATE v. CONNORS*, in holding that one who forces another to do an act under a threat to kill is guilty of an assault with intent to kill or murder.

Thus, in *Thompson v. State*, 37 Tex. Crim. Rep. 448, 36 S. W. 265, where two prisoners attempted to escape from jail, and one rushed upon an officer and slashed him with a razor, and the other seized the officer's pistol, which fell upon the floor, and pointed it at the latter, and compelled him to go into a cell, it was held that a conviction for assault with intent to murder was proper. The court said: "The parties acted together in the assault. They made no attempt to injure the jailer after he went into the cell, but locked him in. There could be no question that the appellant and his codefendant, Hardy, in making the assault on the jailer, intended to make their

ERROR to the Criminal Court for Cook County to review a judgment convicting defendants of assault with intent to kill. Affirmed.

The facts are stated in the opinion.

Messrs. Daniel L. Cruice, A. S. Langille, O. J. C. Wray and Charles E. Erbstein for plaintiffs in error.

Messrs. John E. Northrup and Robert E. Crowe, with Messrs. W. H. Stead, Attorney General, and John E. W. Wayman, for the People:

Pointing a loaded revolver at another in a threatening manner, without justification, constitutes an assault.

2 Bishop, Crim. Law, §§ 23, 26, 31, 34; 1 Hawk, P. C. Curwood's ed. p. 110, § 1; Bryant v. State, 5 Wyo. 376, 40 Pac. 518; State v. Wilson, 126 Mo. App. 307, 103 S. W. 110; Ryan v. Territory, 12 Ariz. 208, 100 Pac. 770; Com. v. Burk, 8 Phila. 612; Hardy v. State, 36 Tex. Crim. Rep. 400, 37 S. W. 434; Thompson v. State, 37 Tex. Crim. Rep. 448, 36 S. W. 265; State v. Dooley, 121 Mo. 591, 26 S. W. 558; State v. Epperson, 27 Mo. 255; 1 McClain, Crim. Law, § 232; United States v. Meyers, 1 Cranch, C. C. 310, Fed. Cas. No. 15,845; United States v. Richardson, 5 Cranch, C. C. 348, Fed. Cas. No. 16,155; State v. Morgan, 25 N. C. (3 Ired. L.) 186, 38 Am. Dec.

714; State v. Church, 63 N. C. 15; Keefe v. State, 19 Ark. 190; State v. Cherry, 33 N. C. (11 Ired. L.) 475; Cato v. State, 4 Tex. App. 87; Johnson v. State, 7 Tex. App. 210; State v. Horne, 92 N. C. 805, 53 Am. Rep. 442; Bell v. State, 29 Tex. 492; Hardy v. State, 36 Tex. Crim. Rep. 400, 37 S. W. 434.

Vickers, J., delivered the opinion of the court:

Plaintiffs in error, William Connors, Peter Gentleman, Arthur O'Connor, and Edward Storgaard, were jointly indicted, together with Walter Stevens and Joseph Kane, at the June term of the criminal court of Cook county, for an unlawful assault upon Morgan H. Bell. In the first count of the indictment the plaintiffs in error and others were charged with making a felonious assault upon Morgan H. Bell with a certain revolver, to then and there unlawfully, willfully, and with malice aforethought kill and murder the said Morgan H. Bell. There were six other counts in the indictment; but since the verdict found plaintiffs in error guilty in manner and form as charged in the first count of the indictment, it will not be necessary to refer to the other counts. At the August term of said court, Connors, Gentleman, O'Connor, and Storgaard were

escape. They did not intend to kill him if they could make their escape without taking his life, but they did intend to kill him if they had to do so in order to make their escape. They had no lawful right to resist the jailer, or to use force upon him in order to make their escape; and if, at any time during the struggle, they entertained the intent to kill him in order to effect that escape, and they used means calculated to accomplish that purpose, then appellant is guilty of an assault with intent to murder. Undoubtedly, when Ras Hardy, the codefendant of the appellant, was cutting and slashing the jailer about the neck with the razor, he had the intent and purpose to take his life, in order to overpower him and effect his escape. Appellant was a party to this assault, and participated in this purpose, and was as much guilty of an assault with intent to murder as the said Ras Hardy. Moreover, there can be no question of the intent to kill the said McAfee, when he drew the pistol on him and commanded him to go into the cell, if the said McAfee had refused to do so. The defendant had no right to make this demand of the said McAfee, and if he had refused to comply, and had shot him, and killed him, he would have been guilty of murder; and as he intended to kill, or make him comply with the unlawful command, he was guilty of an assault with intent to murder." And to the same effect is Hardy v. State, 36 Tex. Crim. Rep. 400, 37 S. W. 434.
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And one is guilty of an assault with intent to kill where he draws a revolver when committing a burglary, and points it at another, with the warning that if he moves he will be shot. Com. v. Burk, 8 Phila. 612.

And in Keesier v. State, 154 Ind. 242, 56 N. E. 232, it was held that a verdict of guilty of assault with intent to commit voluntary manslaughter should not be disturbed where there was evidence that the defendant, who was driving a light sleigh, met the prosecuting witness, who was driving a sled loaded with logs, at a narrow point in the road, and called to him to give the road, and upon his replying that he would as soon as the sled in front started, the defendant jumped from his sleigh and ran towards the witness, saying, "You give the road . . . I will kill you;" and, as the witness ran, fired at him.

In State v. Epperson, 27 Mo. 255, where the defendant was indicted for an assault with intent to kill for having threatened to kill an officer who was attempting to make a levy, if he went to the door of defendant's house, the point discussed was whether he held his gun in a sufficiently threatening position to constitute an assault. The defendant was held guilty, but it is not clear whether he was held guilty of a simple assault or an assault with intent to kill.

See also Hairston v. State, 54 Miss. 689, 28 Am. Rep. 392, 3 Am. Crim. Rep. 6, set out by the court in STATE v. CONNORS.

J. T. W.

found guilty by a jury of assault to murder, and after overruling a motion for a new trial and in arrest of judgment they were sentenced to imprisonment in the penitentiary upon the verdict of the jury. Stevens and Kane were granted a change of venue, and were not put upon trial with plaintiffs in error. The alleged errors in the application of the law to the undisputed facts are relied on by all of plaintiffs in error for a reversal. Plaintiff in error Arthur O'Connor contends that the verdict as to him is contrary to the clear weight and preponderance of the evidence, and the motion for a new trial should have been sustained as to him for that reason.

The facts out of which the legal questions arise, which all of plaintiffs in error contend were erroneously decided against them, are, in substance, as follows: It appears from the evidence that on and before April 20, 1911, in the city of Chicago, there were two rival labor unions of steam fitters and associated employments. One of these organizations was known as the International Association of Steam Fitters. The other organization was known as the United Association of Plumbers, Gas Fitters, Steam Fitters, and Steam Fitters' Helpers. For convenience the United Association of Plumbers, Gas Fitters, Steam Fitters, and Steam Fitters' Helpers will hereafter be referred to as the "United Association," and the International Association of Steam Fitters will be referred to as the "International Association." On April 20, 1911, a large two-story building was being erected for the use of the Hygienic Ice Company, facing west on South Park avenue, which runs north and south. Just north of Park avenue, running east and west, is Twenty-Sixth street, which is occupied, in part, by the tracks of the Illinois Central Railroad Company. The building being constructed had two stories, or two floors. On the lower floor there was a large room about 65 by 150 feet, and a boiler room and an engine room, from which a stairway led to the second floor. The second or upper floor of the building was substantially one large room. At the time of the occurrences out of which this prosecution grows the walls of the building were up, floors laid, and the doors and some of the windows were in place. On April 20, 1911, there were at work upon the two floors of this building about 30 steam fitters and steam fitters' helpers, who were engaged in installing steam pipes on the two floors of this building. There were also a few other workmen of other trades employed at the time on the building, making a total of some 40 workmen who were employed in completing the building. The steam fitters employed upon

this building at the time in question were members of the International Association. Joseph Kane, who is jointly indicted with plaintiffs in error, had been a member of the International Association for many years; but on April 18th, two days before the alleged assault was committed, he had left the International Association and become a member of the United Association, and at once became a business agent for the United Association, acting jointly in that capacity with Maurice (or Moss) Enright, who had been a business agent of the United Association for some time previous. The headquarters of the United Association were in the Bush Temple Building, and a man by the name of Burke was the secretary of the general association of the United Association. The evidence shows that the United Association was seeking to absorb the membership of the International Association, and that for this purpose Burke, as secretary, had sent out a communication to all of the steam fitters, advising them to desert the International Association (which is also called the old association) and join the new one, known as the "United Association." It is a fair and reasonable inference from the proven facts that the "business agency" of the United Association to which Kane was appointed immediately upon his desertion of the International Association was given him, in part, as a reward for his desertion of the International and going over to the United Association, and with the expectation that his former connection with the International Association and acquaintance among the membership of that organization would make him a useful man in proselyting members from the International Association. About 10 o'clock in the forenoon of April 20, 1911, three or four men, led by Joseph Kane, appeared on the lower floor of the Hygienic Ice plant. Kane spoke to some of his old associates, and informed them that he was now the business agent of the United Association. Kane and his associates remained in the building a minute or two, and then either went to the outer door or stepped out of the door and in a few seconds reappeared on the lower floor with some 15 or 20 other men. There is no dispute as to the presence of all of the plaintiffs in error on this occasion, except as to Arthur O'Connor. The evidence shows that a large portion of the men who appeared in this building were armed with pistols. Their purpose in going there armed with revolvers is made manifest by what was done and said. Pistols were displayed, and the members of the International Association were commanded to take off their overalls, cease work, and go down and obtain cards of membership in the United Association.

and then return to their work. The men who were working on the lower floor went upstairs, where they were followed by the attacking party. When the men were all gotten together on the upper floor, they were lined up by the command of Kane and his associates, and then commanded to take off their overalls and go down and get cards from the United Association. Naturally, in the excitement consequent upon a sudden attack of this character, the witnesses, honestly, no doubt, differ in describing the occurrences that took place. There is, however, a general agreement among the witnesses that the plaintiffs in error and their associates, through threats of violence and by the presentation of drawn revolvers, sought to compel the members of the International Association to cease work, take off their overalls, and go down and join the United Association, threatening that, unless this demand was complied with, they would shoot or kill the members of the International Association. Morgan H. Bell, upon whom the alleged assault to murder was committed, at the time of the attack was at work on the lower floor. The evidence shows that some one of the attacking party, approaching Bell and Lefevre, said, "Get that big son of a b——." The men walked up to Bell, and plaintiff in error Storgaard pulled a revolver partly out of his pocket, presented the point at Bell, and told him to take off his overalls, or "they would bore a hole through him." Bell succeeded in getting away at that time and went upstairs, followed by two of his pursuers. Bell gives the following account of what occurred after he got upstairs: "There was some of them got me there, and put their guns up to me. One of them held two guns at my stomach, and another one at my head, and told me, if I didn't quit my fooling and get out of there, they would fill me full of holes." Plaintiff in error Connors is identified as one of the men who held a pistol on Bell, accompanied by the threat above stated. This witness states that the revolvers were held against him until he began to remove his overalls. Plaintiff in error Gentleman is also identified as one of the men who made the attack upon Bell. The evidence shows that similar attacks were made upon other workmen, who were commanded to take off their overalls under pain of being shot, and to go down to Burke, and get a permit to work. Two of plaintiffs in error, O'Connor and Connors, are shown to have made a similar attack upon one Lettker, commanding him to take off his overalls, and threatening that, if he did not do so, to bore a hole through him. Lettker complied with the request, as did also Bell and others, to the extent of taking off their

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overalls. Lettker says in his testimony: "I took the gentlemen at their word. You know they said they were going to bore a hole through me, and I didn't want to be riddled or killed, and I took the man's word." This witness identifies Kane, O'Connor, Connors, Gentleman, and Storgaard as being present and participating in the assault. Pistols were also drawn upon Kapritzki, and he was commanded as were the others, and to him it was said, "If you look for trouble, I shoot you like a dog;" and, again, "If you don't go right away, you will get killed." A police station was only a block away. Some of the workmen had apparently escaped unnoticed and notified the police, and about the time that Kapritzki was being assaulted there was a cry of "Jiggers!" and "Coppers!" and at that moment a number of policemen appeared upon the scene. When the police arrived, the attacking party made a hasty exit in all directions. Some of them ran down the Illinois Central tracks, some across the coal yards, and some in other directions. As he ran, plaintiff in error Gentleman was seen to throw a revolver away, and another, who went down the Illinois Central tracks, put his revolver by the fence, where it was afterwards picked up by a watchman and taken to the police station. All of the attacking party succeeded in making good their escape except plaintiff in error Storgaard, who was arrested by the police on the lower floor, and a loaded revolver taken from him. The presence and participation of Storgaard and Gentleman in this affair is not denied. Connors testified that he was not present, but he is not corroborated in any substantial particular, and the testimony is amply sufficient to justify a finding that he was present. Arthur O'Connor also denied that he was present, claiming that he was confined to his home at the time by illness. There is some evidence tending to corroborate O'Connor's testimony, which will be considered hereafter.

Plaintiffs in error contend that the trial court erred in giving instruction No. 9 on behalf of the prosecution. That instruction is as follows: "The court instructs you as to the intent to kill alleged in the indictment that though you must find that there was a specific intent to kill the prosecuting witness, Morgan H. Bell, still, if you believe from the evidence beyond a reasonable doubt that the intention of the defendants was only in the alternative—that is, if the defendants, or any of them, acting for and with the others, then and there pointed a revolver at he said Bell with the intention of compelling him to take off his overalls and quit work, or to kill him if he did not,—and if that specific intent was formed

in the minds of the defendants, and the shooting of the said Bell with intent to kill was only prevented by the happening of the alternative,—that is, the compliance of the said Bell with the demand that he take off his overalls and quit work,—then the requirement of the law as to the specific intent is met." The plaintiffs in error earnestly contend that pointing a loaded revolver at another within shooting distance and threatening to shoot unless some demand made by the assaulting party is complied with cannot be held to be a felonious assault with intent to kill and murder, for the reason that the intent is in the alternative and is coupled with a condition, and for that reason is not a specific intent to kill, which is necessary to sustain a conviction for an assault with an intent to murder.

All the authorities agree upon the general proposition that in a prosecution for an assault with intent to murder, or with intent to commit some other felony, the specific intent charged is the gist of the offense, and must be proven as charged in the indictment. *Crosby v. People*, 137 Ill. 325, 7 N. E. 49; *Friederich v. People*, 147 Ill. 50, 35 N. E. 472. Upon this and like authorities where the general rule is stated, plaintiffs in error contend that the intent to commit the crime charged must be absolute and unconditional; and that if a dangerous weapon is presented in a threatening manner, accompanied with a demand upon the assaulted party and a threat to destroy his life unless such demand is complied with, the offense cannot be an assault to murder. It is argued that the condition which accompanies the threat negatives the existence of that positive and specific intent which, under the law, is a necessary element in the offense charged.

No case decided by this court is cited by either party, and we are not aware that any such case exists that is conclusive of the precise question which is raised here. In support of the view that an assault with a loaded revolver and a threat to shoot unless the party assaulted complies with a demand is not an assault with an intent to murder, plaintiffs in error rely with great reliance upon the case of *Hairston v. State*, 54 Miss. 680, 28 Am. Rep. 392, 3 Am. Crim. Rep. 6. In that case *Hairston*, a company with others, attempted to remove the personal effects of a laborer from the plantation of his employer, *Richards*, to whom said laborer was indebted on account of advances of money or provisions made to said laborer. *Hairston* was in the act of hauling away the household furniture when *Richards* attempted to stop the wagon, and took hold of *Hairston's* mules, saying that he could not move the house-

hold goods until his debt was settled. Thereupon *Hairston* drew a pistol and pointed it at *Richards* and said, "I came here to move *Charles Johnson*, and by God I am going to do it, and I will shoot any God damned man who attempts to stop my mules," at the same time urging his mules forward as he spoke. His manner was threatening and angry, and his voice loud and boisterous. Other persons who were accompanying *Hairston*, some of whom were armed with guns, pressed around *Richards*, as if they intended to aid *Hairston* if necessary. *Richards* was deterred by the apparent danger, and released the mules and the wagon moved on. Under the above facts *Hairston* was convicted of an assault with an intent to murder *Richards*. The conviction was reversed by the supreme court of Mississippi. The reasoning of the court in that case is as follows: *Richards* was in the act of committing a trespass upon *Hairston's* property by laying his hands upon the mules, and forcibly stopping *Hairston* upon the public highway. *Hairston* had a right to protect his property from such unlawful trespass, using no more force than was necessary. His threat to shoot was conditioned upon a demand which he had a right to make. In disposing of the case the supreme court of Mississippi uses the following language: "Here there was only a conditional offer to shoot, based upon a demand which the party had a right to make. While the law will not excuse the assault actually committed in leveling the pistol within shooting distance, it cannot, from this fact alone, infer an intent to murder. The intent must be actual, not conditional, and especially not conditioned upon noncompliance with a proper demand." A careful analysis of that case will show that the court laid special stress on the circumstance that the threat to shoot was coupled with a demand which the prisoner had a lawful right to make.

State v. Taylor, 70 Vt. 1, 42 L.R.A. 673, 67 Am. St. Rep. 648, 39 Atl. 447; *Botsch v. State*, 43 Neb. 501, 61 N. W. 730; *People v. Mize*, 80 Cal. 41, 22 Pac. 80; and *Chrisman v. State*, 54 Ark. 283, 26 Am. St. Rep. 44, 15 S. W. 889, are also cited and relied on by plaintiffs in error in support of the position assumed by them upon the question under consideration. None of those cases, however, are similar in their facts to the case at bar. They are all cases supporting the general proposition that a conviction for an assault with intent to murder cannot be sustained without proof of the specific intent to take life charged in the indictment. The rule stated in those cases is well established and has been frequently announced by this court. The *Hairston*

Case, above referred to, seems to be the only decision that lends any support to the position contended for by plaintiffs in error, and that case is clearly distinguishable from the case at bar. We think that the position of plaintiffs in error may be satisfactorily answered without repudiating the authority of the Mississippi case cited, and without in any way departing from the general and well-established principles laid down in the other cases relied upon. Unlawfully pointing a loaded revolver at another within shooting distance, in a threatening manner, undoubtedly, under all of the authorities, constitutes an assault. The character of the assault, whether felonious or otherwise, depends upon the intent of the person charged.

If an assault be made with a loaded revolver with an intent to kill and murder the party assailed, and the assailant is prevented from carrying out his felonious purpose by the intervention of some fact not of the assailant's own will, the offense is complete, regardless of whether the weapon is discharged or not. *Hardy v. State*, 36 Tex. Crim. Rep. 400, 37 S. W. 434; *Thompson v. State*, 37 Tex. Crim. Rep. 448, 36 S. W. 265; *State v. Dooley*, 121 Mo. 591, 26 S. W. 558. The foregoing propositions are so well established that we do not deem it necessary to elaborate them. In the case at bar the evidence shows that plaintiffs in error, or some of them, pointed revolvers at the prosecuting witness and threatened to shoot him unless he quit work, took off his overalls, and procured a card from the United Association. It will be noted that the demand made upon the prosecuting witness and others at work upon the building was one which plaintiffs in error had no lawful right to make. They might properly in a peaceful manner solicit persons to unite with their association, but they could not lawfully use force, violence, or intimidation to accomplish such purpose. The demand with which the members of the International Association were required to comply under pain of being shot by plaintiffs in error and their associates was unlawful, and plaintiffs in error had no right to expect that it would be complied with. The distinction between the case at bar and the *Hairston Case* is that in the latter the condition upon which the threat to shoot was made was lawful, while in the case at bar the demand was unlawful.

In *McClain's Criminal Law*, § 232, the rule applicable to the case at bar is thus stated: "If the threatened injury, coupled with present ability to inflict it, is conditioned on the party assailed refusing to do something which the assailant has no right to require him to do, it will constitute an

assault, even though the conditions are complied with and therefore no violence is used." The quotation above made is supported by *Thompson v. State*, supra; *State v. Morgan*, 25 N. C. (3 Ired. L.) 186, 38 Am. Dec. 714; *State v. Dooley*, and *Hardy v. State*, supra; *State v. Church*, 63 N. C. 15; and numerous other authorities.

In *State v. Morgan*, above cited, the facts were as follows: Morgan was charged with an assault upon a man by the name of Cantrell. The assault grew out of a quarrel for the possession of a gun which Cantrell had. Morgan demanded the gun and Cantrell refused to give it up, whereupon Morgan stepped up within reach of him, held up an ax in a position to strike, and said: "Give up the gun, or I will split you down." Cantrell did not at the time give up the gun, but proposed some arrangement, upon which Morgan laid the ax down. The matter was arranged and Cantrell gave up the gun. The jury found that Morgan, at the time he went up to Cantrell and raised the ax within reach of him, intended to strike unless Cantrell gave up the gun, but did not intend to strike if Cantrell gave it up. In the course of the opinion Gaston, J., used the following language: "The present case is one of a very different character. The act was not only apparently a most dangerous assault, but accompanied with a present purpose to do great bodily harm, and the only declaration by which its character is attempted to be changed is that the assailant was not determined to execute his savage purpose unconditionally and without a moment's delay. He had commenced the attack and raised the deadly weapon and was in the attitude to strike, but suspended the blow to afford the object of his vengeance an opportunity to buy his safety by compliance with the defendant's terms. To hold that such an act, under such circumstances was not an offer of violence,—not an attempt to commit violence,—would be, we think, to outrage principle and manifest an utter want of that solicitude for the preservation of peace which characterizes our law and which should animate its administrators. To every purpose, both in fact and in law, the attack on the prosecutor was begun, and in the pause which intervened before its consummation, most happily for both parties, an arrangement was made which prevented the probably fatal result. But this pause, though intentional and announced when the attack began, does not prevent that attack from being an offer or attempt to strike. If a ruffian were to leave his rifle at a traveler and announce to him that he might have fifteen minutes to make his peace with his God, and the unfortunate man should save his life by prayers, by re-

monstrance, by money, or by any other means before the expiration of that time, could it be pretended that there had been an attempt nor offer to hurt him because the intent was not to kill instantaneously, and therefore did not accompany the act? Will it be doubted if a bully should present his pistol at a citizen and order him, under pain of death, not to walk on the same side of the street with him, whether there was an offer of violence because the purpose to kill was not absolute, but conditional, merely? Wherever the act is done in part execution of a purpose of violence, whether that purpose be absolute or provisional, makes no difference as respects the question whether the act be an assault."

The case of *Thompson v. State*, supra, was as follows: Two prisoners by the names of Hardy and Thompson made an attack upon their jailer for the purpose of escaping, one using a razor and the other a revolver. The revolver was pointed at the jailer and he was commanded to go into the cell. The revolver was not discharged. In passing on that case the supreme court of Texas said: "Moreover, there can be no question of the intent to kill the said McAfee [the jailer] when he drew the pistol at him and commanded him to go into the cell, if the said McAfee had refused to do so. The defendant had no right to make his demand of the said McAfee, and, if he had refused to comply, and had shot him and killed him, he would have been guilty of murder; and, as he intended to kill or make him comply with the unlawful command, he was guilty of an assault with intent to murder." The case of *Hardy v. State*, supra, was presented to the supreme court of Texas under a similar state of facts and the same ruling was made as in the *Thompson Case*.

The rule to be deduced from these cases is correctly stated in the quotation above taken from McClain's Criminal Law. An assault to murder, under this rule, may be complete where it is shown that the assailant, with the present ability to destroy life and do great bodily harm, draws a dangerous weapon on another and threatens to kill unless the party assailed complies immediately with some unlawful condition or demand. The law will not tolerate excessive force or intimidation for the purpose of obtaining or defending one's legal rights, when resorted to for the purpose of carrying out an unlawful enterprise it becomes criminal; and where there is an attempt, coupled with the present ability to commit a felony, and the assailant suspends execution of his purpose merely to give the victim a chance to comply with an unlawful demand, the offense is complete, even

though the commission of the felony is averted by the submission of the assailed party to the unlawful demands made upon him.

In the commission of every crime there must be a union or joint operation of act and intention or criminal negligence. The act committed is ordinarily susceptible of direct proof by facts which are discernible by the natural senses. The intent or purpose exists only in the mind of the accused, and, like malice, or any feeling, emotion, or mental status, is manifested by external circumstances capable of proof.

By whatever means it is ascertained, the intent must be direct and specific to commit the precise offense charged. Thus, if an assault is charged with an intent to commit one felony, proof of an assault to commit another and different offense will not sustain the charge. Is an intent to commit an offense which is coupled with an unlawful condition or demand, such as plaintiffs in error made upon the prosecuting witness, a direct and specific intent within the meaning of the rule of law on that subject? We think it must be so held. To hold otherwise would be to permit one guilty of violating the peace of society and the security of persons and property guaranteed to everyone, to profit by his unlawful conduct. The law will not tolerate and encourage threats of violence and death to enforce unlawful demands made upon helpless and defenseless persons by counting such acts of the perpetrator as righteousness when he is arraigned at the bar of the court where justice is administered and crime punished. In such case the unlawful character of the demand eliminates it from consideration, and the act will be judged in its naked criminality, stripped of any benefit or palliation based upon the unlawful demand or condition. If an attempt is made to commit an assault, and a threat is conditioned upon the party assailed performing some act which is known to be a physical impossibility, such a condition cannot possibly destroy or in any way modify the criminal character of the act. In such case the assailant, knowing the impossibility of compliance with his demand, will be held to have a specific intent to inflict the threatened harm. An impossible condition is no condition. So of an unlawful condition. No one has a right to expect or presume that anyone will submit to an illegal demand made upon him; and where, as in the case at bar, a violent assault with dangerous and deadly weapons is made upon a person in the peace of the people, and a threat to destroy life is made unless the victim complies with some unlawful demand, in determining the guilt or innocence of the accused the case must be determined precisely

as though the unlawful demand did not exist. Instruction No. 9 stated a correct principle of law, and there was no error in giving it to the jury.

Some complaint is made by plaintiffs in error of the rulings of the court as to other instructions, which we have considered, but find nothing in connection with these rulings of special importance to require discussion.

Plaintiffs in error complain of the ruling of the court in admitting evidence tending to show that three or four days before the difficulty four men came to the Hygienic Ice plant, and the prosecuting witness was permitted to detail his conversation with these parties. The conversation was, in substance, as follows: The four men in question came up to where the prosecuting witness was working and asked him what he was doing there, to which he replied, "I am working." They asked, "What kind of a card have you got?" and the witness replied, "I have got an International Steam Fitters' card from Local No. 2." The witness was then asked by some of the party whether all of the men on that job had cards, and said that they had. One of the men said, "That is all right, pal, we will get you afterward,"—and they went away. The objection to this testimony is based upon the assumption that the four men who visited the plant at that time were not shown to be among those who were present at the time of the difficulty. The evidence is not very clear as to the identity of the men that were there on the first occasion, but the evidence tends to show that the four men who came to the ice plant on the first occasion were also there at the time of the difficulty. The prosecuting witness was asked whether he had seen "any of those men at the building before," to which he answered: "Yes; I saw—there was four of them came two days before on the 18th of April. I don't know their names, but I would know their faces if I saw them." He was then asked whether he saw the same men on the 20th that were there on the first occasion, to which he replied: "Yes; I saw that little dark electrician there, with Kane." We think it was entirely proper to show that anyone who was present on the day of the difficulty had visited the plant previously, and also to show what such person did or said. Whether the persons referred to by the witness as being present on the first occasion were in the party on April 20th was a question of fact for the jury. The evidence fairly tended to show that the men with whom witness had the conversation were in the party on the day of the difficulty. There was no error in the admission of this testimony.

Plaintiff in error O'Connor interposes for 30 L.R.A. (N.S.)

himself the defense of an alibi. He testified in his own behalf that he was not present at the time of the difficulty, and that he was at that time confined to his home with rheumatism. Thirteen witnesses were called and testified in support of the alibi. Of these witnesses only three, Herbert O'Connor (a brother), Mrs. Herbert O'Connor, and Sam Craill, testified to having seen O'Connor at home in bed at or near the hour of the commission of the offense at the Hygienic Ice plant. The witnesses in support of the alibi testified that O'Connor was taken suddenly and severely ill with rheumatism about the middle of March, and that he was unable to leave the house from that time until a few days after the 20th of April. Some of these witnesses testified that O'Connor was dangerously ill in the early part of April, and some of them stated that he was so ill that he could not move himself in bed and had to be assisted to do so. To meet this evidence the state produced as witnesses judges of the election in O'Connor's precinct, who testified that O'Connor voted at the city election on April 4th and again at the judicial primary on April 11th, and that he appeared to be well and healthy. O'Connor was recalled to the stand, and in his second examination he admitted that he had voted on the two occasions testified to by the election officials. An affidavit which he had made in support of an application for bail was also introduced, wherein O'Connor swore that he was taken ill with articular rheumatism in December, 1910, and was compelled to stay in bed, under the care of Dr. Griffith, for a period of about six weeks. This testimony when taken in connection with the evidence tending to identify O'Connor as one of the party that visited the ice plant on the 20th of April, is sufficient to justify the jury in rejecting the evidence as to the alibi. It was at least a controverted question of fact for the jury to determine. The verdict of the jury upon this question is not so contrary to the evidence as to warrant us in disturbing the verdict.

We find no error in this record requiring a reversal of the judgment below. It is therefore affirmed.

SOUTH DAKOTA SUPREME COURT

URIAH S. FRY, Appt.,

v.

L. E. AUSMAN et al., Respts.

(— S. D. —, 135 N. W. 708.)

Mortgage — assumption by grantee — liability to mortgagee.

An assumption of an agreement to pa

a mortgage, in a deed from a grantor who was not personally liable on the instrument, imposes no liability on the grantee in favor of the mortgagee, where there is nothing to show an intention to benefit him by the contract, which is necessary under the statute to enable him to sue upon it.

(April 2, 1912.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Jerauld County in defendants' favor in an action brought to recover a deficiency arising on a foreclosure sale of a mortgage. Affirmed.

M. S. Lattin and wife on August 26, 1907, executed and delivered a mortgage containing a power of sale, to M. E. Silvius, upon certain land in Kittson county, Minnesota, which mortgage was to secure the payment of \$5,000 and interest. The following June said M. E. Silvius, for a valuable consideration, assigned in writing to appellant the mortgage. In March the said Lattin and wife granted and conveyed the premises by warranty deed to N. L. Silvius, containing the following clause: "The same are free from all encumbrances except a first mortgage of \$5,000." A warranty deed to the premises was delivered by N. L. Silvius and her husband to the respondents, containing the following clause: "The same are free from all encumbrances except a first mortgage of \$5,000 and interest from April 26, 1908, at 6 per cent, which second party agrees to assume." The mortgage was foreclosed, and, there not being proceeds enough to satisfy it, this action was brought.

Messrs. Gleim & Hatch and Brown & Mossman, for appellant:

Where one person, for a valuable consideration, engages with another to do some act for the benefit of a third person, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of the engagement.

Pom. Code Remedies, § 139.

An exception to the rule that privity of contract is necessary to the maintenance of an action is where, under a contract be-

tween two persons, assets have come into the promisor's hands or under his control, which in equity belong to a third person.

Second Nat. Bank v. Grand Lodge, F. & A. M. 98 U. S. 123, 25 L. ed. 75.

The right of the appellant rests on the equity of the transaction, and the legal right founded on the theory of a provision made for the benefit of a creditor, and the fact that the grantor has the right to contract with his purchaser as to whom, when, and how the consideration for the land should be paid.

Merriman v. Moore, 90 Pa. 78; Bay v. Williams, 112 Ill. 91, 54 Am. Rep. 209, 1 N. E. 340; Enos v. Sanger, 96 Wis. 150, 37 L.R.A. 862, 65 Am. St. Rep. 38, 70 N. W. 1069; Marble Sav. Bank v. Mesarvey, 104 Iowa, 285, 70 N. W. 198.

Whether or not the grantor was liable is immaterial, as the purchase price of the lands is the consideration moving between the purchasers and the grantor.

Hare v. Murphy, 45 Neb. 809, 29 L.R.A. 851, 64 N. W. 211; Marble Sav. Bank v. Mesarvey, 101 Iowa, 285, 70 N. W. 198; McKay v. Ward, 20 Utah, 149, 46 L.R.A. 623, 57 Pac. 1024; Enos v. Sanger, 96 Wis. 154, 37 L.R.A. 864, 65 Am. St. Rep. 38, 70 N. W. 1070; Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467; Merriman v. Moore, 90 Pa. 78; Bay v. Williams, 112 Ill. 91, 54 Am. Rep. 209, 1 N. E. 340; Crone v. Stinde, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907; Hicks v. Hamilton, 144 Mo. 495, 66 Am. St. Rep. 431, 46 S. W. 432; Cobb v. Fishel, 15 Colo. App. 384, 62 Pac. 625; Starbird v. Cranston, 24 Colo. 20, 48 Pac. 652; Brewer v. Maurer, 38 Ohio St. 543, 43 Am. Rep. 436; Little v. Thoman, 4 Ohio Dec. Reprint, 513; Harts v. Emery, 184 Ill. 566, 56 N. E. 865; Harberg v. Arnold, 78 Mo. App. 237; McGregor v. Eastern Bldg. & L. Asso. 5 Neb. (Unof.) 563, 99 N. W. 509; 1 Jones, Mortg. 5th ed. 760; 3 Pom. Eq. Jur. § 1207; 1 Beach, 196.

Messrs. Preston, Wagner, & Tym, for respondents:

There must be a privity of contract be-

Note.—*Right of mortgagee to enforce purchaser's promise to pay the mortgage where the grantee or promisee was not himself liable.*

The early cases upon this question are covered in the note to *Kramer v. Gardner*, 22 L.R.A. (N.S.) 492. A search has disclosed but two cases in which the point has been passed upon since the writing of that note.

In *Jenkins v. Bishop*, 136 App. Div. 104, 120 N. Y. Supp. 825, it was held that a purchaser of land subject to a mortgage did not become liable for any deficiency which might arise on the sale of the property, not-
39 L.R.A. (N.S.)

withstanding his agreement to pay the mortgage contained in the deed to him, where his grantors were not personally liable for the mortgage debt.

And in *Wood v. Johnson*, — Minn. —, 135 N. W. 746, it was held to be the law in Minnesota that where the mortgagor is not personally liable for a mortgage debt, the fact that his grantee agrees with him to assume and pay the outstanding mortgage indebtedness does not create a right of action against the grantee in the mortgagee. In that case, however, the mortgagor was held to be liable, and his grantee, who had assumed the mortgage debt, was therefore held liable.

J. T. W.

tween the plaintiff and defendant in order to render the defendant liable to an action by the plaintiff on the contract.

Mellen v. Whipple, 1 Gray, 317; *Crowell v. Hospital of Saint Barnabas*, 27 N. J. Eq. 650; *Chung Kee v. Davidson*, 73 Cal. 522, 15 Pac. 100.

The liability of a grantee who assumes the payment of a mortgage on land conveyed to him depends upon the personal liability of his immediate grantor. If the grantor is not so liable, the mortgagee (or his assignee) cannot claim any deficiency from such grantee.

New England Trust Co. v. Nash, 5 Kan. App. 739, 40 Pac. 987; *Morris v. Mix*, 4 Kan. App. 654, 46 Pac. 58; *Brown v. Stillman*, 43 Minn. 126, 45 N. W. 2; *Nelson v. Rogers*, 47 Minn. 103, 49 N. W. 526; *Jefferson v. Asch*, 53 Minn. 446, 25 L.R.A. 257, 39 Am. St. Rep. 618, 55 N. W. 604; *Kramer v. Gardner*, 104 Minn. 370, 22 L.R.A.(N.S.) 492, 116 N. W. 925; *Eakin v. Schultz*, 61 N. J. Eq. 156, 47 Atl. 274; *Williams v. Van Geison*, 76 App. Div. 592, 79 N. Y. Supp. 95; *Young Men's Christian Asso. v. Croft*, 34 Or. 106, 75 Am. St. Rep. 568, 55 Pac. 439; *Clement v. Willett*, 105 Minn. 267, 17 L.R.A.(N.S.) 1094, 127 Am. St. Rep. 562, 117 N. W. 491, 15 Ann. Cas. 1053; *Trotter v. Hughes*, 12 N. Y. 75, 62 Am. Dec. 137.

Whiting, J., delivered the opinion of the court:

The sole question presented by this appeal is whether one holding a note secured by a mortgage upon real estate can recover upon such note against a party other than the mortgagor, where such party had taken a deed to said mortgaged premises, and in such deed had assumed such mortgage indebtedness, the grantor in such deed being in no manner bound to pay such mortgage indebtedness, and there being no evidence, other than such deed, to show an intent on the part of the grantor and grantee in such deed to contract for the benefit of the owner of the note and mortgage. The trial court held there could be no recovery.

Respondent contends that, disregarding the other question involved herein, appellant cannot recover because of a lack of privity of contract between appellant and respondent. It is true that, under what is known as the English rule, and which is followed in several of the states, appellant would not be the proper party plaintiff, and it would be necessary that the action be brought in the name of the grantor in the deed; but there early arose in this country what is known as the American rule, allowing the real party in interest to sue in his own name upon a contract made for his benefit. The so-called "Code" states have 39 L.R.A.(N.S.)

many or all adopted, many by statutory enactment, the American rule. This state adopted such rule by § 1193, Civil Code, which reads: "A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it."

Respondent further urges that this court has decided the other question involved herein, in the case of *Fish & H. Co. v. New England Homestake Co.* 27 S. D. —, 130 N. W. 841. It is true that we indorsed therein the rule laid down in *Jefferson v. Asch*, 53 Minn. 460, 25 L.R.A. 257, 39 Am. St. Rep. 618, 55 N. W. 604, to wit: "Without undertaking to lay down a general rule defining when a stranger to a promise between others may sue to enforce it, we are prepared to say that where there is nothing but the promise, no consideration from such stranger, and no duty or obligation to him on the part of the promisee, he cannot sue upon it." An examination of the contract involved in the *Fish & H. Co.* Case reveals the fact that such contract was one solely between Godfrey and his co-owners for Godfrey's benefit, and in no manner contained any promise or covenant in favor of third parties, and was therefore not "expressly for the benefit of a third person."

Under all the authorities, such a contract goes to third parties no right of action. The supreme court of Wisconsin holds exactly contrary to the above Minnesota decision; yet the Wisconsin court, in a case involving a question similar to that arising upon the contract in the *Fish & H. Co. Case*, sustains this court in its holding as to effect of such contract. *Electric Appliance Co. v. United States Fidelity & G. Co.* 110 Wis. 434, 53 L.R.A. 609, 85 N. W. 648. Another opinion along the same line, the reasoning in which shows that this court was clearly right in its holding as to the effect of the contract in the *Fish & H. Co. Case*, regardless of the exact question involved in the case at bar, is that of *Parlin v. Hall*, 2 N. D. 473, 52 N. W. 405. See also *Thomas Mfg. Co. v. Prather*, 65 Ark. 27, 44 S. W. 218. It is thus seen that the precise question now before us was not necessarily involved in the *Fish & H. Co. Case*, and we therefore approach the discussion of it as though we had made no reference to it in our opinion in such case.

Pomeroy, at § 1207 of the third edition of his work on Equity Jurisprudence, notes that the courts holding that there can be no liability upon the part of the grantee, where there was none on the part of the grantor, also hold that the liability, when any does exist, results only from an application of the doctrine of subrogation, and that, unless there was a liability, or obliga-

tion on the part of the grantor so that, as between the grantor and grantee, the grantee became the principal debtor and the grantor but a surety, there would be nothing upon which the creditor could base a claim of subrogation. Pomeroy also notes that the courts holding the grantee liable were the grantor was not liable base the right of recovery solely upon the contract, taking the position that, where a contract made for the benefit of one not a party thereto, he may treat the promise as though made to himself, and may sue in his own name thereon.

The Federal Supreme Court has adopted the subrogation theory of liability as appears by the following from the case of *Keller v. Ashford*, 133 U. S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 494: "The doctrine of the right of a creditor to the benefit of all securities given by the principal to the surety for the payment of the debt does not rest upon any liability of the principal to the creditor, or upon any peculiar relation of the surety towards the creditor, but upon the ground that the surety, being the creditor's debtor, and in fact occupying the relation of surety to another person, has received from that person an obligation or security for the payment of the debt, which a court of equity will therefore compel to be applied to that purpose at the suit of the creditor. Where the person ultimately held liable is himself a debtor to the creditor, the relief awarded has no reference to that fact, but is grounded wholly on the right of the creditor to avail himself of the right of the surety against the principal. If the person who is admitted to be the creditor's debtor stands at the time of receiving the security in the relation of surety to the person from whom he receives it, it is quite immaterial whether that person is or ever has been a debtor of the principal creditor, or whether the relation of suretyship or the indemnity to the surety existed, or was known to the creditor, when the debt was contracted. In short, if one person agrees with another to be primarily liable for a debt due from that person to a third person, so that, as between the parties to the agreement, the first is the principal and the second the surety, the creditor of such surety is entitled in equity to be substituted in his place for the purpose of compelling such principal to pay the debt."

For a general discussion of this question, and a review of the numerous authorities resting upon the different phases thereof, we refer to the very exhaustive notes, pages 205 to 207 of 71 Am. St. Rep. These notes attract particular attention to the two elements required under the New York decisions in order that there may be a recovery: (1) L.R.A.(N.S.)

There must be an intent to benefit the third party; and (2) the promisee must owe some obligation to the third party. It is very apparent that the decisions from those states which have adopted the English rule, above referred to, are of no authoritative value upon the question before us. Among these states seem to be Georgia, Massachusetts, Michigan, New Hampshire, North Carolina, Vermont, Virginia, and Wyoming. We therefore cite cases from those states only which recognize the American rule, allowing suit by real party in interest.

Among the authorities supporting the New York rule, and denying a right of recovery under the facts in this case, are the following: *King v. Whitely*, 10 Paige, 465; *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195; *Wilbur v. Warren*, 104 N. Y. 192, 10 N. E. 263; *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. 49; *Jefferson v. Asch*, supra; *Kramer v. Gardner*, 104 Minn. 370, 22 L.R.A.(N.S.) 492, 116 N. W. 925; *Clement v. Willett*, 105 Minn. 267, 17 L.R.A.(N.S.) 1094, 127 Am. St. Rep. 562, 117 N. W. 491, 15 Ann. Cas. 1053; *Morris v. Mix*, 4 Kan. App. 654, 46 Pac. 58; *New England Trust Co. v. Nash*, 5 Kan. App. 739, 46 Pac. 987; *Crone v. Stinde*, 156 Mo. 202, 55 S. W. 863, 56 S. W. 907; *Young Men's Christian Association v. Croft*, 34 Or. 106, 75 Am. St. Rep. 568, 55 Pac. 439; *Eakin v. Schultz*, 61 N. J. Eq. 156, 47 Atl. 274; *Ward v. De Oca*, 120 Cal. 102, 52 Pac. 130. Supporting the other rule we find: *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 474; *Harts v. Emery*, 184 Ill. 560, 56 N. E. 865; *Birke v. Abbott*, 103 Ind. 1, 53 Am. Rep. 474, 1 N. E. 485; *Marble Sav. Bank v. Mesarvey*, 101 Iowa, 285, 70 N. W. 199; *McGregor v. Eastern Bldg. & L. Asso.* 5 Neb. (Unof.) 563, 99 N. W. 509; *Hare v. Murphy*, 45 Neb. 809, 29 L.R.A. 851, 64 N. W. 211; *Merriman v. Moore*, 90 Pa. 78; *Brewer v. Maurer*, 38 Ohio St. 543, 43 Am. Rep. 436; *McKay v. Ward*, 20 Utah, 149, 46 L.R.A. 623, 57 Pac. 1024; *Enos v. Sanger*, 96 Wis. 150, 37 L.R.A. 864, 65 Am. St. Rep. 38, 70 N. W. 1069; *Tweeddale v. Tweeddale*, 100 Wis. 517, 61 L.R.A. 509, 96 Am. St. Rep. 1003, 93 N. W. 440; *Fanning v. Murphy*, 126 Wis. 538, 4 L.R.A.(N.S.) 666, 110 Am. St. Rep. 946, 105 N. W. 1056, 5 Ann. Cas. 435.

We would call particular attention to the Utah case, owing to the very exhaustive dissenting opinion found therein. There are many other authorities which in principle support one or the other of the two theories mentioned herein, but we have confined our citations to those where the facts passed upon were the same as here, namely, where the grantee in a deed had assumed a mortgage debt for which his grantor was not liable.

While we think it must be conceded that, in case the second element required under the New York decisions does exist, it may, from that fact, be presumed that the first element is also present, and therefore the party for whose benefit the contract is made be entitled, under the subrogation theory, to recover of the party who has rendered himself the principal debtor; yet it seems equally clear to us that, whenever two parties enter into an agreement that appears to have been made expressly for the benefit of a third party, and such agreement has a good and sufficient consideration, the agreement itself creates all the privity there need be between the person for whose benefit the agreement was entered into, and the party assuming the obligation, and an action at law should lie regardless of whether there was any obligation existing between the other party to the agreement and the third party. But, before the third party can adopt the agreement entered into and recover thereon, he must show clearly that it was entered into with the intent on the part of the parties thereto that such third party should be benefited thereby. This intent might, in a given case, sufficiently appear from the contract itself, but it must frequently be shown by other proof. While the cases sustaining a recovery have few, if any of them, expressly recognized the necessity of the existence of the first element (the intent to benefit the third party), yet an examination of the decisions will reveal the fact that such element was clearly established in nearly all such cases.

We concur heartily in the following words of Chief Justice Bartch, of Utah, in his dissenting opinion in *McKay v. Ward*: "My conclusion is that the rule which exempts a grantee who has merely in a deed of conveyance assumed and agreed to pay the mortgage, in case his immediate grantor is not personally liable for the payment of the mortgage debt, from liability to the mortgagee or owner of the mortgage, is not only founded in reason and principle, but is sustained by an overwhelming weight of authority. I do not intend to hold, however, that the grantee of mortgaged premises, whose grantor is under no personal obligation to pay the mortgage debt, cannot render himself liable to the mortgagee for a deficiency judgment upon foreclosure and sale, by accepting a deed containing an assumption clause, with knowledge of such contents, and which clause contains apt words showing that the grantor intended to bestow a benefit upon the mortgagee. The rule cannot be thus extended; for doubtless a grantor may direct the payment of the purchase price as he chooses, and may, if he so wishes, contract with a grantee that the

latter will pay a certain sum to a stranger, or a mortgagee, or any person upon whom the grantor chooses to confer a benefit, and in such cases the beneficiary may enforce the contract. Where, however, as in the case at bar, the grantor is not personally liable, the assumption clause ought to be construed as a mere indemnity to the grantor, unless there is something to show a different intention by the contracting parties. In this case there appears to be nothing which indicates any other intention on the part of the grantor, than that of indemnity to himself. There are no words in the deed, nor any evidence of facts or circumstances, which indicate that the grantor had any interest in protecting the mortgagee, to whom he was under no personal obligation. Doubtless, in general, the greatest interest a grantor has is in effecting a sale of the premises, and it cannot be assumed that he would hazard the chances of such a sale by insisting on that which would not benefit him. The circumstances of this case disclose no intention to benefit the mortgagee, and therefore he is not entitled to a deficiency judgment against the promisor, the assumption in the deed being intended merely to indemnify the promisee. If the intention of the contracting parties had been otherwise, the respondent could easily have shown it by placing the vendor, McDonald, upon the stand, and interrogating him upon the subject. This he failed to do, although, under the great weight of authority, the burden was upon him to show that the contract was intended for his benefit, or that the vendor was under some legal obligation to him respecting the debt. The respondent not having done this, why should the appellate court assume that as a fact of which there is no proof?"

We think also that the very terms of our statute determine this question in favor of respondent. Recovery can only be had in case the contract was "made expressly for the benefit of a third person." The state of California has identically the same statute, and in *Chung Kee v. Davidson*, 73 Cal. 522, 15 Pac. 100, the supreme court of that state said: "It is not necessary that the parties for whose benefit the contract has been made should be named in the contract. It must appear, however, by the direct terms of the contract, that it was made for the benefit of such parties. It cannot be implied from the fact that the contract would, if carried out between the parties to it, operate incidentally to their benefit." See also *Biddell v. Brizzolara*, 64 Cal. 354, 30 Pac. 609.

From both reason and authority we conclude that, inasmuch as the provision in the deed before us merely provided that the

grantee assumed the mortgage debt, and there being no other evidence of the intent of the parties to such deed, we should construe such provision as a mere agreement or contract to indemnify the grantor, and therefore insufficient as the basis of an action founded upon the doctrine of subrogation,—there being no obligation on part of grantor to the third person,—and also insufficient, as the basis of an action under § 1193, Civil Code, it not appearing that the said agreement or contract was entered into "expressly for the benefit of a (the) third person."

The judgment of the trial court is affirmed.

ILLINOIS SUPREME COURT.

CITY OF PAXTON

v.

J. E. FITZSIMMONS, Appt.

(253 Ill. 355, 97 N. E. 675.)

Tax on dogs — uniformity.

A dog tax need not be uniform according to the value, when assessed by a municipality under charter authority to regulate dogs and impose a tax on them, since it is

Note. — Character of dog tax.

As to the constitutionality of a tax on dogs for the benefit of sheep owners, see *McGlone v. Womack*, 17 L.R.A. (N.S.) 855, and note.

A *per capita* tax on dogs is almost uniformly held to be a police regulation, rather than an exercise of the taxing power. *Re Ackerman*, 6 Cal. App. 5, 91 Pac. 429; *Griggs v. Macon*, 103 Ga. 602, 68 Am. St. Rep. 134, 30 S. E. 561; *Fincher v. Collum*, 2 Ga. App. 740, 59 S. E. 22; *State v. Sharp*, 169 Ind. 128, 81 N. E. 1150; *Com. v. Markham*, 7 Bush, 486; *Mowery v. Salisbury*, 82 N. C. 175; *Litchville v. Hanson*, — N. D. —, 124 N. W. 1119; *Carter v. Dow*, 16 Wis. 299; *Tenney v. Lenz*, 16 Wis. 566.

Such a tax or license fee is therefore not subject to statutory or constitutional provisions applying to the levy of taxes, where no provision is made for its enforcement except by prohibiting the keeping of a dog until the amount is paid. *Fox v. Mohawk & H. R. Humane Soc.* 20 Misc. 461, 46 N. Y. Supp. 232. On appeal, 165 N. Y. 517, 51 L.R.A. 681, 80 Am. St. Rep. 767, 59 N. E. 353, this case was reversed, and the statute involved held unconstitutional, on the ground that a provision for use by defendant of the fees paid thereunder was an appropriation of public money to private uses, and because it allowed humane societies to harbor dogs without paying the license required of every other citizen.

Such a license, being for the purpose of regulation rather than revenue, need not 39 L.R.A. (N.S.)

not a property tax, but is assessed under the police power for purposes of regulation.

(February 23, 1912.)

APPEAL by defendant from a judgment of the Circuit Court for Ford County in plaintiff's favor in an action brought to recover a penalty for the alleged violation of a city ordinance imposing a tax on dogs. Affirmed.

The facts are stated in the opinion.

Mr. C. E. Beach, for appellant:

The law recognizes the right of property in dogs, and the dog owned, possessed, harbored, and kept within the city of Paxton by defendant, was his property.

Brent v. Kimball, 60 Ill. 211, 14 Am. Rep. 35; *Polar Wave Ice & Fuel Co. v. Alton Branch of Illinois Humane Soc.* 155 Ill. App. 310; *Washington v. Meigs*, 1 MacArth. 53, 29 Am. Rep. 578; *Harrington v. Miles*, 11 Kan. 480, 15 Am. Rep. 355; *Parker v. Mise*, 27 Ala. 480, 62 Am. Dec. 776; *Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175; *Wheatley v. Harris*, 4 Sneed, 468, 70 Am. Dec. 258; *Dodson v. Mock*, 20 N. C. 282 (4 Dev. & B. L. 146); *Perry v. Phipps*, 32 N. C. (10 Ired. L.) 259, 51 Am. Dec. 387.

Taxation as to every species of property must be equal and according to value.

be uniform and equal. *State ex rel. Curtis v. Topeka*, 36 Kan. 76, 59 Am. Rep. 529, 12 Pac. 310, 7 Am. Crim. Rep. 479; *Kidd v. Reynolds*, 20 Tex. Civ. App. 355, 50 S. W. 600.

Nor is it required that it be levied according to value. *Carthage v. Rhodes*, 101 Mo. 175, 9 L.R.A. 352, 14 S. W. 181; *Ex parte Cooper*, 3 Tex. App. 489, 30 Am. Rep. 152.

In *Washington v. Lynch*, 5 Cranch. C. C. 498, Fed. Cas. No. 17,231, it being contended that the city had no power to tax dogs because they were not property, it was held that such tax or license could be levied under the power to prevent nuisances.

And in *Gibson v. Harrison*, 69 Ark. 385, 54 L.R.A. 268, 63 S. W. 999, a tax on dogs was held to be merely a police regulation, although described in the agreed statement of facts as a tax, this being a mere opinion not binding on the court.

However, in *Com. v. Bean, Thasher*, Crim. Cas. 85, it is held that a city has no right to impose a license fee upon owners of dogs, as such would be a tax, and in violation of a constitutional provision that no tax shall be imposed without an act of the legislature.

And in *Washington v. Meigs*, 1 MacArth. 53, 29 Am. Rep. 578, it is held that, while a dog is property subject to taxation, the owner cannot be required to pay a license fee for keeping it, under penalty of fine or imprisonment for failure to do so.

R. L. S.

People v. Bradley, 39 Ill. 130; Rich v. Chicago, 59 Ill. 286.

Mr. S. Ludlow for appellee.

Farmer, J., delivered the opinion of the court:

This was an action of debt brought in the circuit court of Ford county, to recover a penalty for the alleged violation of an ordinance of the city of Paxton. The ordinance set out in the declaration required the owners and keepers of dogs to pay to the city marshal "a tax or fee of \$2 for each male dog and \$5 for each female dog." The ordinance also required the owner or keeper of the dog to register it at the office of the city marshal, and prescribed a penalty of not less than \$3 nor more than \$10 for its violation. The declaration, after setting out the ordinance, charged the defendant was the owner or keeper of a female dog within the corporate limits of the city of Paxton, and that he had not paid to the marshal the tax or fee required, nor caused the dog to be registered in the office of the city marshal, whereby an action had accrued, etc. A demurrer to the declaration, setting out as special causes the unconstitutionality of the ordinance, was overruled. The defendant elected to stand by his demurrer and refused to plead. It was stipulated that the defendant was the owner of the dog, as alleged; that he had not paid the tax or fee on said dog; that the ordinance set out in the declaration had been duly passed, signed by the mayor, and published. The court rendered judgment against the defendant, and assessed the plaintiff's damages at \$5. Defendant prayed an appeal, and on the certificate of the court that the validity of a municipal ordinance was involved, and that the public interest required the appeal to be prosecuted direct to the supreme court, the appeal was brought direct to this court.

The principal argument made against the validity of the ordinance is that a dog is property, and that the ordinance is in violation of § 1 of article 9 of the Constitution, which provides for raising revenue by levying a tax by valuation, so that every person "shall pay a tax in proportion to the value of his, her, or its property;" also in violation of §§ 9 and 10 of said article 9 of the Constitution, which require that taxes levied by the corporate authorities shall be uniform in respect to persons and property.

Clause 80, § 1, art. 5, of the cities and villages act (Hurd's Rev. Stat. 1909, chap. 24, § 62), confers power upon the city council in cities, and the president and board of trustees in villages, "to regulate, restrain, and prohibit the running at large of horses, 39 L.R.A.(N.S.)

cattle, swine, sheep, goats, geese, and dogs, and to impose a tax on dogs." It is true, dogs are regarded, in law, as property, but they stand on a different basis from other domestic animals, and have always been subject to control and regulation by the exercise of the police power. Statutes and ordinances imposing a tax or license on dogs have been almost uniformly held to be within the police power of the state, and not governed by constitutional provisions relating to taxation for revenue. Ordinances prohibiting dogs from running at large, and authorizing the killing of any dog found running at large in violation of an ordinance, have been sustained as a valid exercise of the police power, and not violative of any constitutional provision. The object of statutes and ordinances for the imposition of a tax or license on dogs is regulation, and not revenue.

In *Carthage v. Rhodes*, 101 Mo. 175, 9 L.R.A. 352, 14 S. W. 181, the court passed upon the validity of an ordinance requiring the licensing of dogs and cats, and providing for their being impounded or destroyed if found running at large. The validity of the ordinance was sustained. The court said: "Taxation may be for the purpose of raising revenue, or for the purpose of regulation. Where for the purpose of regulation, it is an exercise of the police power of the state. They are both distinct, coexistent powers in the state, and either or both may be exercised through a municipal corporation. In this case by the terms of the charter, both powers are granted to the city of Carthage as to the dogs of that city. The dog license tax required by its ordinance is easily referable to the exercise of the police power."

In *Van Horn v. People*, 46 Mich. 163, 41 Am. Rep. 159, 9 N. W. 246, the constitutionality of a statute imposing a tax on dogs was before the court. It was claimed the statute violated the constitutional provision for uniformity and the taxation of property according to its value. The court held the statute was not an emanation from the taxing power within the meaning of the Constitution; that it was not for revenue, but was a species of legislation pertaining to the police power of the state.

In *State ex rel. Curtis v. Topeka*, 36 Kan. 76, 59 Am. Rep. 529, 12 Pac. 310, 7 Am. Crim. Rep. 479, the court considered an ordinance passed pursuant to power conferred by act of the legislature, which required the registration of dogs and the payment of a tax of \$2 for male and \$5 for females. In that case it was contended the ordinance was in conflict with the Constitution, which required taxes to be levied at a uniform and an equal rate. The court held the ordi-

nance was valid; that the tax was not for the purpose of raising revenue, but for the purpose of regulation and restriction.

In *Holst v. Roe*, 39 Ohio St. 340, 48 Am. Rep. 459, the court construed the validity of a statute which required dogs over three months old to be listed by the owner without any valuation; but the owner might, if he desired, fix a valuation, without swearing to it. The statute further provided that, in addition to the tax on the valuation that might be fixed by the owner, an additional tax of \$1 on each dog should be levied by the auditor. The court held the statute was a valid exercise of the police power, and was not controlled by the constitutional provisions relating to taxation for revenue.

In *Sentell v. New Orleans & C. R. Co.* 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693, the Supreme Court of the United States considered the validity of a statute of the state of Louisiana which declared that dogs were personal property and entitled to the same guaranties of law as other personal property, provided they were given in by the owner to the assessor, and unless so listed with the assessor and placed upon the assessment roll, no dog was entitled to the protection of the law. The statute further provided that in civil actions for killing or injuring a dog, the owner could not recover beyond the value of the dog as fixed by himself in the last assessment. The statute was held valid, and a number of cases are cited and quoted from in the opinion. Among the cases cited with approval is *Ex parte Cooper*, 3 Tex. App. 489, 30 Am. Rep. 152. The Supreme Court says: "In *Ex parte Cooper*, supra, it was held that dogs were not property within the tax clause of the Constitution, and that a tax upon dogs was a police regulation, and a legitimate exercise of the police power. The point was made that dogs, being property, should, under the Constitution, be taxed ad valorem, as other property was; but it was held that the law was not a tax law in its ordinary sense, but a police regulation."

In *Cole v. Hall*, 103 Ill. 30, owners of dogs filed a bill to enjoin the collector of taxes from collecting a license fee of \$1 on each dog owned by them, which was imposed under the act of 1879 (*Laws 1879*, p. 54) entitled "An Act to Indemnify the Owners of Sheep in Cases of Damage Committed by Dogs." This tax is called in the act "a license fee." The court held the act valid as an exercise of the police power, and that the license fee was not a tax within the meaning of the section of the Constitution providing for the raising of revenue by levying a tax so that every person shall pay the tax in proportion to his or her property.

Appellant contends the *Cole* Case has no 39 L.R.A. (N.S.)

application to the ordinance before us, because it was held in *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560, that there is a difference between a tax and a license, and that the constitutional provision in reference to taxation has no application to fees exacted for a license. It is claimed the exaction imposed by the ordinance before us is not a license fee, but is a tax. The ordinance calls it "a tax or fee." But we think it immaterial, when imposed for regulation and restriction under the police power of the state, whether it is called a license, a fee, or a tax. This is sustained by the authorities above cited.

Appellant also contends that there is a material difference between the statute authorizing a tax or license fee against dogs, and the ordinance before us. The difference pointed out is that the statute requires the money collected from the dog tax or license fees to be applied to the reimbursement of persons whose sheep have been killed or injured by dogs running at large, while the ordinance makes no provision for the application of the fund collected under it. In *Cole v. Hall*, supra, the court held what disposition was to be made of the fund, when collected, could not affect the validity of the statute, and the same rule is applicable to the ordinance.

The demurrer was properly overruled, and the judgment of the Circuit Court is affirmed.

NEBRASKA SUPREME COURT.

ELIZABETH HARMAN et al.

v.

BENJAMIN FISHER et al.

and

JOHN KOLP et al.

(90 Neb. 688, 134 N. W. 246.)

Trust — parol — acquiescence.

1. An express trust with respect to real estate may not be created or declared by parol, yet if a parent conveys a tract of land to her son for the benefit of J., the grantee, and his brother B., and for more than ten years subsequently they occupy the land as tenants in common, B. tilling the farm and making lasting and valuable

Headnotes by Root, J.

Note. — The question of the admissibility of parol evidence as to the consideration of a deed is discussed in notes to *Velten v. Carmack*, 20 L.R.A. 101, and *Shehy v. Cunningham*, 25 L.R.A. (N.S.) 1194.

As to the admissibility of parol evidence to show the true nature of the transaction, where the recited consideration of the deed is shown not to have been paid, see note to *Koogle v. Cline*, 24 L.R.A. (N.S.) 413.

improvements thereon under a claim of ownership, and J. conceding, during that period, that his brother owns one half of the land, the heirs of J. will not be permitted to disturb B. in his possession and title to an undivided one half of the real estate, notwithstanding there is no written evidence of a trust or of B.'s title, and none was ever executed.

Deeds — contradicting consideration named — oral evidence.

2. In a contest between heirs of the whole blood and heirs of the half blood of an intestate, oral evidence is admissible to prove that the sole consideration for the deed from his mother, whereby he was vested with title to the tract of land in controversy, was love and affection, notwithstanding the sole recitation in the deed of a consideration is a substantial, valuable consideration.

(Root, J., dissents from proposition 2.)

(January 24, 1912.)

CROSS APPEALS from a decree of the District Court for Furnas County in an action brought to quiet title to certain land and for a partition of said land; plaintiffs appealing from so much of the judgment as awarded them an undivided one-eighth interest in the land and from an order refusing partition; defendants Kolp et al. appealing from so much as awarded defendant Benjamin Fisher a three-fourths interest. Affirmed.

The facts are stated in the opinion.

Messrs. **Perry Lambe, & Butler**, for plaintiffs:

The conveyance from Elizabeth Fisher to her son John Thomas Fisher was a gift.

1 Devlin, Deeds, § 11; Sires v. Sires, 43 S. C. 266, 21 S. E. 115; Ten Eyck v. Witbeck, 135 N. Y. 40, 31 Am. St. Rep. 809, 31 N. E. 994; Turner v. Howard, 10 App. Div. 555, 42 N. Y. Supp. 335; Morris v. Ward, 36 N. Y. 587; Peck v. Vandenberg, 30 Cal. 11; Salmon v. Wilson, 41 Cal. 606; Bradley v. Love, 60 Tex. 472; Wolf v. Wolf, 12 La. Ann. 529; Lawrence v. Lawrence, 105 Pa. 335.

There being no consideration for the deed, the burden of proof to show that the mother intended the transaction as one of bargain and sale is upon the parties claiming under the same as such.

Jones v. Thomas, 218 Mo. 508, 117 S. W. 1177; McDonnell v. McDonnell, 10 Cal. App. 63, 101 Pac. 40; 6 Cyc. 335; Dowie v. Driscoll, 203 Ill. 480, 68 N. E. 56; Snow v. Hazelwood, 85 C. C. A. 226, 157 Fed. 898; Cowee v. Cornell, 75 N. Y. 91, 31 Am. Rep. 428; Re Smith, 95 N. Y. 516; Green v. Roworth, 113 N. Y. 462, 21 N. E. 165; Barnard v. Gantz, 140 N. Y. 249, 35 N. E. 430; Ten Eyck v. Witbeck, 135 N. Y. 40, 31 Am. 39 L.R.A.(N.S.)

St. Rep. 809, 31 N. E. 994; Davis v. Dean, 66 Wis. 100, 26 N. W. 737; Worrall's Appeal, 110 Pa. 349, 1 Atl. 380, 765; Disch v. Timm, 101 Wis. 179, 77 N. W. 196; Gibson v. Hammang, 63 Neb. 349, 88 N. W. 500.

Mr. John Stevens also for plaintiffs.

Messrs. J. J. Thomas, John F. Fults, W. B. Whitney, and F. W. Byrd for defendants Kolp et al.

Mr. W. S. Morlan for defendants Fisher et al.

Root, J., delivered the opinion of the court:

This is an action in equity to settle conflicting claims to a quarter section of land in Furnas county. The case is here on appeal and cross appeals.

Elizabeth Fisher, a widow, one of the pioneers of Furnas county, acquired title from the United States to the land in controversy. Mrs. Fisher was the second wife of her husband, and to them were born three sons and two daughters, all of whom attained maturity. Of these children Benjamin, the oldest, for many years, was the head of the family. One son, Perley J. Fisher, departed this life subsequently to his mother's demise, and his heirs are parties to this action. The daughters married, and they also are parties hereto. Benjamin, subsequently to his marriage, lived separate from his mother, but in the immediate neighborhood of her home. The other son, John Thomas Fisher, remained unmarried and departed this life intestate May 28, 1908. Elizabeth Fisher departed this life intestate September 17, 1895. There are numerous other parties to this action, all of whom are relatives of the half blood of John Thomas Fisher, or assignees of some of those relatives. For convenience' sake they will be collectively referred to as "the half bloods." All of these relatives are descendants of John Thomas Fisher's father by the first marriage, and in the veins of none of them flows the blood of Elizabeth Fisher.

There is evidence to prove, and this court may take judicial notice of the fact, that droughts, insect plagues, and almost universal low prices for farm products, prevailed in western Nebraska during many of the years covered by this inquiry. The proof also discloses that Benjamin Fisher years ago sold his homestead, and the proceeds were used in part at least for the benefit of his mother's family. The same sacrifice was made by one of the daughters, and John Thomas also brought to the common fund the proceeds of the sale of a tract of land formerly owned by him. The close and tender relations which the evidence discloses existed between this widow and all of her

children continued to the close of her natural life. In 1895, during a period of financial depression, the Fishers were in sore need of money, and for the purpose of supporting her sons Benjamin and John Thomas with funds, Elizabeth Fisher, probably at the suggestion of Benjamin, determined to mortgage her farm. She also concluded that, for the purpose of keeping the title to the homestead in those sons, she would convey the farm to them. The attendance of a justice of the peace was procured, and, according to his testimony, he was directed by Mrs. Fisher to prepare a deed conveying the farm to these men. She said: "My time is short, and I want this land to remain with the Fisher boys,"—referring to Benjamin and John. Before the deed was drawn, it was mentioned that Benjamin's wife was not in condition to go to Beaver City, the county seat, to sign the mortgage which it was proposed should be made, and thereupon it was suggested by the scrivener or by Benjamin, that the deed might be made to the unmarried son, John Thomas, and this was done. Subsequently, the mortgage was executed to secure the payment of \$500. The deed was executed February 28, 1895, but seven months before Mrs. Fisher died. The proof discloses that John Thomas Fisher was an easy-going, pleasure-loving man of simple tastes, working at times on the farm and on another quarter section, the title whereof he acquired under the pre-emption laws, but devoting considerable of his time to hunting, attending baseball games, and occasionally indulging in a mild drinking bout. Benjamin farmed his land, and was in controversy, and John Thomas's exemption, so that Benjamin received all the income from these tracts of land. He paid the taxes thereon, and supplied John Thomas with whatever money he desired. With one possible exception, there seems to have been no friction between the brothers, but John Thomas, relieved of all responsibility and the necessity of earning his bread in the sweat of his face, was content that Benjamin should farm the land, pay the taxes and all expenses, receive the proceeds, and furnish his brother such sums of money as he demanded. The evidence is contradicted that John Thomas was well supplied with money, and that it was all furnished by his brother Benjamin. This condition existed before as well as subsequently to the execution of the deed by Elizabeth Fisher.

The court held that the deed executed by Mrs. Fisher was void and conveyed no title. A deed from Mrs. Bailey, one of Mrs. Fisher's daughters, to Benjamin Fisher, was set aside, and the title to the land was quieted as follows: In Benjamin Fisher an undivided

ed three fourths, in the heirs of Perley Fisher, each, a one thirty-second part, collectively a one eighth, and in Mrs. Bailey an undivided one eighth. Benjamin's portion includes the share his sister Mrs. Kolp inherited, which she conveyed to him.

The writer of this opinion is directed by a majority of the court to say that, while this court does not adopt all of the findings nor the reasoning of the learned district judge, we are of opinion that he attained the correct result for the reasons following: We are inclined to the view that the heirs cannot now successfully question the validity of the deed from Mrs. Fisher to her son John Thomas. At this late date, it is immaterial whether there was a consideration for the deed, or whether it was executed by reason of Benjamin's undue influence. John Thomas was in possession of this land under a claim of right for more than ten successive years subsequently to the execution of the deed and to Mrs. Fisher's demise, before he departed this life and before this suit was commenced. Therefore the plea of the statute of limitations is sustained. Nor do we think there is any such proof of recently acquired knowledge of the alleged duress, fraud, or lack of consideration as will toll the statute.

To the contention made by the plaintiffs and by the relatives of the half blood that the deed conveyed no estate to Benjamin, and that, since no writing was signed by Elizabeth Fisher or by John Thomas Fisher, no trust was created or declared which Benjamin may avail himself of, and therefore he has no interest in the land other than as an heir of John Thomas, we have to say: If the evidence of the justice of the peace is competent, it discloses that Elizabeth Fisher intended that her sons Benjamin and John Thomas should own the farm in equal shares, and but for the ignorance of all parties to the transaction, including the scrivener, a written instrument would have been prepared and signed to evidence that intent. However, the proof is satisfactory that, subsequently to the execution of the deed, Benjamin's possession was under a claim in right. He made lasting and valuable improvements on the farm, and not only tilled the soil, but assumed authority to place his married children in possession of the land. Ordinarily such acts would reasonably be referable to a claim of right, but it is said that, because of the peculiar circumstances of this case, we should not so hold. But we find declarations of John Thomas made at different times to within two years of his death, admitting, by inference or directly, his brother's interest in the land. In 1897, but two years after the deed was executed, John Thomas requested a third party to

prepare a deed to convey all of the title to Benjamin, saying that "he ought to have it" (the land), and, solely because the proposed scrivener desired to go home to luncheon and the subsequent attraction of a ball game, that purpose was not consummated. John Thomas refused to sell part of the land because, as he said, it was always to remain in the Fisher family. This statement may indicate a testamentary intention, but it sheds some light on the controversy. Within two years of John Thomas's demise, in discussing the location of a ditch on the farm, he said, in substance, that he did not know whether Benjamin wanted the ditch constructed along the proposed path, and that he and Benjamin owned the land together. There is some evidence of John Thomas's declarations to the contrary, and also Benjamin's declarations evincing a disclaimer of any interest in the land, but, taking all of the evidence together, we find that, at all times subsequently to the execution of the deed to John Thomas, Benjamin Fisher asserted ownership to at least an undivided one half of this land, and, in reliance upon his belief and contention that his mother intended that he should have an interest in the land, made lasting and valuable improvements thereon, and, with his brother John, held undisputed possession of the premises for more than ten years preceding the commencement of this action, and subsequently to his mother's death; and during all of that time John acquiesced in that claim. A tenancy in common may be created by prescription. *Inglis v. Webb*, 117 Ala. 387, 23 So. 125. This estate in Benjamin was not created so much by a disseisin of his brother John, as by John's recognition of his mother's trust and confidence in him and his respect for his brother's rights. There was in effect an execution by him of the trust reposed in him by her, and, that trust having been fully executed and respected by him for more than ten successive years, not only should the ten-year statute of limitations (§§ 5 and 6 of the Code) bar a recovery, but the case is within the principle announced in *Karr v. Washburn*, 56 Wis. 303, 14 N. W. 189, and *Oberlender v. Butcher*, 67 Neb. 410, 93 N. W. 764.

This brings us to the contention between the half bloods and the descendants of Elizabeth Fisher, the one faction contending for an estate of inheritance because the deed from Elizabeth Fisher is one of purchase, and the other side asserting that the deed is one of gift, and hence, by the terms of § 33, chap. 23, Comp. Stat. 1911, which provides that an estate of inheritance which vested in an intestate by devise or gift from some of his ancestors shall descend from him solely to such of his relatives as are of

the blood of that ancestor. The line of descent is confined to the heirs of the full blood. We do not think that the execution of the mortgage and the use of the funds acquired thereby should control the character of Mrs. Fisher's deed. The money was secured for the benefit of Benjamin Fisher and John Thomas Fisher, and, in effect, they mortgaged their land to secure the payment of their debt. Rather this controversy depends upon the right of the heirs of the full blood to contradict by oral evidence the recital in the deed from Elizabeth Fisher that she was paid \$2,000 therefor.

A majority of the court instructed me to say that oral evidence is admissible to prove the actual consideration for a deed, even though the effect may be to convert the instrument from one of bargain and sale into one of pure gift. Such proof has always been considered competent in other actions, and a majority of the court does not think sound sense should permit an exception to be made in a case where to do so is to compel the court to hold contrary to the fact and thereby render ineffectual a plain provision of the statute. Such evidence, although admissible, should not be held to prove the fact, unless it is clear and convincing and leaves no reasonable doubt in the mind concerning the consideration given for the deed. The courts of last resort are not in harmony in cases like the one at bar. The following cases directly sustain the majority of this court: *Bradley v. Love*, 60 Tex. 472; *Rockill v. Spraggs*, 9 Ind. 30, 68 Am. Dec. 607; *Jones v. Jones*, 12 Ind. 389; *Kenney v. Phillipy*, 91 Ind. 511. See also *Sires v. Sires*, 43 S. C. 266, 21 S. E. 115, and *Salmon v. Wilson*, 41 Cal. 595.

The writer of this opinion, while recording the views of a majority of the court, personally holds to the contrary. That is to say, that while for many purposes recitations in a deed may not, even as between the parties and their privies, be conclusive evidence of the facts, and the recitation of consideration is frequently held to be solely prima facie evidence of the fact, yet it seems to me that both upon reason and the better authority, persons claiming under a deed should not, in the absence of fraud or mutual mistake, be permitted to prove by oral evidence that a recitation of a substantial, valuable consideration, where no other consideration is referred to in the deed, is false, and prove by the oral evidence that the sole consideration was good, so as to change the quality of the estate thereby conveyed. In such cases the recitation gives quality to the estate transferred, and to contradict it by oral evidence violates the statute of frauds and perjuries. *Patter-*

son v. Lamson, 45 Ohio St. 77, 12 N. E. 531; Brown v. Whaley, 58 Ohio St. 654, 65 Am. St. Rep. 793, 49 N. E. 479; Groves v. Groves, 65 Ohio St. 442, 62 N. E. 1044. Among the cases cited to sustain the majority of the court, Bradley v. Love, supra, is directly in point, but the opinion is a mere declaration that the law is as stated, and contains no convincing argument to sustain the conclusion. The later Indiana cases follow Rockhill v. Spraggs, 9 Ind. 30, 68 Am. Dec. 607, and it was decided on the authority of M'Crea v. Purmort, 16 Wend. 460, 30 Am. Dec. 103. The New York case, however, merely involved the right of a party to a deed to prove that the consideration therefor was a quantity of iron delivered by the grantee to the grantor, rather than a money consideration as recited in the deed. That case was correctly determined, but does not sustain the Indiana cases, nor the majority opinion in the instant case. In Salmon v. Wilson, 41 Cal. 395, in addition to a recitation of a nominal valuable consideration, there was a recitation of a good consideration, and it was held that, upon a consideration of the entire instrument, the court should construe the deed to be one of gift. In Carty v. Connelly, 91 Cal. 15, 27 Pac. 599, that court recognized the rule that, in the absence of fraud, oral evidence should not be received to contradict the recitation of consideration, for the purpose of defeating the conveyance according to its terms. In the case at bar the testimony is convincing that the sole consideration for the deed was that of love and affection, and we conclude, upon a consideration of the entire record, that substantial justice has been done.

The judgment of the District Court therefore is affirmed.

Sedgwick, J., concurring:

The foregoing opinion was prepared by Judge Root while he was a member of the court, and is now adopted as a correct disposition of the case. The most serious contention in the case is determined by the second paragraph of the syllabus. The general rule is that the consideration expressed in a written instrument may be inquired into, and that it may be shown by parol testimony to be without consideration, although such consideration is recited in the instrument. The adjudicated cases are in conflict, and each view is supported by many decisions. We think that the better reasoned decisions hold that the general rule obtains in cases of this kind. If there was a valuable consideration for the deed, the property goes, upon the death of the grantee, to his heirs in general. If the deed was in fact a gift from an ancestor of the

grantee, the property, upon the death of the grantee, descends to those who are "of the blood of such ancestor." When the ancestor makes a gift to his descendant and recites in the deed of gift that a valuable consideration was paid therefor, this recitation on his part may be for the purpose of controlling the line of descent of the property. We know, however, that in practice this recitation is often made in deeds for other and different purposes, or it may be carelessly made without any purpose whatever. If the conveyance is in fact a gift, and the ancestor desires to qualify the estate conveyed, and control the line of descent, he can do so by inserting in the conveyance apt and conclusive words for that purpose. If the ancestor desires to make disposition of his property that shall take effect after his death, or to place limitations upon the title derived through him, he can accomplish these results through a gift of the property by will, and the law favors that method of making such posthumous limitations. It is not usual in practice to qualify the estate conveyed by so uncertain a method as recitations of consideration, and to adopt such methods would lead to uncertainties in titles to real estate. We think, therefore, the better reason is in favor of the rule which we have adopted.

Petition for rehearing denied April 8, 1912.

IOWA SUPREME COURT.

CERRO GORDO COUNTY, Appt.,
v.
BOONE COUNTY.

(152 Iowa, 602, 133 N. W. 132.)

Pauper — aid — implied liability of county.

1. A county is under no implied duty to reimburse another county for expense incurred in relieving paupers who first become in need of aid within its borders.

Note. — Right to compensation from public for relief furnished poor person, in cases not provided for by law, or where there has been no compliance with statutory prerequisites.

It is well established in this country by the authorities that paupers are not a public charge unless made so by statute (see Saguache County v. Tough, 45 Colo. 395, 101 Pac. 411; Alton v. Madison County, 21 Ill. 115; Fox v. Bristol, 45 Ill. App. 330; Cooledge v. Mahaska County, 24 Iowa, 211; Blakesburg v. Jefferson, 7 Me. 125; Augusta v. Chelsea, 47 Me. 387; Newry v. Gilead,

Same — voluntary aid — liability.

2. To render a county liable for aid furnished to a pauper it must be supplied at the instance of the officers designated by statute to have charge of the relief of the poor.

Same — casting pauper adrift — request for aid.

3. That a county in which a nonresident pauper was found in need of aid did not perform its statutory duty to furnish it, but furnished him with transportation into another county, does not amount to a request to the latter to furnish the aid at its expense, so as to render it liable to reimburse such other county for expense incurred in furnishing the relief.

(November 15, 1911.)

60 Me. 154; *East Sudbury v. Sudbury*, 12 Pick. 1; *Com. v. Dracut*, 8 Gray, 455; *Lamson v. Newburyport*, 14 Allen, 30; *Plymouth v. Wareham*, 126 Mass. 475; *O'Keefe v. Northampton*, 145 Mass. 115, 13 N. E. 382; *Duval v. Laclede County*, 21 Mo. 396; *Handlin v. Morgan County*, 57 Mo. 114; *Gilligan v. Grattan*, 63 Neb. 242, 88 N. W. 477; *Rock County v. Holt County*, 78 Neb. 616, 111 N. W. 366; *Otoe County v. Lancaster County*, 78 Neb. 517, 111 N. W. 132; *Lander County v. Humboldt County*, 21 Nev. 415, 32 Pac. 849; *Mace v. Nottingham-West*, 1 N. H. 52; *Otis v. Strafford*, 10 N. H. 352; *Strafford County v. Rockingham County*, 71 N. H. 37, 51 Atl. 677; *Buxton v. Chesterfield*, 60 N. H. 357; *People ex rel. Blenheim v. Schoharie County*, 121 N. Y. 345, 24 N. E. 830; *Copple v. Davie County*, 138 N. C. 127, 50 S. E. 574; *North Whitehall Twp. v. South Whitehall Twp.* 3 Serg. & R. 117; *Caswell v. Hazard*, 10 R. I. 490; *Hamlin County v. Clark County*, 1 S. D. 131, 45 N. W. 329; *Aldrich v. Londonderry*, 5 Vt. 441; *Ives v. Wallingford*, 8 Vt. 224; *Putney v. Dummerston*, 13 Vt. 370; *Churchill v. West Fairlee*, 17 Vt. 447; *Thetford v. Hubbard*, 22 Vt. 440; *Chelsea v. Washington*, 48 Vt. 610; *Macon v. Berlin*, 49 Vt. 13; *Morristown v. Hardwick*, 81 Vt. 31, 69 Atl. 152; *Patrick v. Baldwin*, 109 Wis. 342, 53 L.R.A. 613, 85 N. W. 274; *Martin v. Fond du Lac County*, 127 Wis. 586, 106 N. W. 1085; and that the various municipal subdivisions of the state, as such, are under no natural or moral obligation to provide relief for the poor, but the duty is of mere positive obligation, created and charged upon them by the statute by which the nature and extent of such obligation is limited and controlled (*Blakesburg v. Jefferson*, 7 Me. 125; *Newry v. Gilead*, 60 Me. 154; *East Sudbury v. Sudbury*, 12 Pick. 1; *Lamson v. Newburyport*, 14 Allen, 30; *Mace v. Nottingham-West*, 1 N. H. 52; *People ex rel. Blenheim v. Schoharie County*, 121 N. Y. 345, 24 N. E. 830; *North Whitehall Twp. v. South Whitehall Twp.* 3 Serg. & R. 117; *Patrick v. Baldwin*, 109 Wis. 342, 53 L.R.A. 613, 85 N. W. 274).

In order to render the public liable for 30 L.R.A.(N.S.)

A PPEAL by plaintiff from a judgment of the District Court for Story County in defendant's favor in an action brought to recover the expenses incurred in the care and medical treatment of a nonresident pauper. Affirmed.

The facts are stated in the opinion.

Messrs. **Robert M. Witwer, J. C. Robinson, and Fitchpatrick & McCall**, for appellant:

Where the law provides that a quasi or municipal corporation shall give care and treatment to a poor person upon application, due request, in a proper case, creates an absolute legal obligation on the part of such corporation for the required relief and care.

Cincinnati Twp. v. Ogden, 5 Ohio, 23;

relief furnished a needy person, the case must fall within, and the liability be created pursuant to, and in the manner prescribed by the statute (*Coolidge v. Mahaska County*, 24 Iowa, 211; *O'Keefe v. Northampton*, 145 Mass. 115, 13 N. E. 382); and however equitable a claim, there can be no recovery without compliance with the statutory prerequisites (*Strafford County v. Rockingham County*, 71 N. H. 37, 51 Atl. 677).

There are no equities between towns in respect to caring for and supporting paupers, but the whole matter is purely and strictly statutory; and where the statute imposes no liability there is none, and that is the end of it. *Morristown v. Hardwick*, 81 Vt. 31, 69 Atl. 152.

The obligations of municipalities in reference to the support of paupers result from the provisions of positive law, and have none of the elements of a contract, express or implied. There are no equitable considerations out of which presumptions will arise in favor of either party. *Davis v. Milton Plantation*, 90 Me. 512, 38 Atl. 539.

Accordingly, a town is not liable for medical aid and nursing given to one of its inhabitants by the town in which he was injured, where he did not come under the ordinary definition of "pauper." *Kankakee County v. Manteno*, 68 Ill. App. 365.

And in the absence of statutory provision a town is not obliged to reimburse a county for relief given to a former resident, who, before gaining a settlement in the county, became a poor person. *Delaware County v. Delaware*, 105 App. Div. 129, 93 N. Y. Supp. 954.

Since the liability of a town to support its poor is purely statutory, it is not liable for the support of the pauper by another town, where it provides a place of residence for the pauper in his own town, and offers to remove him and his effects to it, and there support him, and the pauper refuses to go, and threatens to prosecute any person who shall attempt to remove him. *Fox v. Bristol*, 45 Ill. App. 330.

A debt contracted by a ladies' aid society for coal given by them to the poor consti-

Seagraves v. Alton, 13 Ill. 366; *La Salle County v. Reynolds*, 49 Ill. 189; *Perry County v. DuQuoin*, 99 Ill. 479; *Barnard v. Sangamon County*, 190 Ill. 119, 60 N. E. 104; *Shreve v. Budd*, 7 N. J. L. 431; *Ogden City v. Weber County*, 26 Utah, 129, 22 Pac. 433; *Lee County v. Gilbert*, 70 Miss. 791, 12 So. 593; *Jenks Twp. v. Sheffield Twp.* 135 Pa. 400, 19 Atl. 1004.

One municipality may sue another that has wrongfully removed a pauper within the jurisdiction of the former, and may sue another for relief given to a pauper, which the latter was, by law, obliged or required to furnish.

22 Am. & Eng. Enc. Law, 1003; *Pittsford v. Plattsburgh*, 15 Johns. 436; *Sheldon v. Fairfax*, 21 Vt. 102; *Tomlinson v.*

Bentall, 5 Barn. & C. 738, 8 Dowl. & R. 493, 5 L. J. Mag. Cas. 7, 29 Revised Rep. 375; *Plumcreek Twp. v. Elderton*, 120 Pa. 626, 18 Atl. 549; *Taylor v. Shenango*, 114 Pa. 394, 6 Atl. 475; *Stone v. Glover*, 60 Vt. 651, 15 Atl. 334.

Messrs. E. H. Addison and Harpel & Cederquist, for appellee:

The duty of Boone county was governmental, quasi judicial, and did not extend beyond temporary relief.

Armstrong v. Tama County, 34 Iowa, 312; *Beeks v. Dickinson County*, 131 Iowa, 247, 6 L.R.A.(N.S.) 831, 108 N. W. 311, 9 Ann. Cas. 812; *Ellison v. Harrison County*, 74 Iowa, 494, 38 N. W. 372; *Sheridan County v. Denebrink*, 9 L.R.A.(N.S.) 1234, note; 3 Abbott, Mun. Corp. §§ 969, 1095, 1096.

tutes no charge against the county, and no allowance can be made therefor out of the county funds without statutory permission or authority. *Rayburn v. Davis*, 2 Ill. App. 348.

The liability of a town for the support of its paupers, being purely statutory, has in it none of the elements of a contract, express or implied; and therefore is not a proper subject of set-off in an action by one town against another for such support. *Augusta v. Chelsea*, 47 Me. 367.

As a consequence of the doctrine embodied in the foregoing decisions, it is uniformly held that the public cannot be held to make compensation for relief furnished to persons who have fallen into distress, except by virtue of a contract with the proper officers, or in a case specified by statute. See *Nate ex rel. Chisholm v. Gold*, 140 Ind. 60, 40 N. E. 55; *Dalton v. Hinsdale*, 6 Mass. 501; *Rogers v. Newbury*, 105 Mass. 133; *Wilson v. Coos County*, 72 N. H. 112, 4 Atl. 1101; *St. Luke's Hospital Asso. v. Grand Forks County*, 8 N. D. 241, 77 N. W. 18; *Hamlin County v. Clark County*, 1 S. D. 131, 45 N. W. 329; *Houghton v. Danville*, 10 Vt. 537; *Putney v. Dummerston*, 13 Vt. 370; *Churchill v. West Fairlee*, 17 Vt. 447; *Thetford v. Hubbard*, 22 Vt. 440; *Forrester v. Ballard*, 38 Vt. 60; *Buck v. Forrester*, 48 Vt. 1; *Chelsea v. Washington*, 50 Vt. 610.

Accordingly, a physician cannot recover for any portion of the medicines or medical services which were furnished a poor person prior to the time of his employment by the township trustees to attend such person. *Mansfield v. Sac County*, 60 Iowa, 11, 14 N. W. 73.

Statutory duty to furnish relief as basis of implied promise to compensate.

Notwithstanding some of the earlier decisions which apparently incline to the opposite view, but which need not be noticed here, having long since been disapproved, it is now well settled that the existence of a statutory duty on the part of a county or town L.R.A.(N.S.)

town to furnish relief cannot be regarded as the basis of an implied contract to compensate the person who or municipality which furnishes such relief. On this head it is said in *Lamson v. Newburyport*, 14 Allen, 30: "The obligation of cities and towns to furnish relief and support to paupers is created by statute. No moral duty rests on them to give aid to the needy and distressed, and no legal liability exists except such as is derived from positive legislative enactments. Consequently no promise or undertaking on their part can be implied to pay for anything which may have been bestowed on a person standing in need of relief, unless it is shown to have been afforded under such circumstances as to come within the statutory provisions by which towns are made liable for expenses incurred for such a purpose."

By the established construction of the statutes for the aid of the poor, they imply no promise by the county to pay for services rendered by a physician or surgeon, even in cases of emergency, if there has been no judicial ascertainment that the person cared for is a pauper. *Cantrell v. Clark County*, 47 Ark. 239, 1 S. W. 200.

No person can charge the county for the board of a poor person, whether known to be a pauper or not, unless such person is legally authorized to furnish the board at the county's expense. *Knox County v. Jones*, 7 Ind. 3.

A town is not liable to reimburse an inhabitant of another town for expenses incurred by him in such other town for the relief of one of its paupers. *Conley v. Woodville*, 97 Me. 240, 54 Atl. 400.

An individual undertaking to support a pauper has no right to compensation as against the town of the pauper's settlement, except as it is given by statute. *Mitchell v. Cornville*, 12 Mass. 333.

The fact that one cares for a person who is a proper subject for public relief does not create in his favor a legal demand against the county. *Reynolds v. Alcorn County*, 59 Miss. 132.

Towns are not liable by the common law to support paupers, and no implied prom-

There is no liability for expenditures made on behalf of the poor, resident or foreign, except as provided by statute.

Mansfield v. Sac County, 60 Iowa, 15, 14 N. W. 73; *Gawley v. Jones County*, 60 Iowa, 159, 14 N. W. 236; *Cooledge v. Mahaska County*, 24 Iowa, 213; *Hardin County v. Wright County*, 67 Iowa, 127, 24 N. W. 754; *Winneshiek County v. Allamakee County*, 62 Iowa, 558, 17 N. W. 753; *Hamilton County v. Meyers*, 23 Neb. 718, 37 N. W. 625; *Sheridan County v. Denebrink*, 15 Wyo. 342, 9 L.R.A.(N.S.) 1235, 89 Pac. 7; 3 *Abbott*, Mun. Corp. § 1104; *Mousseau v. Sioux City*, 113 Iowa, 247, 84 N. W. 1027; 11 Cyc. 489, 490.

Ladd, J., delivered the opinion of the court:

In January, 1908, William R. Wood, after examining the timber on an island in the Des Moines river, near Fraser, with a view of contracting to cut it, broke through the

ice can arise against them for such support. *Otis v. Strafford*, 10 N. H. 352.

An action on the case will not lie against overseers of the poor for omitting or refusing to take the necessary measures to provide for paupers, in favor of an individual who, from motives of humanity, furnishes them with the sustenance and attention which their situation absolutely requires. *Minklaer v. Rockfeller*, 6 Cow. 276.

There is no implied obligation upon an overseer or county superintendent of the poor to compensate a person who has voluntarily relieved a pauper, and without request from the overseers of the poor. *Smith v. Williams*, 13 Misc. 761, 35 N. Y. Supp. 236.

No contract to pay for the support of a pauper can be implied from the statutory duty to provide for the poor. *Salsbury v. Philadelphia*, 44 Pa. 303.

No promise to pay for supplies furnished to a pauper can be implied from the existence of a statutory duty to provide for indigent persons, and from the fact that the officers charged with such duty neglected and refused to make any provision. *Caswell v. Hazard*, 10 R. I. 490.

An action will not lie at common law against a town for the support of their paupers by any other town, nor can it be maintained on the general provision in the statute declaring it to be the duty of each town to support its own paupers, where the statute points out in what particular cases a town shall be liable to any town for their support, and what steps must be taken to render it liable. *Middlebury v. Hubbardton*, 1 D. Chip. (Vt.) 205; *Jamaica v. Guilford*, 2 D. Chip. (Vt.) 103.

The obligation resting on a town to provide for the poor is a statutory obligation, and no implied contract that a town will pay an individual for affording assistance to those who are destitute and who are in

ice and wet his feet. Being unable to find a lodging place, after walking several miles, he crawled into a straw stack, and remained during the night. In the morning both feet were frozen. After walking two or three miles, he caught a ride into Boone. He then had but \$1.50, and after procuring a lunch inquired for a physician. Being advised by the chief of police that the county physician was out of town, he remained at the police station until the next morning, and at about 11 o'clock A. M. was examined by the county physician, who seems to have properly dressed his feet, and said he "would have to get him into a hospital." Upon his return to the station, J. W. Keigley, a member of the board of supervisors to whom had been assigned the duty of looking after the poor in that vicinity, conversed with him concerning the care of his feet, and was told by Wood that the county physician had said he would get him into a hospital. To this the officer responded,

fact paupers may be inferred from the nature of the obligation, however urgent or great may be the necessities of the case. *Aldrich v. Londonderry*, 5 Vt. 441.

No obligation aside from that imposed by statute rests upon towns to sustain their own poor. The obligation is altogether a matter of positive law, and the right of anyone to compel towns to pay for the support of their poor is one *stricti juris*, and cannot be enforced except in accordance with some statutory provision. Hence an obligation or a promise on the part of a town to pay for the support of its poor can never be implied. *Castleton v. Miner*, 8 Vt. 209.

The general statutory provision that each town shall provide for its own poor creates no liability except in the cases expressly specified. *Baldwin v. Rupert*, 8 Vt. 256.

There is no consideration for a promise on the part of an overseer of the poor to pay for medical services rendered to a pauper before application to the overseer, even though with the expectation that the town would pay for them. *Farmer v. Salisbury*, 77 Vt. 161, 59 Afl. 201.

Where the law imposes on a municipality the duty of maintaining poor persons, and designates officers thereof to act in its behalf in the performance of such a duty, their mere neglect will not operate as an implied request to a private party to supply a needy person's wants, upon which such party can act, and hold the municipality liable as upon an implied contract. *Patrick v. Baldwin*, 109 Wis. 342, 53 L.R.A. 613, 85 N. W. 274.

Existence of emergency as basis for implied promise to compensate.

Without one exception, the cases seem unanimously to hold that the existence of an emergency rendering relief necessary before proper steps can be taken to charge the

"Did he say that?" His feet were painful throughout the day (Sunday), and at about 11 o'clock A. M. Monday the county physician, in response to a message, opened one or two blisters and dressed his feet again, and upon ascertaining he had formerly lived in Wisconsin, inquired if he wished to return there, and said he would talk with the supervisor about it. At about 5 o'clock in the afternoon, the chief of police informed him, "We are going to send you away on the 5:30 train," took him to the depot, and gave him a ticket to Nevada, the county seat of Story county. Keigley paid the chief of police the 48 cents expended for the ticket, and thereafter was reimbursed by the county on claim presented. Upon reaching Nevada, Wood obtained food, and slept that night in a livery stable. In the morning the city marshal, after building a fire, took him to the city hall, where he was examined by a local physician and his feet dressed. In the evening, money

was raised by the marshal, from which he bought him a ticket to Mason City, and furnished him money to pay his way to Wisconsin. He was put aboard the train, and arrived at Mason City the next morning in a condition such as to preclude proceeding farther. At the instance of the humane officers of that county, he was taken to a hospital, and accorded the consideration and given the care and treatment usually bestowed in civilized communities on the unfortunate.

The story reads like the parable of the man who was wounded and left by the wayside half dead. The priest and the Levite passed by on the other side; but the good Samaritan "had compassion on him, . . . bound up his wounds, pouring in oil and wine, . . . and brought him to an inn, and took care of him."

It was found necessary to amputate both feet, and the expenses incurred by Cerro Gordo county for his treatment, surgical

public, or the refusal of relief by public officers, gives a person furnishing relief no right to compensation in the absence of statutory provision for such case. But see *Lee County v. Gilbert*, 70 Miss. 791, 12 So. 523, *infra*.

Thus, a poor district is not liable for services rendered to a person in distress in a case of emergency, where no provision is made therefor by statute. *Williams v. Mercer County*, 15 Pa. Co. Ct. 525.

There is no such duty incumbent upon a town to furnish medical assistance to poor persons as to render the town liable for assistance furnished in an emergency before the overseers could be applied to. *French v. Benton*, 44 N. H. 28.

No action lies by a physician against overseers of the poor for services in attending upon a pauper, though upon the most pressing necessity, the services not being rendered at the request of the overseers, and they not having promised to pay. *Gourley v. Allen*, 5 Cow. 644.

There is no obligation to pay for medical services furnished to a pauper unless furnished at the request of the proper officials. *Everts v. Adams*, 12 Johns. 352.

A county is under no legal liability for a physician's services to a nonresident, furnished without any direction from any person having authority to act. *Hamilton County v. Meyers*, 23 Neb. 718, 37 N. W. 623.

No county, nor any subdivision thereof, is liable for the support of the poor, or medical attendance bestowed thereon, unless the legislature has so authorized. *Gilligan v. Grattan*, 63 Neb. 242, 88 N. W. 477; *Rock County v. Holt County*, 78 Neb. 616, 11 N. W. 366.

A county is not liable for care and medical attendance upon an indigent transient person, in the absence of statutory provision. *Upshur County v. Yeury*, 19 Tex. 126, 39 L.R.A. (N.S.)

A county is not liable for medical treatment given to a poor person out of humanity, the physician employed by the county commissioners to attend upon the poor of the township having refused to give such person any attention at all, the method by which support and relief are to be administered being definitely pointed out by law. *Morgan County v. Seaton*, 122 Ind. 521, 24 N. E. 213.

Since towns are not liable by the common law to support paupers, no compensation can be recovered for a surgical operation performed on a pauper without application to the overseers. *Miller v. Somerset*, 14 Mass. 396. Even where the operation is immediately necessary. *Kittredge v. Newbury*, 14 Mass. 448; *Hull v. Oneida County*, 10 Johns. 259, 10 Am. Dec. 223.

But in *Lee County v. Gilbert*, 70 Miss. 791, 12 So. 593, it was held that the county should be held liable for the fees of a surgeon for services rendered in an emergency to a poor person, although no steps had been taken by any county officer or other person to have such person declared a pauper and removed to the poorhouse in the manner prescribed by law.

In the absence of statute, a town is under no obligation to reimburse another town by which expenses have been incurred in caring for a person resident in the former while ill with a contagious disease. *Machias v. Wesley*, 99 Me. 17, 58 Atl. 240.

There being no duty outside of statute to provide for the burial of paupers, a pauper's place of residence is not liable for his burial expenses. *Davis v. Milton Plantation*, 90 Me. 512, 38 Atl. 539; *Duval v. Laclede County*, 21 Mo. 396; *Handlin v. Morgan County*, 57 Mo. 114; *Morristown v. Hardwick*, 81 Vt. 31, 69 Atl. 152.

As to liability to pauper himself, see note to *Wood v. Boone County*, post, 169.

E. S. O.

operations, and subsequent care amounted to \$713.95. For this amount, judgment is sought against Boone county, on the theory that it was obligated, upon discovering the condition of this nonresident pauper, and having begun caring for him, to furnish him such care and treatment as was essential to restore him to health; and that, instead of discharging such obligation, its officers, at a cost of a few cents, compelled him to move on, and as a consequence plaintiff was at the expense stated. Upon showing the facts as recited, verdict was directed for defendant, and subsequently judgment entered thereon.

The showing as made was not at all complimentary to the officers of Boone county, but, as no evidence was introduced in its behalf, there may be circumstances somewhat extenuating their conduct in casting a helpless man, sorely in need of medical aid, adrift, in order to evade the expenditure of a few dollars. The statutes provide adequate relief for paupers applying for succor having settlement in a county of this state, and if this is afforded by a county other than of the pauper's settlement, recovery may be had of the latter. Code, § 2228. But the county only becomes liable upon compliance with the statutes; that is, the liability of any county is purely statutory. *Coolidge v. Mahaska County*, 24 Iowa, 211; *Cerro Gordo County v. Wright County*, 50 Iowa, 439; *Otis v. Strafford*, 10 N. H. 352; *Mansfield v. Sac County*, 60 Iowa, 11, 14 N. W. 73; *Gawley v. Jones County*, 60 Iowa, 159, 14 N. W. 236.

The care of the poor was not a municipal function at the common law. Matters of charity were thought more appropriate for the church. It was ordained by the ancient kings that "the poor should be sustained by parsons, rectors of the church, and by parishioners, so that none of them die for want of sustenance." Later, and supposedly about the time of Hen. VIII., the law seems to have made paupers a charge on certain municipalities. Blackstone, in 1765, said: "The law not only regards life and member and protects every man in the enjoyment of them, but also furnishes him with everything necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessities of life from the more opulent part of the community, by means of the several statutes enacted for the relief of the poor." 1 Bl. Com. 10th Eng. ed. 131.

Undoubtedly, the legislature is endowed with power to create liability on the part of the county for the care of the poor, and to determine under what circumstances one county shall be liable to another. *Fox v. 39 L.R.A. (N.S.)*

Kendall, 97 Ill. 72. But, in the absence of such provisions, the obligation to pay any expenses incurred, no matter how meritorious the claim, is not to be implied, for the corporation is under neither a moral nor legal obligation to care for the poor. "Whatever may be the duty of individuals, from religious or charitable considerations, it is certain the public is bound by no moral obligation to support the poor of the community. That duty being legal and of positive institution is to be carried no farther than the express provisions of the poor laws." *North Whitehall Twp. v. South Whitehall Twp.* 3 Serg. & R. 117.

The only statutory provision authorizing the relief of the transient poor is found in § 2225 of the Code: "A person coming from another state, and not having become a citizen of, nor having a settlement in, the state, applying for relief, may be sent to the state whence he came, at the expense of the county, under an order of the district court or judge; otherwise, he is to be temporarily relieved in the county where he applies." The manner of relief is prescribed in § 2230: "The township trustees of each township, subject to general rules that may be adopted by the board of supervisors, shall provide for the relief of such poor persons in their respective townships as should not, in their judgment, be sent to the county poorhouse. But where a city is embraced, in whole or in part, within the limits of any township; the board of supervisors may appoint an overseer of the poor, who shall have within said city or part thereof, all the powers and duties conferred by this chapter on the township trustees. The relief may be either in the form of food, rent, or clothing, fuel and lights, medical attendance, or in money, and shall not exceed \$2 per week for each person for whom relief is thus furnished, exclusive of medical attendance." All moneys expended are to be paid out of the county treasury (§ 2232, Code), and "when relief is granted by a county to a poor person having a settlement in another county" recovery may be had of the latter for the reasonable expenses so incurred. Section 2228, Code. But reimbursement for aid extended to a transient pauper is not directed, and, if plaintiff is entitled thereto, this must be owing to an implied promise on the part of Boone county to repay Cerro Gordo county. Cases may be found where an individual who has furnished the necessities of life to a pauper, after a municipality has omitted to discharge such duty, has been permitted to recover the value thereof, but in most of these this was contemplated by the statute authorizing the relief.

Our statutes direct by what officers relief

shall be furnished, and there is no ground for charging the county, unless it is supplied by these, or at their instance. *Beetham v. Lincoln*, 16 Me. 137; *Hamilton County v. Meyers*, 23 Neb. 718, 37 N. W. 623; *Copple v. Davie County*, 138 N. C. 127, 50 S. E. 574; *Cantrell v. Clark County*, 47 Ark. 239, 1 S. W. 200; *Kittredge v. Newbury*, 14 Mass. 448; *Gourley v. Allen*, 5 Cow. 644. See note to *Sheridan County v. Denebrink*, 9 L.R.A. (N.S.) 1232; *Patrick v. Baldwin*, 109 Wis. 342, 53 L.R.A. 613, 85 N. W. 274; *North Whitehall Twp. v. South Whitehall Twp.* 3 Serg. & R. 117. As well said in *Patrick v. Baldwin*, supra: "While an implied contract is sufficient, as indicated, it must be established, if one endeavors to recover upon it, the same as any other implied contract. The statute creates a liability to relieve destitute persons, but not a liability to individuals who may voluntarily perform that service. It empowers appropriate agents of municipalities to make their liability effective by necessary contracts to that end, and imposes upon such agents the duty to exercise such power. If they refuse to do so, they are doubtless amenable in some way for such misconduct, but the law gives no private person the right to perform the duty of such officers. *Otis v. Strafford*, 10 N. H. 352. Performance of that duty by the person designated by law is absolutely essential to create a binding obligation upon the municipality to compensate one for relieving a poor person, legally entitled to relief at its expense. . . . There is no more reason for holding that a person may aid a pauper, upon the supervisors of the town in which such pauper has a legal settlement neglecting their duty, and hold such town liable therefor, than for holding that one may repair the highways of a town, because its supervisors neglect their duty in that respect, and recover of such town therefor. The duty of the municipality in both cases is regulated by statute, and in neither case can it be bound to a private person for services rendered, except by contract made as contemplated by law."

The cases holding to the contrary seem to overlook the circumstance that the relief is purely statutory; that the duty to extend relief is expressed in general terms, leaving the occasion, method, and extent of relief to the judgment and discretion of the local officers; and therefore, to create a binding pecuniary obligation, there must be a contract to that effect, or services must have been rendered at the request of officers authorized to enter into the agreement. See *Seagraves v. Alton*, 13 Ill. 366; *Ogden City v. Weber County*, 26 Utah, 129, 72 Pac. 39 L.R.A. (N.S.)

433; *Shreve v. Budd*, 7 N. J. L. 431; *Cincinnati Twp. v. Ogden*, 5 Ohio, 23.

Doubtless some provision for emergencies exacting quick action should be made, but that is a matter for the legislature, and not the courts. It is not pretended that anything was done for Wood at the instance of the officers of Boone county, so that a promise to pay is not to be implied. Undoubtedly Boone county should have given him proper medical treatment. *Brock v. Jones County*, 145 Iowa, 397, 124 N. W. 209; *Taylor v. Shenango*, 114 Pa. 394, 6 Atl. 475. He there became helpless and a fit subject for relief. The duty to extend it was then immediately cast upon the defendant. But from its failure or refusal to respond, as both the law and the dictates of humanity required, an obligation to pay another individual or county is not to be inferred. Public charity is bestowed in this state as a duty, rather than as a corporate obligation, and therefore the extent of relief, as well as its character, is left to the discretion and judgment of the officers charged with the care of the helpless. Such officers may not delegate that duty to others (*Sloan v. Webster County*, 61 Iowa, 738, 17 N. W. 168); and, as seen, because of their omission thereof, succor may not be given by another, not at their instance, at the public expense. That the officers of Boone county may have been neglectful of the dire needs of Wood, who had never before asked alms, did not charge it with the expense incurred by an individual or another county in giving him the care and treatment his condition required. Nor can the circumstance that its officers gave him a ticket to Nevada be construed as a request to Cerro Gordo county to furnish relief.

By casting the unfortunate adrift, they avoided a manifest duty; and, though this may have resulted in putting the burden on another county, it cannot be said to have been assumed at the request of the officers of Boone county. The cause differs from those relied on by appellant. In *Pittstown v. Plattsburgh*, 15 Johns, 436, the defendants procured an order of court, transferring a transient pauper to Pittstown, and, as a consequence, he was maintained by the overseers thereof. Subsequently the order was quashed, and the court held that recovery could be had against the overseers procuring the order, on the principle "that a burden has unjustly been thrown upon Pittstown by the procurement of the overseers of the poor of Plattsburgh; that, the pauper having no legal settlement in this state, it was their duty to have exonerated Pittstown from the burden they had cast on them."

In *Sheldon v. Fairfax*, 21 Vt. 102, several

towns joined in maintaining a poor farm within the limits of Sheldon; each agreeing to pay its share of the expense. In 1837, the town of Fairfax sent a foreign pauper and family in need of relief there, and they, or a part of them, were cared for at the poor farm until the termination of the arrangement in April, 1846. The town of Fairfax failed to remove them, and refused to pay the expense of their care, but the court held it liable, saying: "The duty of the town of Fairfax to take the pauper away when the temporary purpose for which he was sent was accomplished is necessarily implied from the contract between the two towns; and the town of Sheldon, having suffered injury by the breach of that duty, is entitled to compensation. I apprehend there is no doubt but that, upon acknowledged legal principles, the plaintiff's claim is well sustained. It rests on the common doctrine that, when one party sustains an injury by the culpable misconduct or negligence of another, the party injured may recover compensation for it by an action on the case." There is nothing in the record to bring the case within the principle recognized in either of these decisions. The officers of defendant did no more than neglect and omit to perform the statutory duty imposed, and, nothing having been done by defendant at their instance or request, the court rightly held that there could be no recovery.

Affirmed.

Sherwin, Ch. J., took no part.

IOWA SUPREME COURT.

WILLIAM B. WOOD, Appt.,

v.

BOONE COUNTY et al.

(— Iowa —, 133 N. W. 377.)

Poor — failure to relieve — liability.

Neither a county nor its overseer of poor is liable for the loss by a transient pauper of his feet because it failed to give him

Note. — *Liability to poor person for failure to furnish, or negligence in furnishing, relief.*

There is a *dictum* in *Flower v. Allen*, 5 Cow. 654, that if the overseers of the poor wholly neglect their duty in providing for a pauper, he may, under some circumstances, maintain an action for the injury sustained by such neglect.

In *Merrill v. Bassett*, 97 Me. 501, 54 Atl. 1102, it was held that the liability of one employed by the overseers of the poor to remove a sick person from one town to an-

other, under the pauper law, did not depend upon whether as a matter of fact the plaintiff was in a fit physical condition to be moved, but upon whether, in moving the plaintiff, he acted as a reasonably prudent and careful person would under like circumstances have done, by making proper inquiry as to whether the plaintiff was in a suitable physical condition, by selecting a day affording proper weather conditions, and by furnishing the poor person with suitable wearing apparel to protect her, considering her condition, from the weather, and a conveyance to and from the train

(November 20, 1911.)

APPPEAL by plaintiff from a judgment of the District Court for Story County in defendants' favor in an action brought to recover damages for failure of defendants to furnish proper relief to plaintiff. **Affirmed.**

Statement by Deemer, J.:

Action at law to recover damages due to defendant's failure to furnish plaintiff, who was a transient poor person, proper relief. Defendant Keigley was a member of the board of supervisors of defendant county and overseer of the poor of that county. At the close of plaintiff's testimony, the trial court directed a verdict for the defendants and plaintiff appeals.

Messrs. Fitchpatrick & McCall and Robert M. Witver for appellant.

Messrs. E. H. Addison and Harpel & Cederquist, for appellees:

The duty of defendants to the plaintiff as a foreign pauper is prescribed by statute under the title of the "Police Power of the State," and it is governmental, discretionary, and quasi judicial, and does not extend beyond the granting of temporary relief.

3 Abbott, Mun. Corp. §§ 954-957, 969, 1095, 1096, 11 Cyc. 498, 499; *Beeks v. Dickinson County*, 131 Iowa, 245, 6 L.R.A. (N.S.) 831, 108 N. W. 311, 9 Ann. Cas. 812; *McFadden v. Jewell*, 119 Iowa, 324, 60 L.R.A. 401, 97 Am. St. Rep. 321, 93 N. W. 302; 5 Thomp. Neg. 846, 857.

A county is not liable in damages for negligence of its board of supervisors or other officers, and, as it must act through its agents, such agents are not liable where the principal is not.

Nutt v. Mills County, 61 Iowa, 754, 16

N. W. 536; *Lindley v. Polk County*, 84 Iowa, 308, 50 N. W. 975; *Dashner v. Mills County*, 88 Iowa, 401, 55 N. W. 468; *Green v. Harrison County*, 61 Iowa, 311, 16 N. W. 136; *Kincaid v. Hardin County*, 53 Iowa, 430, 36 Am. Rep. 236, 5 N. W. 589; *Packard v. Voltz*, 94 Iowa, 277, 58 Am. St. Rep. 396, 62 N. W. 757; *Wenck v. Carroll County*, 140 Iowa, 558, 118 N. W. 900; *Ford v. Park Comrs.* 148 Iowa, 1, 126 N. W. 1031, Ann. Cas. 1912 B, 940; *Wilson v. Wapello County*, 129 Iowa, 77, 105 N. W. 363, 6 Ann. Cas. 958.

Deemer, J., delivered the opinion of the court:

There being no legal obligation at common law upon a county or any of the instrumentalities of government to furnish relief to the poor, plaintiff's action, if he has any, must be bottomed upon some statute of the state entitling him to relief. *Coolidge v. Mahaska County*, 24 Iowa, 211. His counsel think they find such duty in §§ 2225 and 2230 of the Code, reading as follows:

"A person coming from another state, and not having become a citizen of, nor having a settlement in, the state, applying for relief, may be sent to the state whence he came, at the expense of the county, under an order of the district court or judge; otherwise he is to be temporarily relieved in the county where he applies." Code, § 2225.

"The township trustees of each township, subject to general rules that may be adopted by the board of supervisors, shall provide for the relief of such poor persons in their

respective townships as should not, in their judgment, be sent to the county poor-house. But where a city is embraced, in whole or in part, within the limits of any township, the board of supervisors may appoint an overseer of the poor, who shall have within said city, or part thereof, all the powers and duties conferred by this chapter on the township trustees. The relief may be either in the form of food, rent, or clothing, fuel and lights, medical attendance, or in money, and shall not exceed \$2 per week for each person for whom relief is thus furnished, exclusive of medical attendance. They may require any able-bodied person to labor faithfully on the streets or highways at the rate of 5 cents per hour in payment for, and as a condition of, granting relief; said labor shall be performed under the direction of the officers having charge of working streets and highways. When medical services are rendered by order of the trustees or overseers of the poor, no more shall be charged or paid therefor than is usually charged for like services in the neighborhood where such services are rendered. No supervisor, trustee, or overseer shall be directly or indirectly interested in any supplies furnished the poor." Code, § 2230.

"The poor must make application for relief to the trustees of the township where they may be, and if the trustees are satisfied that the applicant is in such a state of want as requires relief at the public expense, they may afford such relief, subject to the approval of the board of supervisors, as the necessities of the person require, and shall report the case forthwith to the board of supervisors, who may continue or deny

in a careful and prudent manner; and that he had discharged his duty by inquiring of plaintiff's attending physician as to whether her condition was such that she might be moved, and, receiving an affirmative answer, by selecting a day which was an average warm one for the time of year, and by furnishing such clothing as the plaintiff said she needed to keep her comfortable.

In *Meier v. Paulus*, 70 Wis. 165, 35 N. W. 301, an action against the keeper of the county poor farm, to recover damages for his neglect in not properly watching and caring for the plaintiff while he was in his charge, being then sick with pneumonia and temporarily deranged, it was held that, even though the plaintiff was brought to the poor farm without any authority from the proper officers of the county, and though the defendant was not required by law to receive the plaintiff into the poorhouse, or to take care of him there, yet, having received him into his house, and having undertaken to take care of him, he would be liable for neglect to give him proper care; and that where there was evidence tending to show that he knew of the na-

ture of the plaintiff's disease, that he was not permanently insane, that the effects of the disease under which he was laboring rendered him for the time wholly incompetent to take care of himself, that he knew that in his delirium he was inclined to leave the house, that he knew that he had left the house the first night he was in his custody, and that about 2 o'clock A. M. on the second night he knew that the plaintiff had left the house again dressed only in his shirt and pantaloons, and with nothing but stockings on his feet, that the weather was very cold and the snow deep, and that the probabilities of his being injured by his exposure were very great, that nevertheless, he made no attempt to rescue him from this dangerous situation, nor did he request or direct any person under his control to make any attempt to rescue him, the court could not say as a matter of law that there was no evidence tending to show that the defendant had neglected his duty. As to liability of public for relief furnished by others to poor persons, see note to *Cerro Gordo County v. Boone County*, ante, 161.

E. S. O.

relief, as they find cause. The board of supervisors may examine into all claims, including claims for medical attendance, allowed by the township trustees for the support of the poor, and, if they find the amount allowed by said trustees to be unreasonable, exorbitant, or for any goods or services other than the necessities of life, they may reject or diminish the claim, as in their judgment would be right and just; and this act shall apply to all counties in the state, whether there are poorhouses established in the same or not. This act shall apply to acts of overseers of poor in cities as well as to township trustees." Code, § 2234.

In addition to these sections, we quote the following as having some bearing upon the case:

"Persons coming into the state, or going from one county to another, who are county charges, or are likely to become such, may be prevented from acquiring a settlement by the authorities of the county, township, or city in which such persons are found, warning them to depart therefrom. After such warning, such persons cannot acquire a settlement except by the requisite residence of one year without further warning." Code, § 2226.

"Such warning shall be in writing, and may be served upon the order of the trustees of the township, or of the board of supervisors, by any person; and such person shall make a return of his doings thereon to the board of supervisors, which, if not made by a sworn officer, must be verified by affidavit." Code, § 2227.

"The trustees in each township, in counties where there is no poorhouse, have the oversight and care of all poor persons in their township, and shall see that they receive proper care until provided for by the board of supervisors." Code, § 2233.

"All claims and bills for the care and support of the poor shall be certified to be correct by the proper trustees, and presented to the board of supervisors, and, if they are satisfied that they are reasonable and proper, they shall be paid out of the county treasury. In no case shall a trustee, or either of the trustees, nor overseer of the poor, draw an order upon himself, or upon either of the board, for supplies for the poor, except such trustees or overseer has a contract to furnish such supplies." Code, § 2235.

"The board of supervisors may make contracts with the lowest responsible bidder for furnishing any or all supplies, medical attendance or services required for the poor, for a term not exceeding one year, or it may enter into a contract with the lowest responsible bidder, through proposals

opened and examined at a regular session of the board, for the support of any or all the poor of the county for one year at a time, and may make all requisite orders to that effect, and shall require all such contractors to give bonds in such sum as it believes sufficient to secure the faithful performance of the same." Code, § 2238.

"The word 'poor' and 'poor person' as used in this chapter shall be construed to mean those who have no property, exempt or otherwise, and are unable, because of physical or mental disabilities, to earn a living by labor; but this section shall not be construed to forbid aid to needy persons who have some means, when the board shall be of opinion that the same will be conducive to their welfare and the best interests of the public." Code, § 2252.

Now, the charge in the petition is, in substance, that plaintiff was a foreign pauper; that he came into defendant county about January 25, 1908, with badly frozen feet, which needed medical attention; that defendant Keigley was a member of the board of supervisors of defendant county, and a committee on and the overseer of the poor; that plaintiff made application to the defendant through its proper officers for relief, and that defendant undertook to furnish him some relief, but that, after undertaking the same, it negligently, wrongfully, and unlawfully withheld adequate or proper treatment, and on the 27th day of January "expelled plaintiff from Boone county," subjecting him to exposure, and depriving him of proper care until he reached Cerro Gordo county, on the 29th day of January, where he was received and taken care of by the proper county authorities. He claims that, by reason of the negligent and wrongful conduct of the defendant county and its agent Keigley, he lost both feet, and suffered great mental and bodily pain. The testimony shows that plaintiff arrived in the city of Boone at the time alleged; that his feet were frozen; that he went to the police station in Boone, and asked the chief of police where he could find a doctor. To this the chief responded that he would see. The mayor of the city was also present, and, after some cross-examination of plaintiff by these officials, plaintiff said to them that he was short of money and needed a doctor. The police officer told plaintiff he would give him a night's lodging, and accordingly housed him in the police station during the night. When plaintiff arose in the morning, he made inquiry as to the doctor, and the chief of police said he would see about it. About 11 A. M. plaintiff was taken to the office of the county physician, and there examined and given some treatment. The doctor then said to him that he would

have to get him into a hospital. After plaintiff's return to the police station after seeing the doctor, he first met defendant Keigley, and he testified to the following conversation with him, Keigley: "He told me that the doctor said for me to keep my feet warm. He placed a chair for me to put my feet on near the radiator, and I made the remark to Keigley that the doctor said he would get me in the hospital. Mr. Keigley said, 'Did he say that?' and turned, and went out of the station." The doctor saw plaintiff on Sunday morning, and on Monday morning he again visited plaintiff, at his, plaintiff's, request, in company with defendant Keigley and the chief of police. The doctor dressed plaintiff's feet in the presence of the others, and remarked that they were looking good. At this time the doctor asked plaintiff where he lived, and was informed that he used to live in Wisconsin. He was then asked if he wanted to go there, and, in response, said that, if he had the means to go, he would like to. The doctor then said he would talk with defendant Keigley about it. On Monday afternoon the chief of police came to plaintiff, and said, "We are going to send you away on the 5:30 train." Making no protest, he started to walk to the depot, but was finally taken in a buggy by the chief to the railway depot, and given a ticket to Nevada, Story county, just as the train was about to start. When he arrived at Nevada, the following occurred: "The train reached Nevada about 6 o'clock, where I got off. A busman took me up to a restaurant. I got some supper there. After supper I walked on the street thinking to see the marshal, and, not seeing him, I went to a livery barn. My feet were very painful at this time, and I was more unwell than I was in the afternoon. At the livery barn the proprietor permitted me to sleep in the office. The next morning I saw Mr. Corbin, the marshal. . . the livery man found him for me. Mr. Clinton said for me to stop there, and he would go and build a fire at the city hall, and that I could then go there and lie down. About half an hour after that I walked over to the city hall. At the city hall that morning, Tuesday, about 9 o'clock, Dr. Chamberlain came to see me. My feet were very painful, and I was getting quite sick. The doctor dressed my feet. They were quite dark at that time. After that visit I did not walk any more. My feet had got so painful that I could not. I was there until the evening train went East. Mr. Corbin bought me a ticket to Mason City, and gave me money to go from there to Wisconsin, and there was a cot and there to Wisconsin, and there was a cot and there to Wisconsin brought in to me. The train left soon after 6 o'clock . . . the same number I came on from Boone." He pursued his journey through Marshalltown, and was taken off the train at Mason City, and there given attention by the public authorities.

That plaintiff lost his feet by reason of inadequate and untimely treatment a jury may well have found, but the vital and fundamental question in the case is the liability of the defendant county and the member of the board of supervisors, who is made a joint defendant.

In addition to what has already been set out, the following is the only testimony of plaintiff with reference to defendant Keigley's connection with the matter:

I told Dr. Nimms I used to live in Wisconsin, that I had a brother there that I used to make my home with, but he was not living there.

Q. Mr. Keigley was there?

A. Mr. Keigley and Mr. Jones. Whether they were in there at the time we had this conversation I don't know.

Q. Didn't you tell Dr. Nimms that you wanted to go to your relation in Wisconsin?

A. He asked me if I wanted to go, and I said: "If I had the means to go, I would go." I didn't tell him I wanted to go. My first talk with Mr. Keigley was shortly after seeing the doctor the first time. I was sitting on a chair near the window by the radiator, and he said, "The doctor says you must keep your feet warm," and he got a chair and placed it there for my feet.

Q. He spoke to you kindly?

A. Yes, that was when I made the remark to him that the doctor told me he would get me into a hospital, and he remarked, "Did he say that?" and went out.

Q. What did you say?

A. I said, "Yes, sir," and he went out. Mr. Keigley was in when the doctor was looking at my feet the next day. I don't call to mind that he made any remark in particular. That is the last time I saw Mr. Keigley.

However, the chief of police said that he purchased the ticket for plaintiff upon the advice of Keigley, and that he was reimbursed for the cost thereof by Keigley, and Keigley presented his bill to the board, and it was allowed. It should also be stated in this connection that there was testimony tending to show that with proper treatment at Boone plaintiff's feet might have been saved. Such is the record in its most favorable aspect for plaintiff, and we have to inquire whether or not there is any legal liability on the part of the defendants or either of them. It is argued that defendant Keigley may be liable, although the defendant county may not be, for the reason that he was under a personal duty of using

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due care,—a care commensurate with the situation in which he found the plaintiff. Whatever the view of other courts upon this proposition, we are committed to the doctrine that, under the facts here disclosed, there is no liability on the part of Keigley, unless the county be held responsible. From *Packard v. Voltz*, 94 Iowa, 277, 58 Am. St. Rep. 396, 62 N. W. 757, we quote as follows, directly applicable to the facts disclosed by this record: "It must certainly be an anomalous doctrine that would exempt the corporation itself from liability for the doing of a lawful act in a negligent manner, upon the ground of its compulsory agency in behalf of the public welfare, and at the same time affix liability upon its agent for precisely the same acts done under express authority. We think an instance of such liability is not to be found. It must be a reason for the rule of exemption on the part of a political corporation that its agency is a public necessity, and it seems to us that the same law that would give it exemption from liability for negligence would protect from liability the servant through whom only the corporation can discharge its duty to the public." See also *Beeks v. Dickinson County*, 131 Iowa, 245, 6 L.R.A. (N.S.) 831, 108 N. W. 311, 9 Ann. Cas. 812.

So that we are brought at last to the controlling proposition: Is a county liable in damages for failure to furnish adequate and timely medical aid and assistance to a foreign pauper who may transiently be within its borders? A county is an instrumentality of government, and the furnishing of aid to the poor is a governmental function. The necessity for and the extent of such relief is largely, if not wholly, a matter of discretion, and is quasi judicial in character. The relief which may be granted a foreign pauper is temporary in character, and such persons may be prevented from acquiring a settlement in the county where found. Before one is entitled to relief under § 2234 of the Code, he must satisfy the overseer of the poor within a city that he is in such a state of want as requires relief at public expense, and even then this section does not require that such relief be furnished. Moreover, not only the overseer of the poor must be so satisfied, but the board of supervisors are also to look into the matter, and inquire as to the necessities of the case.

It is a general rule that, where a governmental duty rests upon a state or any of its instrumentalities, there is absolute immunity in respect to all acts or agencies. *Peeks v. Dickinson County*, supra. In this case it is said: "In so far as a municipality undertakes the duty of making and enforcing quarantine regulations and other laws

for the promotion of the public health, it is performing governmental functions, and its officers are not agents for whose action or inaction it is liable, unless such liability is imposed by its charter or by the laws of the state under which it exists. . . . The remaining question is whether the members of the local board of health are individually liable for the loss of the plaintiff's crops. The statute makes it the duty of the health officers to quarantine against all 'infectious or contagious diseases dangerous to the public,' and it cannot well be questioned that the defendants were acting within the scope of their duty as such officers, and that in establishing the quarantine they were acting in a quasi judicial character. They were vested with the power to determine whether an infectious or contagious disease existed in the appellant's family, and, if found to exist, their duty under the statute required them to take proper steps to prevent its spread, and, had they neglected to do so, they would have been culpable in a high degree. They were therefore acting judicially, and it is the general rule that officers so acting are not liable for injuries which may result from such acts performed in the honest exercise of their judgment, however erroneous or mistaken the action may be, provided there be no malice or wrong motive present." See also *McFadden v. Jewell*, 119 Iowa, 324, 60 L.R.A. 401, 97 Am. St. Rep. 321, 93 N. W. 302: As supporting the same proposition, see *Ogg v. Lansing*, 35 Iowa, 495, 14 Am. Rep. 499; *Kincaid v. Hardin County*, 53 Iowa, 431, 36 Am. Rep. 236, 5 N. W. 589; *Calwell v. Boone*, 51 Iowa, 687, 33 Am. Rep. 154, 2 N. W. 614; *Saunders v. Ft. Madison*, 111 Iowa, 103, 82 N. W. 428; *Lahner v. Williams*, 112 Iowa, 428, 84 N. W. 507; *Easterly v. Irwin*, 99 Iowa, 696, 68 N. W. 919. A great number of cases announcing the same rule are to be found in 28 Cyc. 1305, 1306. Some cases seem to make an exception where the county undertakes to furnish relief, and in doing so negligently fails to use proper and necessary care. Such an exception seems to be made in *Meier v. Paulus*, 70 Wis. 165, 35 N. W. 301. But the contrary rule was announced in *Lexington v. Batson*, 118 Ky. 489, 81 S. W. 264; *Twyman v. Frankfort*, 117 Ky. 518, 64 L.R.A. 572, 78 S. W. 446, 4 Ann. Cas. 622; *Richmond v. Long*, 17 Gratt. 375, 94 Am. Dec. 461.

That the Wisconsin court did not intend to depart from the general rule is manifest from a consideration of a later case reported in 92 Wis. 263, 65 N. W. 1030, under the title of *Kuehn v. Milwaukee*. Again, in the *Meier Case*, the action was against a county poor master for his personal neglect, and it is clearly stated in the opinion that

defendant was under no obligation to receive an insane patient, and could not have been held liable for failure to accept him as an inmate of a county house, but that, having received him, he was under the duty of exercising ordinary care for his safety. The question of liability for failure to exercise a governmental function was neither discussed nor decided. Conceding *arguendo* that the defendant Keigley might be personally liable for failure to exercise due care after undertaking to grant a relief, although the county itself would not be liable, this liability must be founded upon negligence, and it must be shown that he undertook to furnish plaintiff with proper treatment in virtue of his office, and that he either wrongfully or negligently failed to perform the duty. There is no showing that defendant did anything more than see the plaintiff when the county physician was treating him, and that he had no other part in securing his removal from the county than ratifying what the chief of police did by reimbursing him the amount paid for the ticket. It is very doubtful if this amounted to anything more than an attempt upon the part of defendant to get plaintiff out of the county, to which the plaintiff consented. But the greatest obstacle to recovery is the fact that there is no testimony tending to show that defendant Keigley knew it was dangerous to life or health to send the plaintiff away. The doctor who had charge of plaintiff for defendant county said, in the presence of both plaintiff and Keigley, that his, plaintiff's, feet were looking good. After that, plaintiff started to walk to the train, and was picked up by the chief of police and carried there in a buggy. There is a lack of testimony showing, or tending to show, that defendant Keigley had any knowledge or information of any danger involved in moving the defendant away from the county. The most that can be said is that the defendant wanted to rid the county of the expense of caring for plaintiff, and that he was seeking to avoid furnishing aid. Had it been shown, as in the Wisconsin case, that defendant Keigley knew of the plaintiff's condition, and that he was likely to suffer great injury if he were not cared for, there might, if we were to adopt the reasoning of the minority of the courts, be some ground of liability. But the record does not disclose such a situation. However, we are committed to the doctrine of absolute immunity in the performance of this governmental function, to both the county and its officials, and, if we are to adhere to this rule so many times announced, the other proposition need not be considered.

We cannot close, however, without suggesting that the practice of shifting foreign

paupers from one county to another does not meet with our approval, and such a policy, as said in *Mansfield v. Sac County*, 60 Iowa, 14, 14 N. W. 73, is a disgrace to our civilization.

Our conclusion is that the judgment must be and it is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

GREENFIELD SAVINGS BANK, by Arthur B. Chapin, Bank Commissioner,
v.
ROBERT ABERCROMBIE et al.

(211 Mass. 252, 97 N. E. 897.)

Savings banks — loss of funds — personal liability of trustees.

1. Salaried trustees of a savings bank are personally liable for loss of its funds which they lend in excess of the statutory limit for the security furnished if, by the exercise of reasonable care and prudence, they ought to have known that they were exceeding the limit.

Pleading — bill against savings-bank trustees — allegations of interest.

2. Allegations that loans were made to assist transactions in which defendants were interested, and that they received considerations for making them, are proper in a bill seeking to hold savings-bank trustees personally liable for losses of funds through loans made by them.

Savings banks — loans — statutory requirements.

3. Statutory requirements that, in lending money by a savings bank, only first mortgages shall be taken, after report on the value of the property, and that all applications for loans shall be in writing, are mandatory, and trustees will be personally

Note. — Liability of bank directors in case of bad loans or investments.

The early decisions on this subject are collected in a note appended to *Bosworth v. Allen*, 55 L.R.A. 751, covering the general subject of the liability of the directors of a corporation.

As to liability of bank directors for default or negligence of cashier, see note to *Mason v. Moore*, 4 L.R.A. (N.S.) 597.

As to liability of bank director for breach of duty as such when he acts for himself or for a third person in the transaction, see note to *Hicks v. Steel*, 4 L.R.A. (N.S.) 279.

On the general question as to jurisdiction of equity over suits by a corporation or its representative to hold the directors or officers liable for the losses of such corporation occasioned by the fraud, bad faith,

responsible for money lost through loans made without observing these requirements.

Same — failure to observe by-laws — effect.

4. Trustees of a savings bank are personally liable for money lost through loans made without observing the limitations imposed by the rules and by-laws of the institution.

Limitation of actions — losses by savings-bank trustees — discovery by bank.

5. The statute of limitations does not begin to run against liability of trustees of a savings bank for money lost through loans made by them in contravention of statute

and the rules of the institution, until the facts are learned by the institution.

(February 20, 1912.)

RESERVATION by the Supreme Judicial Court for Fairfield County for the opinion of the full bench of a demurrer to a bill filed to hold defendants liable for losses on certain specified loans of the plaintiff bank's money, alleged to have been made by defendants on certain described parcels of real estate, in violation of statute and the rules of the plaintiff bank. Demurrer overruled.

The facts are stated in the opinion.

or negligence of such officers, see note to *Emerson v. Gaither*, 8 L.R.A.(N.S.) 738.

As shown in the early note, bank directors are bound to possess ordinary skill and capacity, and to exercise reasonable care and diligence in the exercise of the powers conferred upon them. To the same effect is *Rankin v. Cooper*, 149 Fed. 1010.

Some cases announce the rule that a bank director is required to exercise such reasonable care and diligence as a reasonably prudent man would exercise under like circumstances (*Stone v. Rottman*, 183 Mo. 573, 82 S. W. 76; *Rankin v. Cooper*, supra); while other cases have held that a bank director is required to exercise such a degree of care as a reasonably prudent man would exercise in his own affairs (*Hanna v. Lyon*, 179 N. Y. 107, 71 N. E. 778; *Kavanaugh v. Commonwealth Trust Co.* 64 Misc. 303, 118 N. Y. Supp. 758; *Hanna v. People's Nat. Bank*, 35 Misc. 517, 71 N. Y. Supp. 1076; *Kavanaugh v. Gould*, 131 N. Y. Supp. 1059).

And it has been said that the degree of care required further depends upon the subject to which it is to be applied, and each case must be determined in view of all the circumstances; that if nothing has come to the knowledge to awaken suspicion that something is going wrong, ordinary attention to the affairs of the institution is sufficient; but if, on the other hand, directors know, or, by the exercise of ordinary care, should have known, any facts which would awaken suspicion and put a prudent man on his guard, then a degree of care commensurate with the evil to be avoided is required, and a want of that care makes them responsible. *Rankin v. Cooper*, supra.

In *Stone v. Rottman*, 183 Mo. 552, 82 S. W. 76, it is pointed out that there is a marked difference between the duty which the directors of a bank owe to the bank and that which they owe to strangers or creditors; that, aside from statutory liability, bank directors are not liable to creditors and depositors for mere nonfeasance, though they are liable to the bank or to its assignee or received for losses resulting from neglect of duty.

The national banking act, imposing certain express duties and liabilities, does not relieve the directors from the common-law 39 L.R.A.(N.S.)

liability for failure diligently and honestly to administer the affairs of the bank. *Allen v. Luke*, 163 Fed. 1018.

Liability for loss resulting from acts in excess of their power.

As pointed out in the earlier note (pp. 758, 761), there is a distinction between the question as to the liability of directors for acts that are in excess of their power and their liability for acts and omissions with respect to matters within their authority.

At common law the liability of bank directors for resulting losses, where they knowingly exceed their authority, is established without reference to the question whether or not what they did might be justified on the principle of reasonable care.

And the rule imposing liability for losses from acts beyond their authority has been expressly adopted by statute—national banking act and statutes of various states.

Accordingly it has been held that where loss has resulted from excessive loans made in violation of the banking law, the only inquiry is whether the loans were knowingly made or assented to by the directors. *City Nat. Bank v. Crow*, 27 Okla. 107, 111 Pac. 210, Ann. Cas. 1912B, 647.

Directors of a national bank who engage in or knowingly permit the funds of the bank to be used in stock speculations are liable for the losses thus occasioned, stock speculation being no part of the business of a national bank. *McKinnon v. Morse*, 177 Fed. 576.

Liability for acts or omissions with respect to matters within their authority.

In *Rankin v. Cooper*, 149 Fed. 1010, it is held that it is incumbent upon bank directors, in the exercise of ordinary prudence, and as a part of their duty of general supervision, to cause an examination of the condition and resources of the bank to be made with reasonable frequency.

Accordingly it was held that the bank directors were personally liable for losses that could have been prevented by a proper discharge by them of their duties after they had been warned by the Comptroller of the Currency to eliminate all paper of a certain

Messrs. William H. Brooks and Boyd B. Jones, for defendants:

More negligence is not a ground for making directors and persons holding similar positions responsible for losses due to an error in judgment, where that judgment has been honestly exercised.

Lyman v. Bonney, 118 Mass. 222; Turquand v. Marshall, L. R. 4 Ch. 376, 38 L. J. Ch. N. S. 639, 20 L. T. N. S. 766, 17 Week. Rep. 935; Overend, G. & Co. v. Gibb, L. R. 5 H. L. 480, 42 L. J. Ch. N. S. 67; Grimwade v. Mutual Soc. 52 L. T. N. S. 409; Re Liverpool Household Stores Asso. 59 L. J. Ch. N. S. 616, 62 L. T. N. S. 873, 2 Me-

character from the assets of the bank, and admonished that it was the duty of the board to meet more frequently. Ibid.

Bank directors and members of the executive committee are guilty of negligence rendering them liable to the bank for losses resulting from their failure to require all loans and investments to be reported to them for approval, where, under the by-laws, as well as the custom in well-regulated institutions in that vicinity, it was their duty to do so. Kavanaugh v. Commonwealth Trust Co. 64 Misc. 303, 118 N. Y. Supp. 758.

Nor are the directors not members of the executive committee excused from liability because they committed their duties to the executive committee, and relied upon them to examine the loans and collateral, where, by proper vigilance, they could have acquired knowledge and prevented the wrongdoing and the resulting losses. Ibid.

Bank directors who, as members of the discount and examining committees of the bank, permit the cashier to loan the funds of the bank in the shape of paying over drafts of insolvent persons, without the approval of the discount committee, and without bringing the matter to the attention of the board of directors, are guilty of such negligence as to render them personally liable to the receiver for resulting losses. Stone v. Rottman, supra.

Under a statute imposing upon bank directors the duty of managing the affairs of the bank, and rendering them liable for intentional neglect or refusal to perform their duties, the bank directors are liable to creditors of the bank for losses which resulted from allowing the cashier to lend to one person and his various enterprises, without security, sums of money largely in excess of the capital stock of the bank, and to continue that course of dealing for a period of several years, which resulted in the insolvency of the bank. Bailey v. O'Neal, 92 Ark. 327, 135 Am. St. Rep. 185, 122 S. W. 763.

In Holmes v. McDonald, 226 Ill. 169, 80 N. E. 714, reversing 128 Ill. App. 560, it was held that the directors of an unincorporated savings association, who were men of large business experience and standing, and who had been attentive to their

gone 217; Re Faure Electric Accumulator Co. L. R. 40 Ch. Div. 141, 58 L. J. Ch. N. S. 48, 59 L. T. N. S. 918, 37 Week. Rep. 116, 1 Megone, 99; Re New Mashonaland Exploration Co. [1892] 3 Ch. 577, 61 L. J. Ch. N. S. 617, 67 L. T. N. S. 90, 41 Week. Rep. 75; Lagunas Nitrate Co. v. Lagunas Syndicate [1899] 2 Ch. 392, 68 L. J. Ch. N. S. 699, 48 Week. Rep. 74, 81 L. T. N. S. 334, 15 Times L. R. 436; Dovey v. Cory [1901] A. C. 477, 70 L. J. Ch. N. S. 753, 50 Week. Rep. 65, 85 L. T. N. S. 257, 17 Times L. R. 732, 8 Manson, 346; Citizens' Bldg. Loan & Sav. Asso. v. Coriell, 34 N. J. Eq. 383; Spering's Appeal, 71 Pa. 11, 10 Am. Rep.

duties as trustees, would have learned that the affairs of the association were being mismanaged, and of the financial condition of the bank in which the funds of the association were on deposit, were liable to the depositors for losses due to the insolvency of the bank, notwithstanding the by-law of the association which exempted the trustees from responsibility for losses except such as resulted from their wilful misconduct. The court said: "In our judgment the duties and responsibilities of the trustees herein partake more of the character of ordinary trustees than of bank directors or of any other officer of an incorporated company. Whatever the responsibility, it must depend, as has been stated, largely upon the subject under consideration, and be determined in view of all the circumstances surrounding the transactions."

The president of a bank is personally liable for losses sustained through his conduct by personally permitting a depositor to overdraw his account and borrow money without security, without the knowledge and consent of the board of directors and advisory committee, which was daily on hand to pass on loans applied for. Western Bank v. Coldewey, 120 Ky. 776, 83 S. W. 629.

But bank directors are not guilty of neglect of duty making them liable to stockholders for a loss resulting from a loan made by the vice president and general manager surreptitiously and without their knowledge, while two of them were out of the state on important business, and the other was absent on account of ill health, where, upon discovering the transaction, they made all reasonable efforts to collect the amount involved. Warren v. Robison, 25 Utah, 205, 70 Pac. 980.

In First State Bank v. Morton, 146 Ky. 287, 142 S. W. 694, it was held that an unsalaried president of the bank, who was a mere figurehead of the institution, and not familiar with the banking business, was liable only for gross neglect in the management of the corporation, and was not liable to the bank for failure to prevent the cashier, who was given the entire management of the bank, from making illegal and excessive loans.

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684; Dunn v. Kyle, 14 Bush, 134; Jones v. Johnson, 86 Ky. 530, 6 S. W. 582; Hedges v. Paquett, 3 Or. 77; Harvard College v. Amory, 9 Pick. 446; Brown v. French, 125 Mass. 410, 28 Am. Rep. 254.

The intention of the legislature to hold defendants responsible for consequences not the reasonable result of their omission to comply with its direction must be clearly expressed by the words of the statute, in the light of the subject-matter to which they are addressed; and words of prohibition do not of themselves make a statute mandatory.

Eccles Lumber Co. v. Martin, 31 Utah, 241, 87 Pac. 713; Sutherland, Stat. Constr. §§ 446, 447; People v. Cook, 14 Barb. 259, affirmed in 8 N. Y. 67, 59 Am. Dec. 451; Gallup v. Smith, 59 Conn. 355, 12 L.R.A. 353, 22 Atl. 334; Rex v. Loxdale, 1 Burr. 445; Jones v. State, 1 Kan. 273; Holland v. Osgood, 8 Vt. 276; Spencer's Appeal, 78 Conn. 301, 61 Atl. 1010; People ex rel. McKune v. Weller, 11 Cal. 49, 70 Am. Dec. 754; Gilson v. Cambridge Sav. Bank, 180 Mass. 444, 62 N. E. 728.

The statute of limitations is a bar to those causes of action which appear to have accrued more than six years prior to the commencement of the suit.

Coram v. Davis, 209 Mass. 229, 95 N. E. 298; Fogg v. Price, 145 Mass. 513, 14 N. E. 741; Wilcox v. Plummer, 4 Pet. 172, 7 L. ed. 821; Aachen & M. F. Ins. Co. v. Morton, 15 L.R.A.(N.S.) 156, 84 C. C. A. 366, 156 Fed. 654, 13 Ann. Cas. 692; Betts v. Norris, 21 Me. 314, 38 Am. Dec. 264; Link v. McLeod, 194 Pa. 566, 45 Atl. 340.

Officers of a corporation are not technical trustees, and the statute of limitations is a bar to suits against them for fraud and negligence.

Boyd v. Mutual Fire Asso. 116 Wis. 155, 16 L.R.A. 918, 96 Am. St. Rep. 948, 90 N. W. 1086, 94 N. W. 171; Landis v. Saxton, 105 Mo. 487, 24 Am. St. Rep. 403, 16 S. W. 912; Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448; Link v. McLeod, 194 Pa. 566, 45 Atl. 340; Cooper v. Hill, 36 C. C. A. 402, 94 Fed. 582; Mason v. Henry, 152 N. Y. 529, 46 N. E. 837; Spering's Appeal, 71 Pa. 11, 10 Am. Rep. 684.

Messrs. Charles F. Choate, Jr., Frederick H. Nash, and Thomas W. Streeter, for plaintiff:

Defendants are liable for loss resulting from transactions in excess of their powers, even if it be assumed that they acted in good faith and without negligence.

Lewin, Tr. 12th ed. p. 1173; Bolles, Bkg. p. 286; Perry, Tr. 6th ed. § 460, p. 74; Paine v. Barnum, 59 How. Pr. 303; Paine v. Irwin, 59 How. Pr. 316; Kavanaugh v. 39 L.R.A.(N.S.)

Commonwealth Trust Co. 64 Misc. 303, 118 N. Y. Supp. 758; Thompson v. Greeley, 107 Mo. 577, 17 S. W. 962; Williams v. Riley, 34 N. J. Eq. 399; Cocker v. Quayle, 1 Russ. & M. 535; Fyler v. Fyler, 3 Beav. 550, 5 Jur. 187; Re Lands Allotment Co. [1894] 1 Ch. 616, 63 L. J. Ch. N. S. 291, 7 Reports, 115, 70 L. T. N. S. 286, 42 Week. Rep. 404, 1 Manson, 107, 7 Eng. Rul. Cas. 614; Re Sharpe [1892] 1 Ch. 154, 61 L. J. Ch. N. S. 193, 65 L. T. N. S. 806, 40 Week. Rep. 241; New Haven Trust Co. v. Doherty, 75 Conn. 555, 96 Am. St. Rep. 239, 54 Atl. 209.

The defendants must show in excuse for their *ultra vires* act that they exercised the same care and prudence in considering the loan that reasonable men would devote to a similar piece of business of their own.

Re Davis, 183 Mass. 499, 67 N. E. 604; Kavanaugh v. Commonwealth Trust Co. 64 Misc. 303, 118 N. Y. Supp. 758; Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546; 3 Pom. Eq. Jur. § 1090; Paine v. Barnum, 59 How. Pr. 303; Paine v. Irwin, 59 How. Pr. 316.

Knowledge of the wrongful acts of defendants cannot be imputed to the complainant corporation prior, at least, to December, 1909, so as to bring it within the rule that a *cestui que trust* must bring a suit within six years from the time knowledge of the trustee's default is brought home to him.

Brinckerhoff v. Roosevelt, 74 C. C. A. 498, 143 Fed. 478; National Bank v. Wade, 84 Fed. 10; Re Sharpe [1892] 1 Ch. 154, 61 L. J. Ch. N. S. 193, 65 L. T. N. S. 806, 40 Week. Rep. 241; Re Lands Allotment Co. [1894] 1 Ch. 616, 63 L. J. Ch. N. S. 291, 7 Reports, 115, 70 L. T. N. S. 286, 42 Week. Rep. 404, 1 Manson, 107, 7 Eng. Rul. Cas. 614; Williams v. McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; Williams v. Reilly, 41 N. J. Eq. 137, 3 Atl. 692; Ellis v. Ward, 137 Ill. 509, 25 N. E. 530; Spering's Appeal, 71 Pa. 11, 10 Am. Rep. 684.

The defendants are not held liable in their official character as a board, but individually.

Franklin F. Ins. Co. v. Jenkins, 3 Wend. 130; Williams v. McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; Williams v. McDonald, 42 N. J. Eq. 392, 7 Atl. 866.

Sheldon, J., delivered the opinion of the court:

This bill is brought in the name of the plaintiff by the bank commissioner, who, it is averred, has taken possession of the business and property of the plaintiff under the provisions of Stat. 1910, chap. 399, and is now administering its affairs. The defendants were five of the seventeen members of the plaintiff's board of trustees, constituted its investment committee, and two of them were respectively

its president and vice president. The bill alleges that the defendants, in violation of their duties, have committed many acts of misconduct specifically set out in the bill, and seeks to hold them personally liable for large losses on certain specified loans of the bank's money, alleged to have been made by them on certain described parcels of real estate. It is averred that in making these loans the defendants violated the statutes then in force (Stat. 1894, chap. 317, §§ 21, 24), and also the by-laws of the plaintiff; and the particulars of such violations are set out in detail. It is charged that these investments were made contrary to law and in excess of the authority of the defendants, and that they resulted in the loss to the bank of large sums of money. The details as to the making of each one of these investments and as to the subsequent dealings of the defendants therewith are stated in the bill, and the alleged wrongful acts of the defendants and the losses resulting therefrom are fully set out. According to the averments, each of these loans was largely in excess of the value of the security taken, "as the defendants well knew, or, by the exercise of a reasonable degree of care and prudence, might have known;" most of them were made without any report or certificate of two members of the board of investment (Stat. 1894, chap. 317, § 21, cl. 1); in many instances no written applications for the loans were made and recorded, as required by § 24 of the same act; and in some instances money was lent on second mortgages. It is alleged also that the rules (which are specified in the bill) adopted by the board of trustees were not complied with in the respects specified in the bill. It is alleged that these loans were made to or for one Rich and one Dowlin, for the purpose of assisting them in certain real-estate transactions in which the defendants had an interest. Further manipulations of some of these properties are averred to have been made by the defendants by causing deeds of them to be given, and by making foreclosures, followed by other deeds, resulting in the defendants' taking for the bank new and larger mortgages upon the same properties which had been found to be insufficient security for the original and smaller loans.

Each of the defendants has demurred to the bill on many different grounds. It scarcely seems necessary to discuss these separately. It will be enough to consider the objections which have been stated in the elaborate argument made for the defendants.

They contend in the first place that the members of the investment committee of a savings bank, acting in good faith, are

not liable for losses resulting from errors of judgment attributable to mere negligence in making loans within the scope of their authority. They say that the averments of the bill are not sufficient to show that they acted unlawfully by taking loans to an excessive amount upon property of insufficient value. Those averments are in substance that the loans were largely in excess of the statutory limit, "as the defendants well knew, or, by the exercise of a reasonable degree of care and prudence, might have known." It follows, of course, from the recognized rules of equity pleading, that such an averment in the alternative does not charge actual knowledge, but simply that the defendants, by the exercise of reasonable care and prudence, ought to have known the fact. This they say is not sufficient; and they rely upon a large number of familiar decisions in which it has been held that the directors or managers of a business corporation conducted for profit are not to be made responsible for losses due to a mere error of judgment, where there has been an honest exercise of judgment. It is not necessary to refer to these cases in detail. They are almost without exception statements or illustrations of the rule laid down in *Lyman v. Bonney*, 118 Mass. 222, and *Overend, G. & Co. v. Gibb*, L. R. 5 H. L. 480, 42 L. J. Ch. N. S. 67. But these and similar decisions are not applicable to the case of a savings bank under the laws of this commonwealth. As was said in *Gilson v. Cambridge Sav. Bank*, 180 Mass. 444, 446, 62 N. E. 728, we have an "elaborate statutory system for the government and regulation of savings banks, which is intended to protect the interests of depositors." As to these depositors, for the encouragement of thrift by the allowance of interest upon small savings, they approximate somewhat to the character of charitable institutions. They are designed to help the poorer members of the community to help themselves by giving them an opportunity to make their small savings productive, and thus to confer upon them a greater and more lasting benefit than in many cases can be derived from mere eleemosynary assistance. Accordingly definite and rigid provisions have been made by our statutes for the administration of savings banks. Not to go outside the time here in question, see Stat. 1894, chap. 137, §§ 13 et seq. It is not without significance that in this statute, as in former and subsequent ones, the governing board of officers is given the name of trustees. Careful provisions are prescribed also for the investment of the deposits that may be received; and it is manifest upon the most cursory reading that the

dominant purpose of the legislature has been to provide in this way for the safety of the money intrusted to savings banks, and to hold the officers intrusted therewith to a strict accountability. As was said in *Lewis v. Lynn Inst. for Savings*, 148 Mass. 235, 243, 1 L.R.A. 785, 12 Am. St. Rep. 535, 19 N. E. 365, 367: "The fundamental idea has never been departed from, that all the funds and investments of a savings bank are held exclusively for the benefit and security of the depositors. This idea was, and still is, the corner stone of the whole system. . . . To others, to third persons, the corporation can incur liabilities, in contract or in tort, for which the funds in its hands will be responsible. But to the depositors themselves, the undertaking of the corporation is that it will receive and combine the deposits, and manage and use them to the best practical advantage, according to the judgment of the trustees, and give to the depositors in just proportion among themselves the benefit of the result of such management." In other words, the savings bank and its managing officers or trustees are held to the same duty as ordinary trustees of a direct trust. See *Re Newark Sav. Inst.* 28 N. J. Eq. 552. For honest errors of judgment, while acting with ordinary skill and prudence, measured according to the demands of the duties or business which they have taken upon themselves, they are not to be held liable; but they cannot excuse themselves from the consequences of their misconduct or of their ignorance or negligence by averring that they have failed merely to exercise ordinary skill, care, and vigilance. And so are the decisions as to the trustees or managing officers of savings banks in New York and New Jersey, in which such banks are not commercial institutions having a capital stock and conducted in whole or in part for the gain of their stockholders, but occupy the same position and are intended to serve the same beneficent purposes as is the case in this commonwealth. It is held that the relation between the managing officers and the depositors, or the bank, as representing them, is that of trustees and *cestuis que trust*. *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546, in which it was held also that where loss has occurred from the failure of such a trustee to exercise ordinary care and judgment, he cannot excuse himself by claiming that he did not possess those qualities; for, by voluntarily assuming the position, he undertook that he did possess and would exercise them. *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775; *Williams v. Reilly*, 41 N. J. Eq. 137, 3 Atl. 692; *Dodd v. Wilkinson*, 42 N. J. Eq. 647, 9 Atl. 685, affirming *s. c.* *Wilkinson L.R.A. (N.S.)*

son v. Dodd, 40 N. J. Eq. 123, 3 Atl. 360. And see *Re Liverpool Household Stores Asso.* 59 L. J. Ch. N. S. 616, 62 L. T. N. S. 873, 2 Megone, 217. As was said in *Beasley*, Ch. J., in *Williams v. McKay*, ubi supra: "The equitable rule which is applicable to persons holding official positions such as were held by these defendants is not in doubt. The duty belonging to such a position is a plain one,—to care for the moneys intrusted to them in the manner provided in the charter, and to exercise ordinary care and prudence in so doing. It is true that the defendants were unpaid servants, but the duty of bringing to their office ordinary skill and vigilance was none the less on that account, for to this extent there is no distinction known to the law between a volunteer and a salaried agent. These defendants held themselves out to the public as the managers of this bank, and by so doing they severally engaged to carry it on in the same way that men of common prudence and skill conduct a similar business for themselves. This is the measure of the responsibility of officers of this kind." This is the same rule of duty to which other trustees have been held,—that they must "exercise a sound judgment and a reasonable and prudent discretion." *Re Davis*, 183 Mass. 499, 502, 67 N. E. 604; *Ashley v. Winkley*, 209 Mass. 509, 95 N. E. 932; *Pine v. White*, 175 Mass. 585, 590, 56 N. E. 967. The same rule has been applied to officers and managers of other financial institutions, somewhat similar in character to savings banks; and the doctrine is applicable *a fortiori* to the case at bar. Types of such decisions are *New Haven Trust Co. v. Doherty*, 75 Conn. 555, 96 Am. St. Rep. 239, 54 Atl. 209, and *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448.

We do not regard the allegation in the bill that the defendants "received salaries and fees from the complainant corporation for acting as its officers and trustees and members of its finance committee" as being in itself sufficient to hold them personally responsible for official misconduct and breaches of duty. But the averment is not made for that purpose. This is one of the existing circumstances in the light of which their conduct is to be judged. It is not necessary to aver the amount of their compensation or to show its adequacy. This allegation does not weaken the rest of the bill.

The same things may be said of the averment that the loans complained of, or some of them, were "made to assist in the real-estate transactions of said George N. Rich, in which transactions said respondents were interested." This also bears upon the char-

acter of the defendants' conduct, upon the honest exercise of their judgment, and their good faith. And the averments as to the personal dealings of some of the defendants with Dowlin and Rich, and as to the inducements, commissions, and gifts given by Dowlin and Rich to two of the defendants, are proper for the same reasons. We see nothing here repugnant to the rest of the bill. Assuming that it may be singled out for a separate objection, the demurrer to it cannot be sustained.

The statute already referred to (Stat. 1894, chap. 317, §§ 21, 24) requires also that only first mortgages of real estate shall be taken, and that "no loan or mortgage shall be made except upon the report of not less than two members of the board of investment, who shall certify to the value of the premises to be mortgaged, according to their best judgment, and such report shall be filed and preserved with the records of the corporation," and that "all applications for loans shall be made in writing, through the treasurer of the corporation, who shall keep a record thereof." The bill avers that the defendants failed to comply with these requirements. We have no doubt that these statutes are mandatory, and not merely directory. They are part of a series of careful provisions made to secure the interests of the depositors and to make it certain that the conduct of trustees in making loans upon mortgages should be not only honest and careful, but manifestly so, done with the concurrence of other officers, and spread upon the records of the corporation. These are restrictions placed by the legislature upon the power of the defendants. A loan made without the observance of these requirements may be valid as between the bank and the borrower or as to third parties (*Gerrity v. Wareham Sav. Bank*, 202 Mass. 214, 88 N. E. 1084); but as between the defendants on the one side and the bank and its depositors on the other side, their conduct in making loans in such a manner is *ultra vires*.

It is a wrongful diversion of the funds of the bank. And the decisions are practically uniform that for such a wrongful diversion, made in excess of their authority and in defiance of the statutory requirements, they are to be held responsible. The decision in *Crocker v. Quayle*, 1 Russ. & M. 535, rests on this ground, although there it was the directions of a private trust, not the requirements of a statute, that were violated. So in *Worcester City Missionary Soc. v. Memorial Church*, 186 Mass. 531, 72 N. E. 71. Even the decisions by which the directors of a private business corporation have been exempted from liability for bare errors of judgment or for mere ordinary

negligence in the exercise of their authorized functions have almost invariably refused, when the question has been considered, to extend that exemption to acts which were *ultra vires* or in violation of law. See, for example, *Overend, G. & Co. v. Gibb*, L. R. 5 H. L. 480, 487, 42 L. J. Ch. N. S. 67; *Turquand v. Marshall*, L. R. 4 Ch. 376, 386, 38 L. J. Ch. N. S. 639, 20 L. T. N. S. 766, 17 Week. Rep. 935; *Re Faure Electric Accumulator Co. L. R.* 40 Ch. Div. 141, 58 L. J. Ch. N. S. 48, 59 L. T. N. S. 918, 37 Week. Rep. 116, 1 Megone, 99; *Re New Mashonaland Exploration Co.* [1892] 3 Ch. 577, 61 L. J. Ch. N. S. 617, 67 L. T. N. S. 90, 41 Week. Rep. 75; *Mazzetti's Case*, 42 L. T. N. S. 206, 28 Week. Rep. 541; *Grimwade v. Mutual Soc.* 52 L. T. N. S. 409, 416; *Re Liverpool Household Stores Asso.* 59 L. J. Ch. N. S. 616, 62 L. T. N. S. 873, 2 Megone, 217; *Cooper v. Hill*, 36 C. C. A. 402, 94 Fed. 582; *Citizens' Bldg. Loan & Sav. Asso. v. Coriell*, 34 N. J. Eq. 383; *Stone v. Rottman*, 183 Mo. 552, 82 S. W. 76. For such a wrongful diversion of the funds of the savings bank, followed by and resulting in a total or partial loss of the money thus wrongfully withdrawn, the defendants are *prima facie* responsible. *New Haven Trust Co. v. Doherty*, 75 Conn. 555, 96 Am. St. Rep. 239, 54 Atl. 209; *Paine v. Barnum*, 59 How. Pr. 303; *Paine v. Irwin*, 59 How. Pr. 316; *Williams v. Riley*, 34 N. J. Eq. 398; *Dodd v. Wilkinson*, 42 N. J. Eq. 647, 9 Atl. 685; *Williams v. McDonald*, 42 N. J. Eq. 392, 7 Atl. 866; *Thompson v. Greeley*, 107 Mo. 577, 17 S. W. 962; *National Bank v. Wade* (C. C.) 84 Fed. 10; *Fyler v. Fyler*, 3 Beav. 550, 5 Jur. 187; *Re Sharpe* [1892] 1 Ch. 154, 61 L. J. Ch. N. S. 193, 65 L. T. N. S. 806, 40 Week. Rep. 241; *Re Lands Allotment Co.* [1894] 1 Ch. 616, 63 L. J. Ch. N. S. 291, 7 Reports, 115, 70 L. T. N. S. 286, 42 Week. Rep. 404, 1 Manson, 107, 7 Eng. Rul. Cas. 614.

The powers of the defendants were likewise, as between themselves and the bank or its depositors, limited by the terms of its rules and by-laws. This comes under the same general doctrine as limitations upon a trustee by the creator of a private trust, which already have been referred to. None of these matters affords ground for demurrer. As to them, the averments of the bill are sufficient. It was not necessary to allege the amounts of the assessors' valuations of the different parcels of real estate mortgaged, or to negative by anticipation any excuse or justification that the defendants may be able to set up for their illegal acts.

But the defendants insist that the statute of limitations is a bar to any remedy for most of their wrongful acts, because as

to most of them more than six years had elapsed after their wrongful diversion of the plaintiff's money before the bill was filed. But this contention overlooks the fact, which has been sufficiently shown, that these defendants stood, as to the bank and its depositors, in the position of trustees of a direct trust. In such a case the statute of limitations does not begin to run against the *cestuis que trust* until they have learned of the trustee's wrongdoing or of his practical repudiation of the trust and of the duties thereby imposed upon him. *Davis v. Coburn*, 128 Mass. 377; *Jones v. McDermott*, 114 Mass. 400; *Second Religious Soc. v. Harriman*, 125 Mass. 321; *Potter v. Kimball*, 186 Mass. 120, 71 N. E. 308. Instances of the application of the rule to such cases as the one now before us are sufficiently numerous. *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775, reversing s. c. *Williams v. Halliard*, 38 N. J. Eq. 373; *Williams v. Riley*, 34 N. J. Eq. 398; *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530; *National Bank v. Wade* (C. C.) 84 Fed. 10; *Brinckerhoff v. Roosevelt*, 74 C. C. A. 498, 143 Fed. 478; *Re Sharpe* [1892] 1 Ch. 154, 61 L. J. Ch. N. S. 193, 65 L. T. N. S. 806, 40 Week. Rep. 241. In most of the cases relied on by the defendants the case was either governed directly by statute, as in *Re Lands Allotment Co.* [1894] 1 Ch. 616, 631, 63 L. J. Ch. N. S. 291, 7 Reports, 115, 70 L. T. N. S. 286, 42 Week. Rep. 404, 1 Manson, 107, 7 Eng. Rul. Cas. 614, and *Mason v. Henry*, 152 N. Y. 529, 46 N. E. 837, or it was held that no direct trust relation existed between the parties. Such cases need not be considered. So far as they differ from our conclusions we have not been willing to follow them. Nor is it now necessary to determine whether a fraudulent concealment of the cause of action is sufficiently charged against the defendants.

We cannot say as matter of law that the alleged foreclosures of the mortgages or the other dealings with the mortgaged properties, or any entries that may have been made on the plaintiff's books and records, show knowledge in the plaintiff of the defendants' wrongdoings. See, as to this, *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448. The bill expressly avers that the plaintiff had neither such knowledge nor the means of acquiring it until shortly before the bringing of the bill. We find nothing in the allegations necessarily repugnant to this averment.

The sixteenth paragraph of the bill might not of itself show any independent cause of action against the defendants, but, like some other averments which have been con-

sidered, the circumstance alleged may throw light upon some of the misconduct complained of. It is proper to give the defendants notice of the fact that this is one of the matters relied on by the plaintiff in determining the character of their acts. It is not repugnant to the seventh paragraph of the bill.

There is no such repugnance or uncertainty in other parts of the bill as to justify us in calling it bad. The grounds of demurrer which have not been specifically dealt with have all been examined; the able argument made by the counsel for the defendants and the supplementary brief which has been filed have been carefully considered; and we are satisfied that the order must be:

Demurrer overruled.

WASHINGTON SUPREME COURT. (Department No. 1.)

SUSIE STONE et al., Respts.,

HUNTER TRACT IMPROVEMENT COMPANY et al., Appts.,

(— Wash. —, 122 Pac. 370.)

Damages — injunction against constructing dwelling — measure.

1. The damages for wrongfully enjoining the erection of a dwelling on a parcel of real estate are the reasonable rental value of the property with the building upon it, during the time its enjoyment was prevented by the injunction, where the building would have been erected but for the injunction, and was actually built as soon as the injunction was dissolved.

Injunction — failure to move for dissolution — effect on damages.

2. One wrongfully enjoined from erecting a dwelling is not precluded from recovering damages therefor because he fails to move to discharge the injunction, where the whole controversy is over the right to erect the building because defendant is of negro blood, and the injunction is not merely ancillary to or in aid of the main issue.

(April 1, 1912.)

Note. — Measure of damages for wrongful injunction restraining erection of building.

Although the damages recoverable for the wrongful suing out of an injunction are only such as naturally and proximately result therefrom, and do not include remote or speculative damages (22 Cyc. 1062), it seems clear, as held in *STONE v. HUNTER TRACT IMPROV. CO.*, that, in the case of a wrongful injunction restraining the erection or completion of a building, where the building would have been erected or completed

A PPEAL by defendants from a judgment of the Superior Court for King County in plaintiffs' favor in an action brought to recover damages for the wrongful suing out of an injunction to restrain plaintiffs from erecting a dwelling on land which had been assigned to them, pending the appeal of an action for the cancelation of the assignment. Affirmed.

Statement by Chadwick, J.:

Defendant Hunter Tract Improvement Company sold a lot in an addition platted by it to plaintiffs' assignor, and approved the assignment, but afterwards sued to cancel the assignment on the ground that its approval was made through mistake and without knowledge that plaintiffs were colored persons, and also sued out an injunction restraining plaintiffs from building a house thereon pending its appeal, claiming that plaintiffs could not build on the lot because they were colored persons.

Messrs. Hughes, McMicken, Dovell, & Ramsey, and Otto B. Rupp, for appellants:

The only damages which can be recovered upon injunction bonds in actions are such as arise from the operation of the injunction itself, and not such as are occa-

but for the injunction, and has been erected or completed in accordance with the original plans since the dissolution of the injunction, the reasonable rental value of the property with the proposed building upon it for such period as its use was prevented by the injunction, is a natural and proximate damage, and not remote or speculative.

So, the measure of damages sustained by reason of an injunction against the erection of a building which had actually been commenced is the rental value of the proposed building, for such period as the defendant was deprived of its use by the pendency of the injunction. *Spears v. Armstrong*, — Tenn. —, 42 S. W. 37.

And the measure of damages for the wrongful suing out of an order temporarily restraining the continuance of the erection of an addition to a dwelling house is the value of the use of the property for the whole period and season during which the owner was deprived of it as the direct result of the restraining order, which period is not necessarily limited to the time the order was in force. *Hutchins v. Munn*, 209 U. S. 246, 52 L. ed. 776, 28 Sup. Ct. Rep. 504, affirming 28 App. D. C. 271. In this case, it appeared that it was the habit of the owner of the dwelling house involved, to occupy the house during the late autumn, the winter, and the early spring, which was the common season of occupancy of houses of like character in the place, and to live elsewhere during the remainder of

sioned by the suit independent of the injunction.

2 High, Inj. § 1663; *Donahue v. Johnson*, 9 Wash. 187, 37 Pac. 322; *White Pine Lumber Co. v. Aetna Indemnity Co.* 42 Wash. 569, 85 Pac. 52; *Collins v. Huffman*, 48 Wash. 184, 93 Pac. 220; *Southern R. Co. v. Pardue*, 123 Tenn. 376, 131 S. W. 862.

Messrs. Andrew R. Black and Ralph Simon, for respondents:

Where a party is deprived of the use of property wrongfully by injunction or otherwise, he is entitled as damages to the value of the use; and in cases of property of real estate, the value of the use would, of course, be the reasonable rent of the property.

Spears v. Armstrong, — Tenn. —, 42 S. W. 37; 2 *Sutherland, Damages*, 70; 1 *Sedgw. Measure of Damages*, § 184.

Chadwick, J., delivered the opinion of the court:

This suit was brought by the plaintiffs to recover damages for the wrongful suing out of an injunction which was continued pending an appeal to this court. *Hunter Tract Improv. Co. v. Stone*, 58 Wash. 661, 109 Pac. 112.

Under the rulings of the trial judge, the only question left in the case is whether a

the year. The proposed addition was begun about July 1st, and was to have been completed within four months, and in time for occupancy of the house during the coming season. The work was wrongfully enjoined on August 14th, after the house had been rendered practically uninhabitable by the removal of some of its exterior walls, and the restraining order was dissolved on November 25th, after which the addition was not completed until April, and could not, at that time of the year, have been completed, if reasonable speed had been used, before March, after which time the property could not have been rented, and the entire rental season would have been lost. It further appeared that, if the owner, in November, had found and leased other property substantially the same in character, and desired to occupy it until her own residence could have been finished, she would have been compelled to pay the full season's or year's rent, so that the injury suffered by her in being deprived of her residence was practically consummated before the 1st of November. And under these circumstances, the court of appeals of the District of Columbia and the United States Supreme Court affirmed a decree ratifying and confirming an auditor's report, ascertaining and fixing the amount of damages sustained by the owner at \$8,000, being three fourths of the annual rental value of the property.

In an action on an injunction bond, after the dissolution of an injunction prohibit-

true measure of damages was given to the jury. Plaintiffs had begun the erection of a six-room dwelling house to cost \$2,300, when the work was arrested by the lower court. After the case had been decided on appeal and the remittitur sent down, plaintiffs erected a dwelling costing less money than the one contemplated. The testimony shows that the contractor threw up the contract after a time on account of the delay and increased cost of wages and material. Plaintiffs set up several items of damage, all of which were denied by the court, except the reasonable rental value of the property during the time the case was pending. The court told the jury that they might find as damages the rental value of the property if the house had been built from the 15th day of May, 1909, the time when the building was to be completed, until the release of the restraining order. The plaintiffs' testimony is to the effect that \$40 was a reasonable rental value, while the testimony of the defendant is that \$25 is a fair rent. The jury returned a verdict for \$525. From a judgment upon the verdict, defendants have appealed.

It is contended that only nominal damages should have been allowed, inasmuch as the law will not take care of damages which are remote, conjectural, or specula-

tive; that no house was on the property during the time the injunctions were in force, and that the rental value of a house that had not been built was not a proper measure, it being admitted, or rather not denied, that the lot without the house had no rental value. Our first impression was that this theory had merit, but a more careful consideration of the principle involved impels us to hold that plaintiffs are entitled to recover damages for the loss of the use of the property, to be measured by the rental value, or what it would have been worth to respondents had they been allowed to build a house according to their original design.

The measure of damages in a case where a person is prevented by injunction from completing a house cannot be defined with any degree of accuracy. It may be said to be the just application of the rule of reason to the facts of a particular case; or, as stated by Mr. High: "In determining the amount of damages to be allowed upon the dissolution of an injunction restraining one from exercising acts of ownership over his real property, the courts are not governed by arbitrary rules, but proceed upon equitable principles; the defendant being entitled to such damages as are the necessary and proximate result of such deprivation." 2 High, *Inj.* 4th ed. § 1673; Sutherland, *Dam-*

ing the completion of the erection of a cow stable, the damages recoverable are all such natural and proximate damages as have been actually and necessarily or directly sustained by reason of the injunction,—including the injury done to the plaintiff's cows, the decrease caused in their flow of milk, and the extra care and food required by their exposure to the weather; the loss to the plaintiff by reason of his being obliged to buy feed for his cows by the small quantity; and the difference between the cost of completing stable at the time when the building thereof was stopped by the injunction, and the increased cost at the time when the injunction was dissolved and the stable completed. *Lange v. Wagner*, 52 Md. 310, 36 Am. Rep. 380.

And where a person has commenced to tear down a building on his premises for the purpose of erecting a new building, the damages recoverable by him on account of a temporary injunction restraining him from interfering with the wall between his own and an adjoining building, whereby the completion of his new building is delayed, include the loss of rent of the building, increased cost of labor and materials, and counsel fees on motion to dissolve the injunction and on appeal from the order of dissolution. *Roberts v. White*, 73 N. Y. 375.

But in accord with the rule that "the only damages which can be recovered are such as arise from the operation of the injunction itself, and not such as are occasioned by the suit independent of the injunction" (High, *Inj.* § 1663), only nominal damages, and no rental at all for the use of the proposed building, can be recovered on the injunction bond, after dissolution of an injunction restraining the erection of a building, but only nominal damages, although the injunction itself was the cause of the failure to build the proposed structure, where the building contemplated when the injunction suit was begun was never constructed at all, but the project was finally and permanently abandoned after the injunction was dissolved. *Ibid.*

Nor can the rental value of the proposed building be recovered as damages on the injunction bond, after the dissolution of an injunction restraining the erection of a building, but only nominal damages, although the injunction itself was the cause of the failure to build the proposed structure, where the building contemplated when the injunction suit was begun was never constructed at all, but the project was finally and permanently abandoned after the injunction was dissolved. *Ibid.*

Many phases of the general subject of loss of profits as an element of damages are discussed in notes cited in the Index to Notes, under the title, Damages; loss of profits.

A. C. W.

ages, 3d ed. § 527; *Rice v. Cook*, 92 Cal. 144, 28 Pac. 219; *Alexander v. Colcord*, 85 Ill. 323; *Hermann v. Allen*, — Tex. Civ. App. —, 118 S. W. 794. Now, in this case, although it is contended on the authority of *Southern R. Co. v. Pardue*, 123 Tenn. 376, 131 S. W. 862, that damages cannot be recovered for the loss of rent for a building that was not built, we nevertheless believe that, where the facts show that the respondents were in the act of building, and, but for the act of the appellant, would have erected a building according to the plans which had been drawn for that purpose, and where they did actually build a house after the termination of the suit, and for the uses contemplated, the true measure of damages is the rental value of the property with the improvements as designed. Mr. High cites the case of *Roberts v. White*, 73 N. Y. 375, to sustain the proposition that loss of rent is an item of damages where a party was restrained from tearing down a wall alleged to be a party wall, intending to erect a building, where the result of the injunction was to interrupt and postpone the plans and purposes of the owner. The same rule is announced in *Hutchins v. Munn*, 209 U. S. 246, 52 L. ed. 776, 28 Sup. Ct. Rep. 504. We see no difference in principle between this case and that of *Hermann v. Allen*, — Tex. Civ. App. —, 118 S. W. 794, where the plaintiff in the suit had been enjoined from removing a store building from a lot owned by the defendant. It was there contended that interest on the value of the building was the true measure of damages. But this was held to be wholly inadequate; the defendant knowing that the building could be rented, and being charged with notice of its reasonable rental value. Rent was allowed although the building was not removed, just as rent should be allowed in this case although the building was not built. It seems to be the purpose of the law in cases of this kind to allow a recovery of rent where the testimony shows that it might have been earned but for the injunction. The case of *Ridpath v. Merriam*, 22 Wash. 311, 60 Pac. 1120, in effect holds that, if a building can be moved so as to put it to use as such, the rental value is the measure of damages. That measure was denied solely upon the ground that the building could not be moved, and had no value to the owner except as knocked-down material.

As illustrative of the manner in which courts should approach the admeasurement of damages in this class of cases, Mr. Sutherland says: "In a case in which the party suing out the injunction was sought to be charged with the value of land for pasture, he was allowed the cost of fencing it for such use. If the land was unfenced

when the injunction issued, and was fit only for pasture, and the defendant was not intending to use it for that purpose, or was not prepared to do so, he was not entitled to any compensation. If his intention was to use it and inclose it for use, he was entitled to the value of the use, less the expense of inclosing it. If he had procured materials to fence it, and was prevented from doing so, he was entitled to be reimbursed for any loss necessarily resulting." 2 *Sutherland, Damages*, 3d ed. § 527. Upon the same principle of equitable consideration, one who is kept out of the possession of his property is not restricted in a suit on the injunction bond to proof of the value of the use, but may recover for loss of crops. *Edwards v. Edwards*, 31 Ill. 474; *Fleming v. Bailey*, 44 Miss. 132. In the *Pardue Case*, after the injunction had been dissolved, the plaintiff built a house which was much larger than and cost five times as much as the one originally designed, and which was devoted to different uses. We think the court properly refused to allow the loss of rent as an item of damage in that case, for the subsequent conduct of the owner was in effect a declaration of benefit. The case turned on the finding that the plaintiff had abandoned his purpose, but the court had in mind the rule as we find it to be: "When the building is subsequently erected, after the restraint caused by the injunction has been removed, the court can then see that contingency has given place to achievement; but, when it is abandoned, the doubt based upon the contingency that necessarily attends all uncompleted projects is proven, justified, and confirmed." In the consideration of this case we have found the case of *Bingham v. Walla Walla*, 3 Wash. Terr. 68, 13 Pac. 408. It is there said: "The damage claimed by him is for prospective profits which he might have received as rent of the building had he been permitted to erect the same. We think this element of damage too remote." Standing alone, this would seem to negative all that we have said as to the measure of damage; but we think that case can be clearly distinguished under the authorities. The title was in real dispute, and in such cases, if it be shown that the owner would not have built while the title was in dispute, it has been often held that a recovery for the loss of rent will not be allowed. The statement that such damages are too remote is too broad, and will not be applied unless the facts warrant it.

Defendant invokes the rule that no damages can be recovered unless they are sustained because of the injunction; that inasmuch as respondents did not move to discharge the injunction in the former case, but were content to try the case on its merits

its, or, in other words, bide the time until the doubt as to their title had been removed, their recovery is limited to nominal damages. Ordinarily no recovery will be allowed in such cases, but, strictly speaking, the former case was not a contest over title. Title has never been disputed. Defendant was selling what purported to be a good title, and plaintiff was willing to take the title offered. The real question was whether plaintiffs could use and occupy the lot, being of negro blood. In principle the former action was as if the vendor had brought suit to restrain a nuisance, and a defendant in such cases should not be held to the rule invoked unless the injunction is ancillary to or in aid of the real issue. Where a ruling upon the injunction would determine the case, where that is the whole controversy, a defendant should not be penalized because he treats it as in truth it is, as the essence of the controversy.

Finding no error, the judgment of the lower court is affirmed.

Dunbar, Ch. J., and Parker, Crow, and Gose, JJ., concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

STAR GROCER COMPANY

v.

W. BRADFORD et al., Plffs. in Err.

(— W. Va. —, 74 S. E. 509.)

Principal and surety — bond — principal's nonexecution — effect.

1. Sureties in a bond are not released by omission of the principal to execute it, if he is bound by law or a collateral contract, recited in the bond, for the performance of the duty recited in the condition thereof.

Bond — incompleteness — effect.

2. Such technical incompleteness in the bond, under such circumstances, imposes upon the obligee no duty of inquiry as to whether it was delivered by the sureties on condition that the principal should execute it, nor to require him to do so, since the sureties suffered no substantial prejudice from such omission.

Evidence — admissions by principal — effect on sureties.

3. Receipts, statements, and other evidences of liability in the handwriting of the principal are admissible evidence against

the sureties, and prove prima facie liability on their part.

Same — relation of witness to subject-matter.

4. Relation of a witness to the subject-matter of his testimony, such as his incumbency of an office in a private corporation on whose behalf, as a party to the suit, he is to testify, may be shown by his oral evidence.

(March 12, 1912.)

EROR to the Circuit Court for Ritchie County to review a judgment in plaintiff's favor in an action brought to enforce a liability on a bond given by plaintiff's agent to secure faithful performance of his contract. Affirmed.

The facts are stated in the opinion.

Messrs. Robinson & Prunty, for plaintiffs in error:

The bond was never properly executed, and no liability can attach on it.

Newlin v. Beard, 6 W. Va. 110; Nash v. Fugate, 32 Gratt. 595, 34 Am. Rep. 780; Solenberger v. Gilbert, 86 Va. 789, 11 S. E. 789; Wendlinger v. Smith, 75 Va. 317, 40 Am. Rep. 727; 2 Minor, Inst. 4th ed. 736; Pawling v. United States, 4 Cranch, 219, 2 L. ed. 601; Bibb v. Reid, 3 Ala. 88; Smith v. Kirkland, 81 Ala. 345, 1 So. 276; Wright v. Lang, 66 Ala. 389; Duncan v. United States, 7 Pet. 435, 8 L. ed. 739; White Sewing Mach. Co. v. Saxon, 121 Ala. 399, 25 So. 784; Warfel v. Frantz, 76 Pa. 88; Fales v. Filley, 2 Mo. App. 345; Morton v. Harvey, 57 Neb. 304, 77 N. W. 808; Middleboro Nat. Bank v. Richards, 55 Neb. 682, 76 N. W. 528; Benton County Sav. Bank v. Boddicker, 45 L.R.A. 341, note; Ward v. Churn, 18 Gratt. 801, 98 Am. Dec. 749; Garvin v. Mobley, 1 Bush, 48; Cutler v. Roberts, 7 Neb. 4, 29 Am. Rep. 371; Stuart v. Livesay, 4 W. Va. 45; Kidd v. Beckley, 64 W. Va. 80, 60 S. E. 1089.

Messrs. Kreps & Russell and Adams & Cooper for defendant in error.

Poffenbarger, J., delivered the opinion of the court:

The bond constituting the basis of this action, and given by a traveling salesman to secure faithful performance of his written contract with his principal, contains, in the obligatory clause thereof, the name of the salesman, described as principal, and the condition recites his employment, his duty to collect accounts for his employer, and the existence of an article of agreement between them, giving its date, but is signed by the two defendants herein only as sureties. Its obligation as to them is denied on two grounds: (1) Its acceptance by the obligee in an obviously incomplete condition;

Headnotes by POFFENBARGER, J.

Note. — For effect of delivery of bond unsigned by principal obligor, see note to School Dist. No. 80 v. Lapping, 12 L.R.A. (N.S.) 1105.
39 L.R.A. (N.S.)

and (2) acceptance thereof by the obligee with knowledge of its execution and delivery upon condition that other persons, who did not do so, were to execute it as sureties along with the defendants and the principal, one O. J. Wilson.

Incompleteness of a bond on its face, when tendered to the obligee, is sufficient to put him upon inquiry as to whether those whose signatures it bears intended to be bound by it in such condition. This is particularly and universally true when the names of persons, apparently contemplated as additional sureties, appearing in the body of the bond or elsewhere, have not been signed to it. *Wendlinger v. Smith*, 75 Va. 309, 40 Am. Rep. 727; *Nash v. Fugate*, 32 Gratt. 595, 34 Am. Rep. 780; *Ward v. Churn*, 18 Gratt. 801, 98 Am. Dec. 749; *Hicks v. Goode*, 12 Leigh, 479, 37 Am. Dec. 677. The apparent imperfection is suggestive of a delivery upon condition, and imposes upon the obligee the duty of inquiry as to whether there was such a qualified delivery, omission of which releases the sureties; and parol evidence is admissible to prove the condition, which diligent inquiry would have revealed.

Nothing on the face of this bond, however, indicates incompleteness as to the sureties, or failure of any person to sign as surety. But lack of the signature of the principal renders it in a sense incomplete, and this fact is relied upon as having the same effect as incompleteness in respect of sureties. As to whether lack of the signature of the principal raises the same duty on the part of the obligee, and discharges the sureties in case of omission thereof, the authorities are in conflict. In some jurisdictions and under some circumstances, the sureties are held not bound. *Wood v. Washburn*, 2 Pick. 24; *Ferry v. Burchard*, 21 Conn. 602; *Bunn v. Jetmore*, 70 Mo. 228, 35 Am. Rep. 425; *Russell v. Annable*, 109 Mass. 72, 12 Am. Rep. 665; *Bryant v. Kinyon*, 127 Mich. 152, 53 L.R.A. 801, 86 N. W. 531; *Bean v. Parker*, 17 Mass. 591; *People v. Hartley*, 21 Cal. 585, 82 Am. Dec. 758; *Johnston v. Kimball Twp.* 39 Mich. 187, 33 Am. Rep. 372; *Lyman v. Williams*, 84 Ill. App. 82. On the contrary, many cases hold the bond good and valid as to the sureties, without the signature of the principal, when the latter is bound by law or his special contract for the debt or default for which the bond was given. *State use of The Treasurer v. Bowman*, 10 Ohio, 445; *Trustees of Schools v. Sheib*, 119 Ill. 579, 59 Am. Rep. 830, 8 N. E. 189; *Pima County v. Snyder*, 5 Ariz. 45, 44 Pac. 297; *Cockrill v. Davie*, 14 Mont. 131, 35 Pac. 958; *Mitchell v. Hydraulic Bldg. Stone Co.* — *Tex. Civ. App.* —, 129 S. W. 148; *Wright v. Jones*, 55 Tex. Civ. App. 610, 120 S. 39 L.R.A. (N.S.)

W. 1139; Williams v. Marshall, 42 Barb. 524; *St. Louis Brewing Asso. v. Hayes*, 38 C. C. A. 449, 97 Fed. 859. The decided weight of authority throughout the country, and especially of the later cases, is that the sureties are bound by such an instrument, if the principal is bound by law or his special contract for the debt or default for which the sureties have obligated themselves.

The argument of inconvenience or violation of technical rules is answered by the court in *State use of The Treasurer v. Bowman*, cited, as follows: "Great reliance is placed upon the fact that, if the instrument is not executed by the principal, it will affect the remedy over against him by the securities. There would be great force in this argument if the remedy were destroyed; but it is not; the force and the extent of this liability to them are unimpaired. Whether they could use the bond, *per se*, as evidence of his liability, presents a question merely of convenience in the use of the right, but does not affect the right itself, any more than would the loss or destruction of the bond." That the sureties can recover from the principal what they have been compelled to pay on account of their suretyship in a bond, not executed by the principal, is asserted in *Harnsberger v. Yancey*, 33 Gratt. 527. This being true, the sureties are not, in any substantial sense, prejudiced by inability of the obligee to sue the principal along with them on the bond. The ground of their release, in case of the omission of a surety to sign, as contemplated by the parties, is the injury resulting to those who signed, in case they were bound, because of their inability to exact contribution from the omitted cosurety, since he is not bound at all. This result cannot be predicated of the omission of the principal to sign, when the law or another contract binds him as firmly and fully as the bond would have bound him, had he executed it, and for the benefit of the sureties under the law of subrogation, as well as that of the obligee. Every rule and exception is coextensive only with the reason underlying it; and, as there is no substantial reason for discharge of the sureties under such circumstances, they should be held liable. The equitable remedies for subrogation and indemnity are as fully available and efficacious as if the principal had executed the bond. In no substantial sense, therefore, are the sureties affected by the omission.

The record discloses no direct evidence of notice to the obligee of any agreement with the two defendants, the obligors in the bond, for additional sureties. The charge of such notice stands upon the theory of

agency on the part of the principal debtor to obtain the bond. Having sought employment by the obligee, he had been required, as a condition, to give a bond with two sureties, to be approved by his employer. He submitted the names of the two defendants, but no others, so far as the evidence indicates, and they, after investigation as to their financial ability, were accepted. Then Wilson, the principal debtor, went and procured their signatures to the bond as prepared by the obligee. He obtained and gave this bond as a condition of his employment. Prior to that time, he had not been unconditionally employed, nor permanently employed at all. Obviously, therefore, the procurement of the bond was primarily his business, and not that of his employer, and accordingly he must be held to have acted for and on behalf of himself, and not of his prospective employer, in the procurement of it. No authority sustaining the contention of the plaintiffs in error for the theory of agency, under such circumstances, has been produced or found. *Newlin v. Beard*, 6 W. Va. 110, invoked for the purpose, does not do so. Before the principal debtor in that case was directed to obtain sureties on the bond, it had been accepted as complete, without any sureties on it. Here there had been no such acceptance. There the obligee, having completed a contract, made the debtor his agent to obtain sureties. Here the principal acted for himself, because no contract had been completed. He was making a contract for his own benefit. The facts here shown apply the rule stated in *Lyttle v. Cozad*, 21 W. Va. 183, declaring the principal to be the agent of the sureties.

Wilson defaulted and left the country. His successor, as salesman for the territory he had traveled, called upon the customers of his employer, and obtained from them evidence of the collections made by Wilson in the form of invoices received by him and checks in payment of invoices, made payable to his employer and collected by him, after his indorsement of his employer's name by him as agent. These receipted invoices and checks were admitted as evidence of liability on the bond. A statement in the handwriting of Wilson, showing a balance against him of \$460.75, for which he gave his check, together with the protested check, were also introduced as evidence, supplemented by proof of lack of funds in the bank on which the check was drawn to pay it. In one instance, the customer testified to the payment of a bill not accounted for by Wilson. In all the instances in which checks appeared to have been given and indorsements made by Wilson, his handwriting was proved. In addition

to this evidence, the bookkeeper of the employer, with the books in his possession and at hand, testified to the delivery and shipment of all the goods, the purchase money of which was shown to have been collected, as aforesaid. Admissibility and sufficiency of this evidence are challenged on account of its alleged secondary character. It is unnecessary to enter upon an inquiry as to the classification of evidence referred to in the brief. The receipts, checks, and statement in the handwriting of the principal constitute admissions by him, made within the period of his employment and in the course thereof, and are admissible against the sureties, according to all authority, and sufficient, in the absence of any contradiction thereof, to fix liability upon them. "Accounts, entries, and written statements by the principal are prima facie evidence against his sureties; in some states being conclusive." 32 Cyc. 137. See also *Brandt, Suretyship*, §§ 797-800; 1 *Greenl. Ev.* §§ 187, 188. To the admission in argument of the admissibility of this evidence against Wilson, if he were a party, we add these authorities, conclusively showing it to be likewise admissible against his sureties. Clearly admissible, covering the full amount of the recovery and wholly uncontradicted, it precludes any possible verdict other than the one rendered; and therefore the error, if any, in admitting the testimony of the bookkeeper as to the delivery of the goods, was obviously harmless. Hence there is no occasion for inquiry as to its admissibility.

The testimony of McConnaughey, president of the plaintiff company, was objected to for lack of documentary proof of his position as president. According to well-settled practice, his own evidence as to that was sufficient to establish it prima facie, because the fact was collateral in character. His office in the corporation was not in issue. The sole purpose of proof of his position was to show how or why he had done certain things and possessed certain knowledge. To establish such a status for such purpose, the highest and best evidence is not required. Generally, it is conceded. In qualifying experts, physicians and lawyers are not required to produce their licenses. Their oral testimony suffices everywhere.

These conclusions destroy the basis of all the numerous assignments of error. The court properly refused to set aside the verdict, and rendered judgment upon it. It did not err in holding the defendants liable on the bond. There was no error in admitting the receipts and checks to establish the liability and its extent. There was no error in permitting McConnaughey to testify. If there was any error in the admission of

Brohard's testimony as to sales of goods, Wilson's written admissions and the testimony of a customer, all uncontradicted, covered all of that. Some of the instructions asked for by the defendants and refused were in direct conflict with the law as here stated, and others declared legal propositions having no foundation in the evidence. It would subserve no good purpose to quote and analyze them. From what has been said, it is apparent that there was no evidence of any fraud in the procurement of the bond. If there was any error in the rulings upon objections to evidence, it was harmless for the reasons herein stated. Practically all of such objections were based upon the untenable positions already disposed of.

Seeing no error in the judgment, we affirm it.

KANSAS SUPREME COURT.

STATE OF KANSAS, Appt.,

v.

HARRY RABINOWITZ et al.

(85 Kan. 841, 118 Pac. 1040.)

Nuisance—common law.

1. At the common law acts done in violation of law, or which are against good morals, constitute public nuisances.

Intoxicating Liquors—nuisance—injunction.

2. The selling and delivering of intoxicating liquors on the streets and alleys of a city, publicly, repeatedly, and persistently, is a common nuisance, which may be enjoined by a court of equity under § 265 of the Code of Civil Procedure (Gen. Stat. 1909, § 5859), authorizing the granting of an injunction "in the name of the state to enjoin and suppress the keeping and maintaining of a common nuisance."

Injunction—matter constituting public offense—nuisance.

3. The fact that the same acts may constitute a public offense is no bar to the maintenance of an equitable action to enjoin the nuisance.

Same—Intoxicating Liquor indictment—description of place.

4. In proceedings brought under the pro-

Headnotes by JOHNSTON, Ch. J.

Note.—For injunction at suit of state against public nuisance which is also a crime, see notes to State ex rel. Crow v. Canty, 15 L.R.A.(N.S.) 747; State v. Ehrlick, 23 L.R.A.(N.S.) 691; and Carrell v. State, 33 L.R.A.(N.S.) 325.

For injunction against crime which is a private nuisance, or which involves property rights, see note to Detroit Realty Co. v. Oppenheim, 21 L.R.A.(N.S.) 585.

29 L.R.A.(N.S.)

hibitory law, which provides, among other things, that all places where intoxicating liquors are sold, or given away, or kept for sale or delivery in violation of law, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, are common nuisances, which may be enjoined and abated at the instance of the state, the occupation and use of a street or alley or other public ground by the defendant for the unlawful purpose may be enjoined; and an averment in the petition for the injunction that the defendant had been using, and was still continuing to use, the streets and alleys of a certain city for the sale and delivery of intoxicating liquors in violation of the law, is a sufficient description of the place within the meaning of that statute.

(November 11, 1911.)

APPEAL by the State from a judgment of the District Court for Leavenworth County in defendants' favor in an action to enjoin defendants from engaging in business in violation of the prohibitory laws. Reversed.

Statement by Johnston, Ch. J.:

In the foregoing cases the attorney general of the state and the county attorney of Leavenworth county filed petitions in behalf of the state, the averments in each being substantially the same. In the Rabinowitz Case it was alleged:

"(1) That at the time of the institution of this action, the above-named defendants were, and still are, residents and citizens of the city and county of Leavenworth, state of Kansas.

"(2) That for many months before the institution of this action, the said defendants were, and still are, engaged in the unlawful sale, barter, and delivery of intoxicating liquors within the said city and county of Leavenworth, state of Kansas, in the form and manner as hereinafter alleged and set forth.

"(3) That for many months before the institution of this action, the said defendants were, and still are, maintaining and operating a so-called storeroom or warehouse, or a shift, device, or subterfuge, at a place called Stillings, in Platte county, state of Missouri, just across the Missouri river, about 1 mile east of said city of Leavenworth, state of Kansas, at which place the said defendants at all of the times herein mentioned have been, and still are, temporarily unloading and storing intoxicating liquors for the express unlawful purpose, intent, and design of thereafter selling, bartering, and delivering the same wholly within said city and county of Leavenworth, state of Kansas, as herein more fully alleged and set forth.

"(4) That for many months before the filing of the original petition in this action, the said defendants have owned, maintained, used, and employed, and are still maintaining, using, and employing upon all the streets and alleys of the city of Leavenworth, Kansas, certain wagons, vehicles, and conveyances, with horses or mules hitched thereto and drivers thereon, for the express unlawful purpose of conveying or carrying said intoxicating liquors across said Missouri river from said town of Stillings, Missouri, to and within said city and county of Leavenworth, state of Kansas, and there selling, bartering, and delivering said intoxicating liquors to various persons and places whose names and location are now unknown to said plaintiff, with the express purpose, intent, and design on the part of said defendants of unlawfully aiding and abetting many of said persons, in the violation of the prohibitory laws of said state of Kansas, as herein more fully alleged and set forth.

"(5) That for many months before the institution of this action, the said defendants did, and do still, maintain and operate a local Leavenworth city telephone at their said so-called storeroom or warehouse, or said shift, device, and subterfuge, at said town of Stillings, Missouri, which said telephone at all of the times herein mentioned was, and still is, directly connected with residences and places of business within said city and county of Leavenworth, Kansas, over which said telephone the said defendants, their agents, and employees, have at all of the times herein mentioned and still are taking and receiving telephone orders for said intoxicating liquors at said so-called storeroom or warehouse, or said shift, device, or subterfuge, at said town of Stillings, Missouri, and thereafter selling, bartering, and delivering said intoxicating liquors, so ordered, to said residences, persons, and places of business wholly within said city and county of Leavenworth, Kansas, in violation of the said prohibitory Laws of said state of Kansas, as herein more fully alleged and set forth.

"(6) And plaintiff alleges that at all of the times herein mentioned it has been, and still is, the unlawful custom, habit, or system of the said defendants, their agents, and employees, to collect the sale price of said intoxicating liquors so delivered upon said telephone orders, as aforesaid, wholly and entirely within said city and county of Leavenworth, state of Kansas, in violation of the prohibitory laws of said state of Kansas.

"(7) Plaintiff further alleges that at all of the times herein mentioned, the said defendants have maintained, used, and em-

ployed a local Leavenworth city telephone at their residence at Second and Ottawa streets and No. 714 Miami street, respectively, in said city of Leavenworth, Kansas, over which said telephone the said defendants have, at all of the times herein mentioned, received, and do still receive, telephone orders for said intoxicating liquors from residences, persons, and places of business wholly within said city and county of Leavenworth, Kansas, and thereafter delivered the same to said residences, persons, and places of business by means of said wagons, vehicles, and conveyances from said so-called storeroom or warehouse, or said shift, device, and subterfuge, at said town of Stillings, Missouri, or from said wagons wherever they may be on the streets and alleys of said city of Leavenworth, Kansas, and thereafter collect the sale price of said intoxicating liquors wholly within said city and county of Leavenworth, Kansas, all in violation of the prohibitory laws of said state of Kansas.

"(8) Plaintiff further alleges that at all of the times herein mentioned, the said defendants have authorized, directed, and allowed, and do still authorize, direct, and allow, the drivers of said wagons, vehicles, and conveyances, who are in their employ, and also other agents and employees, whose names are unknown to said plaintiff, to solicit, take, and receive orders for said intoxicating liquors at residences, places of business, and of various persons whose names are unknown to plaintiff, wholly within said city and county of Leavenworth, Kansas, and on the streets and alleys of said city, and upon such orders the said defendants have, at all of the times herein mentioned, delivered, and are still delivering, said intoxicating liquors to said residences, persons, and places of business from said so-called storeroom or warehouse, or said shift, device, or subterfuge, at said town of Stillings, Missouri, and from said wagons on the streets and alleys of said city of Leavenworth, Kansas, and thereafter collecting the sale price of said intoxicating liquors wholly within said city and county of Leavenworth, Kansas, all in violation of the prohibitory laws of said state of Kansas.

"(9) And plaintiff further alleges that at all of the times herein mentioned, the said defendants have kept, and do still keep, said wagons, vehicles, conveyances, horses, mules, and drivers within said city and county of Leavenworth, Kansas, especially at night, at places unknown to said plaintiff, and that frequently the said wagons, vehicles, or conveyances are kept loaded overnight with intoxicating liquors, which are delivered the next morning to various

residences, persons, and places of business within said city and county of Leavenworth, Kansas, and the sale price thereafter collected wholly within said city and county of Leavenworth, state of Kansas, all in violation of the prohibitory laws of said state of Kansas.

"(10) And plaintiff further alleges that a very large part or proportion of the said places and persons to whom or which said intoxicating liquors are sold, bartered, and delivered in the manner herein alleged, are thereafter selling, bartering, and delivering said intoxicating liquors in violation of the prohibitory laws of the state of Kansas; that said defendants well knew this to be a fact; that said defendants, at all of the times herein mentioned, have been, and still are, selling, bartering, and delivering said intoxicating liquors to them, as herein alleged and set forth, for the express unlawful purpose, and with the express unlawful intent and design, of aiding and abetting them in violating said prohibitory laws of said state of Kansas.

"(11) And plaintiff further alleges that the said defendants have adopted, employed, and used, and are now adopting, employing, and using, the said so-called storeroom or warehouse, at said town of Stillings, Missouri, and said wagons, vehicles, conveyances, horses, mules, drivers, telephones, and all other property and means employed, as herein alleged, purely and simply as devices, shifts, and subterfuges to attempt to avoid and violate the said prohibitory laws of said state of Kansas.

"(12) And plaintiff further alleges that said defendants have at all of the times herein mentioned pretended, and do still pretend, to be engaged in interstate commerce in selling, bartering, and delivering said intoxicating liquors, as herein alleged, but plaintiff alleges that they have been and are conducting said unlawful business, as herein alleged, wholly within said state of Kansas, and are not bona fide engaged in any interstate commerce business.

"(13) Plaintiff further alleges that at all of the times herein mentioned, the said defendants have received, and do still receive, said intoxicating liquors at their said so-called storeroom or warehouse, or said shift, device, or subterfuge, at said town of Stillings, Missouri, in original packages, and that said intoxicating liquors are then taken out of said original packages by the said defendants, and thereafter sold, bartered, and delivered to said residences, persons, and places of business within said city and county of Leavenworth, Kansas, in other than their original packages, suitable for the use and convenience of said residences, persons, and places of business within said

city and county of Leavenworth, Kansas.

"(14) Plaintiff further alleges that this is an action in which the state of Kansas is entitled to an injunction, and that unless said defendants, their agents, and employees are restrained and enjoined from doing and performing the unlawful acts and omissions herein complained of, they will continue in the violation of said prohibitory laws of the said state of Kansas in the manner and form herein alleged and set forth.

"(15) Plaintiff further alleges that a reasonable attorneys' fee herein is the sum of \$500.

"Wherefore, and because of all the matters and things herein alleged, said plaintiff prays and demands that a temporary injunction issue herein against said defendants, restraining them and their agents and employees from doing any of the unlawful acts herein complained of; that they be enjoined from conducting said unlawful business; that they be enjoined from maintaining, using, and employing said wagons, vehicles, and conveyances, horses, mules, telephones, and any other property in the unlawful manner herein alleged; that upon the final determination of this action, said injunction may be made permanent; that said wagons, vehicles, conveyances, horses, mules, telephones, and all other property used in said unlawful business, be declared common nuisances, and that the same be abated; that said plaintiffs have and recover its costs herein, including attorneys' fee of \$500, and for such other and further relief as said plaintiff may be entitled to."

The defendants in each case filed a demurrer alleging that the petition did not state facts sufficient to constitute a cause of action, which was sustained by the court. The state appeals.

Messrs. John S. Dawson, Attorney General, Lee Bond, S. M. Browster, and Arthur M. Jackson for the State.

Messrs. A. E. Dempsey and F. P. Fitzwilliam for appellees.

Johnston, Ch. J., delivered the opinion of the court:

Accepting the averments of the petition as facts, was the state entitled to an injunction under either the general provision of the Code which authorizes the enjoining of a common nuisance, or the section of the prohibitory liquor law which provides for enjoining the maintaining of a place where intoxicating liquors are sold or given away in violation of law, or where persons are permitted to resort for the purpose of drinking such liquors?

If the provision of the prohibitory law

for enjoining or abating nuisances was left out of consideration, or had never been enacted, there would still be sufficient authority for enjoining the nuisance in question. The Code specifically provides that "an injunction may be granted in the name of the state to enjoin and suppress the keeping and maintaining of a common nuisance." Civ. Code Proc. § 265 (Gen. Stat. 1909, § 5859). This provision gives direct authority to the state for the injunction sought if the acts and things charged against appellees in the petition constitute a common nuisance. At the common law acts done in violation of the law, or which are against good morals or public decency, and which result in injury to the public, constitute a public nuisance. 1 Wood, Nuisances, 3d ed. § 17; Joyce, Nuisances, § 5; 6 Current Law, 828.

A nuisance is public if it affects the community at large, or if it affects a place where the public have a right to and do go, such as a park, street, or alley, and which nuisance necessarily annoys, offends, or injures those who come within the scope of its influence. That the illegal act is publicly, repeatedly, and persistently committed in the streets of a city, thus offending and injuring all who use the streets, and who necessarily come within the range of such an influence, is an important factor in determining whether it constitutes a common or public nuisance. For instance, it has been held that "street walking" might be stopped, as it was inhibited by the common law (*Braddy v. Milledgeville*, 74 Ga. 516, 58 Am. Rep. 443); also that the setting up of a menagerie and circus in a graveyard which had been dedicated to a municipality was a public nuisance (*Kansas City v. Lemen*, 6 C. C. A. 627, 12 U. S. App. 640, 57 Fed. 905); and that the exhibition of a stud horse on the streets of a town amounted to a nuisance (*Nolin v. Franklin*, 4 Yerg. 163). The singing of ribald songs in a loud and boisterous manner in the streets for ten minutes was held to be a nuisance (*State v. Toole*, 106 N. C. 736, 11 S. E. 168, 8 Am. Crim. Rep. 608); and the same court held that the repeated use of profane and blasphemous language on the public streets in the hearing of many persons passing and repassing was a public nuisance (*State v. Chrisp*, 85 N. C. 528, 39 Am. Rep. 713). The discharge of fireworks and of heavily charged explosives on the public streets in a densely populated part of a large city was held to be a public nuisance. *Speir v. Brooklyn*, 139 N. Y. 6, 21 L.R.A. 641, 36 Am. St. Rep. 664, 34 N. E. 727; *Landau v. New York*, 180 N. Y. 48, 105 Am. St. Rep. 709, 72 N. E. 631. In addition to these considerations, it has been

held by our own court that every place where a public statute is openly, publicly, repeatedly, continuously, persistently, and intentionally violated is a public nuisance. *State ex rel. Vance v. Crawford*, 28 Kan. 728, 42 Am. Rep. 182. In the present case it is alleged that the offensive and injurious acts were committed on the public streets and alleys of a large city, and these acts, it appears, are injurious to public morals, contrary to the policy of the state, and in direct violation of statute. It is further shown that the streets have been thus openly, persistently, and illegally used for a period of many months prior to the bringing of this action. It is clear that the charge made against appellees constitutes a common nuisance at the common law, and is one which may properly be enjoined under the general provisions of the Code.

The fact that the maintaining of a common nuisance is made a public offense, or that special provision is made for its abatement, is not necessarily a bar to the enjoining of a public nuisance by a court of equity. While courts of equity cannot be used to punish crime or enforce the criminal laws, still, if the acts done, and threatened to be done, are such as to bring them within the jurisdiction and power of a court of equity, its arm is not shortened by the fact that the same acts may be denounced as a crime. The mere criminality of an act, whether it be a public or private nuisance, will not deprive the injured party of his equitable remedies, nor shelter the wrongdoer from the judgment of a court of equity. In *State ex rel. Vance v. Crawford*, supra, it was said: "While it is unquestionably true that the keeping of the saloon in question is a criminal offense, and its operation involves the commission of many criminal offenses, yet we cannot think that these facts can possibly take away any of the jurisdiction which courts of equity might otherwise exercise." Page 735 of 28 Kan. The Supreme Court of the United States held in *Mugler v. Kansas*, 123 U. S. 623, 672, 673, 31 L. ed. 205, 214, 8 Sup. Ct. Rep. 273, 303, that "in case of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information also lies in equity, to redress the grievance by way of injunction." 2 Story's Eq. §§ 921, 922. The ground of this jurisdiction in cases of pre-emption, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy than can be had at law. They can not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future; whereas courts

of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury."

The question was before our court in the recent case of *State ex rel. Jackson v. Lindsay*, 85 Kan. 79, 83, 35 L.R.A.(N.S.) 610, 116 Pac. 207, 208, where it was said: "Courts of equity are reluctant to use the process of injunction where the remedy by indictment or information is efficacious, but will not hesitate where the remedy is not adequate, and it is necessary to protect the rights of the public or an individual. A court is not powerless to prevent the doing of an act merely because it is denounced as a public offense." See also *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; *State ex rel. Crow v. Canty*, 207 Mo. 439, 15 L.R.A.(N.S.) 747, 123 Am. St. Rep. 393, 105 S. W. 1078. 13 Ann. Cas. 787; *Vegelahn v. Guntner*, 167 Mass. 92, 35 L.R.A. 772, 57 Am. St. Rep. 443, 44 N. E. 1077; *Columbian Athletic Club v. State*, 143 Ind. 98, 28 L.R.A. 727, 52 Am. St. Rep. 407, 40 N. E. 914; *North American Ins. Co. v. Yates*, 116 Ill. App. 217; *Com. v. McGovern*, 116 Ky. 212, 66 L.R.A. 280, 75 S. W. 261. It is said that the statutory remedy for the punishment and abatement of common nuisances is adequate, and therefore injunction is not necessary nor available. In the first place, the remedy by prosecution is only applicable to existing nuisances, and cannot reach future illegal acts and nuisances which the scheme of appellees contemplated. According to the averments in the petition, appellees are doing the illegal acts in many places throughout the city at the same time, and are moving up and down the streets of the city, rendering it difficult to trace their operations, and are conducting the business through so many agencies and in such devious ways that a multiplicity of prosecutions and proceedings would be necessary under the remedies provided by the prohibitory law. The migratory character of the nuisances, the number of them, the persistence of appellees in their unlawful action, and the various subterfuges, shifts, and devices employed by them in committing public nuisances, show clearly enough that criminal prosecution would be an inadequate remedy. It is a well-recognized rule that equity will take jurisdiction to prevent a multiplicity of suits. A court of equity can prevent threatened nuisances as well as restrain and abate existing ones. 39 L.R.A.(N.S.)

It may in a single proceeding put an end to those in progress, and perpetually enjoin those in contemplation.

The ground of adequacy of legal remedies, however, is not a very strong or important consideration in cases like this, where the express right is given to the state to enjoin and suppress the maintaining of common nuisances. It was said in *North American Ins. Co. v. Yates*, supra, that, "independent of statute, the state may file a bill to enjoin a violation of its laws where the acts complained of are injurious to the public. And it is immaterial that such acts are punishable under the criminal statute, or that there is an adequate remedy at law, or that the complainant has suffered no injury." Pages 220, 221 of 116 Ill. App. In speaking of the jurisdiction of a court of equity in cases of this kind, it has been said that "this jurisdiction is founded upon the ability of equity to prevent irreparable mischief and vexatious litigation, and to furnish a more complete remedy than can be had at law. The remedy by indictment for a public nuisance is not an adequate remedy at law precluding the remedy by injunction." 21 Am. & Eng. Enc. Law, 2d ed. 703. There are sufficient grounds alleged for invoking the jurisdiction of a court of equity to enjoin and suppress public nuisances under the general provision of the Code, but we think that injunction will also lie under the provisions of the prohibitory law. It provides that "all places where intoxicating liquors are manufactured, sold, bartered, or given away in violation of law, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter, or delivery in violation of the law, and all intoxicating liquors, bottles, glasses, kegs, pumps, bars, and other property kept in and used in maintaining such a place, are hereby declared to be common nuisances." Gen. Stat. 1909, § 4387. "The attorney general, county attorney, or any citizen of the county where such a nuisance as is defined in § 1. chapter 232, Session Laws of 1901, exists or is kept, or is maintained, may maintain an action in the name of the state to abate and perpetually enjoin the same," etc. Gen. Stat. 1909, § 4388.

The contention of appellees is that the averments of the petition of the state do not sufficiently describe the place, or, rather, do not describe such a place as is contemplated by the foregoing statute. They allege, in effect, that appellees carry on their unlawful business and create a nuisance on the streets and alleys of the city. It is true, as contended, that ordinarily such unlawful business is conducted and such nuil-

ances are maintained in houses, apartments, and rooms, and in proceedings brought under the statute quoted, it has been said that the place should be so described that those interested can identify it. It is necessary that the description should be so definite that the parties can understand the scope of the judgment, and so that officers called on to abate the nuisance may be able to identify it, and so that all can know the extent of the place to which the injunction ordered applies. However, the statute does not provide that the place must be in a building or inclosure, nor does it fix any limit on the dimensions of such a place. It was held in *State v. Walters*, 57 Kan. 702, 47 Pac. 839, that such a nuisance might be maintained on open ground, and that two lots of a certain block in a city was a good description. In *State v. Dykes*, 83 Kan. 250, 252, 111 Pac. 179, 180, a nuisance proceeding, the defendant was enjoined from maintaining a place in a certain county, and it was held that this blanket judgment, although broader than the charge against him, was not void. It was alleged and shown that he sold beer kept in a barrel in an alley, and that part of the alley so occupied and used by him was held to be a "place," and the testimony sufficient to justify a finding that he was maintaining a nuisance within the meaning of the law. It was said: "The want of other 'paraphernalia' did not prevent the spot occupied from being a 'place' within the condemnation of the statute, nor did its location in an alley prevent his being its 'keeper,' so long as he used it for his own ends."

As the statute does not prescribe the character or extent of the place, the attorney general or county attorney in charging the maintaining of a nuisance may make the description of the place as extended or limited as the facts and circumstances of the case may warrant. It may be in a building or in a room in it, or it may be on an open lot or a block, or it may be in a field or a park. As we have seen, it may be in an alley, and therefore it may be in a street. It was undoubtedly the intention of the legislature that every place in which a nuisance was maintained, wherever located and whatever the size or extent, should be abated. Ownership of the ground on which the nuisance is kept is not essential to the exercise of the power of injunction, as the *Dykes* Case determined that the place might be on public ground. If the place of the nuisance is public, the court must adopt methods of abatement suitable to the place and the situation. There could, of course, be no lien obtained on the premises, the place could not be padlocked or

closed, neither could it be removed nor destroyed. A nuisance may be abated by injunction or by some of the other processes mentioned. The injunction process is peculiarly applicable to the abatement of a nuisance kept in streets and alleys, or in any part of the public grounds of a city. The fact that a person moves back and forward in the described place in conducting his unlawful business will not serve to protect the culprit, nor deprive the court of the power to enjoin him from continuing the nuisance in any part of the place. An offender could not get beyond the reach of an injunction if he took a push cart loaded with intoxicating liquors, and moved it about from one place in a park to another while making sales; and in a proceeding brought against him, it would be sufficient to charge that he maintained a nuisance in the park. The same would be true if he made such use of a house boat which he moved up and down the river in the center of a city. And it would be clear that if he carried on his business from a wagon which he moved about in the busiest section of a city; that so much of the streets as he used might be described as the place of the nuisance. If the nuisance is of an ambulatory character, and the offender is moving it from point to point over the city, and is thus illegally using to some extent all the streets and alleys of the city, no reason is seen why such streets and alleys may not be described as the place of the nuisance, nor why the offender may not be enjoined from maintaining a nuisance on any street or alley of the city. Blanket injunctions covering a wide scope of territory, when the nuisance extends over only a small part of such territory, will not be issued, but the magnitude of the place and the range of the injunction must depend on the methods of the defendant and the circumstances of each case. In the case of *State ex rel. Lyon v. City Club*, 83 S. C. 509, 515, 65 S. E. 730, 732, cited by appellees in support of the contention that an injunction cannot reach so extended a place as that described, it was held that a general blanket injunction covering the whole of the state was not warranted, but it also recognized that it might be as extended as the devices and operations of the defendant in conducting the unlawful business and in keeping the nuisance. After deciding that there was no error in refusing an injunction restraining sales of liquor throughout the state, and independently of the place where the nuisance existed, the court said: "Possibly circumstances may be such as would justify the court in enlarging the sphere of its injunction, as where the court has reason to believe the offender, after injunction, will

shift his nuisance to another place, so as to render the injunction practically useless. The court might prefer not to chase the offender from place to place, but might head him off by a broader restraining order." The allegations of appellant show such conduct and circumstances in this case as were forecast in the cited case, and they afford good grounds for enlarging the sphere of the injunction to the extent of the place described in the petition. The restraining power of the court as given by the statute is broad enough to reach the wrongdoer, whether he is in motion or stationary within the described place, and however large the place of his operations.

It is suggested that the sales of liquor taken from a warehouse in Missouri and brought into Kansas, where it was sold and delivered to purchasers, cannot be enjoined, as it would be an interference with commerce between the states. It appears from the petition that the sale and delivery of the liquor was made by the appellees themselves, and that the delivery was made and the sales consummated within the state. The appellees were therefore punishable under the laws of the state, and the nuisance maintained by them in Kansas was subject to the restraining power of the district court. Parties cannot escape the condemnation of the law by storing liquors beyond the state line, and then carting them back into the state, making periodical or occasional trips to certain places where the liquors are sold, and delivering them to persons on this side of the state line. They cannot peddle the liquors up and down the highways of the state without subjecting themselves to the penalties of the prohibitory law and the restraining power of courts of equity. According to the averments of the petition, the appellees are resorting to a number of cunningly devised shifts and subterfuges, intended to baffle the officers and defeat the enforcement of a law enacted for the protection of public morals, public health, and public safety. Knowing the policy of the state and the prohibition of a traffic that is conceded to be the greatest source of vice and crime and poverty and sorrow, they employ the tricks and fraudulent means enumerated to bring in and sell the prohibited liquors. They flagrantly undertake to thwart the policy of the state, and contemptuously defy the law and its officers; but the courts will look through such pretenses and subterfuges, and hold them responsible for their real intent and acts. Under the averments of the petition, they are to be regarded as outlaws who are selling and delivering liquors and creating common nuisances within the state, and, if the nuisances are shown to exist as 35 L.R.A. (N.S.)

alleged, it is the manifest duty of the court to perpetually enjoin them.

The demurrers should have been overruled in each of the cases. The judgment will therefore be reversed, and the causes remanded for further proceedings.

KENTUCKY COURT OF APPEALS.

ROBERT COLEMAN, Appt.,

v.

SALLIE COLEMAN.

(147 Ky. 383, 144 S. W. 1.)

Divorce — restoration of property — transfer to defraud creditors.

Property transferred by a man to his wife to defraud his creditors is not within the operation of a statute providing that in case of divorce any property which either party may have obtained from the other during marriage, in consideration or by reason thereof, shall be restored to the party from whom it was obtained.

(March 6, 1912.)

Note. — Applicability of statutory provision for restoration of property in case of divorce, to voluntary gifts or conveyances.

This note is limited to the bearing of the statutes upon voluntary gifts or conveyances, and does not include cases upon the restoration of property which came to the husband by force of the marriage. Cases relating to community property or homestead rights, or "settlements" under the English statutes permitting the court to vary settlements, are excluded, as are also cases where the statute permits the court in decreeing a divorce to make such division of the property as may be equitable.

As to right to join prayer for return of plaintiff's property with prayer for divorce, see the note to *Singer v. Singer*, 29 L.R.A. (N.S.) 819.

For marital misconduct of one spouse as avoiding gift by other spouse, see note to *Thomas v. Thomas*, 35 L.R.A. (N.S.) 124.

Voluntary gifts and conveyances are not affected by statutes relating to property obtained "in consideration of" or "by reason of" or "by virtue of" the marriage. *McNutt v. McNutt*, 78 Ark. 346, 95 S. W. 778; *Spurlock v. Spurlock*, 80 Ark. 37, 96 S. W. 753; *Flood v. Flood*, 5 Bush, 167; *Phillips v. Phillips*, 9 Bush, 183; *Chase v. Phillips*, 153 Mass. 17, 26 N. E. 136; *Kinzey v. Kinzey*, 115 Mo. 496, 20 L.R.A. 222, 22 S. W. 497; *Pitts v. Sheriff*, 108 Mo. 110, 18 S. W. 1071; *Cockrill v. Woodson*, 70 Fed. 752; *Bufe v. Bufo*, 88 Mo. App. 627; *Dillon v. Starin*, 44 Neb. 881, 63 N. W. 12; *Thomas v. Thomas*, 27 Okla. 784, 35 L.R.A. (N.S.) 124, 109 Pac. 825, 113 Pac. 1058.

In *Flood v. Flood*, 5 Bush, 167, where a

APPPEAL by plaintiff from a judgment of the Circuit Court for Harrison County in defendant's favor in an action brought to recover a tract of land alleged to have been paid for by plaintiff and conveyed to defendant during marriage, which, because of dissolution of the marriage, should be restored to plaintiff. Affirmed.

The facts are stated in the opinion.

Messrs. J. T. Simon and W. T. Lafferty for appellant.

Messrs. M. C. Swinford and T. E. King, for appellee;

Property will not be restored to a grantor who himself conveyed it for the fraudulent purpose of defeating his creditors.

Hill v. Scott, 12 Ky. L. Rep. 877, 15 S. W. 667; Southwood v. Southwood, 30 Ky.

L. Rep. 307, 98 S. W. 304; Carson v. Beliles, 121 Ky. 294, 1 L.R.A.(N.S.) 1007, 89 S. W. 208; Lankford v. Lankford, — Ky. —, 117 S. W. 962; Bennett v. Bennett, 95 Ky. 545, 26 S. W. 392.

Clay, C., delivered the opinion of the court:

Appellant, Robert Coleman, and appellee, Sallie Coleman, were married on March 21, 1883. On December 3, 1904, in an action brought by appellee, they were divorced by a judgment of the Harrison circuit court. The judgment, following § 425 of the Civil Code, provided as follows: "Any property not disposed of at the commencement of this action, which either party may have obtained, directly or indirectly, from

compromise was made of an action for divorce, in which it was agreed that there should be a perpetual divorce from bed and board, the husband setting aside a considerable property in trust for the use of the wife and her children after her death, and the wife married again, whereupon the husband, having divorced her *a vinculo*, brought an action to have the deed of trust canceled and the property returned to him. In denying this application, the court said: "Our statute requires that all the property remaining in kind which one party may have obtained from or through the other, during the marriage, in consideration of or by reason thereof, shall be restored on granting a divorce. (2 Stanton, Rev. Stat. 21.) But here she did not get the property in consideration of or by reason of her intermarriage with him, but because they could not live in the proper conjugal relations, and were severing the same."

In Phillips v. Phillips, 9 Bush, 183, where the husband, in a decree of divorce in his favor, was granted land which he had conveyed after marriage to a trustee for the separate use of his wife for her life, and with remainder to her children, the court, in holding that this decree was erroneous, said: "Section 6, article 3, chapter 47, Revised Statutes, provides that 'upon final decree of divorce from the bond of matrimony, the parties shall be restored such property not disposed of at the commencement of the suit, as either obtained from or through the other, before or during the marriage, in consideration or by reason thereof.' The 462d section of the Civil Code of Practice differs therefrom in this: It limits the property to be restored to property obtained during the marriage. It may well be doubted whether it was intended by the adoption of this provision of the Code to supersede the statute quoted. The design seems to have been to regulate the mode of enforcing the right of restoration, and not to establish or define such right. Williams v. Gooch, 3 Met. (Ky.) 486. But, however this may be, the Code makes no provision as to property acquired before marriage, and therefore the statute 39 L.R.A.(N.S.)

remains in force as to such property. It is apparent from the language both of the statutes and the Code, that the mere fact that property was obtained by one of the parties from or through the other, before or during the marriage, does not entitle the party from or through whom it was obtained to have it restored upon final judgment for a divorce. If such had been the legislative intention, the condition found in each of the two sections, that it must have been obtained 'in consideration or by reason of the marriage,' would have been omitted as superfluous."

In McNutt v. McNutt, 78 Ark. 346, 95 S. W. 778, it was held that a husband obtaining a divorce for his wife's misconduct could not recover any of the property, real or personal, which he had assigned and conveyed to her after marriage, under the Arkansas statute, the court holding that, as the statute had been copied from the Kentucky Code of 1854, where the word "consideration" in the statute had been held to mean "the act of marriage, or some agreement or contract touching or relating to the act of marriage," and the expression, "by reason thereof," "to relate to such property as either party may have obtained from or through the other by operation of the laws regulating the property rights of husband and wife," the statute could not relate to the conveyances in question. (The court points out that a later change in the Kentucky Code, in 1876, was not copied by their legislature.)

So, in Spurlock v. Spurlock, 80 Ark. 37, 96 S. W. 753, supra, where a wife had, with her own earnings, paid off a mortgage on her husband's property, in case of a divorce, for her adultery, it was held, following the McNutt Case, that this was not within the Arkansas statute. But the court held that in equity the wife should be subrogated to the rights of the mortgagee.

So, in Thomas v. Thomas, 27 Okla. 784, 35 L.R.A.(N.S.) 124, 109 Pac. 825, 113 Pac. 1058, supra, it was held that a gift of property made during the existence of marriage, by a husband to his wife, is not such "property" as is provided for in § 1856, Ind.

or through the other during marriage, in consideration or by reason thereof, shall be restored to the party from whom it was obtained." This action was brought by appellant against appellee to recover a tract of about 35 acres of land, which, he alleges, was paid for by him and conveyed to appellee during their marriage and in consideration thereof. Among the defenses interposed by appellee was that the land was conveyed to her by appellant, or was caused to be conveyed to her by him, with the fraudulent intent to cheat his creditors, and to prevent them from subjecting the land to the payment of their claims against him. Proof was taken, and upon submission of the case the chancellor denied appellant the

relief prayed for. From that judgment this appeal is prosecuted.

It appears from the evidence that the tract in controversy is a part of a larger tract which was purchased by appellant at decretal sale. Appellant was unable to execute bond for the purchase price, so he assigned his bid to W. T. Lafferty. Lafferty agreed that enough land should be sold to pay the bonds and a reasonable fee, and that the remainder of the land should belong to appellant. The land was sold, with the exception of the tract in controversy, and there was realized from the sale a sum sufficient to pay the sale bonds and all of Lafferty's fee except \$65. The land was conveyed to appellee by deed reserving to Lafferty a lien for the balance of his fee.

Terr. Anno. Stat. (Mansfield's Dig. § 2568), which is similar to the Arkansas statute.

A similar result was reached in *Chase v. Phillips*, 153 Mass. 17, 26 N. E. 136, supra. In that case a woman, having conveyed to her husband through a third party certain personal property, brought a suit in equity to recover it, which was settled, she making a deed of settlement in his favor to certain trustees. Later, the parties were divorced on account of the husband's adultery. In an action thereafter, brought by her to set aside the deed of settlement, it was held that the statute authorizing the court, after a divorce, to make a decree restoring to the wife "the whole or any part of her personal estate that has come to her husband by reason of the marriage," did not cover the case, and that the property which came to the husband under the trust deed made by his wife, in settlement of their differences, did not come to him "by reason of the marriage," within the meaning of the statute.

In *Bufe v. Bufo*, 88 Mo. App. 627, it was held that the wife had not forfeited her rights under an antenuptial agreement, by reason of the statute providing that in cases of divorce "the guilty party shall forfeit all rights and claims under and by virtue of the marriage." The court said: "The effect of its provisions is, in case of divorce, to forfeit all the guilty party's rights and claims under and by virtue of the marriage. But the plaintiff's demand against the estate was acquired by the antenuptial agreement, that is, by grant, and not 'under and by virtue of the marriage.'"

Under this statute, in *Cockrill v. Woodson*, 70 Fed. 752, supra, where the plaintiff attempted to convey real property directly to his wife, and thereafter the parties were divorced by the fault of the husband, it was held that, as the operation of the conveyance when made was to leave the legal title in the husband, and the equitable title in the wife, he held as trustee for her, and that upon the divorce, under the statute, his trusteeship ceased, and she became seised of the fee of the property. The court states that in this respect it follows the construction of the statute by the Missouri court, 39 L.R.A. (N.S.)

referring especially to *Pitts v. Sheriff*, 108 Mo. 110, 18 S. W. 1071, where the same question was similarly decided.

But in *Raney v. Raney*, 128 Mo. App. 167, 106 S. W. 577, where the wife, at the request of the husband, had lent money to his relatives, for which promissory notes were taken to the joint order of her and her husband, secured by deeds of trust, it was held that upon a divorce for his fault, she was entitled to these notes as her separate property, the court not stating whether this was decided under the statute or merely as equitable relief.

Under a statute providing that upon the dissolution of a marriage, the court may make a further decree restoring to the wife the whole or such part as it shall deem just and reasonable of the personal estate that shall have come to the husband by reason of the marriage, or awarding to her the value thereof, to be paid by the husband in money, this provision immediately following a section providing that when a decree of divorce shall be granted, the wife shall be entitled to the possession of her real estate in like manner as if her husband were dead, it was held that these two provisions "had reference to the property rights of a husband as they existed at common law, and that their object was to restore the wife to her property rights on dissolution of marriage, and prevent the husband from retaining the personal property and possession of the real estate thereafter," and that the statute did not cover personal property inherited by the wife during the marriage, from her father, and with which she had paid a debt of her husband, as it came to the husband by gift or loan, and not by reason of the marriage. *Dillon v. Starin*, 44 Neb. 881, 63 N. W. 12.

General provision for return of property owned at marriage.

In *Tyson v. Tyson*, 54 Md. 35, where the statute gave the court power, upon granting a divorce, "to award to the wife such property or estate as she had when married, or the value of the same, or of such part there-

Appellant's purpose in having the land conveyed to his wife is shown, not only by the evidence of others acquainted with the facts, but by the allegations of his second amended petition and his own account of the transaction. Thus the amended petition contains the following averment: "That plaintiff was in debt to some extent at that time, and this was done [the conveyance of the property to appellee] to give him a chance to pay his debts and secure a home for himself and his children."

In answer to the question, "State what about the contract with your wife?" appellant answered as follows: "I was bound up,

and Judge Lafferty said he thought he could straighten it, and make the deed over to my wife, and he said, 'Any time you want to change it, you can change it.' He said, 'When you get straightened up, we can change the deed,' and we went on and wrote the deed." On cross-examination, in answer to the question, "Why did you not have this deed made to you by Judge Lafferty, instead of to your wife?" appellant answered: "I was a little behind in some indebtedness, and I knew there was enough coming out of my brother's estate to pay it, but they wouldn't settle up. I owed Mr. William Webber \$130, I think, and Mr. William

of as may have been sold or converted by the husband, having regard to the circumstances of the husband at the time of the divorce, or such part of any such property as the court may deem reasonable," it was held that the statute had no relation to an absolute gift of personal property made by the wife to the husband during the marriage.

In *Reed v. Reed*, 109 Md. 690, 130 Am. St. Rep. 552, 72 Atl. 414, where a woman, alleging that she had been granted by the English court an absolute divorce from her husband, asked for a decree of the Maryland court that real property in Maryland bought with her money during the marriage, and which she caused to be conveyed to her self and her husband "as tenants by entireties," be adjudged to be her sole property, the court, in holding that, without further allegations and proof showing the transaction to be against her will, she could not recover, said: "The theory on which the bill was filed is that the appellant having been divorced from the appellee, the mere fact that the property was paid for out of money belonging to the appellant is sufficient to authorize a court of equity, either under the authority of art. 16, § 37, of the Code, or independently of that section, to restore the property to her. Without considering or determining whether said section, which confers upon the court granting the divorce 'power to award to the wife such property or estate as she had when married,' has reference only to the court decreeing the divorce, or whether courts of equity, apart from the statute, have such power, it is clear from the decisions in this state that, where a wife during coverture voluntarily, and without any fraud or undue influence on the part of the husband, conveys her property to him, the effect of a decree for divorce is not to vest in her an equitable title to such property. . . . Assuming that the Code confers on the court the power of awarding the wife all the property she had during coverture, as well as that possessed prior and at the time of the marriage, that power must be qualified by the rights acquired by the husband, or others through him, claiming with her privy and consent." (The court stated that the effect of the divorce itself was to change the title into a tenancy in common.)

34 L.R.A. (N.S.)

General provision for return of property "derived from husband."

In *Gallagher v. Gallagher*, 89 Wis. 461, 61 N. W. 1104, it was held, where property was purchased in the wife's name, with money which was held to be the husband's, that such property was "derived from the husband," under the statute which provided: "Upon judgment of divorce the court may finally divide and distribute the estate, both real and personal, of the husband, and so much of the estate of the wife as shall have been derived from the husband, between the parties, and divest and transfer the title of any thereof accordingly."

As illustrating a division, under this statute of "the estate," part of which was in the wife's name and derived from the husband, see *Hoernig v. Hoernig*, 109 Wis. 229, 85 N. W. 346.

In *Martin v. Martin*, 112 Wis. 314, 87 N. W. 232, 88 N. W. 215, a decree of divorce was reversed because the court, in separating the property, had evidently overlooked the fact that a valuable piece of land owned by the wife had been deeded to her by the husband without any consideration and wholly as a gift or gratuity.

And in *Brenger v. Brenger*, 142 Wis. 26, 26 L.R.A. (N.S.) 387, 135 Am. St. Rep. 1050, 125 N. W. 109, 19 Ann. Cas. 1136, a judgment was reversed because the court below had decreed that the wife pay the husband a monthly sum, which would require her to resort to property not derived from the husband. The court, however, directed that, in adjusting the matter, the property conveyed by the husband to the wife directly should be returned to the husband.

But where the husband's father deeded property to the wife on which the husband built a house, and it appeared that the wife had spent more than the value of the house in paying taxes and interest on mortgages on the property, it was held that this property was not "derived from the husband," within the terms of the statute. *Frackelton v. Frackelton*, 103 Wis. 673, 79 N. W. 750.

Later Kentucky statute.

Subsequently to the Kentucky cases cited supra, the Code of Kentucky was amended to read: "Every judgment for a divorce

Terry a note, and, let me see, I owed another note to somebody. Bob Clifford was the one, and they all wanted their money." Judge Lafferty testifies that, at the time of the conveyance to appellee, appellant was involved, and the deed was made to appellee, because it was understood by all present that, if the land was conveyed to appellant, his creditors would take it for their debts. James Coleman, appellant's son and witness, testifies that he understood that the land was deeded to his mother to prevent its being subjected to the payment of his father's debts.

It would be difficult to find a case where

the intention of the grantor was made clearer. He and all his witnesses admit that the land was conveyed to appellee to prevent it from being taken away from him by his creditors. Counsel for appellant insist, however, that the proof is not sufficient to justify the conclusion that the conveyance was caused to be made by appellant for the purpose of defrauding his creditors, because the whole transaction was a matter of record, and never attacked, which is conclusive that the rights of no creditor were affected. This contention was made in the cases of *Carson v. Beliles*, 121 Ky. 294, 1 L.R.A. (N.S.) 1007, 89 S. W. 208, and *Lankford*

from the bond of matrimony shall contain an order restoring any property not disposed of at the commencement of the action, which either party may have obtained, directly or indirectly, from or through the other, during marriage, in consideration or by reason thereof; and any property so obtained without valuable consideration shall be deemed to have been obtained by reason of marriage." (The rest of the section is as to method of proceeding, etc.)

Under this amendment, voluntary gifts and conveyances will be restored upon divorce, without regard to the guilt of the respective parties. *Irwin v. Irwin*, 107 Ky. 24, 52 S. W. 927; *Grow v. Grow*, 134 Ky. 816, 135 Am. St. Rep. 440, 121 S. W. 654; *Thomason v. Thomason*, 142 Ky. 176, 134 S. W. 161; *Hawkins v. Northern Coal & Coke Co.* 145 Ky. 118, 140 S. W. 48; *Bayer v. Fusche*, 7 Ky. L. Rep. 832; *Bennett v. Bennett*, 19 Ky. L. Rep. 1243, 43 S. W. 247; *Duvall v. Duvall*, — Ky. —, 144 S. W. 78; *Maynard v. Maynard*, 145 Ky. 197, 140 S. W. 156.

The rule has been applied by requiring restoration of:

—land conveyed to a wife through a third party. *Thomason v. Thomason*, 142 Ky. 176, 134 S. W. 161;

—real estate purchased with the proceeds of a lottery ticket bought by the husband, which won \$15,000 which was deposited in bank to the wife's credit and later invested in real estate in her name. *Irwin v. Irwin*, 107 Ky. 24, 52 S. W. 927;

—money which the husband had obtained from the wife, and acknowledged her claim to. *Duvall v. Duvall*, — Ky. —, 144 S. W. 78;

—a paid-up life insurance policy for which the husband had furnished the money. *Bennett v. Bennett*, 19 Ky. L. Rep. 1243, 43 S. W. 247.

Where, on sale of property by reason of failure of the husband to make a deferred payment, the wife bought it in, in her own name, and later, on sale of a part of it, the amount she had paid was repaid to her, on a subsequent divorce the property was decreed to the husband. *Maynard v. Maynard*, 145 Ky. 197, 140 S. W. 156.

In *Grow v. Grow*, 134 Ky. 816, 135 Am. St. Rep. 440, 121 S. W. 654, where, after 3 L.R.A. (N.S.)

marriage, the parties lived on the wife's farm, on divorce in her favor it was held, the husband having brought about \$400 of personal property to the farm, which ought to have increased to \$500 at the time of the divorce, that he should receive the amount of \$500 from the stock and personalty on hand when the parties separated.

In *Pope v. Pope*, — Ky. —, 146 S. W. 410, where it was claimed by the wife after a divorce that the husband, in contemplation of an immediate separation, had given her \$500, and had thereafter forcibly taken the money from her, it was held that, under the pleadings, she was not entitled to receive the money back, the court stating that it did not appear from the pleadings that the money was given to her in settlement of any of her property rights, in which case a different question would have been presented.

But in *Dollins v. Dollins*, 26 Ky. L. Rep. 1036, 83 S. W. 95, where upon a divorce it appeared that the woman, against whom the divorce was granted, had, when the parties separated, a horse, a cow, some furniture, and a note upon her husband for \$150, all of which she sold or collected before the decree, and that on her marriage she owned real estate worth \$150, afterwards sold, and that the husband at the time of the divorce was worth not more than \$375, it was held that the court properly refused to compel the husband to restore to her the property which he had obtained from her during the marriage, evidently referring to the real estate.

In *Harris v. Harris*, 31 Ky. L. Rep. 930, 104 S. W. 387, where the husband had in his possession a note of a third party to the order of his wife, and the evidence was that this was her own property, and upon a divorce from bed and board, the note itself could not be found, it was ordered that he should pay her the amount of this note. To the objection that the statute permitted the restoration of property only in the event of a final divorce, the court stated in effect that the statute had nothing to do with the note, as, at the time, the wife's property did not belong to the husband, so that there was no question of restoration, but simply of a finding that the note was the absolute property of the wife.

v. Lankford, — Ky. —, 117 S. W. 962, and held to be without merit. In the former case, the court said: "Suppose, for an example, one conveys his property on secret trust for the purpose of defrauding his creditors, and then should afterwards pay all his debts; would the fact that no credit-

—where consideration is a valuable one.

Where the consideration for the conveyance is a valuable one between the parties, the statute does not apply. See *Dunker v. Schuff*, 134 Ky. 192, 119 S. W. 742.

—conveyances in fraud of creditors.

The decision in *COLEMAN v. COLEMAN*, that the statute will not enable the husband to recover property which he caused to be conveyed to his wife for the purpose of defrauding his creditors, is supported by *Lankford v. Lankford*, — Ky. —, 117 S. W. 962, where the court pointed out that the statute relates only to conveyances made by reason of the marital relation, and therefore does not apply to those made to defraud creditors. The court there said: "It is the contention of appellant that the house and lot in question were conveyed to his wife by reason of their marital relation, and that, a divorce having been granted in this action, appellant is entitled, under § 228 of the Civil Code of Practice, to have restored to him the property so conveyed. The question whether or not appellant is entitled to restoration of his property depends altogether upon the fact of whether or not it was conveyed to appellee by reason of their marital relation, or whether it was conveyed for the fraudulent purpose of defeating his creditors. . . . Without giving the evidence in detail, we may say that there is no doubt in our minds that the conveyance to Skidmore, and from Skidmore to appellee, was made to defeat appellant's creditors. That being the case, it was not obtained by appellee by reason of the marital relation, but was obtained by her by reason of the fact that appellant thereby sought to defraud his creditors. If, as we hold, it was so conveyed, then it necessarily follows that appellant is not entitled to restoration of the property."

Gifts not "settlements" under English divorce statutes.

In *Chalmers v. Chalmers*, 68 L. T. N. S. 28, 1 Reports, 504, where a wife had assigned certain property to her husband, she asked, upon a decree dissolving the marriage, that the property be reassigned to her in place of maintenance, as thus varying a post-nuptial settlement, or that it be reassigned to her as maintenance, and the court, finding great difficulty in holding the assignment to be a "settlement," did not pass on that question, but ordered that the 39 L.R.A. (N.S.)

or was actually injured enable him to recover from his vendee? Or suppose one, having no creditors, should convey his property for the purpose of becoming indebted, and of then defrauding his dupes by being insolvent, but should repent before the fraud was committed; could it be main-

husband "secure to the petitioner, as maintenance, the value of the property in question."

The question was definitely decided, however, in *Hubbard v. Hubbard*, [1901] p. 157, 70 L. J. Prob. N. S. 34, 84 L. T. N. S. 441, where a husband after marriage assigned a leasehold to a trustee who on the same day assigned the same to the wife, the object being to make a provision for the wife, and it was held that this was not a "settlement" under the English statute giving the court power to vary settlements, and that, upon the nullity of the marriage being declared, the court had no power to vary the assignment.

This case is not referred to in *Stedall v. Stedall*, 86 L. T. N. S. 124, 50 Week. Rep. 320, 18 Times L. R. 254, where a tontine life policy was payable in the event of the husband's death before the end of the tontine, to his wife, if living, and the court, on a divorce by her fault, was inclined to think the policy was a "settlement," but it was held that the wife should be compelled to assign her interest for the benefit of her husband and children, under the provision of the statute of 1857, that in such a case property of the wife in possession or reversion might be so settled.

Miscellaneous.

In *Burkett v. Burkett*, 78 Cal. 310, 3 L.R.A. 781, 12 Am. St. Rep. 58, 20 Pac. 715, where a husband declared a homestead on his separate property, and later made a deed of it to his wife, and they were subsequently divorced without any mention being made of the property, the court held that the effect of the conveyance was not to divest the property of its character as a homestead, but simply to convey it to the wife in fee subject to the homestead, as the California statute provided: "If a homestead has been selected from the separate property of either, it shall be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the innocent party," and, as it appeared that the plaintiff was not the innocent party in the divorce suit, and had made no request to have the property set off to him for any time in that suit, that it must be deemed to be the property of the wife in fee from the decree in the divorce suit.

In *Dean v. Richmond*, 5 Pick. 461, where the statutes regarding divorce *a mensa et thoro* provided that the wife be restored to all her lands, tenements, and hereditaments, and that she should have reasonable allow-

tained that, because he had paid his creditors in the first case, and never had any in the second, he could recover the property so conveyed? We think both these questions should be answered in the negative." And in the case of *Lankford v. Lankford*, supra, where the husband, after divorce, was seek-

ing the restoration of certain property on the ground that he conveyed it to his wife in consideration of marriage, relief was denied because it appeared that the conveyance was made by the husband for the purpose of defrauding his creditors, though none of his creditors were actually defraud-

ance of alimony out of her husband's estate, having regard to the personal property which she carried to the husband, a wife after her marriage joined her husband in the conveyance of certain real estate of which she was seized at the time of the marriage. A part of the consideration was a promissory note, and it was agreed at the time of the sale by the husband, that the wife should retain the note as her own property and should receive payment of it to her own separate use, and she ever since retained it. On a divorce from bed and board the court ordered that her real and personal estate, which came to the husband by the marriage, should be restored to the wife, and she thereafter brought action upon the promissory note, and it was held that she could not recover, as the statutes in regard to divorces *a mensa et thoro* did not give the court any authority to restore to the wife personal property.

In *Myers v. Myers*, 88 Neb. 656, 130 N. W. 254, where the statute did not allow the court to make an equitable division of real estate in divorce, the appellate court was of the opinion that real estate bought with money which was the accumulation of the joint industry and frugality of both husband and wife ought to be held to belong to both of them; but it declined to disturb the finding of the trial court that the property, which seemed to be thus acquired and which stood in the wife's name, was really the property of the husband. And permanent alimony of half its value having been decreed to the wife by the trial court, this decision was affirmed.

In *Tolerton v. Williard*, 30 Ohio St. 579, the court evidently approved the plan of giving a wife a gross sum as "alimony as well as repayment" of money received from or through her, secured on land in which such money was invested, where the statute provided that when a divorce is granted by reason of the aggression of the husband, the wife shall be restored to all her lands, tenements, and hereditaments not previously disposed of, and shall be allowed such alimony "as the court shall think reasonable, having due regard to the property which came to him (the husband) by marriage;" and this alimony is to be "allowed to her in real or personal property, or both, by decreeing to her such sum of money, payable either in gross or instalments, as the court may deem just and equitable."

In *McAllister v. McAllister*, 10 Heisk. 345, where the statute (§ 2471 of the Code) provided that a wife should have the exclusive dominion and control (subject to rights of creditors before the decree) of land owned by her at the time of a decree dissolving

the marriage, the court, in ordering a divorce from bed and board, with a direction that the case should remain on the docket, and that if a reconciliation should not take place in a reasonable time, the chancellor should have power to dissolve the marriage, said, as to land conveyed by the wife to the husband through a third party: "Shall we regard the land as the property of the defendant, and assign to the complainant a part thereof in lieu of alimony, or shall we regard it as complainant's land, and restore it to her in accordance with § 2471 of the Code? We think the latter course must prevail. Although the legal title be vested in defendant, yet, in a court of equity, as between the husband and wife, we must regard the latter as the real owner. We cannot sanction the means by which he obtained the title. We decide nothing as to creditors. The title to the land will be restored to the complainant. In one event the life estate of the defendant may be restored to him." But it should be stated that another section of the statute gave the court power, in case of a divorce from bed and board, to decree to the wife such part of the husband's real and personal estate as it thought proper, and that in so doing it might take into consideration property received by him from her, as well as that secured to her, by marriage contract or otherwise.

In *Saunders v. Saunders*, 144 Mo. 482, 46 S. W. 428, where the husband had conveyed property to his wife through a third party, the deed to her being in consideration "of the relinquishment and release of all claims of dower" in and to his personal and real estate, and he obtained a divorce on account merely of her desertion of him, and the statutes provided that if the husband be divorced from the wife for her fault or misconduct, she should not be endowed, and further that in case of an abandonment with adultery, the wife should lose both her jointure and dower, it was held that the conveyance here was in the nature of jointure, and that the husband could not have the deeds canceled.

There is an *obiter dictum* in *Hinds v. Hinds*, 7 Mackey, 85, that a statute providing that the court might restore to the wife all the separate property that she had at the date of her marriage, and that she could retain her dower, and that the court might restore to her the whole or any part of her separate property, however acquired, would not authorize the court to disturb a settlement made by the husband voluntarily upon the wife before the cause of the divorce accrued, she being the innocent party.

B. B. B.

ed. In discussing this phase of the case, the court said: "This court has held in a long line of decisions that property will not be restored to a grantor who himself conveyed it for the fraudulent purpose of defeating his creditors. The transaction is one which involves moral turpitude in the intention in which it is done. What actually happens may be immaterial. It matters not whether the creditor was actually injured or not, if, as a matter of fact, the debtor makes a conveyance for the purpose of defrauding his creditors. He who doth fraud may not borrow the hand of the chancellor to draw equity from a fountain his own hath polluted. *Carson v. Beliles*, supra; *Southwood v. Southwood*, 30 Ky. L. Rep. 307, 98 S. W. 304."

It follows that, under the foregoing authorities and the facts of this case, appellant is not entitled to recover the land in controversy.

Judgment affirmed.

WISCONSIN SUPREME COURT.

STATE OF WISCONSIN

v.

EDWARD BOWEN et al.

(— Wis. —, 135 N. W. 494.)

State — boundary — change of channel of stream.

The boundary and jurisdiction of a state which has been along the main channel of a stream is not changed by the construction

by a railroad company, of a dam which throws the main channel to the other side of an island for the purpose of convenience in the construction of a bridge.

(April 3, 1912.)

CERTIFICATION by the Circuit Court for LaCrosse County to the Supreme Court of a question arising upon conviction of defendants of taking fish in violation of law. Negative answer returned.

Statement by Vinje, J.:

The defendants were charged with a violation of the provisions of § 4560d, Stats., being chapter 525 of the Laws of 1909, in this: That they did, on the 15th day of April, 1911, in the county of La Crosse and state of Wisconsin, unlawfully set, place, and use in an inland water of this state, to wit, in the Mississippi river, one certain net which was not then and there a landing net. The respective parties, by their attorneys, stipulated in open court that a jury be waived, and that the case be tried and determined by the court. The judge found the facts as follows: "That on the day charged in the complaint the defendants were fishing with a seine and trammel net in what is known as the east channel of the Mississippi river, and west of the thread of the stream of said channel, and at a point opposite to the county of La Crosse, Wisconsin, and east of Minnesota island, contrary to the provisions of § 4560d of chapter 525, Laws of 1909. That said east channel lies between the Wisconsin

Note. — Change of channel as change of state boundary.

The rule laid down with practical unanimity by the courts is that, in case of a gradual shifting of the channel of a stream which constitutes a boundary between states, the boundary will change with the channel (*Bellefontaine Improv. Co. v. Niedringhaus*, 181 Ill. 426, 72 Am. St. Rep. 269, 55 N. E. 184; *Buttenuth v. St. Louis Bridge Co.* 123 Ill. 535, 5 Am. St. Rep. 545, 17 N. E. 439, *dictum*); but that, while a gradual change in the channel will have this effect, a sudden change or avulsion will not (*Nebraska v. Iowa*, 143 U. S. 359, 36 L. ed. 186, 12 Sup. Ct. Rep. 396; *Missouri v. Nebraska*, 196 U. S. 23, 49 L. ed. 372, decree, 197 U. S. 577, 49 L. ed. 881, 25 Sup. Ct. Rep. 580; *DeLoney v. State*, 88 Ark. 311, 115 S. W. 138; *Coulthard v. McIntosh*, 143 Iowa, 389, 122 N. W. 233; *McBride v. Steinweden*, 72 Kan. 508, 83 Pac. 822; *Fowler v. Wood*, 73 Kan. 511, 6 L.R.A.(N.S.) 162, 117 Am. St. Rep. 534, 85 Pac. 763; *Rees v. McDaniel*, 115 Mo. 145, 21 S. W. 913; *Holbrook v. Moore*, 4 Neb. 437; *Bouvier v. Stricklett*, 40 Neb. 792, 59 N. W. 550; *Moss v. Gibbs*, 10 Heisk. 283; *Collins* 39 L.R.A.(N.S.)

v. State, 3 Tex. App. 323, 30 Am. Rep. 142; *Rodriguez v. Hernandez*, 35 Tex. Civ. App. 78, 70 S. W. 343).

Thus, a change in the channel of the Mississippi river whereby it abandoned 20 miles of its former channel in less than two days was held to leave the boundary between the states of Arkansas and Tennessee in the center of the old channel. *State v. Muncie Pulp Co.* 119 Tenn. 47, 104 S. W. 437; *Stockley v. Cissna*, 119 Tenn. 135, 104 S. W. 792; *Stockley v. Cissna*, 56 C. C. A. 324, 119 Fed. 812.

It follows as a matter of course that a change in the channel of a river by artificial means does not change the boundary. *State v. Young*, 46 Vt. 565; *James v. State*, 10 Ga. App. 13, 72 S. E. 600.

And in *Indiana v. Kentucky*, 136 U. S. 479, 34 L. ed. 329, 10 Sup. Ct. Rep. 1051, it is held that the filling up of the channel of the Ohio river, partly by natural and partly by artificial causes, so that the river now runs on the Kentucky side of a former island, does not separate that land from the state of Kentucky.

In *Norton v. Whiteside*, 188 Fed. 356, it is held that a boundary between states was changed by an artificial straightening of

main shore and what is known, and designated upon the government maps, as Minnesota island. That, prior to 1876, said east channel of the Mississippi river was the one usually navigated by steamboats, and was designated as the main channel of the Mississippi river by the surveyors who surveyed La Crosse county in 1854. That about the year 1877 the Chicago, Milwaukee, & St. Paul Railroad Company constructed a bridge from the mainland in La Crosse county across said east channel, and across said Minnesota Island; and to the main Minnesota shore. That, prior to the construction of said bridge, and in 1876, the said Chicago, Milwaukee, & St. Paul Railroad Company constructed a dam across said east channel of the Mississippi river near the head of said Minnesota island, thus diverting the said main channel of the river from the east side of Minnesota island to the west side thereof, in order to avoid constructing a drawbridge across said east channel, and to throw and divert the channel of said river through the drawbridge constructed by it on the west side of said Minnesota island. That since the construction of said dam the main navigable channel of the Mississippi river has been to the west of said Minnesota island, and

since said date the said east channel has not been navigable for steamboats. That the construction of said dam, diverting the said channel, was with the consent of the War Department of the government of the United States. That the said Minnesota island was surveyed by the government of the United States as a part of the state of Minnesota; and the taxes upon the same have been ever since assessed and collected by the authorities of the state of Minnesota." As a conclusion of law, the judge found the defendants guilty as charged in the complaint; but, being of the opinion that a question of law arose on the trial which was so important as to require the decision of the supreme court thereon, and the defendants consenting thereto, he reported the following question for the decision of this court: "Upon the foregoing findings of fact, was the circuit court of La Crosse county jurisdiction of this prosecution?"

Messrs. James Thompson, L. H. Bancroft, Attorney General, and Russel Jackson, Assistant Attorney General, for the State.

Mr. F. E. Withrow for defendants.

the channel, but no cases are cited in support of the holding, and it appears to be at variance with all the authorities.

Robert v. Michelsen, 82 Neb. 48, 116 N. W. 949, furnishes a striking illustration of the rules as to the effect of gradual and sudden changes in the course of a stream which forms a state boundary. In that case it appears that the land involved was situated on the west side of the Missouri river in the state of Nebraska, but that during a period of three years the current gradually shifted so that it became entirely submerged and the channel changed to the westward of it. Thereafter, the land was restored by accretions to the eastern bank, so that, as restored, the land, according to the rule as to gradual change, was in the state of Iowa. Still later, by a sudden change, the channel was transferred to the eastward of the land, but, as a sudden change does not alter the boundary, the land in question was held to be a part of Iowa, although the river had returned to substantially its original location with reference to such land.

Where there is a sudden change in the course of a river, so that the boundary remains the same, it runs along the center of the main channel as the river formerly ran, unless there is an absence of evidence as to the location of the main channel, in which case it will be the center of the old bed located from bank to bank. *State v. Keane*, 84 Mo. App. 127.

But while a sudden change in the course 39 L.R.A. (N.S.)

of a boundary river does not change the boundary between the states, it does have the effect of limiting the jurisdiction of the states to the actual boundary in the former bed of the stream, where formerly it was concurrent over the whole stream. *Cooley v. Golden*, 52 Mo. App. 229.

Whether the shifting of the channel of a stream is such as will change the boundary is a question of fact for the trial court to determine. *Plummer v. Marshall*, — Tex. Civ. App. —, 126 S. W. 1162.

But the change in the course of a boundary stream may be considered to be gradual, though it is at times visible and perceptible. *Denny v. Cotton*, 3 Tex. Civ. App. 634, 22 S. W. 122.

In *Missouri v. Kentucky*, 11 Wall. 395, 20 L. ed. 116, which was a contest as to the jurisdiction over an island in the Mississippi river, the court says that if the river changed its course with reference to the island subsequently to the fixing of the boundary, the boundary was not changed thereby, but no distinction is made between gradual or sudden changes.

And in *Washington v. Oregon*, 211 U. S. 127, 53 L. ed. 118, on rehearing 214 U. S. 205, 53 L. ed. 969, 29 Sup. Ct. Rep. 631, where the boundary between Oregon and Washington was fixed at the center of the north channel, it was held that it was not changed to the south channel by a gradual filling up of the north channel and its abandonment for navigation purposes in favor of the south channel. R. L. S.

Vinje, J., delivered the opinion of the court:

In *Roberts v. Fullerton*, 117 Wis. 222, 65 L.R.A. 953, 93 N. W. 1111, it was held that the jurisdiction of a state for the enforcement of its fish and game laws is coextensive with and limited by the boundaries of the state, even though they consist of the thread of a navigable stream over whose waters the adjacent states have concurrent jurisdiction for other purposes. The answer to the question reported, therefore, depends upon whether or not the boundary of the state of Wisconsin changed from the thread of the channel east of Minnesota island to the thread of the channel west thereof, by reason of the construction of the bridge and dam of the Chicago, Milwaukee, & St. Paul Railroad Company about 1877, which diverted the waters into the west channel to such an extent that it afterwards became the main channel, and the only one navigable by steamboats.

The district attorney of La Crosse county relies upon the cases of *Franzini v. Layland*, 120 Wis. 72, 97 N. W. 499, and *Iowa v. Illinois*, 147 U. S. 1, 37 L. ed. 55, 13 Sup. Ct. Rep. 239, to sustain the contention that the boundary changed with the change of channel. Those cases established the rule that, within the limits of the main channel, the boundary follows the "mid channel" or thread of the stream as it changes, from time to time, owing to the gradual shifting of sand banks, or other causes. But they do not hold that the creation of a new and different main channel shifts the boundary from the old to the new. And such is not the law. For the purpose of determining the boundary between states, where that is declared to be the center line or thread or middle of the main channel of a stream separating them, the conditions existing at the time of their creation govern as to what channel is meant. The *then* main channel, except as it may be changed by erosion or accretion, will forever contain within it the declared boundary line, though not necessarily in the same place at all times. *Nebraska v. Iowa*, 143 U. S. 359, 36 L. ed. 186, 12 Sup. Ct. Rep. 396; *Missouri v. Nebraska*, 196 U. S. 23, 49 L. ed. 372, 25 Sup. Ct. Rep. 155; *Washington v. Oregon*, 211 U. S. 127, 53 L. ed. 118, 29 Sup. Ct. Rep. 47, s. c., 214 U. S. 205, 53 L. ed. 969, 29 Sup. Ct. Rep. 631; 1 *Farnham, Waters*, 40; *Gould, Waters*, § 159.

In *Nebraska v. Iowa* and *Missouri v. Nebraska*, *supra*, it is held that, where a stream which is the boundary between two states from any cause suddenly abandons its old bed and seeks a new one, such change in the channels results in no change in the boundary. That remains in the center of

the old bed or channel, even though it may be dry. In each of those cases, the change was caused by avulsion. In the present case, the change was caused by the construction of a dam. It is obvious that any change wrought in the flow of the water by means of a dam cannot affect the question of state boundary any more than can such change produced by avulsion. It is only where the change takes place by the slow process of erosion or accretion that a change in boundary is effected. *Missouri v. Nebraska*, 196 U. S. 23, 25 Sup. Ct. Rep. 155, 49 L. ed. 372. States and individuals alike are subject to the losses and gains of erosion and accretion; but neither can have the boundaries of his domain changed by avulsion, or by the diversion of the water effected by human agencies. *New Orleans v. United States*, 10 Pet. 662, 9 L. ed. 573. Such being the law, a negative answer to the question reported for decision is required. It is due to the attorney general to add that, for reasons stated in his brief, he argues that no change in the state boundary was effected by the construction of the dam and consequent diversion of the water into the western channel.

The question reported is answered: No.

LOUISIANA SUPREME COURT.

GLENN G. ROGERS

v.

HIRAM J. ALLEN LUMBER COMPANY,
Limited, Appt.

(129 La. 899, 57 So. 166.)

Master and servant — negligence — defective appliances.

1. A mill hand operating a cut-off saw was struck upon the arm by a strip of wood carelessly thrown by another hand, who was working with another machine, with the result that his arm was knocked against the saw and his hand cut off; and this court finds that, save for the blow upon the plaintiff's arm, there would have been no accident, and, even with the blow, there would probably have been none, if the saw had been provided with its usual and proper

Headnotes by MONROE, J.

Note. — While no other case has been found involving the question whether the amount of damages to be awarded a plaintiff can be affected by the fact that the defendant is insolvent, so that the plaintiff will be able to realize only a portion of the amount awarded, it seems clear, as held in *ROGERS v. HIRAM J. ALLEN LUMBER Co.*, that the amount to which the plaintiff is justly entitled cannot be increased, or a greater amount awarded or allowed, on the

equipment. Held, the mill owner was guilty of negligence in employing a careless or incompetent hand and in failing to provide plaintiff with a reasonably safe place and reasonably safe appliance in and with which to do the work to which he was assigned, and plaintiff was not guilty of contributory negligence, and did not assume the risk of defendant's negligence, or of that of its careless or incompetent hand, who was not plaintiff's fellow servant within any rule that has been recognized by this court, since he and plaintiff were not engaged in the same work, and plaintiff had not seen enough of his carelessness to warrant the belief that he realized the danger therefrom to himself.

Damages — loss of hand — amount.

2. Where a young man nineteen years of age, who is dependent upon his physical labor for his livelihood, loses his right hand through the negligence of his employer, this court feels justified in allowing him \$7,500 as damages.

Same — receivership — effect.

3. The amount to be awarded plaintiff in an action for damages for personal injury cannot be affected by the suggestion or consideration that the defendant company has been placed in the hands of a receiver, and is paying but 10 cents on the dollar to its creditors.

(May 8, 1911.)

APPEAL by defendant from a judgment of the Judicial District Court for the Parish of Bienville in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Modified and affirmed.

The facts are stated in the opinion.

Messrs. Barksdale & Barksdale and Hall & Jack, for appellant:

In the absence of proof of negligence in the employment of incompetent and careless servants, an employer is not responsible for damages resulting to a servant from the carelessness of a fellow servant.

Satterly v. Morgan, 35 La. Ann. 1167;

ground that, by reason of the insolvency of the defendant, the plaintiff cannot, in any event, realize the full amount to which he is entitled, but will be obliged to accept only a percentage of whatever amount is awarded or allowed. All that a jury or court can properly do is to determine and award the amount of damages to which the plaintiff is entitled, regardless of whether he will be able to realize that amount upon execution of his judgment, and in case the defendant is insolvent, the plaintiff should share in his estate on the same basis with other creditors.

It seems, however, under the general rule that evidence of the pecuniary condition and financial circumstances of a defendant is 39 L.R.A. (N.S.)

Weaver v. W. L. Goulden Logging Co. 116 La. 470, 40 So. 798.

Plaintiff, with his experience in such work and being familiar with the risks and danger of the position, voluntarily and necessarily assumed the risk of injury through the use of the wooden lever, as he assumed, and must be held to have assumed, the risk of unavoidable accidents resulting from an unforeseen and peculiar combination of circumstances.

Brown v. J. A. Adams & Sons' Co. 120 La. 119, 44 So. 1005; Smith v. Sellars, 40 La. Ann. 527, 4 So. 333; 20 Am. & Eng. Enc. Law, 109 et seq.; Dresser, Employers' Liability, §§ 82, 90; Beach, Contrib. Neg. 2d ed. § 36; New Orleans & N. E. R. Co. v. McEwen & Murray, 49 La. Ann. 1184, 38 L.R.A. 134, 22 So. 675; 21 Am. & Eng. Enc. Law, 486; Meyers v. Ruddock Orleans Cypress Co. 118 La. 805, 43 So. 448.

Plaintiff necessarily and voluntarily assumed the risk of injury through the carelessness of this fellow servant, and cannot recover

12 Am. & Eng. Enc. Law, 920; Beach, Contrib. Neg. §§ 354, 371; Thomp. Neg. §§ 4896, 5341, 5429; 26 Cyc. 1306.

In comparison with previous awards, the judgment is grossly and unreasonably excessive.

Hebert v. Kingston Lumber Co. 126 La. 775, 52 So. 1021; Reems v. New Orleans G. N. R. Co. 126 La. 511, 52 So. 681; Williams v. W. R. Pickering Lumber Co. 125 La. 1087, 136 Am. St. Rep. 365, 52 So. 167, 19 Ann. Cas. 1244; Rossey v. Lawrence, 123 La. 1053, 49 So. 704, 17 Ann. Cas. 484; McBailey v. Suberbielle, 120 La. 570, 45 So. 442; Lumpkin v. Reiser Mach. Shops, 120 La. 597, 45 So. 518; Carter v. Fred W. Dubach Lumber Co. 113 La. 239, 36 So. 952; Stucke v. New Orleans R. Co. 50 La. Ann. 172, 23 So. 342; Budge v. Morgan's L. & T. R. & S. S. Co. 108 La. 349, 58 L.R.A. 333, 32 So. 535; Lehman v. Louisiana Western R. Co. 37 La. Ann. 705; Barnes v.

relevant and admissible as bearing upon the amount of punitive or exemplary damages which may be awarded (13 Cyc. 211), that, in cases where such damages are in issue, evidence of the insolvency of the defendant might be admissible to diminish the amount of the award of such damages, though it seems that this general class of evidence is admitted, not for the purpose of showing the defendant's mere ability to pay, but rather to aid in determining what amount will constitute a proper punitive award, under all the circumstances. And where no punitive damages are in issue, and only compensatory damages are recoverable, such evidence is inadmissible (13 Cyc. 212).

A. C. W.

Shreveport City R. Co. 47 La. Ann. 1218, 49 Am. St. Rep. 400, 17 So. 782.

Messrs. Richardson & Richardson for appellee.

Provosty, J., delivered the opinion of the court:

Appellee has moved to dismiss the appeal on the ground that no bond for appeal has been filed. There is none in the record.

Appeal dismissed.

A petition for rehearing having been filed, Monroe, J., on January 2, 1912, handed down the following additional opinion:

(1) Plaintiff, being a little more than nineteen years of age, had his right hand severed from his arm by a cut-off saw which he was operating whilst in defendant's employ, and he attributes his injury to defendant's negligence, and prays for damages. Defendant pleads contributory negligence, assumption of risk, and fault on the part of a fellow servant; and it has appealed from an adverse judgment for \$10,000. The story of the accident, as told by the witnesses, is substantially as follows: Plaintiff was operating a cut-off saw, his position being in front of, and facing, the saw, to which he fed the slab that he was cutting with his left hand, whilst he pulled the saw towards him, and against the slab, with his right hand, by means of a lever, which was attached to the frame to which the saw was fastened and which projected through the table or roller bed, upon the right and above the level of the upper edge of the saw. When the slab was cut through, he would push the lever from him, and the saw would be carried into a box or casing, which ordinarily served as a protection to the operator and to passers-by; but it appears that at the time of the accident an iron lever which belonged to the machine, and which was curved in such a way as to furnish a convenient handle whereby the operator could move the saw backward and forward, and yet keep his hand and arm in a comparatively safe position, had been broken, and that there had been substituted for it a straight piece of scantling (say 2x2 or 2x4), the hold upon which was less secure and placed the hand and arm of the operator in a position where, in the event of an accident such as happened, they were more likely to be injured. The accident consisted of plaintiff's being struck upon his right arm by a strip (of wood) which a young man by the name of Upshur had pulled from a near-by "edger" table, and which it was his business to throw into a conveyer trough behind him, but which he carelessly threw against plaintiff's arm, knocking it against the saw just as

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plaintiff was in the act of pulling the saw forward, with the result that plaintiff's right hand was cut off. Another unusual condition was that, for the accommodation of the substitute wooden lever, the top of the box or casing from which plaintiff was pulling the saw had been knocked off, so that the saw was more exposed than it would have been if the iron lever had been in use.

It is shown that Upshur had been employed by defendant for three days (or nights, as he and plaintiff were working on the night shifts), and that plaintiff had seen him at work on the night before that upon which the accident occurred, and had observed that he handled the strips that it was his business to remove from the "edger" table rather carelessly. It is also shown that immediately after the accident defendant caused the iron lever to be replaced and the casing of the saw to be repaired.

Our conclusions from the whole testimony are that, save for the blow upon plaintiff's arm from the strip thrown by Upshur, there would have been no accident, and that even with the blow there would probably have been none, if the equipment of the saw had been in its usual and proper condition. We find that defendant was negligent in employing Upshur and in allowing the saw to be operated whilst the equipment was out of repair. We fail to find that Upshur was the fellow servant of plaintiff within any rule that has been recognized by this court, since the work that he was doing had no connection with that which plaintiff was doing. And we fail to find that plaintiff was guilty of any negligence that contributed to the accident, or that he assumed the risk of Upshur's negligence, or of the negligence of defendant in failing to furnish him with reasonably safe appliances and a reasonably safe place with and in which to do the work for which he was employed.

We are given to understand through the briefs of the counsel (and there is some evidence to that effect in other proceedings before this court) that the defendant company has been placed in the hands of a receiver; that it is paying 10 cents on the dollar to its creditors; and that \$1,020 has been set aside to meet this claim,—from which it is argued that the judgment for \$10,000 in favor of plaintiff should be affirmed, even though in itself it should be considered excessive, as he will, in no event, realize more than the \$1,020, and will get less than that in proportion as the amount allowed by the district court may be reduced. The situation is deplorable, but we cannot meet the difficulty in the manner suggested. All that we are authorized to do in this case is to determine the amount

to which plaintiff is entitled. Whether he will be able to realize that amount upon the execution of his judgment is altogether another matter. We are of opinion that the amount awarded by the district court should be reduced, but we think, in view of the decrease within the past few years in the purchasing power of money, that we are justified in allowing in a case of this kind as much as \$7,500. *Summers v. Crescent City R. Co.* 34 La. Ann. 139, 44 Am. Rep. 419; *Peniston v. Chicago, St. L. & N. O. R. Co.* 34 La. Ann. 777, 44 Am. Rep. 444; *Davis v. Houston & S. R. Co.* 106 La. 81, 30 So. 250; *Dyer v. Rieley*, 28 La. Ann. 6; *Nelson v. Crescent City R. Co.* 49 La. Ann. 491, 21 So. 635; *Ketchum v. Texas & P. R. Co.* 38 La. Ann. 777.

It is therefore ordered, adjudged, and decreed that the amount awarded by the District Court be reduced to \$7,500, and that, as thus amended, the judgment appealed from be affirmed, the costs of the appeal to be paid by plaintiff.

OKLAHOMA SUPREME COURT.

CHICAGO, ROCK ISLAND, & PACIFIC
RAILWAY COMPANY, Plff. in Err.,
v.

JAMES E. HOLLIDAY.

(— Okla. —, 120 Pac. 927.)

Pleading — malicious prosecution — sufficiency.

1. A petition, in order to state a cause of action for malicious prosecution, must

Headnotes by ROBERTSON, C.

Note. — Malicious prosecution: for wrongful search of premises.

Action will lie for causing the issuance of a search warrant maliciously and without probable cause. *Gulsky v. Louisville & N. R. Co.* 167 Ala. 122, 52 So. 393; *Tuell v. Wrink*, 1 Blackf. 249; *Olson v. Tvete*, 46 Minn. 225, 48 N. W. 914; *Boeger v. Langenberg*, 97 Mo. 390, 10 Am. St. Rep. 322, 11 S. W. 223; *Doane v. Anderson*, 39 N. Y. S. R. 913, 1 N. Y. Supp. 459; *Elsee v. Smith*, 1 Dowl. R. 97, 2 Chitty, 304, 24 Revised Rep. 639; *Butt v. Cooper*, 1 T. R. 535, 3 Esp. 135; *Willinsky v. Anderson*, 19 Ont. L. Rep. 437; *Young v. Nichol*, 9 Ont. Rep. 347.

But such an action will not lie where there was reasonable and probable cause for giving the information for a search warrant. *Wyatt v. White*, 5 Hurlst. & N. 371, 31 L. J. Exch. N. S. 193, 1 L. T. N. S. 517, 8 Week. Rep. 307; *McLean v. Gass*, 7 E. L. R. 96, cited in 2 Can. Dig. 2308; *McNellis v. Gartshore*, 2 U. C. C. P. 464; *Lucey* 2 L.R.A. (N.S.)

charge: First. That a prosecution was commenced against plaintiff. Second. That it was instituted or instigated by defendant. Third. That it was malicious. Fourth. That it has been legally and finally terminated in plaintiff's favor. Fifth. That it was without probable cause.

Malicious prosecution — insufficiency of affidavit — effect.

2. It is no defense in an action for malicious prosecution for a wrongful search of a dwelling house, that the affidavit of the party by whom the search warrant was secured did not, in law, authorize its issuance.

Same — liability of corporation.

3. A private corporation, like an individual, is liable for the acts of its agent in instituting a malicious prosecution, if the same were done while acting within the scope of his authority.

Same — inference of malice.

4. Malice may be inferred from want of probable cause. It is an inference which the jury may or may not draw from the want of probable cause.

Master — search by servant — liability.

5. In a case where a station agent for a railway company, having the care, custody, and supervision of the property of his master at the station where he is located, in furtherance of his master's business, while in pursuit of property stolen from his master while in possession of such agent, and with a specific intent of recovering such stolen property back for his master, procures the issuance and service of a search warrant, by which the dwelling house of an innocent person is wrongfully searched, and the issuance of such search warrant having been without probable cause, and with malice, held, that the agent was acting within the scope of his authority, and the master will be held liable in damages for such wrongful search, notwithstanding the master did not directly authorize or afterwards

v. Smith, 8 U. C. Q. B. 518; *Renton v. Gallagher*, 19 Manitoba L. Rep. 478. In commenting on *Wyatt v. White*, 5 Hurlst. & N. 371, 29 L. J. Exch. N. S. 193, 1 L. T. N. S. 517, 8 Week. Rep. 307, it was said in *Young v. Nichol*, 9 Ont. Rep. 347: "It did not seem to be questioned that for issuing such a warrant maliciously and without reasonable and probable cause, an action would lie."

An action for malicious prosecution lies where a search warrant is caused to be issued and executed without probable cause and inferentially through malice. *Whitson v. May*, 71 Ind. 269; *Masse v. Dominion Bridge Co. Rap. Jud. Quebec* 38 C. S. 429.

So, an action for malicious prosecution lies against one who procured a search warrant to issue upon insufficient information (*Riley v. Johnston*, 13 Ga. 260), or for procuring a search warrant to be issued though the commission of the crime was not charged (*Harlan v. Jones*, 16 Ind. App. 398, 45 N. E. 481).

ratify the procurement of such search warrant.

(November 14, 1911.)

ERROR to the District Court for Le Flore County to review a judgment in plaintiff's favor and an order denying a motion for a new trial in an action brought to recover damages for an alleged unreasonable search instituted maliciously and without probable cause by defendant's agent. Affirmed.

The facts are stated in the opinion.

Messrs C. O. Blake, H. B. Low, R. J. Roberts, and Day & Dubois, for plaintiff in error:

An action for malicious prosecution will not lie for preferring an accusation

before a magistrate charging plaintiff with a criminal offense, if he was not apprehended and no process was issued for his arrest.

Cooper v. Armour, 8 L.R.A. 47, 42 Fed. 215.

As the defendant is a corporation and can act only through its agents, its liability must be fixed by the agency created.

Atchison, T. & S. F. R. Co. v. Brown. 57 Kan. 785, 48 Pac. 31; Laird v. Farwell, 60 Kan. 513, 57 Pac. 98; Govaski v. Downey, 100 Mich. 429, 59 N. W. 167; Baltimore & Y. Turnp. Road v. Green, 86 Md. 161, 37 Atl. 642; Pressley v. Mobile & G. R. Co. 4 Woods, 569, 15 Fed. 199.

The prosecution must have been instituted without probable cause.

But where no search is made thereunder, one who swears to a search warrant to recover stolen property suspected to be concealed is not liable for malicious prosecution, and this though want of probable cause and malice be shown. Ton v. Stetson, 43 Wash. 471, 86 Pac. 668, 10 Ann. Cas. 369.

In Flora v. Russell, 138 Ind. 153, 37 N. E. 593, judgment in an action for malicious prosecution was affirmed where a search warrant was issued upon an affidavit based upon a mere suspicion communicated to affiant, that one had stolen property missed and had secreted it in his home.

In Krehbiel v. Henkle, 142 Iowa, 677, 121 N. W. 378, in holding that neither actual arrest or seizure, nor express charge of larceny, is essential to a right of action for maliciously suing out a search warrant, the court said: "The essence of the wrong done to him [plaintiff] was the unreasonable invasion of his home, which wrong was aggravated by the charge that stolen goods were there secreted,—thus, at the very least, casting upon him the suspicion of complicity in larceny."

And in Spangler v. Booze, 103 Va. 276, 49 S. E. 42, 1 Ann. Cas. 995, in holding untenable the contention that in an action for malicious prosecution for causing a search warrant to be issued, that plaintiff must aver that he had been tried before a court of competent jurisdiction and been fully acquitted on the merits of the crime with which he is charged, the court said: "When the stolen goods are not found upon the execution of a search warrant, that prosecution is ended. The warrant has served its purpose and falls to the ground. It is, upon its face, conditioned upon the goods alleged to have been stolen being found. Not being found, as in the case at bar, the prosecution inaugurated by the defendant ended, and no further proceedings could be had thereunder."

Recovery cannot be had in an action for malicious prosecution without proof that one, in making a complaint, acted maliciously and without any reasonable or probable cause, where the charge and nature of the complaint is such as does not authorize 39 L.R.A.(N.S.)

or justify a justice of the peace in issuing the search warrant. McNellis v. Garthouse, 2 U. C. C. P. 464.

To sustain an action for malicious prosecution in procuring a search warrant to be issued, it is necessary to show want of probable cause, malice, and that criminal proceedings had been determined in favor of plaintiff or abandoned. Ton v. Stetson, 43 Wash. 471, 86 Pac. 668, 10 Ann. Cas. 369.

And in Willis v. Knox, 5 S. C. 474, it was held that in an action for maliciously and without probable cause charging one with larceny, and procuring a search warrant to be issued, and causing the room to be searched thereunder, express malice and actual damage must be proved.

But malice may be inferred from want of probable cause. Carey v. Sheets, 67 Ind. 375.

A corporation may be liable to an action for malicious prosecution where its agent causes a search warrant to be issued without probable cause. Masse v. Dominion Bridge Co. Rap. Jud. Quebec 38 C. S. 429; Flora v. Russell, 138 Ind. 153, 37 N. E. 593; Gulsby v. Louisville & N. R. Co. 167 Ala. 122, 52 So. 392.

Error of magistrate in issuing.

One who merely states the facts of the case to a magistrate, and states them fairly, is not liable in damages for the erroneous view of the magistrate that he had jurisdiction to issue a search warrant. Pring v. Wyatt, 5 Ont. L. Rep. 505, 7 Can. Crim. Cas. 60.

And in Lucy v. Smith, 8 U. C. Q. B. 518, it was said by Robinson, Ch. J., that one who laid a complaint for a search warrant would not be liable for any mistake by a justice in acting upon his information; but Burns, J., in the same case, said, in concurring in the judgment: "I desire, however, not to be understood as deciding as that the action is not sustainable because the defendant went to the magistrate rather as asking his advice and relating to him the facts and placing the matter upon his judgment, whether a warrant should issue or not. . . . If the defendant maliciously

Ball v. Rawles, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 938; Rogers v. Olds, 117 Mich. 368, 75 N. W. 933; Tavenner v. Morehead, 41 W. Va. 116, 23 S. E. 670; Erb v. German American Ins. Co. 112 Iowa, 357, 83 N. W. 1055; Burton v. St. Paul, M. & M. R. Co. 33 Minn. 189, 22 N. W. 301; Hess v. Oregon German Baking Co. 31 Or. 503, 49 Pac. 805; Parli v. Reed, 30 Kan. 534, 2 Pac. 635; Bell v. Keepers, 37 Kan. 64, 14 Pac. 542; Wheeler v. Nesbitt, 24 How. 544, 16 L. ed. 765.

Proof that the defendant was acting honestly under advice of counsel is a complete defense.

Ten Cate v. Fansler, 10 Okla. 14, 65 Pac. 375; Cooley, Torts, 183; Kansas & T. Coal Co. v. Gallaway, 71 Ark. 351, 74 S.

W. 526; Widmeyer v. Felton, 95 Fed. 926.

On petition for rehearing

To support an action for a malicious criminal prosecution, the plaintiff must prove, in the first place, the fact of prosecution, and that the defendant was himself the prosecutor, or that he instigated its commencement, and that it finally terminated in acquittal.

He must also prove that the charge preferred against him was unfounded, and that it was made without reasonable or probable cause, and that the defendant, in making or instigating it, was actuated by malice.

Wheeler v. Nesbitt, 24 How. 544, 16 L. ed. 765; Stewart v. Sonneborn, 98 U. S. 187, 25 L. ed. 117; El Reno Gas & Elec-

set the magistrate in motion, I do not see that the want of jurisdiction, and that the magistrate erred, should excuse the defendant from the consequences."

In Hope v. Evered, 16 Cox, C. C. 112, defendant laid an information before the magistrate that she had grounds for believing that plaintiff was detaining in her house her daughter for immoral purposes, and on this information the magistrate issued a search warrant under the crimes act, which authorized such procedure where information is made on oath by one who appears to be acting bona fide in the interest of any woman or girl; and in an action for malicious prosecution, it was held that such acts vests in the justice a judicial as well as a ministerial function, and that if the justice upon the bona fide information of an applicant decides that there are reasonable grounds for suspicion, and issues a search warrant, no action for malicious prosecution will lie against applicant for having given the information to the justice. Lord Coleridge, in his opinion, said: "I do not, however, for a moment suggest that if a person acts in a false and fraudulent manner, or for purposes of malice or oppression, and the magistrate is persuaded that there are reasonable grounds for granting a search warrant, an action would not lie. But if the applicant is acting bona fide, and if the matter is stated fully and fairly to the magistrate, and he comes to the conclusion that there are reasonable grounds for issuing the warrant, then the course taken by the magistrate is a complete answer to any proceedings of this sort."

And Hope v. Evered was followed in Lea v. Charrington, 58 L. J. Q. B. N. S. 461, L. R. 23 Q. B. Div. 45, 61 L. T. N. S. 222, 16 Cox, C. C. 704, 37 Week. Rep. 736, 54 J. P. 39, where, acting upon information supplied by another, defendant had laid information before a magistrate that he had grounds for believing that plaintiff was detaining in her house a young girl for immoral purposes.

Want of probable cause.

Evidence that no property had been fe-
-L.R.A. (N.S.)

loniously taken by any person, and lack of any evidence whatever of facts or circumstances justifying a charge that one had stolen certain property, or that such property was secreted, show that the issuance of a warrant and search was procured by malice and without probable cause. Krehbiel v. Henkle, 142 Iowa, 680, 121 N. W. 378.

And in Olson v. Tveta, 46 Minn. 225, 48 N. W. 914, it was held that proof of a thorough search and the official return to the warrant that the property was not found, and evidence that plaintiff had for a long time borne a good reputation in the community for honesty and integrity, made a prima facie case of want of probable cause.

Notorious bad character for honesty is admissible in evidence to prove probable cause. Miller v. Brown, 3 Mo. 127, 23 Am. Dec. 693.

Where there is reasonable doubt as to probable cause, the question shall be submitted to the jury. Gulsby v. Louisville & N. R. Co. 167 Ala. 122, 52 So. 392; Young v. Nichol, 9 Ont. Rep. 347; Pring v. Wyatt, 5 Ont. L. Rep. 505, 7 Can. Crim. Cas. 60; Willinsky v. Anderson, 19 Ont. L. Rep. 437.

Advice of counsel.

Advice of prosecuting attorney will not protect against an action for malicious prosecution for procuring a search warrant to be issued, where facts within the knowledge of the prosecuting witness are not fully and fairly stated to such attorney. Flora v. Russell, 138 Ind. 153, 37 N. E. 593.

Damages.

Compensatory damages for misery, suffering, and humiliation may be recovered in an action for malicious prosecution for the wrongful search of premises. Krehbiel v. Henkle, — Iowa —, 129 N. W. 945, petition for rehearing, 133 N. W. 115.

Exemplary damages may be recovered, though express malice or ill-will be not shown, if the search was wanton and reck-

tric Co. v. Spurgeon, — Okla. —, 118 Pac. 397.

The discontinuance of the proceeding, the acquittal of the defendant, or even the discharge by a presiding magistrate, did not constitute a prima facie case.

Bekkeland v. Lyons, 96 Tex. 255, 64 L.R.A. 474, 72 S. W. 50; Ton v. Stetson, 43 Wash. 471, 86 Pac. 668, 10 Ann. Cas. 369; Chicago, R. I. & P. R. Co. v. Rhoades, 64 Kan. 553, 68 Pac. 58; Atchison, T. & S. F. R. Co. v. McFarland, 2 Kan. App. 662, 43 Pac. 788; Ward v. Metropolitan I. Ins. Co. 66 Conn. 227, 50 Am. St. Rep. 80, 33 Atl. 902; Globe Acci. Ins. Co. v. Gerisch, 163 Ill. 625, 54 Am. St. Rep. 486, 45 N. E. 563; Moore v. Renick, 95 Mo. App. 202, 68 S. W. 936; Missouri P. R. Co. v. Porter, 73 Tex. 304, 11 S. W. 324; Cole v. Boardman, 63 N. H. 580, 4 Atl. 572; Terry v. Rodahan, 79 Ga. 278, 11 Am. St. Rep. 420, 5 S. E. 38; Missouri, K. & T. R. Co. v. Wilder, 3 Ind. Terr. 85, 53 S. W. 400; United States v. Ross, 92 U. S. 281, 23 L. ed. 707; Manning v. John Hancock Mut. L. Ins. Co. 100 U. S. 693, 25 L. ed. 761; 9 Enc. Ev. 880.

Messrs. White & Hale, for defendant in error:

The petition states facts sufficient to constitute a cause of action.

25 Am. & Eng. Enc. Law, 2d ed. 150; Olson v. Tvete, 46 Minn. 225, 48 N. W. 914; Miller v. Brown, 3 Mo. 127, 23 Am. Dec. 693; Doane v. Anderson, 39 N. Y. S. R. 913, 15 N. Y. Supp. 459.

It is no defense to this action that the affidavit of the party by whom it was secured did not in law authorize the issuance of the warrant.

25 Am. & Eng. Enc. Law, 2d ed. 150.

Defendant was liable for the acts of its agent.

1 Clark & S. Agency, 1097; Staples v. Schmid, 18 R. I. 224, 19 L.R.A. 824, 26 Atl. 193; Smith v. Munch, 65 Minn. 256, 68 N.

W. 19; Jackson v. American Teleph. & Tele. Co. 139 N. C. 347, 70 L.R.A. 738, 51 S. E. 1015; Wheeler & W. Mfg. Co. v. Boyce, 36 Kan. 350, 59 Am. Rep. 571, 13 Pac. 609.

Robertson, C., filed the following opinion:

This case presents error from the district court of Le Flore county. On February 22, 1909, the defendant, James E. Holliday, who was plaintiff below, and who will hereafter be designated as plaintiff, commenced an action in the district court of Le Flore county against the Chicago, Rock Island, & Pacific Railway Company, defendant, and hereinafter designated as such. The petition, omitting the caption, is in words and figures as follows:

"Comes now James E. Holliday, the plaintiff herein, and for cause of action against defendant, Chicago, Rock Island, & Pacific Railway Company, alleges and states: First. That plaintiff is a resident of Howe, Le Flore county, state of Oklahoma, and that defendant is a foreign corporation, operating lines of railroads through and across Le Flore county, Oklahoma, and having therein an office for the transaction of business, and an agent of the aforesaid company. Second. That said plaintiff, James E. Holliday, is a true and honest citizen of said state and county, and as such has always behaved and conducted himself, and has never been guilty, or until the committing of the grievances by the said Chicago, Rock Island, & Pacific Railway Company, hereinafter mentioned, been suspected to have been guilty, of felony or of any other crime; and that before the committing of the several grievances by the said Chicago, Rock Island, & Pacific Railway Company, as hereinafter mentioned, the said plaintiff had deservedly obtained and acquired the good opinion and credit of all his neighbors; yet the said Chicago, Rock Island, &

less and in disregard of plaintiff's rights. Krehbeil v. Henkle, — Iowa —, 129 N. W. 125.

But in Gulsby v. Louisville & N. R. Co. 167 Ala. 122, 52 So. 392, it was held that a charge that the jury "are authorized to award such damages over and above actual damages, as will be punishment to defendant and serve as example to him and others in the future," was not erroneously refused.

An action can be sustained for an injury done to the character by a malicious application, without probable cause, for a search warrant on the ground that goods had been stolen and were concealed within the person's inclosure. Miller v. Brown, 3 Mo. 127, 23 Am. Dec. 693. The court said: "This action is to redress any damages the plaintiff may have sustained either in his repu-

tation by the scandal, in his person, by imprisonment, or in his property by expense incurred; and it would have well lain upon the mere affidavit of the defendant if made with malice and without probable cause; for, assuredly, an application for a search warrant upon the ground that goods have been stolen and are concealed within the person's inclosure is a sufficient scandal to the reputation, to sustain an action as to this ground."

Twenty-five hundred dollars is not excessive in an action for maliciously causing a search warrant to be issued, which resulted in compelling plaintiff, a young woman, to disrobe herself before a constable and to let him rummage with his fingers in her hair. Doane v. Anderson, 39 N. Y. S. R. 913, 15 N. Y. Supp. 459. J. H. B.

Pacific Railway Company, acting by and through its officers and agents, and more particularly through one J. M. Grimes, well knowing the premises, but contriving and maliciously intending to injure said plaintiff in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, and to impoverish, oppress, and ruin him, heretofore, to wit, on the —day of January, 1909, without any probable cause whatever, charged him, the said James E. Holliday, before J. M. Rooney, justice of the peace within and for Howe township, said county and state, with feloniously stealing certain meat belonging to said defendant, and with having said stolen articles concealed in the house where said plaintiff dwelt; and that said defendant, Chicago, Rock Island, & Pacific Railway Company, acting by and through its officers and agents, maliciously and without probable cause, procured said justice to grant a warrant to search the house of plaintiff. Third. That said justice issued said warrant accordingly, and that during the absence of plaintiff herein, and in the presence of plaintiff's wife and small children, plaintiff's house was searched by one George Barlow, constable of said township, assisted by one —. Fourth. That after said diligent search had been made, and none of the goods searched for found, said George Barlow, constable, as aforesaid, departed from plaintiff's premises, and since that time neither defendant, Chicago, Rock Island, & Pacific Railway Company, nor any other person, has further prosecuted plaintiff, and has abandoned said prosecution, and in no wise made reparation for injury done plaintiff. Fifth. That by means of the premises plaintiff has been injured and damaged in the sum of \$1,999. Wherefore, the premises considered, the plaintiff prays that he have judgment against said defendant, Chicago, Rock Island, & Pacific Railway Company, for said sum of \$1,999, and his reasonable costs herein laid out and expended."

The defendant answered as follows: "(1) Defendant denies each and every material allegation in said petition contained. (2) Defendant, further answering, alleges that the said J. M. Grimes had no authority to represent the defendant in matters and things in plaintiff's petition alleged to have been done by him, and that said defendant is in no way responsible therefor. (3) Defendant further alleges that neither it, nor any person authorized to represent it in that behalf, caused the process mentioned in plaintiff's petition to be issued or served. Wherefore defendant prays judgment."

Upon the issues thus joined, trial was had, which resulted in a verdict in favor of the L.R.A. (N.S.)

plaintiff in the sum of \$1,494.50. Motion for new trial was filed, argued, and overruled, and judgment was entered for plaintiff in the sum found by the jury, and the defendant brings this appeal to reverse said judgment, and relies upon five assignments of error, which, in their order, are as follows: "First. The petition did not state facts sufficient to constitute a cause of action. Second. The court erred in admitting the search warrant in evidence. Third. The petition did not charge facts sufficient to entitle plaintiff to prevail in an action for malicious prosecution. Fourth. The court erred in overruling defendant's motion to direct a verdict in its favor. Fifth. The court erred in overruling defendant's motion for new trial."

Inasmuch as the first and third assignments embrace practically the same propositions, they will be treated together. The first question presented in the combined first and third assignments of error challenges the sufficiency of the petition. Was the petition sufficient to charge malicious prosecution? In order to properly state a cause of action for malicious prosecution, the petition must allege, first, that a prosecution was commenced against the plaintiff; second, that it was instituted or instigated by defendant; third, that it was malicious; fourth, that it has been legally and finally terminated in plaintiff's favor; fifth, that it was without probable cause. *Schrieber v. Clapp*, 13 Okla. 215, 74 Pac. 316; *Jones v. Finch*, 84 Va. 204, 4 S. E. 342; *Newell, Malicious Prosecution*, page 297. A careful examination of the petition shows that it contains, clearly and succinctly, each and every allegation required by the rule as above laid down by our own supreme court, and is therefore amply sufficient as against the objections urged by the plaintiff in error, and no error was committed by the court in refusing to sustain defendant's motions.

The next assignment urged is that "the court erred in admitting the search warrant in evidence." The only objection made by the defendant to the introduction of the search warrant at the trial was: "The defendant objects to the introduction of the search warrant, for the reason that there was no legal affidavit filed upon which to base the search warrant." Record, page 6. We do not understand that such an objection can be made in a case like this.

In *Am. & Eng. Enc. Law*, 2d ed. vol. 25, p. 150, it is said: "It is no defense to such an action that the affidavit of the party by whom it was secured did not, in law, authorize the issuance of the warrant."

"A party who maliciously and without probable cause prosecutes another upon a

criminal charge cannot . . . avoid his liability by showing that the information or indictment was defective or insufficient, either in substance or form, as that the complaint upon which the plaintiff was arrested did not, in law, charge a criminal offense." *Shaul v. Brown*, 28 Iowa, 37, 4 Am. Rep. 151.

"In an action on the case for maliciously suing out an attachment against the plaintiff, the defendant cannot raise the objection that the affidavit which he made to procure the attachment, and on which the writ was issued, was insufficient to authorize the issuance of an attachment." *Forrest v. Collier*, 20 Ala. 175, 56 Am. Dec. 190.

"Procuring a search warrant to be issued may be made the foundation of an action for malicious prosecution, notwithstanding the affidavit on which such search warrant was issued does not charge a crime." *Harlan v. Jones*, 16 Ind. App. 398, 45 N. E. 481.

And in *Cooney v. Chase*, 81 Mich. 203, 45 N. W. 833, it was held that the complaint and warrant were admissible, though irregular in form.

The great weight of authority is to the effect that the defendant in an action for malicious prosecution for a wrongful search of a dwelling house will not be permitted to show at the trial that the affidavit or complaint upon which the search warrant issued was defective or insufficient. See, in support of this principle, in addition to the foregoing: *Stancilff v. Palmeto*, 18 Ind. 321; *McCullough v. Rice*, 59 Ind. 580; *Schattgen v. Holnback*, 149 Ill. 646, 36 N. E. 969; *Matlick v. Crump*, 62 Mo. App. 21; *Dennis v. Ryan*, 65 N. Y. 385, 22 Am. Rep. 635; *Collins v. Love*, 7 Blackf. 416. In the case at bar, no objection to the form or sufficiency of the search warrant was made, and the court did not err in permitting it to be introduced in evidence.

The introduction of the search warrant shows, as plaintiff had a right to show, that defendant charged that a burglary had been committed from a car in which certain goods and merchandise in custody of the defendant had been taken, and that the officer to whom it was directed was commanded to search plaintiff's house, and to arrest plaintiff if the goods were found in his possession, and the return of the officer on the back of the warrant showed the time and manner of its execution, together with the result of the search, and the warrant and return thereon were properly identified by the officer who served the same.

By the introduction of the search warrant, the genuineness of which was not in any way disputed, the fact that a search of plaintiff's house had been made by the officer, the authority upon which the search was

made together with the result of the search, were made clear. What better way of providing these matters did plaintiff have, and how was defendant prejudiced thereby? The admission of the search warrant in evidence tended merely to establish certain facts alleged in the petition. If this had been the only evidence offered by plaintiff in support of those allegations, objection might well have been made, and, no doubt, the ruling of the court would have been different. It was competent evidence, and went to the jury for what it was worth, together with all the other facts and circumstances appearing in evidence at the trial, and under proper instructions by the court. The jury gave it such weight and credit as it was entitled to, and no error was committed by the court in permitting it to be identified and introduced.

"To show the institution of the proceedings complained of, the original record, or a duly certified copy thereof, is admissible, and is in general the only competent evidence of the fact, unless a foundation is laid for secondary evidence. For this purpose, and also to show the defendant's connection with the prosecution, the affidavit or complaint on which the warrant issued and the warrant itself are frequently introduced." 19 Am. & Eng. Enc. Law, 2d ed. 694.

"In an action for malicious prosecution against the prosecutor and the justice before whom the proceedings were instituted, the affidavit and warrant issued thereon are competent evidence." *Cooper v. Turrentine*, 17 Ala. 13.

"In an action for maliciously prosecuting the plaintiff for a criminal offense, the affidavit on which the warrant for the arrest issued is admissible evidence for the plaintiff, if it authorized the warrant." *Turpin v. Remy*, 3 Blackf. 210.

"A charged B before a justice with having committed perjury on a trial between them in a justice's court, upon which charge a warrant issued against B, and he was thereon arrested. For this arrest, B brought an action of malicious prosecution against A. Held, that the original affidavit and warrant were admissible evidence for the plaintiff." *Conduit v. Dicken*, 3 Blackf. 216.

"In a suit for malicious prosecution, the petition alleged the arrest, etc., of plaintiff under process issued upon affidavit and complaint of defendant charging plaintiff with knowingly cutting and carrying away timber from land not his. . . . Upon the trial, the affidavit was introduced, and, over objection, the capias and bond in the case, in which plaintiff was charged with theft. Held, that there was no variance, . . . as affecting the liability of the party mak-

ing the complaint that the proceedings may not have been strictly regular." Cooper v. Langway, 76 Tex. 121, 13 S. W. 179.

Nor do we agree with counsel for defendant that the introduction of the search warrant was for the sole purpose of proving the result of the criminal proceedings against plaintiff. The rule announced in Sweeney v. Perney, 40 Kan. 102, 19 Pac. 328, also in Casey v. Sevaton, 30 Minn. 516, 16 N. W. 407, correctly states the law, but in both cases cited the judgment of acquittal was urged and relied upon by the plaintiff as a final adjudication of the controversy in favor of the plaintiff, and against the defendant. No such contention is made in this case, but the question of the determination of the prosecution was submitted to the jury, with other questions; and, while the evidence thereon is not as strong and satisfactory as it might have been yet the jury was satisfied, and, no objections to the instructions of the court in thus submitting it having been made, we are not disposed to disturb the finding of the jury on the subject, nor to criticize the action of the court in admitting the search warrant in evidence.

The fourth assignment of error, to our mind, presents the only real question in this case, viz.: "Did the court err in overruling the defendant's motion to direct a verdict in its favor?" Defendant insists that the refusal to direct a verdict was error, because: "(1) That no such agency was shown to exist between the defendant and witness J. M. Grimes as to fix liability upon the defendant for his actions. (2) That it was not shown that there was a want of probable cause. (3) That the existence of malice was not established by the evidence. Let us examine these grounds in their order.

The testimony of the agent Grimes, which is all the testimony in the record bearing on the question of agency, is as follows:

Direct examination.

By Mr. White: Q. State your name.

A. J. M. Grimes.

Q. Where do you live?

A. I live at Howe.

Q. What is your business?

A. Well, I am agent of the C. R. I. & P. Railroad Company.

Q. Agent for the Chicago, Rock Island Railroad Company?

A. Yes, sir.

Q. You were agent of the Rock Island Railroad Company during the month of January of this year, Mr. Grimes?

A. Yes, sir.

Q. Is that your signature? (Handing witness

original information. Witness examines affidavit.)

A. Yes, sir.

Q. As agent for the C. R. I. & P. Railway Company, what are your duties?

A. Well, I have various duties. I don't know as I could tell you all the duties I do have.

Q. The station is in your charge, is it?

A. Yes, sir.

Q. The goods of the company are transferred under your charge, and under your protection?

A. Yes, sir.

Q. The goods in transit in the freight yards are under your care and supervision?

A. Yes, sir.

Q. In what capacity for yourself, or for the C. R. I. & P. Railway Company, did you make that affidavit? (Defendant objects. There is no proof that he was authorized to make that affidavit by his employers, or that it came in the scope of his authority.)

By the Court: You might as well settle that now.

By Mr. White: Q. Whose goods were you attempting to recover on the 26th day of January? (Objected to as incompetent, irrelevant, and immaterial.)

By the Court: I will let him answer the question. (Objection overruled. Defendant excepts.)

A. The goods belonged to Dawson and Echols, of Little Rock.

Q. In whose care and custody were these goods at the time they were stolen?

A. They were in mine, I suppose, as agent of the C. R. I. & P. Railway Company.

Q. They were goods in transit, being shipped by the C. R. I. & P. Railway Company?

A. Yes, sir.

Q. Now, then, for whom were you attempting to recover the goods that had been stolen?

A. Well, do you want me to state the case?

Q. I want you to state, in other words, were the goods for your own personal use, or to be returned to the Rock Island Railroad Company?

A. To be returned to the C. R. I. & P. R. Co.

Q. I want to ask him now for whom he signed the original affidavit? It is signed by him as agent of the C. R. I. & P. Railway Company. (Defendant objects to that as incompetent, irrelevant, and immaterial, for the reason it is not proof to show what his authority was.)

By Mr. White: We can also show that he was at that time engaged, as he thought, in the service of the company. Now we have shown that in his official capacity as

agent of the C. R. I. & P. Railway Company he has the property charged to have been stolen in his possession as agent; that he has charge of that property, and it is his duty to protect that property.

By the defendant: He is not charged with that.

By the Court: He is agent of the company, and if he hasn't testified to it already he possibly would.

By Mr. Day: Q. Do you say you had the meat at the station?

A. In a car out in the yard.

By the Court: Q. Was that car registered when it passed through your station? Did you register it, or take any list of it, or anything of the kind?

A. Yes, sir.

Q. You did that?

A. Yes, sir.

By the Court: I think I will let you ask the question. (Defendant excepts.)

By Mr. White: Q. By whom and in what capacity did you sign that affidavit?

A. Well, I signed it in the capacity as agent, but I had no authority from my superior officers to do it. I signed it as agent of the company. I had no authority for that.

Q. You had no written authority to do it.

A. No, sir. I had no written authority.

Q. But, if I understand your statement, you did that as agent of the C. R. I. & P. Railway Company?

A. Yes, sir.

Q. And not for yourself?

A. No, sir; not for myself.

Cross-examination.

By Mr. Day: Q. You say you had no authority whatever from your superior officers to make that affidavit to search for that meat?

A. No, sir.

Q. Did you have any other kind of authority, written or otherwise?

A. No, sir; I didn't have any written authority of any kind, only what I found.

Q. What was that?

A. The salt I found.

Q. You didn't understand my question, Mr. Grimes. Did you have any authority of any kind? You said you had no written authority from your superior officers. Did you have any authority of any kind to institute searches for the company?

A. No, sir.

Q. Did that come within the scope of your authority?

A. No, sir; I don't think it did. We have circulars from the company with information of that kind.

Q. Does not come within the scope of your authority?

A. No; legal matters do not.

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Q. Then I understand you say you had no authority to institute searches, make complaints against the railroad company?

A. I didn't have any in that case.

Q. Have you in any case, unless the authority comes special?

A. I don't think I would on an occasion like that.

Q. And you were given no authority to do that?

A. No, sir; I wasn't given any authority.

This evidence, if it proves anything, shows that Grimes was the agent of the defendant at Howe; that as such agent the goods of the defendant, transferred and in transit, were in his care, custody, and supervision; that he was engaged, at the time the search warrant was issued, in the service of the defendant; that the goods had been stolen from the company, and said goods, at the time they were stolen, were in his care, custody, and supervision, and at the time he caused the search warrant to be issued he was trying to locate and recover back for the defendant company, not for himself personally, the goods, which it was his duty, as such agent, to care for and protect. These salient points are nowhere in the record denied; in fact, they stand admitted. Now, was he acting within the scope of his duties when he signed the affidavit as the agent of the defendant company?

We are not unmindful of the difficulties to be encountered in the solution of this question. There is an amazing lack of uniformity in the decisions of courts on this question, yet, after a critical examination of the cases, we are inclined to the view presented by counsel for defendant in error that there is in all the reported cases "a marked distinction, in the liability of the master for the act of his servant, between those cases wherein the result of the act of the servant was to inflict punishment upon the offender, or to vindicate justice, and those cases wherein the servant was attempting to protect the master's property, which was under his care and supervision, or to recover this property back after it had been taken." Defendant in error's brief, page 8.

"The later decisions, however, incline to the rule making the principal liable for acts of the agent done within the scope of his employment, though they be wanton or malicious." 1 Am. & Eng. Enc. Law, 2d ed. 1156, and the many cases there cited. Also: "It seems to be the better doctrine that, where a prosecution which is maliciously instituted by an agent of a corporation is in the line of his duty, for the purpose of benefit to his principal, and not for any object personal to himself, the corporation will be held

responsible." 1 Am. & Eng. Enc. Law, 2d ed. 1157.

It has been held in Missouri that, where an express agent, charged with the duty of protecting property and collecting charges thereon, attempts to collect charges on property unlawfully taken without payment of the charges, and in such attempt, as agent, mistakenly institutes a criminal prosecution without probable cause, the principal will be liable in an action for malicious prosecution, though, where the agent acts as a citizen, and for the purpose of vindicating justice, the rule is otherwise. *Cameron v. Pacific Exp. Co.* 48 Mo. App. 99; *Gillett v. Missouri Valley R. Co.* 55 Mo. 315, 17 Am. Rep. 653.

"A private corporation, like an individual, is liable for the acts of its agents in instituting a malicious prosecution authorized or ratified by the corporation, or within the scope of the authority conferred." *Farmers' Mut. F. Ins. Assn. v. Stewart*, 167 Ind. 544, 79 N. E. 490; *Cooley, Torts*, pp. 200-205; 10 Cyc. 1203, 1208, 1211, 1217; 19 Am. & Eng. Enc. Law, 2d ed. 691, 692; *Pennsylvania Co. v. Weddle*, 100 Ind. 138; *American Exp. Co. v. Patterson*, 73 Ind. 430; *Markley v. Snow*, 207 Pa. 447, 64 L.R.A. 685, 56 Atl. 999; *Carter v. Howe Mach. Co.* 51 Md. 290, 34 Am. Rep. 311.

There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony or recovering it back, and an act done for the purpose of punishing the offender for that which has already been done. 1 Clark & S. Agency, p. 1087.

In *Staples v. Schmid*, 18 R. I. 224, 19 L.R.A. 824, 26 Atl. 193, the supreme court of the state of Rhode Island, in discussing this subject, says: "It remains to apply these principles to the case at bar. The servant in this case was left with an assistant in charge of his master's store. His ordinary duties undoubtedly were to show goods, and to sell them to customers. It was, however, equally his duty to protect his master's property from pilfering. The acts complained of were evidently done with that intention. The arrest was for the purpose of searching for and recovering the master's property, not with the object of punishing crime against the public. The establishment was not a railroad station, where the multiplicity of employees confines each one to a narrow round of duties, where special officers are stationed to preserve order and detain criminals; nor a large dry goods emporium, where detectives and watchmen are employed to guard against thieves. The servant here was salesman and custodian in one. Whatever the master might do in the protection of his property, he expected his serv-

ant to do in his absence. If the servant had seen the plaintiff take up and secrete the package of spoons in question, and had allowed her to walk away with them unmolested, could anyone say that he had not been derelict in his duty to his master? If, in the performance of this duty, he mistook the occasion for it, or exceeded his powers, or employed an improper degree of compulsion, the mistake and the excess must be answered for by the master." And, following the rule as announced, the supreme court of Minnesota, in *Smith v. Munch*, 65 Minn. 256, 68 N. W. 19, says: "While there is much conflict in the decisions as to when a master is liable for the intentional torts of his servant, yet the tendency of the modern authorities is to extend the liability of the master in such cases; and the general rule may now be said to be that a master is responsible for the torts of his servant done with a view to the furtherance of the master's business, whether the same be done negligently or wilfully, but within the scope of his agency. The fact that the servant, in committing the tort, may have exceeded his actual authority, or even disobeyed his express instructions, does not alter the rule. We think that the facts of the present case bring it within this rule."

The supreme court of North Carolina, in *Jackson v. American Teleph. & Teleg. Co.* 139 N. C. 347, 70 L.R.A. 738, 51 S. E. 1015, says: "In this case the jury have found that the defendant, by its servant, caused the plaintiff to be unlawfully arrested, for the purpose of putting him out of the way, so that its agents and servants might erect telephone and telegraph poles on his land. If this is not an act done in the course of the employment, and in the furtherance of the master's business, for his benefit and advantage, it would be hard to conceive of one which would come under that class."

And a case very much in point is *Wheeler & W. Mfg. Co. v. Boyce*, reported in 36 Kan. 350, 59 Am. Rep. 571, 13 Pac. 609, wherein the rule in this class of cases is stated as follows: "To make the corporation responsible, it is not necessary, as plaintiffs in error contend, that the principal should have directly authorized the particular wrongful act of the agent, or should have subsequently ratified it. Judge Story, in treating of the liability of principals for the acts of their agents, says that 'the principal is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorize or justify or

participate in, or, indeed, know of, such misconduct, or even if he forbade or disapproved of them,' and to sustain this [case] he cites numerous authorities. 'In all such cases,' he says, 'the rule applies, *respondeat superior*, and it is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings either directly with the principal, or indirectly with him through the instrumentality of agents.' Story, Agency, 452." See, also, Moore v. Atchison, T. & S. F. R. Co. 26 Okla. 682, 110 Pac. 1059.

The third ground of the motion to direct a verdict is "that the existence of malice was not established by the evidence." Malice may be inferred from want of probable cause. It is an inference which the jury may or may not draw from the want of probable cause. To be sure, there was no express malice shown, but plaintiff was not required to prove express malice, in the ordinary significance of the term. To prove malice sufficient to warrant a verdict, the ill-will, hatred, or resentment of defendant toward plaintiff may be inferred by the jury from want of probable cause, or other good reason. The question was fairly submitted to the jury under proper instructions by the court. By the verdict, the jury found that there was malice in the bringing of the criminal prosecution, and it is not for us to say that they were mistaken.

The fifth assignment of error raised by defendant in its brief, "that the court erred in overruling defendant's motion for a new trial," is, in our opinion, untenable; the only serious contention of counsel seeming to be that the finding of the jury was made under the influence of passion and prejudice. This we do not think is the case. Plaintiff, as shown by the testimony, was an honest, law-abiding citizen; he had never been charged or accused of a crime before this; he was by this proceeding subjected to great humiliation and disgrace, and his house was put into great disorder and confusion by the unwarranted search; suspicion among his friends and neighbors was necessarily cast upon him by the wrongful acts of defendant; the privacy of his home was interfered with, and his family made to endure the shame and disgrace which always attend such acts. The damages assessed doubtless exceeded the injury done to the goods; but the jury, as it has a right to do, assessed the damages with reference to the feeling of plaintiff and the disturbance of his family. Plaintiff made out at least a prima facie case, and the questions were submitted to the jury under proper instructions by the court, and 39 L.R.A.(N.S.)

no objections were made in defendant's brief to the same, and it is presumed, therefore, that they were satisfactory to it.

After a careful investigation of the whole record, we fail to find error which would warrant a reversal, and the judgment of the District Court of Le Flore County should therefore be affirmed.

Per Curiam:

Adopted in whole.

Petition for rehearing denied.

ARKANSAS SUPREME COURT.

DR. J. C. MINOR, Appt.,

v.

C. W. MAPES.

(— Ark. —, 144 S. W. 219.)

Automobile — speeding past standing street car — negligence.

1. The driver of an automobile may be found to be negligent in running his machine at a speed of 10 or 12 miles an hour, on the parallel track past a street car which he has overtaken after it has stopped to discharge passengers from the front door, without taking precautions to ascertain if passengers will attempt to cross in front of the car, where there is a space of 60 feet between the car and the curb which the driver might have used.

Highway — crossing past street car — lookout for vehicles.

2. The jury must determine whether or not a passenger who alights from a street car is negligent in attempting to cross the street in front of a standing car without looking to see if vehicles are coming on the parallel track which may render the crossing dangerous.

Husband and wife — liability for wife's negligence — driving automobile.

3. A man riding with his wife in her automobile, which she is driving, is answerable for injuries negligently inflicted by her upon pedestrians.

Appeal — nonjoinder of parties — first objection.

4. Failure to join a woman in an action to hold her husband liable for injury inflicted by her in driving an automobile cannot be questioned for the first time on appeal.

(February 19, 1912.)

Note.—As to negligence of automobile driver in speeding past a standing street car, and as to duty of passenger alighting from street car to look for automobiles, see note to Baker v. Close, 38 L.R.A.(N.S.) 487.

As to effect of married women's acts upon husband's liability for wife's torts, see notes to Kellar v. James, 14 L.R.A.(N.S.) 1003 and Jackson v. Williams, 25 L.R.A.(N.S.) 840.

A PPEAL by defendant from a judgment of the Circuit Court for Garland County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Greaves & Martin, for appellant:

The driver of an automobile has the right to assume, and act upon the assumption that others using the highway will also exercise a like caution, and will not recklessly expose themselves to danger.

Thies v. Thomas, 77 N. Y. Supp. 276; Millsaps v. Brogdon, 97 Ark. 469, 32 L.R.A. (N.S.) 1177, 134 S. W. 632.

Plaintiff was guilty of contributory negligence and cannot recover.

Burns v. St. Louis Southwestern R. Co. 76 Ark. 12, 88 S. W. 824; St. Louis, I. M. & S. R. Co. v. Tucka, 95 Ark. 192, 129 S. W. 541; Barker v. Savage, 45 N. Y. 191, 6 Am. Rep. 66; Barker v. Pendergast, 32 Ohio St. 494, 30 Am. Rep. 620; Beach, Contrib. Neg. §§ 268, 269; Sheehan v. Edgar, 58 N. Y. 631; Borg v. Spokane Toilet Supply Co. 50 Wash. 204, 19 L.R.A. (N.S.) 160, 96 Pac. 1037; Dimuria v. Seattle Transfer Co. 50 Wash. 633, 22 L.R.A. (N.S.) 471, 97 Pac. 657.

The accident was committed by the wife without coercion on the part of the husband, and there was no cause of action against appellant unless his wife should be joined in the suit with him.

Kosminsky v. Goldberg, 44 Ark. 401; Cassin v. Delany, 38 N. Y. 178; Mahoney v. Roberts, 86 Ark. 130, 110 S. W. 225.

Messrs. Wallace & Graham, for appellee:

Appellant was guilty of gross negligence.

Gregory v. Slaughter, 124 Ky. 345, 8 L.R.A. (N.S.) 1228, 124 Am. St. Rep. 402, 99 S. W. 247.

Thies v. Thomas, 77 N. Y. Supp. 276.

Appellant knew that this was a point of danger, and great caution and care was required of him.

Abern v. Oregon Teleph. & Teleg. Co. 24 Or. 276, 22 L.R.A. 635, 33 Pac. 403, 35 Pac. 549; Porter County v. Dombke, 94 Ind. 75; Baltimore v. Holmes, 39 Md. 249; King v. National Oil Co. 81 Mo. App. 155; Robinson v. Manhattan R. Co. 5 Misc. 209, 25 N. Y. Supp. 91; Frankford & B. Turnp. Co. v. Philadelphia & T. R. Co. 54 Pa. 345, 93 Am. Dec. 708; Pendroy v. Great Northern R. Co. 17 N. D. 433, 117 N. W. 531.

Plaintiff was not guilty of contributory negligence.

Simeone v. Lindsay, 6 Penn. (Del.) 224, 39 L.R.A. (N.S.)

65 Atl. 778; Benoit v. Miller, — R. I. —, 67 Atl. 87.

Appellant's wife operated the machine for his benefit.

Kosminsky v. Goldberg, 44 Ark. 401.

McCulloch, Ch. J., delivered the opinion of the court:

Appellee sued appellant in the circuit court of Garland county to recover damages on account of personal injuries resulting from alleged negligence on the part of appellant in driving an automobile, or causing it to be driven, along Central avenue in the city of Hot Springs. Appellant and his wife were in the machine at the time, the latter driving. Appellee alighted from a street car, at the front end of it, which was customary, and started across the track in front of the car to go to the opposite side of the street. He hesitated at first, but the motorman told him to go ahead, and he proceeded to cross. As he stepped beyond the end of the car, the automobile, which was running at a speed of 10 or 12 miles per hour, struck him and knocked him down. He was just stepping on the other track, about 4 feet from the street car, when the automobile struck him. It was a rainy day, and he had his umbrella raised and was walking rapidly. He testified that the street car obstructed the view down the street, and that as he passed the car he looked down the street, but did not see the automobile approaching, and failed to see it until too late to get out of the way. There was a space of 60 feet between the street car and the other side of the street. Appellant testified that he purchased the machine and gave it to his wife for her own use; that she drove it herself, and that he never attempted to drive and knew nothing about handling a machine of that kind. There was testimony to the effect that appellant paid the city vehicle license fee for operating the machine. The verdict was in appellee's favor for recovery of damages.

It is insisted that the evidence fails to establish negligence on the part of appellant, and that the undisputed evidence shows negligence on the part of appellee which bars recovery. We think that on both of those issues the verdict is sustained by sufficient evidence.

The machine was being operated at a rapid rate of speed, unnecessarily near the street car, though there was abundant space further out in the street for the machine to pass along. It was customary for passengers to alight from the front end of street cars, and it was reasonably to be anticipated that they might pass in front of a car going

to the other side of the street. The jury was warranted in finding that it constituted negligence for an automobile driver to run the machine at a rapid speed so near a street car which had stopped for passengers to alight. Automobilists and the drivers of other vehicles have the right to share the streets with pedestrians; but they must anticipate the presence of the latter, and exercise reasonable care to avoid injuring them. Care must be exercised commensurate with the danger reasonably to be anticipated. *Gregory v. Slaughter*, 124 Ky. 345, 8 L.R.A.(N.S.) 1228, 124 Am. St. Rep. 402, 99 S. W. 247.

The question of contributory negligence on the part of appellee was one for the jury, and was properly submitted. It cannot be held that the failure of a pedestrian upon a public street to look up and down the street before crossing constitutes, under all circumstances, negligence as a matter of law. There is no statute or rule of law which raises a presumption of negligence from the failure of a pedestrian, on a public street, not at a railroad crossing, to look. The rule is that a pedestrian, having equal rights with others to the use of the streets, must exercise ordinary care for his own safety, and this is generally a question for the jury to say whether such care has been exercised. *Millsaps v. Brogdon*, 97 Ark. 469, 32 L.R.A.(N.S.) 1177, 134 S. W. '632.

It is next insisted that, according to the undisputed evidence, appellant did not own the machine or control it, but was merely riding therein with his wife, who was driving, and that for that reason no liability on his part is established. It is contended in other words, that, it being shown affirmatively that the wife was not acting under the compulsion of the husband, he is not responsible for negligence on her part which caused the injury. In this contention learned counsel are mistaken as to the law on the subject. At common law the husband was liable for torts committed by the wife, whether committed in or out of his presence, or whether committed at his command or not. Such is the law in this state now. *Kosminsky v. Goldberg*, 44 Ark. 401; *Jackson v. Williams*, 92 Ark. 486, 25 L.R.A.(N.S.) 840, 123 S. W. 751. The only difference is that, where the tortious act is committed in the immediate presence and under the direct compulsion of the husband, the wife is not liable and the husband alone is liable. In other instances, where the tort is committed in the absence of the husband, or, if in his presence, without any control or compulsion on his part, the husband and wife are jointly liable and 30 L.R.A.(N.S.)

must be joined in the action; the liability of the husband ceasing upon the dissolution of the marriage relation. *Kosminsky v. Goldberg*, supra.

No question was raised below as to the failure to join the wife as defendant in the action, and that question must be deemed as waived, and cannot be raised here for the first time. *Townsley v. Yentsch*, 98 Ark. 312, 135 S. W. 882.

But aside from the question of the husband's common-law liability for torts of the wife, we are of the opinion that the evidence was sufficient to warrant the jury in finding negligence on the part of appellant. The rule is that where one who rides in a public conveyance, or merely upon the invitation of some third party, and exercises no control over the driver, and is not guilty of any positive act of negligence, the negligence of the driver cannot be imputed to him so as to render him liable for injuries to another person. *St. Louis & S. F. R. Co. v. McFall*, 75 Ark. 30, 69 L.R.A. 217, 86 S. W. 824, 5 Ann. Cas. 161; 1 *Thomp. Neg.* 502; *Little v. Hackett*, 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep. 391; *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. L. 161, 54 Am. Rep. 126. This rule cannot, however, be extended so as to afford an avenue for the husband's escape from liability on account of negligent act of his wife or minor child with whom he is driving in an automobile or other vehicle. He is presumed to exercise some control over them under those circumstances, at least to the extent of preventing an act of negligence which is calculated to result in injury to other persons, and it is his positive duty to do so. In this instance the husband was sitting beside his wife, who was driving the machine, and whatever danger there was in driving too near the street car was as obvious to him as it was to her. He needed no knowledge or experience in the operation of the machine in order to apprise him of such a danger. To say that the husband was not liable for the negligent act of the wife committed under those circumstances would be to absolve him entirely from any duty to fellow travelers.

The court gave an instruction which is in conflict with some of the views we here express; but as it was in appellant's own favor, and the verdict, notwithstanding that, was against him, he cannot complain of it.

We are of the opinion that the verdict was supported by the evidence, and it is not contrary to any rule of law applicable to the facts of the case.

The judgment is therefore affirmed.

ARKANSAS SUPREME COURT.

CHICAGO, ROCK ISLAND, & PACIFIC
RAILWAY COMPANY, Appt.,

v.

LUCY PAYNE.

(— Ark. —, 146 S. W. 487.)

**Negligence — pathway — alteration —
duty to licensee.**

A railroad company in cutting, for drainage purposes, a ditch across a path on its right of way, which has been used by the public for many years, is under no obligation to leave it safe for licensees, so as to render it liable for injury to one who, in attempting to use the path in the dark, falls to his injury from a pile of dirt left in the path.

(April 15, 1912.)

A PPEAL by defendant from a judgment of the Circuit Court for Logan County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been due to the negligent construction of a ditch across a pathway which plaintiff was attempting to use. Reversed.

Statement by Wood, J.:

Appellant, in order to drain its right of way, dug a ditch across a footpath on its right of way that had been used by the public with appellant's permission for ten

years. Appellant put piles of dirt in the roadway 5 or 6 feet wide and 2 or 3 feet high. The appellee on the night of the injury had walked to church on the pathway and had crossed over the piles of dirt, and noticed same. On her return she was afraid of getting hurt at the place where the dirt was piled, so she went down the railroad track till she got past where she thought the dirt was, but she was mistaken, and went down off the railroad track on top of the dirt, and fell off the pile and was injured. The night was extremely dark, and there were no lights there.

Appellee sued appellant for damages on account of the injury, alleging that appellant was negligent in failing and refusing to level down the piles of dirt, and in failing and refusing to place lights or other signals to warn appellee of the danger, and that appellee's injury was caused by such negligence. Appellant admitted that there was a trail on its right of way, but denied that it owed the public any duty to keep it clear of dirt. It admitted that for some considerable time there had been piles of dirt in the pathway, but denied that appellee was unaware of it, and denied that it owed her any duty to advise her of it. Appellant alleged that, if appellee was injured, her injury was the result of her own negligence.

The court gave the following instructions on its own motion:

"If the public, with the knowledge and acquiescence of the defendant, used for a long

Note. — Duty of owner of land which licensees are accustomed to cross, to guard against injuries in consequence of changes in the conditions.

As to duty to member of public on private way used by public generally, see notes to *Stevens v. Nichols*, 15 L.R.A. 459, and *Bowler v. Pacific Mills*, 21 L.R.A. (N.S.) 976.

As to duty of owner of premises to protect licensee against hidden danger, see notes to *Watson v. Manitou & P. P. R. Co.* 17 L.R.A. (N.S.) 916.

As to duty to trespasser with respect to excavations maintained on uninclosed land near highway, see notes to *Lepnick v. Gaddis*, 26 L.R.A. 686, and *Johnson v. Paducah Laundry Co.* 5 L.R.A. (N.S.) 733.

The earlier cases on this subject are collected in the note appended to *Habina v. Twin City General Electric Co.* 13 L.R.A. (N.S.) 1126.

In *Brinilson v. Chicago & N. W. R. Co.* 144 Wis. 614, 32 L.R.A. (N.S.) 359, 129 N. W. 664, it was held that a railroad company is liable to a mere licensee who is injured by falling into a steam pit which it maintains under a wooden pathway which the public is accustomed to use, where it permits a hole to remain in the covering, through which users are likely to fall, which 39 L.R.A. (N.S.)

is obscured from general observation by the steam emerging through the cracks.

So a landowner who, without objection, has permitted the public to cross his lands by a well-defined path for a long period of time, and with knowledge that people were accustomed to travel over it both by day and night, is liable for injury to one who after dark attempts to cross it and falls into an unguarded excavation. *Hanson v. Spokane Valley Land & Water Co.* 58 Wash. 6, 107 Pac. 863; *Phipps v. Oregon R. & Nav. Co.* 161 Fed. 376.

But in *Fox v. Warner-Quinlan Asphalt Co.* 204 N. Y. 240, 38 L.R.A. (N.S.) 395, 97 N. E. 497, it was held that the landowner was under no duty to guard an excavation near the path, though it rendered the way unsafe for travelers.

And in *East Hill Cemetery Co. v. Thompson*, — Ind. App. —, 97 N. E. 1036, a right of action was denied for injuries sustained by reason of the defective condition of a bridge in a cemetery which plaintiff entered for the purpose of inspection and pleasure at a time when the rules of the cemetery association provided that the gates should be open for visitors to enter, on the ground that the cemetery association owed plaintiff no duty except to protect him from active negligence. A. L. R.

time a road or path along, across, and near its right of way, and with the knowledge, permission, and acquiescence of the defendant was doing so at the time of the injury complained of, and if the defendant caused or allowed its servants to negligently deposit and leave in such road or path a large pile or large piles of dirt, so as to make such road or path dangerous to persons using the same with due care, then, if plaintiff was traveling along said road or path, and using due care for her own safety, and was caused to fall and suffer injury by reason of such pile or piles of dirt in the road or path, if any, you should find for the plaintiff, otherwise you should find for defendant.

"The defendant is not an insurer of the safety of persons traveling along, across, or upon its right of way and premises, and owes them no duty except not to wilfully or wantonly injure them, unless such persons are invited or licensed by defendant to be there. In such latter case it owes them the duty of exercising ordinary and reasonable care for their safety."

Also the following prayer of appellee:

"If the defendant permitted the public to use a road or pathway along and upon its right of way for a long period of time with its knowledge and acquiescence, and had not revoked such license, then the plaintiff, while traveling such road or pathway, would be there upon the implied invitation of the defendant, and it would owe to her ordinary care to prevent her from being injured while traveling such road or pathway."

The court refused to instruct a verdict for appellant.

Appellant duly reserved its exceptions to the rulings of the court, and duly prosecutes this appeal from a judgment in favor of appellee.

Messrs. Thomas S. Buzbee and George B. Pugh, for appellant:

Even if appellee had been a licensee by invitation, she would not be entitled to recover if she knew of the obstruction.

St. Louis, I. M. & S. R. Co. v. Forbes, 63 Ark. 427, 39 S. W. 63; *Bruker v. Covington*, 69 Ind. 33, 35 Am. Rep. 204.

The mere use of the pathway on the appellant's right of way by the public, for its own convenience and benefit, without any benefit to the appellant, even though continued for a long time, cannot be said to be by invitation.

Plummer v. Dill, 156 Mass. 426, 32 Am. St. Rep. 463, 31 N. E. 128; 3 *Elliot*, *Railroads*, § 1249; *Galveston Oil Co. v. Marton*, 70 Tex. 400, 8 Am. St. Rep. 611, 7 S. W. 756; *Wright v. Boston & A. R. Co.* 142 Mass. 296, 7 N. E. 866; *St. Louis, I. M. & S. R. Co. v. Ferguson*, 57 Ark. 16, 18 L.R.A. 110, 38 Am. St. Rep. 217, 20 S. W. 545; *St. Louis, I. M. & S. R. Co. v. Dooley*, 70 Ark. 389, 67 S. W. 1012; 1 *Thomp. Neg.* § 1015.

Messrs. Carmichael, Brooks, & Powers for appellee.

It is unlawful to make an excavation or to put a dangerous obstruction of any kind adjoining a public highway, and leave it in a condition to endanger the safety of those who are traveling thereon, and who themselves are in the exercise of ordinary care.

Beck v. Carter, 68 N. Y. 283, 23 Am. Rep. 175; *Barnes v. Ward*, 9 C. B. 392, 2 Car. & K. 661, 19 L. J. C. P. N. S. 195, 14 Jur. 334; *Hadley v. Taylor*, L. R. 1 C. P. 53, 11 Jur. N. S. 979, 13 L. T. N. S. 368, 14 Week. Rep. 59; 1 *Wood, Nuisances*, 3d ed. § 271; *Strange v. Bodcaw Lumber Co.* 79 Ark. 490, 116 Am. St. Rep. 92, 96 S. W. 154; *Allison v. Haney*, — Tex. Civ. App., 62 S. W. 933; *Southern Exp. Co. v. Texarkana Water Co.* 54 Ark. 131, 15 S. W. 361; *Pine Bluff Water & Light Co. v. Derrisseaux*, 56 Ark. 132, 19 S. W. 428; *Galveston, H. & S. A. R. Co. v. Schuessler*, 56 Tex. Civ. App. 410, 120 S. W. 1149.

Wood, J., delivered the opinion of the court:

The undisputed evidence shows that appellee was a mere or bare licensee. She was using the footpath upon appellant's right of way for her own convenience, and not for any purpose connected with the business of appellant, or for the common interest or mutual benefit of appellant and appellee. Appellant did no affirmative act to compel or induce appellee to use the footpath upon its right of way. It merely acquiesced in such use by appellee and the public. Under such circumstances, it cannot be said that there was any implied invitation upon the part of appellant for the use of its right of way by appellee. Appellant therefore did not have to exercise ordinary care to make the pathway safe for appellee. As appellant had done nothing that could be construed as an invitation to appellee and the public to use its right of way for a footpath, appellant was not negligent because, in draining its right of way, it failed to exercise ordinary care to make and leave the footpath safe for appellee. In *St. Louis, I. M. & S. R. Co. v. Dooley*, 77 Ark. 561, 92 S. W. 789, we said: "The bare permission of the owner of private grounds to persons to enter upon his premises does not render him liable for injuries received by them on account of the condition of the premises." In *Arkansas & L. R. Co. v. Sain*, 90 Ark. 278, 285, 22 L.R.A.(N.S.) 910, 119 S. W. 659, 662, we said: "To bare licensees railroad companies owe no affirmative duty of care, for such

licensees take their license with its concomitant perils." Little Rock & Ft. S. R. Co. v. Pankhurst, 36 Ark. 371; St. Louis, I. M. & S. R. Co. v. Ferguson, 57 Ark. 16, 18 L.R.A. 110, 38 Am. St. Rep. 217, 20 S. W. 545; St. Louis, I. M. & S. R. Co. v. Tomlinson, 69 Ark. 489, 64 S. W. 347; Holart-Lee Tie Co. v. Keck, 89 Ark. 122, 116 S. W. 183; Wright v. Boston & A. R. Co. 142 Mass. 296, 7 N. E. 866; Plummer v. Dill, 156 Mass. 426, 32 Am. St. Rep. 463, 31 N. E. 128; 3 Elliott, Railroads, § 1249; Galveston Oil Co. v. Morton, 70 Tex. 400, 8 Am. St. Rep. 611, 7 S. W. 756. The cases of St. Louis, I. M. & S. R. Co. v. Dooley, 77 Ark. 561, 92 S. W. 789, supra; Missouri & N. A. R. Co. v. Bratton, 85 Ark. 326, 108 S. W. 518, and Moody v. St. Louis, I. M. & S. R. Co. 89 Ark. 103, 131 Am. St. Rep. 75, 115 S. W. 400, relied upon by appellee, do not support her contention.

As we have seen, the opinion in St. Louis, I. M. & S. R. Co. v. Dooley recognizes the rule here announced, and in that case the judgment was sustained because there was evidence to warrant the finding that the railway company had invited the plaintiff to use the defective steps that caused her injury. The steps were erected by the defendant for the use and convenience of the public, and had been kept in repair by it to a period "as late as six months before the accident." In Missouri & N. A. R. Co. v. Bratton, 85 Ark. 326, 108 S. W. 518, Bratton had just debarked from the train as a passenger, and was going along the track where passengers had been accustomed to go since the road was built. The roadbed and dump extended to a creek, and a bridge over the creek extended part of the way on the dump of appellant's road. In that case we said: "The jury therefore were warranted in finding that Bratton was on the track of appellant at least by sufferance, if not by implied invitation, and that he was not a trespasser." The facts were sufficient to warrant a finding that Bratton was using the track by implied invitation. In the case of Moody v. St. Louis, I. M. & S. R. Co. there was evidence tending to prove that the defendant company had obstructed the natural drainage of water from the street, causing it to overflow the sidewalk, which compelled footmen to use the railroad as a path for a number of years. The court excluded the evidence. In holding that the testimony was admissible, we said it would tend "to show that the public was using the railroad track as a highway by at least the implied invitation or permission of appellee," railway company. But in that case the railway company by its affirmative act had compelled the public for a number of years to abandon the sidewalk, and to use

its roadbed instead. In Missouri & N. A. R. Co. v. Bratton and Moody v. St. Louis, I. M. & S. R. Co. supra, the plaintiffs were injured while on the railway track. Since the passage of the act of April 8, 1891, railway companies owe to persons on their tracks, whether there by invitation, or as licensees or trespassers, the duty to exercise ordinary care to keep a lookout for them, but it does not abolish their contributory negligence. St. Louis Southwestern R. Co. v. Dingman, 62 Ark. 245, 35 S. W. 219; St. Louis, I. M. & S. R. Co. v. Leathers, 62 Ark. 235, 35 S. W. 216. The court, in using the particular language relied on by appellee in the above last mentioned cases, did not have in mind, and was not discussing, the duty of railway companies to persons off of their tracks, but was passing on the question of whether or not the plaintiffs were trespassers, and whether or not their injuries were caused by their own negligence. The facts in the case at bar are entirely different from the facts in those cases.

The court erred in its instructions. The judgment is therefore reversed, and the cause is dismissed.

IOWA SUPREME COURT.

JOHN A. SENNEFF et al., Appts.,
v.

MARY L. HEALY.

(— Iowa. —, 135 N. W. 27.)

Attorney — agreement to share contingent fee — effect of death.

The death pending appeal, of one of several attorneys who have agreed to share a contingent fee to be earned by the successful prosecution of a suit, will not deprive his estate of his share of the fee in case the judgment in favor of their client is affirmed, without allowance to the successors for their labor in the appellate court.

(March 14, 1912.)

APPEAL by plaintiffs from a judgment of the District Court for Webster County in defendant's favor in an action brought to determine and fix the amount due to the estate of Thomas D. Healy, deceased, out of a contingent fee paid for attorneys' services for the prosecution of a suit. Affirmed.

Note.—The general question of a partner's right to compensation for services rendered to the partnership is covered in the note to Williams v. Pedersen, 17 L.R.A. (N.S.) 399, cases relating to law partnerships being covered at pages 402, 405.

Statement by Deemer, J.:

This is a controversy over the distribution of attorneys' fees growing out of a contract for a part of the recovery in the case of *Wells v. Western Union Teleg. Co.* which case finally reached this court, and was disposed of by an opinion reported in 144 Iowa, 605, 24 L.R.A.(N.S.) 1045, 138 Am. St. Rep. 317, 123 N. W. 371. The trial court made a division according to the terms of the contracts entered into between the attorneys, and plaintiffs appeal.

Messrs. Maurice O'Connor and W. L. Bliss for appellants.

Messrs. Healy & Healy, for appellee: A joint undertaking, or joint adventure, or joint enterprise, is not, strictly speaking, a partnership.

Hurley v. Walton, 63 Ill. 260; *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550; *Edson v. Gates*, 44 Mich. 253, 6 N. W. 645.

The rules and principles of the doctrine of partnership apply generally to the relation of a joint adventure.

23 Cyc. 453; *Alderton v. Williams*, 139 Mich. 296, 102 N. W. 753; *Church v. Odell*, 100 Minn. 98, 110 N. W. 346; *Causten v. Barnette*, 49 Wash. 659, 96 Pac. 225; *Re Kessler*, 174 Fed. 906; *Runkle v. Burrage*, 202 Mass. 891, 88 N. E. 573; *Jackson v. Hooper*, 78 N. J. Eq. 185, 74 Atl. 130; *Berry v. Colborn*, 65 W. Va. 493, 64 S. E. 636, 17 Ann. Cas. 1018; *Botsford v. Van Riper*, — Nev. —, 110 Pac. 705.

In the absence of an express agreement, the law implies an equal division of the profits of a joint adventure or joint undertaking, without regard to any inequality of contribution.

23 Cyc. 459; *Wetmore v. Crouch*, 150 Mo. 671, 51 S. W. 738; *Knapp v. Hanley*, 108 Mo. App. 353, 83 S. W. 1005; *Van Tine v. Hilands*, 131 Fed. 124; *Jones v. Davis*, — N. J. Eq. —, 25 Atl. 370.

Neither party to a joint enterprise may claim compensation for services rendered in the furtherance of the enterprise, unless otherwise so stipulated.

Hopkins Mfg. Co. v. Ruggles, 51 Mich. 474, 16 N. W. 862; *Wilson v. Anthony*, 19 Ark. 16.

Plaintiffs were not entitled to an allowance for services rendered after the death of attorney Healy.

Consaul v. Cummings, 222 U. S. 262, 56 L. ed. 192, 32 Sup. Ct. Rep. 83.

Deemer, J., delivered the opinion of the court:

Plaintiffs are attorneys at law, and at the time this controversy arose Senneff lived at Britt, and Kelleher at Ft. Dodge. Thos. D. Healy, now deceased, was also a 39 L.R.A.(N.S.)

lawyer living at Ft. Dodge. Plaintiff Senneff was employed by one Wells to prosecute a suit against the Western Union Telegraph Company under an arrangement substantially as follows: "The said plaintiff, John A. Senneff, undertook the prosecution of a suit to be brought for said A. Judson Wells against the Western Union Telegraph Company and B. G. Lyman, and undertook and agreed to prosecute the said suit to a final determination, and, together with such attorneys as he might select to be associated with him, to render and perform all services required in the trial, preparation thereof, appeals, and all other proceedings in any manner connected with such suit, until the final termination of the litigation. By the terms of the said agreement, the said Senneff was to have the right to associate with him such other attorneys as he might select, he informing the said Wells, through his said agent, and representative, that he intended associating with him Thomas D. Healy and D. M. Kelleher; and said Senneff and Wells further so agreed in parol that for all services of attorneys they should be paid the equivalent of one third of the net amount finally recovered or collected in said litigation. The said fee to be so paid to be contingent upon the successful termination of the suit and final recovery and collection of the claim of said Wells for which the suit was to be brought." After making this contract with Wells, Senneff, through correspondence and in various interviews, arranged with Kelleher and Healy to assist in the litigation, with the understanding among all that each should share equally in the contingent fee in the event of ultimate recovery.

The case in which these attorneys were employed had a somewhat remarkable history. The action was first brought by Schriver Brothers and the Commercial Bank of Britt against the telegraph company, in the Federal court for the northern district of Iowa, the law firm of Healy Brothers being the sole attorneys for the plaintiffs therein. Judgment was obtained in the lower court, which was later reversed by the United States circuit court of appeals. Some time during the pendency of this suit, Mr. Kelleher became a partner in the law firm of Healy Brothers and he immediately went to work upon the case. After the reversal the case was again tried in the Federal district court, resulting in a verdict and judgment for plaintiffs. Again the case was appealed, and again there was a reversal. The firms of Healy Brothers and of Healy Brothers & Kelleher did a vast amount of work upon the case, both in preparation for the trial nisi and upon the appeals. After the second reversal, the

case rested quietly for a time and during its quiescent stage the firm of Healy Brothers & Kelleher dissolved, Kelleher retiring. About this time Schriver Brothers and the Commercial Bank assigned their claim against the telegraph company to A. Judson Wells, a resident of the state of New York, preliminary to the institution of an action in the state court. Thereupon plaintiff Senneff was employed by Wells to prosecute the action in the local courts under the agreement hitherto set out, and Senneff made the arrangements with Kelleher and Healy as before indicated. Both Kelleher and Healy were very familiar with all the propositions of law and fact involved in the case, because of their prior connection with it. It had been thoroughly briefed for the two appeals, and but a single new question remained open, as will be observed from the opinion disposing of the case in this court. The case went to trial in the district court of Webster county, Iowa, at its January, 1908, term, resulting in judgment for Wells in the sum of \$12,000. Upon this trial the case was handled largely by Kelleher and Healy, because of their familiarity with the record and the legal propositions involved. Thereafter the telegraph company appealed the case to this court, and during the pendency of the appeal Thos. D. Healy died, his death occurring in January of the year 1909. Senneff and Kelleher followed the case to this court, preparing an amended abstract, writing the arguments, and making oral arguments here. As will be noticed, the appeal was unsuccessful, and the judgment was affirmed. On July 30, 1908, the attorneys for Wells filed in the office of the district court of Webster county a notice of an attorneys' lien in the sum of \$6,000. After the affirmance here, the defendant paid to the clerk of the Webster county district court the sum of \$13,420.94, in satisfaction of the judgment against it. The attorneys' lien was released by the surviving attorneys, and the entire fee withdrawn from the clerk's office. After the beginning of this suit, which was to settle the rights of the respective attorneys or their representatives to the fund, one third of the fee going to all, to wit, \$1,491.62, was deposited with the clerk to await the decision of the case. Mary L. Healy, the executrix and sole beneficiary under the will of Thos. D. Healy, deceased, was made a party defendant, and as such she insisted that she was entitled to the full one third of the contingent fee, pursuant to the arrangement and agreement between the parties, notwithstanding the death of her husband, Thos. D. Healy, during the pendency of the appeal. On the other hand, plaintiffs say that she is not entitled to the whole

thereof, but that it should be charged with some offset, or be subject to some diminution, because of the work done by them after the death of Healy. These are the only questions in the case.

Plaintiffs, who are appellants, insist upon the following propositions:

(1) "Where performance of contract for service of an attorney is interrupted by his death, there can be no recovery on the contract, or for more than that proportion of the contract price which the services rendered bears to the whole services contracted for."

(2) "Where a contingent fee contract is made for services of two attorneys, and one dies, even though the survivor carries on and successfully concludes the litigation with other assistants that he employs, will not entitle a recovery on the original contract. Such contract terminated upon the death of either lawyer whose services were contracted."

(3) "There was no partnership relation between the plaintiffs and Thos. D. Healy, deceased. There was therefore no basis to impute an obligation or duty upon the part of the plaintiffs to perform the services contracted to be rendered by Thos. D. Healy, for the benefit of his estate."

(4) "The award made to the appellee by the lower court was affirmative relief granted on her claim to the full fee, and was unwarranted by the facts."

The main thought underlying each of these propositions is that, as Healy died before the case was finally decided upon appeal to this court, neither he nor his representative is entitled to the full one third of the contingent fee, but that it should be divided in the light of the services performed by plaintiffs after Healy's death. It is true, of course, that these attorneys were not a copartnership; but it is equally clear that after the recovery of the judgment in the trial court, which was before Healy's death, they were jointly interested in that judgment,* and each and all desirous of sustaining it for his own individual benefit. There was at all times a joint adventure, which did not amount to a partnership, but which is governed in many respects by the rules applicable to partnerships. This thought is well expressed in *Jackson v. Hooper*, 76 N. J. Eq. 185, 74 Atl. 130; *Berry v. Colborn*, 65 W. Va. 493, 64 S. E. 636, 17 Ann. Cas. 1018; *Runkle v. Burrage*, 202 Mass. 89, 88 N. E. 577; *Botsford v. Van Riper*, — Nev. —, 110 Pac. 705.

What, then, are the respective rights of the parties to a joint adventure such as this under the facts disclosed? Did the death of Healy, after the recovery of the judgment, operate to diminish the amount

to which he would have been entitled had he lived and presented the case to this court upon appeal? In other words, should the amount which his representative is to receive be diminished because the surviving parties to the joint adventure went ahead with the work, and perhaps did more than they would, had all survived and followed the case to the end? We have no cases upon this proposition, nor have we been able to find any, which are exactly in point. Under our statutes joint tenancies with right of survivorship are not favored, and, although there may be joint ownership or ownership in common of personalty, it makes little difference which we call it in this case, the property does not go to the survivors in case of the death of one or more of the joint owners. Parsons, in his law of Partnership, states the following rules which we regard as applicable to the present controversy: "There is not in partnership the same survivorship as in joint tenancy; but there is a survivorship which is peculiar to partnership. The death of a partner invests the surviving partners with the exclusive right of possession and management of the whole partnership property and business; but only for the purpose of selling and closing the same." Section 344. "Until a settlement, the representatives of the deceased cannot claim or take any one chattel, or any portion of the merchandise. The survivors are, from the death, trustees for all concerned in the partnership, for the representatives of the deceased, for the creditors of the firm, and for themselves. Their trust is to wind up the concern in the best manner for all interested, and therefore without unnecessary delay; and their powers are such as enable them most effectually to execute that trust. Nor do we know any difference, in this respect, as to the choses in possession and those in action. The surviving partners are held strictly as trustees; and their conduct in discharging their trust is carefully looked after by courts of equity. Thus, like other trustees, they cannot sell the property of the firm and buy it themselves; nor, as the converse of this, can they buy from themselves property for the firm. Their trust being to wind up the concern, their powers are commensurate with the trust. Hence, they may collect, compromise, or otherwise arrange all the debts of the firm; and their receipts, payments, and doings generally in this behalf are valid, if honest and within the fair scope and purpose of the trust. And, if there be negligence, delay, misconduct, or gross mistake, equity will interfere, and give the proper relief. It is said that the surviving partners are trustees in part for themselves. But while as trustees they have all power

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and possession, they stand as *cestuis que trustent* on the same footing as the others, or, rather, must postpone themselves to the creditors of the firm; and only as to what is left after the creditors are paid do they come in on equal terms with the representatives of the deceased, and with each other. And, if there is not enough to pay the debts in full, then, all being equally liable, they must do nothing to disturb or prevent this equality." Section 345, Parsons on Partnership. "The survivors are not bound to continue the business at all; and would probably be permitted to wind it up quite abruptly if they chose not to engage in new transactions for the firm, or even continue old ones, although the new or the old seemed to promise a much better winding up at the close; . . . but if, by such new business, profit is made, the survivors will be bound to account for this profit as belonging to the firm. And, if no profit or even a loss is made, they must be charged with interest on the funds they use, and the whole loss will be theirs. It seems, however, that, if the survivors carry the business on, and make a profit which is credited to the firm, they may be allowed some compensation for their services, unless the articles of agreement provide otherwise. And a surviving partner may be allowed for his time and expenses, under special circumstances justifying such a claim." Parsons, Partn. § 346. In *Ames v. Downing*, 1 Bradf. 321, the court said: "Nor can Mr. Hicks charge commissions as surviving partner for the collection of the debts. His legal duty was to collect the assets and wind up the business of the firm, a duty the law imposes upon him as an incident to the contract of partnership, and for the performance of which no remuneration is promised or implied. Such a claim is new to me, and I am not aware that it is supported by precedent or authority." See also *Beatty v. Wray*, 19 Pa. 516, 57 Am. Dec. 677; *Brown v. McFarland*, 41 Pa. 129, 80 Am. Dec. 598. In *Newell v. Humphrey*, 37 Vt. 265, compensation was allowed a surviving partner for closing up partly consummated deals; but this was owing to the peculiar facts of the case. Shumaker on Partnership states the law in this wise: "The law imposes upon the surviving partner, as an incident to the contract of partnership, the duty of collecting the assets and winding up the business of the firm, and he is not entitled to compensation therefor, in the absence of an express agreement to that effect." Shumaker, Partn. p. 285. He cites in support of this rule *Ames v. Downing*, supra, and *Young v. Scoville*, 99 Iowa, 177, 68 N. W. 670. *Com. ex rel. Bracken v. Bracken*, 17 Ky. L. Rep. 785, 32 S. W. 609;

Coakley v. Hazelwood, 21 Ky. L. Rep. 40, 49 S. W. 1067; Smith v. Smith, 51 La. Ann. 72, 24 So. 618; Loomis v. Armstrong, 49 Mich. 521, 14 N. W. 505; Id., 63 Mich. 355, 29 N. W. 867; Burdick's Cases, p. 606. See also to same point, Denver v. Roane, 99 U. S. 355, 25 L. ed. 476; Comstock v. McDonald, 126 Mich. 142, 85 N. W. 579.

In the Young-Scoville Case, 99 Iowa, 177, 68 N. W. 670, we said: "Consequently, it has in many cases been held that the representative of a deceased partner may have the partnership settled and an accounting had as of a date later than the death of his intestate; that to accomplish justice the partnership will be treated as a continuing one, and is to be settled as if there had been no dissolution. Of necessity much depends upon the circumstances of the particular case, and no general rule can be adopted which will fit every controversy of the kind. A court of equity will undertake in this kind of a case to do justice without reference to any settled, fixed, and inflexible rule. Parsons, Partn. 4th ed. § 415. See Lindley, Partn. Ewell's ed. ** 981, 1046, Story, Partn. § 343; Taylor v. Hutchinson, 25 Gratt. 544, 18 Am. Rep. 699; Phillips v. Reeder, 18 N. J. Eq. 99, 11 Mor. Min. Rep. 419; Robinson v. Simmons, 146 Mass. 167, 4 Am. St. Rep. 299, 15 N. E. 558, and cases therein cited. According to the facts found by the referee, the parties continued the business of the firm after the death of Mrs. Laing just as they had done before her demise. No change whatever was made by reason of her death, and it seems to us entirely just and equitable to hold, under such circumstances, that the affairs of the partnership should be closed as if she had lived, and were now asking the dissolution of the firm, and the settlement of its business. Appellant has no right to complain of this, for, if he had been so advised, he could have closed up the affairs of the partnership immediately upon the death of Mrs. Laing. As he did not do so, but elected to treat the partnership as continuing, he should be held to account as if it did in fact continue. Another potent reason for adopting this rule is found in the fact that the referee reported that it was impossible to determine with any degree of accuracy the financial condition of the firm at the time of the death of Mrs. Laing. We see no error in the rule adopted by the referee as a basis for the accounting. Again, it is contended that the referee and the court were in error in not allowing Scoville compensation for his services in connection with the business after the death of Mrs. Laing. It seems to us that this contention is determined by the rule last above named. If the partnership, for the purpose of stating the account be-

tween the parties, is to be deemed a continuing one, then it is to be treated as if there was in fact no dissolution by death. If this be true, then neither James Laing nor William Scoville can claim anything for their services, as the labor of one was to offset that of the other. It is argued, however, that, as James Laing is not a party to this suit, he is not bound by such rule, and that, if he may in some subsequent suit recover for his services, appellant ought to be allowed for his time and labor. Sufficient it is to say in answer to this argument that we do not think the premises are correct. James Laing and his representative (she now being dead) are clearly estopped from claiming anything for his services rendered to the firm after the death of his wife. There are no facts found by the referee from which an agreement to compensate the appellant for services performed can justly or fairly be inferred; and without any agreement, express or implied, there can be no allowance to either party for labor and services performed for the partnership. Morris v. Griffin, 83 Iowa, 327, 49 N. W. 846; Levi v. Karrick, 13 Iowa, 344; Boardman v. Close, 44 Iowa, 428. It is said, however, that appellant was entitled to compensation as surviving partner for closing up the business. This proposition may well be doubted. Starr v. Case, 59 Iowa, 491, 13 N. W. 645; Bates, Partn. § 772, and authorities cited. But, concede that it is correct, it is not applicable to this case, for the reason that Scoville did not as surviving partner proceed to wind up the business. On the contrary, he continued it under an arrangement with James Laing, the same as if there had been no dissolution, and there was an implied understanding, at least, that each should offset his services as against the other. Under such circumstances, it is clear that no compensation should be allowed to either. Bates, Partn. § 774."

In Starr v. Case, cited in the Young opinion, we have a case nearest in point to any to which our attention has been called. We there said: "The plaintiffs claimed \$80 for services rendered by them in three several suits brought by them since the death of Mr. Patterson for the collection of claims due the firm of Starr, Patterson, & Harrison. On motion of the defendants this portion of the petition was stricken out. Of this action of the court the plaintiffs complain. It is conceded that the general rule is that surviving partners are not entitled to compensation for settling the affairs of the partnership. It is claimed, however, that legal services rendered in the prosecution of claims due the partnership constitute an exception to the rule. In support of this position, we are referred to Van-

duzer v. McMillan, 37 Ga. 300. That was the case of a mercantile partnership. It was held that one of the members of the firm, who was an attorney, might be entitled to compensation for services rendered by himself in the collection of claims due the partnership. In that case the rendering of legal services was entirely foreign to the business of the partnership. In this case the rendering of such services was the business for which the copartnership was formed. We think there is nothing in this case to make it an exception to the general rule."

The *Denver Roane Case*, 99 U. S. 355, 25 L. ed. 476, is closely in point. The other cases cited in *Shumaker* are more or less in point, and we shall not review them. We do not say that in no case is a surviving partner or owner of personal property or choses of action entitled to compensation for services rendered. Much, of course, depends upon the nature of the enterprise, and of the equities of the various parties. But where there is a joint adventure between attorneys, as here, and the survivors proceed with the case to protect their mutual interests, and carry it through to the end, we think the representative of the deceased co-owner or joint owner is entitled to his share of the profits or proceeds of the joint enterprise without diminution. Such seems to be the express holding in the *Starr Case*, *supra*. There are no equities here which would justify the application of a different rule. In such cases it would not do to ascertain just what services each of the parties performed, and then say that, as one failed to do all that he should, either by reason of shirking his responsibilities or by reason of death, that neither he nor his representative should have his full proportion of the recovery as specified in the contract. Other considerations lead to the same conclusion; but this opinion has already grown so long that we are not justified in amplifying them.

For the reasons already pointed out, it is apparent that the order of the trial court in decreeing defendant entitled to full amount of the deposit is correct, and it is therefore affirmed.

Petition for rehearing denied.

KENTUCKY COURT OF APPEALS.

R. T. STOWE, Appt.,

v.

HOUSTON MORRIS.

(147 Ky. 386, 144 S. W. 52.)

Master and servant — automobile — son — liability of father.

A son who has the right to use an auto-

mobile which his father provided for the comfort and pleasure of the family is acting as the servant of the father, so as to make him liable for injuries caused by his negligent act when he takes the car without special permission for the entertainment of his sister and her friends.

(March 6, 1912.)

APPEAL by defendant from a judgment of the Circuit Court for Christian County in plaintiff's favor in an action brought to recover damages for personal injuries caused by the negligent operation of an automobile by defendant's son. Affirmed.

The facts are stated in the opinion.

Messrs. John T. Edmunds, Southall & Son, and Henry J. Stites for appellant.

Messrs. C. H. Bush and W. T. Fowler for appellee.

Winn, J., delivered the opinion of the court:

The appellee, Houston Morris, a child some twelve years of age, in June, 1910, while riding a bicycle, was run down and dragged by an automobile, the property of R. T. Stowe. Both the child's legs were broken, and other injuries were inflicted on him. To recover damages, he brought his action against the owner of the automobile. The jury brought in a verdict in the child's favor for \$2,000, and from the judgment on the verdict this appeal is prosecuted.

It suffices to say that there was sufficient evidence before the jury to take the case to them upon the question of the negligence of the driver of the automobile. No serious complaint is made upon this feature of the case; nor is it seriously contended that the damages were excessive, or that there was any error in the admission or rejection of testimony. There is but one question of consequence in the record, and we proceed directly to its discussion.

The car, at the time of the accident, was driven by Robert Stowe, the eighteen-year-old son of the appellant. With him in the car were his sister, Miss Kathleen Stowe, a Miss Henry, who was his first cousin, and a couple of other young ladies, who were friends of his sister. Young Mr. Stowe was a deputy in the office of his father, who was the county clerk of Christian

Note. — The cases passing upon the specific question as to liability of a father for injuries inflicted by his automobile while being used by his child for the latter's pleasure are gathered in the note to *Riley v. Roach*, 37 L.R.A. (N.S.) 834, and in the earlier notes there referred to. Generally, to parent's liability for tort of minor child, see note to *Broadstreet v. Hall*, 10 L.R.A. (N.S.) 933.

county; but on the day of the accident young Stowe had been to the office, and finding nothing to do, had left without seeing his father. Indeed, he had not seen him at all on that day, as the young man did not arise for breakfast. The father gave him no orders about the use of the car on that day; nor had anything passed between them on that day as to the son's permission or right to use it. He went for the car of his own volition, and at his suggestion his sister and the other young ladies arranged for and went on the ride with him. The car was kept by the father for the comfort and pleasure of his family, including his son and daughter. They had the right to use it as often as and when they liked. The father knew how to run the car; but the son generally acted as the driver. The son himself testified that he took his sister driving when he felt like it, and when he did not feel like it his father drove the machine; that he took her driving when he wanted to; that he took his mother if she wanted to go; and that the machine was used by the family for the pleasure of the family. The father testified that the young man operated the car with his permission, and had the authority and right to use it when he wanted to; that his daughter had the like right; and that it was used as a family vehicle. This brief statement gives a fairly clear understanding of the ownership of the car, its uses, and the relationship of the parties to it, and of the father and son to each other in the use of the car. This brings us to the question in the case, *i. e.*, was the son, under the facts stated and at the time of the injury, a servant or agent of the appellant? If he was, his father is liable. If he was not, his father is not liable.

In the first place, it may be said that a considerable part of the discussion of counsel is addressed to the idea that, even though the son was generally the agent or servant of the father in the operation of the car, the father is not liable under the facts stated here, because the son was engaged at the time in an enterprise of his own,—the seeking and giving of pleasure to himself, his sister, and their friends, upon an excursion of his own,—in which the father had no interest, and which was not in the line or scope of the son's employment. The question ordinarily is a vital one in cases of this character; but it is of no consequence here. For the only ground upon which the father can be held answerable for this act of his son excludes the idea of an independent venture, under the facts detailed. That ground is, as contended for by the appellee, that the machine was bought and operated for the pleasure of the family; that, at the time of the accident, the son was engaged

in carrying out the general purpose for which the machine was bought and kept; and that, as he took it out at the time in pursuance of general authority from his father to take it when he pleased, for the pleasure of the family and himself as a member of it,—the purpose for which it had been bought,—he was engaged in the execution of his father's business, *i. e.*, the supplying of recreation to the members of the father's family.

In order that our statement may be clear, we again repeat that this is the only basis upon which it is possible to predicate the recovery against the father in the case at bar; for it is established generally that the father is not liable for the torts of the son, committed without his knowledge or authority, express or implied. Nor is it charged in the present case that the father had turned the son loose with a dangerous agency, so that the question of whether that state of fact, if proven, would have rendered the father liable, is not before us. There is the single question stated. We find that the principle has been a good deal discussed in the different states within the few years that motor vehicles have been in current use. The courts are not in harmony. The question is largely a new one in Kentucky; and we have endeavored to arrive at a correct answer, based upon precedent and upon the general principles of law which affect or are ancillary to a just exposition of the law.

The spirit of our determination, it may be remarked, is founded upon a Kentucky case which, though cited but rarely in later Kentucky cases, has been largely cited in the cases from other states, in the text-books, and in the general authority upon the subject. The case is that of *Lashbrook v. Patten*, 1 Duv. 317. In this case the appellant's minor son, whilst driving, with his father's approbation, the latter's carriage and team, conveying the son's two sisters to a picnic, negligently ran against the carriage of another. An action was brought against the father for the damage. This court said that "the son must be regarded as in the father's employment, discharging a duty usually performed by a slave, and therefore must, for the purposes of this suit, be regarded as his father's servant." The opinion commented upon the fact that the occupants of the carriage were the members of the father's family, and that the journey to the picnic, which, of course, was purely in the pursuit of pleasure, was undertaken with the father's approbation. In the case at bar, the journey was a journey in pursuit of pleasure, of which at least two members of the father's family were the beneficiaries. There had been, it is true, no express consent for the particular journey, but

the consent was broader; for it was a consent so general as that it embraced any time and any journey for which the pleasure-seeking young members of the family might see fit to use the car. In consonance with the Kentucky authority named, enlarging the discussion and applying the same principles to the modern automobile, instead of the carriage, the case of *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351, decided in January, 1911, upon facts largely similar to those proven in the case at bar, establishes the liability of the father. It is interesting to observe the facts in that case and the conclusions reached, as a growth from the Kentucky case. Mr. Maxwell relied upon his son, a boy of sixteen, to perform the duties of chauffeur to the family. At the time of the accident from which arose that litigation, the son had asked and obtained the consent of the elder Maxwell to take some of his young friends—three girls and a boy—automobile riding. It was the boy's party, and the father had naught to do with it, except to give his consent to the use of the car for the pleasure of his son and his son's friends. The father's liability was made to turn upon the precise question that we have named as the single vital question in this case. The opinion first remarked the entire accord of authority that the owner of a car cannot be held liable in his absence, except that it be shown that the person in charge of the car not only was the owner's servant, but was engaged at the time in his business as well. The opinion then sets out the rule so aptly that we quote from it somewhat at length as an expression of the view which we have reached as the proper view. It says:

"Should we regard the relationship between the two defendants merely as that of owner and chauffeur, master and servant, the owner should not be held liable for the negligence of the chauffeur, since the evidence shows beyond question that the latter was using the machine merely for his own pleasure. But Ernest [the son] was more than a mere chauffeur. He was the minor son of the owner, and was using the car for his own pleasure, it is true, but with the permission of his father, and for one of the very uses for which his father kept the vehicle. The evidence discloses that the machine was devoted to the use of the family of which Ernest was a member. It was a pleasure vehicle, and, when used for the pleasure of one of the minor children of the owner, how can it be said that it was not being used on business of the owner? It is the practice of parents to provide their children healthful and innocent amusements and recreations; and certainly it is as much the business of parentage to supervise and

control the pleasures of their children as it is to give them nurture and education. Had Ernest been taking his mother for a pleasure ride, instead of taking some of his young friends, no one would contend that he was not on his father's business; or, had he been using the car on an errand of his own, such as shopping for himself, or going to school, he would have been on his father's business, since it was the duty of his father to support and educate him. The rule that a father is not liable for the torts of his minor child applies only to cases where the tort is committed without the consent of the parent, and without the scope of any duty he owes his child. We conclude that, in running the car with the consent of his father and within the scope of the family uses, Ernest was the agent and servant of his father."

So, in the case at bar, the father had provided his family with this car as a means of recreation and amusement; and the son, in the use of the car for that purpose, was not performing an independent service of his own, but was carrying out what, within the spirit of the matter, was the business of the father.

The case of *Moon v. Matthews*, 227 Pa. 488, 29 L.R.A. (N.S.) 856, 136 Am. St. Rep. 902, 76 Atl. 219, is in point. In that case the chauffeur, under the direction of defendant's sister, who made her home with him as a member of his family, had taken the car, and was driving his sister with some of her guests, entirely without the knowledge of the owner. It was remarked that the occupants of the car were the defendant's friends and guests of his sister, and that the errand upon which the car was taken was entirely proper and fitting in itself. The master was held liable. There is other general authority to sustain the same position; but the quotation made from *Daily v. Maxwell* is so excellent an exponent of our view that we do not enlarge upon the authorities.

It is true that there is authority of a most excellent character in direct conflict with the views which we have set out. Notable among the cases are those of *Doran v. Thomsen*, 76 N. J. L. 754, 19 L.R.A. (N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296, and *Maier v. Benedict*, 123 App. Div. 579, 108 N. Y. Supp. 228; but the conclusion reached by us is sustained both by the case of *Lashbrook v. Patten*, from this court, and by what we believe to be the sounder argument. It is not necessary to protract this discussion of the law by any general consideration of the elementary principles, whether contractual or from custom, which create the relation of master and servant, nor to discuss the general but well-settled liability of

the master for the servant's negligence whilst in the furtherance of the master's business.

For the reasons given, the judgment of the trial court is affirmed.

KENTUCKY COURT OF APPEALS.

JOHN J. RADEL COMPANY, Appt.,
v.

CHRISTINE BORCHES.

(147 Ky. 506, 145 S. W. 155.)

Carrier — funeral carriages — duty to passengers.

1. Although a contract for carriages for a funeral is made by a member or friend of the family, and the undertaker knows only in a general way the number and names of those who are to be transported, his contract duty of care exists in favor of each passenger.

Master and servant — undertaker — funeral carriages — subcontract — liability.

2. An undertaker who contracts to furnish carriages for a funeral cannot escape liability to an occupant of a carriage injured by negligence of the driver, on the ground that he sublet the contract to an independent contractor, if the employers did not consent to the subcontract.

Same — driver leaving vehicle — running away of team — scope of employment.

3. The owner of a hired vehicle is not relieved from liability for injury to an occupant due to the running away of the horses, by the fact that the driver had left the team to visit a saloon, on the theory that by so doing he was acting outside the scope of his employment.

Evidence — statement of servant after accident — admissibility.

4. In an action to hold the owner of a vehicle liable for injury to an occupant through the driver's negligence, a statement by the driver after the accident is admissible in evidence to contradict statements made by him as a witness.

Same — physician — complaints of persons injured.

5. Evidence is not admissible in an action to hold one liable in damages for personal injuries due to his negligence, to the effect that two months after the accident the injured person complained to his physician that he was suffering from dizziness and sleeplessness.

Note. — The question of who is responsible for acts of a driver of a hired vehicle is covered by a note to Ash v. Century Lumber Co. 38 L.R.A. (N.S.) 973, and earlier notes referred to therein.
30 L.R.A. (N.S.)

Livery — absence of driver — running away of team — consent of owner — liability.

6. An occupant of a hired carriage cannot hold the owner liable for injury due to the running away of the team during the absence of the driver, leaving the team unattended, if the driver acted at the request, or with the consent, of the occupant.

(March 13, 1912.)

A PPEAL by defendant from a judgment of the Circuit Court for Campbell County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Dempsey & Neiberding, for appellant:

In the ordinary hiring from a livery company of a carriage, horses, and driver, the hirer, who exercises no control over the driver further than a general direction where to go, is not the master or superior of the driver, so as to render such hirer liable in damages to a third person for injuries received through the negligence of such driver.

Boniface v. Relyea, 36 How. Pr. 457; Nicholson v. E. P. McGovern Undertaking Co. 41 Colo. 1, 92 Pac. 225; Frerker v. Nicholson, 41 Colo. 12, 13 L.R.A. (N.S.) 1122, 92 Pac. 224, 14 Ann. Cas. 730; Hershberger v. Lynch, 9 Sadler (Pa.) 91, 11 Atl. 642; Jahn v. McKnight, 117 Ky. 655, 78 S. W. 862; Little v. Hackett, 116 U. S. 306, 29 L. ed. 652, 6 Sup. Ct. Rep. 391; Joslin v. Grand Rapids Ice Co. 50 Mich. 516, 45 Am. Rep. 54, 15 N. W. 887; Driscoll v. Towle, 181 Mass. 416, 63 N. E. 922; Guzman v. Burnett, 6 Mees. & W. 503, 9 L. J. Exch. N. S. 308, 4 Jur. 969; Huff v. Ford, 126 Mass. 24, 30 Am. Rep. 645; Michael v. Stanton, 3 Hun, 462; Ames v. Jordan, 71 Me. 450, 36 Am. Rep. 352; Crockett v. Calvert, 8 Ind. 127; New York, L. E. & W. R. Co. v. Steinbrenner, 47 N. J. L. 162, 54 Am. Rep. 126; Fenner v. Crips Bros. 109 Iowa, 455, 80 N. W. 526; Foster v. Wadsworth-Howland Co. 168 Ill. 514, 48 N. E. 163; Weyant v. New York & H. R. Co. 3 Duer, 360.

An undertaker is nothing more nor less than a livery man, and as such is bound only to furnish a careful driver, a safe vehicle, and horses of ordinary disposition.

McGregor v. Gill, 114 Tenn. 521, 108 Am. St. Rep. 919, 86 S. W. 318; Payne v. Halstead, 44 Ill. App. 97.

A master is liable only for acts of commission or omission done by a servant in the scope of the regular employment.

McCarthy v. Timmins, 178 Mass. 378,

86 Am. St. Rep. 490, 59 N. E. 1038; Ather-ton v. Kansas City Coal & Coke Co. 106 Mo. App. 591, 81 S. W. 223; Slater v. Advance Thresher Co. 97 Minn. 305, 5 L.R.A. (N. S.) 598, 107 N. W. 133; Higgins v. Western U. Teleg. Co. 156 N. Y. 75, 66 Am. St. Rep. 537, 50 N. E. 500.

Testimony of a physician called as an expert witness as to substantive conditions, where opinion is based on acts and statements of injured persons, is inadmissible.

Chesapeake & O. R. Co. v. Wiley, 134 Ky. 461, 121 S. W. 402.

Alleged admissions of a witness detailing circumstances surrounding an accident, but not forming part of the *res gestæ* and made a long time after such accident, are inadmissible to contradict such witness, where the alleged admissions themselves would be incompetent as evidence.

Parker v. Cumberland Teleph. & Teleg. Co. 25 Ky. L. Rep. 1391, 77 S. W. 1109.

Messrs. Ramsey Washington and Howard M. Benton for appellee.

Winn, J., delivered the opinion of the court:

The appellant is an undertaking concern. On October 5, 1910, it conducted the funeral of one John Lickert. The appellee attending the funeral. Upon the return trip from the cemetery, the driver of the carriage in which appellee was riding, at the direction of one of the occupants of the carriage, stopped in front of the Heidelberg Café. The two men occupants left the carriage and went inside the café. The driver wrapped his lines about the brake and went in also. The team ran away. Mrs. Borches jumped or was thrown from the carriage, and brought her action against the undertaking company to recover for the injuries which she claimed to have received. She recovered a judgment for \$597, and the undertaking company appeals.

The plaintiff alleged that the Radel Company had charge of the funeral; that she went to the funeral in a carriage furnished by defendant for that purpose; that the carriage was managed and under the control of defendant, its agents, and employees; and that, by reason of their negligence in leaving the horses unfastened and unattended the runaway and her injuries occurred. The answer did not deny that defendant furnished the carriage, but did deny that it was under the control of the defendant, its agents or employees, or that they were guilty of any negligence, or that the injury occurred. The evidence upon the plaintiff's side of the facts about the furnishing of the carriage, is, in substance, that plaintiff

attended the funeral as a relative of the decedent; that she was put into this carriage by a representative of the Radel Company; that a burial association of which decedent was a member had furnished, through the Radel Company, three carriages for the funeral; that the decedent's sister ordered three extra carriages from a representative of the Radel Company, that it was in one of these extra carriages that plaintiff was at the time of her injury; that the bill had been made out by the Radel Company against the estate of the decedent for the extra carriages, and been paid by the decedent's sister. The evidence upon defendant's side upon this question is, in substance, that these carriages were hired for the funeral; that they were hired by a representative of the Radel Company from the Queen City Livery Company, an independent concern; that the Radel Company kept no carriages; that it had no control over the carriage driver; that the livery company sent the carriages, under orders from the undertaker, to the house, thence to the cemetery, and thence back to the house.

We think it clear that, in arranging for the transportation of the decedent's relatives and family, the undertaking company owes the same contract obligation to each of them, though it may not know, save in the most general way, the number and names of those who are to be transported. It is a matter of common knowledge that, in the distressing surroundings of this nature, someone of the family, or some friend of the family, acts for all; and it is right that the obligations, whatever they may be, assumed or owed by the undertaker, should be held as contract obligations owed to all. The two facts stated above, as appearing upon the sides, are not in conflict. But the divergence of position comes in that the plaintiff insists that since the carriages were ordered of the undertaking concern and supplied by it, it, in effect, was the liveryman, and is answerable to the plaintiff not otherwise than as if the carriages had been its own; while the defendant's position is that the carriage was furnished by an independent contractor, the livery company, and that defendant is not responsible for any negligence of the independent concern's servants or agents.

The error in the Radel Company's conception of its case lies in its misunderstanding of the facts. Under the evidence, it undertook to supply the carriages. There is no evidence that in supplying them it was only to act as agent in procuring them, or that they were to be supplied by another or independent contrac-

tor, or that it was so understood by those to whom the carriages were to be supplied. Nor was the injury suffered by any third person, as against whom the fact of the independent service could be shown. The rule is clear beyond argument that one who undertakes by contract to do for another a given thing cannot excuse himself to the other for a faulty performance, or a failure to perform, by showing that he has engaged another to perform in his place, and that the fault or failure is that of another or independent contractor. It would be different, of course, if it were shown that the substituted performance, the engaging of another to perform, was with the knowledge and acquiescence of the one with whom he undertook his contract obligation. If it were shown here, to illustrate, that either the plaintiff, or the member of the family who engaged the carriages, knew that the Radel Company would not supply the carriages, or understood or assented that they were to be supplied by another, then the plaintiff's claim would be against that other, unless it should be shown by the evidence, as it was not, that the complete direction, authority, and control of the carriage and its owner were surrendered for the time being to the Radel Company.

The state of fact just supposed, *i. e.*, that it was understood in the contract with the Radel Company that the carriages were in fact to be supplied by another under a hiring by it, would bring the case within the rule argued by appellant, that, in an ordinary hiring from a livery company, the hirer, who exercises no control over the driver further than the right to generally direct where to go, is not the master, so as to render him liable in damages to a third person for injuries received through the negligence of the driver of the vehicle. The appellant's trouble in this respect, as above pointed out, lies in that the plaintiff was not a "third person;" *per contra*, she was a party to the contract made with the Radel Company where, in so far as the evidence upon the trial disclosed, that company itself was to furnish the carriages. The notes to *Frerker v. Nicholson*, 13 L.R.A.(N.S.) 1122, illustrate the distinction. The case to which the notes are appended seems to us to be unsound as applied to the facts at bar, in that it treats the occupant of the carriage as a third person, and not as one entering into the contractual relation with the inherent contractual right to look for reasonably safe transportation to the one who, so far as the record disclosed, bore the whole obligation to supply the carriage. The case of *Hershberger v. Lynch*, 9 Sadler 39 L.R.A.(N.S.)

(Pa.) 91, 11 Atl. 642, cited by appellant, was likewise the case of an injury to one driving his own vehicle a third person, who sought to recover from Hershberger, a livery stable keeper, damages for an injury by the latter's carriage which was temporarily engaged in the service of another liveryman. The court held with entire soundness that if the other liveryman only had the temporary control of the vehicle, with the right to its use and route, and without control over its servant, the right to discharge him and the like, Hershberger, and not the other liveryman, would be liable. We believe it would have been ruled differently had the injury been to one who had hired the carriage from the other liveryman, and without his knowledge had been supplied by the other liveryman with a carriage not his own.

The case of *Boniface v. Relyea*, 38 How. Pr. 457, is much relied upon by the appellant. The opinion sustains his position, save that it is not very clear that the undertaker himself agreed to furnish the teams. The proof rather went to show that he was to have entire superintendence of the funeral, and as such, among other things, was to see that carriages were present. But the fallacy of the argument of the learned judge in that case lies in that he eliminates altogether the contractual relation. He says, by way of illustrating the unreasonableness of the position, that if he were to hire a hackney coach from a public stand, and the driver should negligently injure another, he, the hirer, would be responsible; and it is upon such line of reasoning that he finds the undertaker there not liable. He should have extended his reasoning further. He should have illustrated the real position by putting himself in the position of one who, for hire, was supplying the carriage to another; and then, had the one he had undertaken to carry by contract been injured by the negligence of the driver, he would have more aptly illustrated the facts obtaining in his case. The error of the writer is apparent by the fact that he rests his case largely upon the case of *Laugher v. Pointer*, 5 Barn. & C. 547, 8 Dowl. & R. 550, 4 L. J. K. B. 309. Had he noted the distinction drawn here he would have observed that in that case the injured person was a third party entirely, who bore no contractual relation either to the owner or hirer of the vehicle.

The case of *Little v. Hackett*, 118 U. S. 306, 29 L. ed. 652, 6 Sup. Ct. Rep. 391, cited by appellant, is an authority for no other principle than the one conceded here, —that one who hires and uses a public carriage is not responsible for the negligence

of the driver, in the absence of complete control and dominion over him. It does not discuss at all the rights of one who contracts from another the right to use a vehicle, and his consequent right, if injured, to recover against that other, in the absence of any knowledge or agreement that the other supplied a vehicle not his own.

In the case of *Joslin v. Grand Rapids Ice Co.* 50 Mich. 516, 45 Am. Rep. 54, 15 N. W. 887, cited by appellant, Joslin, the plaintiff, was driving his own horse and buggy, and was injured by a collision with a wagon driven by an employee of the ice company. The case nowhere touches the question of a contract right, but purely turns upon the question as to who may be responsible for injury to a third and disinterested person.

The case of *Foster v. Wadsworth-Howland Co.* 168 Ill. 514, 48 N. E. 163, cited by appellant, is the case of the killing of a child, a third party, and is therefore not applicable here.

The case of *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922, cited by appellant, was the case of a third person injured by the negligent driving of a wagon. The question was as to whether he was entitled to recover against the owner of the wagon and general master of the driver, or against one to whom the wagon and driver had been sublet. There was no element of contract present.

The case of *Jahn v. McKnight*, 117 Ky. 655, 78 S. W. 862, cited by appellant, was one wherein Jahn, a telegraph messenger boy, while riding his bicycle on the street, had been struck and killed by a delivery wagon drawn by a runaway horse. The wagon in question was under hire to McKnight & Company, by its owner, who was in the habit of letting it out for hauling. In an effort to recover against McKnight & Company, it was held that under this state of fact the driver of the wagon was not the servant of McKnight & Company, and that there was no liability on their part for his negligence.

And so in all the vehicle cases to which our attention has been invited, or which we have examined upon our own initiative, with the possible exception of the Boniface Case and the Frerker Case, the injury was done to some third person, where there was an entire absence of any duty owed under contract. It may be that at the time the arrangements were made for the funeral, it was understood that in furnishing the teams the Radel Company was merely acting as the agent of the family in obtaining the teams; but we must take the record as we find it. It is matter of common knowledge that under-

takers do supply carriages and teams of their own. The record brought up here shows an engagement by the Radel Company to furnish the carriages. The trial court therefore properly overruled defendant's motion for a preemptory instruction in this aspect of the case; nor was there any error in so much of the instruction given, under the facts presented upon the former trial, as assumed that the driver was the agent of the Radel Company. If, upon the return of the case to the trial court, any evidence should be introduced showing any understanding or knowledge and acquiescence upon the part of the plaintiff, or the one who hired the carriages, either that in procuring them the Radel Company acted as agent or was to furnish the vehicles of another, the court will submit the question to the jury by an appropriate instruction, relieving the Radel Company, in case there was such an understanding; and this upon the well-established general authority that although a driver may be ordered by those who have dealt with his master to go to this place or that, to take this or that burden, to hurry, or take his time, nevertheless, in respect to the driver's conduct and the control of his horses, he remains subject to no orders but those of the man who pays him, and his master, and not the one who has dealt with the master, can be held liable therefor.

It is argued by appellant that in going into the café or bar the servant was upon an independent service of his own, and that therefore there was no obligation upon the master for any damage resulting from it. The conclusion is false, because the premise is false. The accident did not arise as the result of anything done by the driver while absent from the carriage, but from his neglect in leaving the carriage.

Appellant also complains of the admission of the testimony of two witnesses who were called by plaintiff in rebuttal, and who were permitted to testify as to a certain statement the driver of the carriage had made to them about the accident. The driver had been introduced by the defendant, and upon cross-examination by plaintiff had been asked whether he made such a statement, which he denied. Both when the question was asked of him, and when the witnesses were put on to show that he had made the statement, the court properly limited the jury's consideration of the testimony to its effect upon the credibility of the driver's testimony. There was therefore no error in its admission.

The conversation, of course, was not competent as substantive testimony, since

it occurred some three weeks after the time of the injury.

Complaint is also made of the admission of the testimony of Dr. Shaler Berry, a witness introduced on behalf of plaintiff, wherein he testified that he saw her in December after the accident; that she exhibited to him a scar about 2 inches long across the top of her head, which she said she had received from being thrown out of a carriage on the pike; that she was complaining that since the accident she had suffered from various nervous manifestations, dizziness, headache and the like. The witness further said that a physician could not prove whether a woman was sleepless or dizzy, and that he had to rely upon her statements for that. It was error to refuse this instruction. *Idem* when he saw her. The testimony comes within the condemnation of like testimony in *Chesapeake & O. R. Co. v. Wiley*, 134 Ky. 461, 121 S. W. 402, and its admission was error.

There was testimony given by defendant to the effect that the driver left the carriage upon the invitation of its occupants, and an instruction was asked and refused, in substance, that, if the driver left the carriage at the invitation of its occupants, the defendant was not liable. It was error to refuse this instruction. Upon a retrial of the case an instruction will be given in substance as follows: "If the jury believe from the evidence that the driver of the carriage left at the invitation or request of the plaintiff, or at the request or invitation of any of its passengers in the presence of and without objection by the plaintiff, the law is for the defendant, and the jury will so find."

For the reasons given, the judgment of the trial court is reversed for proceedings consistent herewith.

MINNESOTA SUPREME COURT.

JOHN LEUTHOLD, Appt.,
v.

CHARLES A. STICKNEY, Resp't.

(116 Minn. 299, 133 N. W. 856.)

Landlord and tenant — absence of fire escape — waiver of rent.

The owner of a building, who, during the term of a lease thereof, unlawfully fails to equip such building with fire escapes, cannot maintain an action upon such lease for rent.

(December 22, 1911.)

Headnote by SIMPSON, J.
30 L.R.A. (N.S.)

APPEAL by plaintiff from a judgment of the District Court for Ramsey County in defendant's favor and from an order denying a motion for new trial in an action brought to recover rent claimed to be due and unpaid. *Affirmed*.

The facts are stated in the opinion.

Messrs. Edgerton & Edgerton, for appellant:

It was not the intent of the legislature to confiscate the property of the owner of a flat building or apartment for failure to comply with the law in regard to fire escapes, considering, for the sake of argument, that the law has been violated. Had the legislature ever intended that such additional penalty would be incurred, it was easy enough for it to say so.

De Mers v. Daniels, 39 Minn. 158, 39 N. W. 98; *Toledo Tie & Lumber Co. v. Thomas*, 33 W. Va. 566, 25 Am. St. Rep. 925, 11 S. E. 37; *Columbus Ins. Co. v. Walsh*, 18 Mo. 229; *Union Mut. L. Ins. Co. v. McMillen*, 24 Ohio St. 67; *Harris v. Runnels*, 12 How. 79, 13 L. ed. 901.

Where the statute annexes a penalty, contracts made without compliance with the statute are nevertheless valid, on the ground that the purpose of the statute was not to prohibit business, but to accomplish some collateral object.

Larned v. Andrews, 106 Mass. 435, 8 Am.

Note.—The effect of fact that property cannot be devoted to use intended without alteration to conform to police regulations is the subject of a note to *Rockwell v. Eiler's Music House*, — L.R.A. (N.S.) —.

As to effect upon lease of property for saloon, of passage of prohibitory laws during term, see notes to *Heart v. East Tennessee Brewing Co.* 19 L.R.A. (N.S.) 964; *O'Byrne v. Henley*, 23 L.R.A. (N.S.) 497; *Hecht v. Acme Coal Co.* 34 L.R.A. (N.S.) 773.

As to the enforcement of public officers, of restrictions or conditions as to the use of leased premises, as constructive eviction of tenant, see note to *Taylor v. Finnigan*, 2 L.R.A. (N.S.) 973.

As to the landlord's breach of covenant to repair or make improvements as defense to action for rent, see note to *Young v. Berman*, 34 L.R.A. (N.S.) 977.

And as to the landlord's breach of covenant to repair or make improvements as justification of abandonment of premises, see note to *Partridge v. Dykins*, 34 L.R.A. (N.S.) 984.

As to the validity of contracts in business which it is a misdemeanor to transact, see note to *Levison v. Boas*, 12 L.R.A. (N.S.) 575.

As to effect of passage before expiration of the time of performance of contract, of statute rendering performance impossible, see note to *American Mercantile Exch. v. Blunt*, 10 L.R.A. (N.S.) 415.

Rep. 346; Aiken v. Blaisdell, 41 Vt. 655; Strong v. Darling, 9 Ohio, 201; Pangborn v. Westlake, 36 Iowa, 546; Rahter v. First Nat. Bank, 92 Pa. 393.

The illegality connected with the lease is not direct, but is entirely collateral, and the contract upon which the action is predicated is valid between the parties.

Wayman Invest. Co. v. Wessinger, 13 Cal. App. 108, 108 Pac. 1022; Eagle Roller-Mill Co. v. Dillman, 67 Minn. 232, 69 N. W. 910; Tolerton & S. Co. v. Barck, 84 Minn. 497, 88 N. W. 19; Disbrow v. Creamery Package Mfg. Co. 110 Minn. 245, 125 N. W. 115; Bisbee v. McAllen, 39 Minn. 143, 39 N. W. 299; Citizens' State Bank v. Bonnes, 83 Minn. 1, 85 N. W. 718; Gunnaldson v. Nyhus, 27 Minn. 440, 8 N. W. 147; Hanover Nat. Bank v. First Nat. Bank, 48 C. C. A. 482, 109 Fed. 425.

The contract being a valid one, the defendant cannot set up the defense relied upon, in an action to recover for rent based upon the valid written contract.

Flint v. Sweeney, 40 Minn. 509, 52 N. W. 136; Roach v. Peterson, 47 Minn. 291, 50 N. W. 80; Boston Block Co. v. Buffington, 39 Minn. 385, 40 N. W. 361; Wilkinson v. Clauson, 29 Minn. 91, 12 N. W. 147; Harpel v. Fall, 63 Minn. 520, 65 N. W. 913; Flaherty v. Nieman, 125 Iowa, 546, 101 N. W. 281; Cohen v. Conrad, 110 Minn. 210, 124 N. W. 992.

Messrs. Briggs, Thygeson, & Everall, for respondent:

The action is based on a void lease.

Bartlett v. Vinor, Carth. 252, Skinner, 322; Ingersoll v. Randall, 14 Minn. 400, Gil. 304; Solomon v. Dreschler, 4 Minn. 279, Gil. 197; Bisbee v. Allen, 39 Minn. 143, 39 N. W. 299; G. Heileman Brewing Co. v. Peimeisl, 85 Minn. 121, 88 N. W. 441; Thomas Mfg. Co. v. Knapp, 101 Minn. 438, 112 N. W. 989; Stone v. Bevans, 88 Minn. 127, 97 Am. St. Rep. 506, 92 N. W. 520; Handy v. St. Paul Globe Pub. Co. 41 Minn. 188; 4 L.R.A. 466, 16 Am. St. Rep. 695, 42 N. W. 872; Stolz v. Thompson, 44 Minn. 271, 46 N. W. 410; Greenhood, Pub. Pol. Rule DII. 584; Dillon v. Allen, 46 Iowa, 299, 26 Am. Rep. 145; Johnson v. Berry, 20 S. D. 133, 1 L.R.A.(N.S.) 1159, 104 N. W. 1114; Levinson v. Boas, 150 Cal. 185, 12 L.R.A.(N.S.) 575, 88 Pac. 825, 11 Ann. Cas. 661.

The appellant, by his failure to comply with the law and erect fire escapes, failed to keep the premises in the condition required by his lease and the law, and warranted the respondent in moving out of the premises, and relieved him from the payment of rent from the date he moved out until the danger was removed.

Tallmon v. Murphy, 120 N. Y. 345, 24 N. Y. L.R.A.(N.S.)

E. 716; Edmison v. Lowry, 3 S. D. 77, 17 L.R.A. 275, 44 Am. St. Rep. 774, 52 N. W. 583; Waite v. O'Neil, 34 L.R.A. 550, 22 C. C. A. 248, 47 U. S. App. 19, 76 Fed. 408; Fire Department v. Williamson, 16 Abb. Pr. 199.

Respondent had a right to assume that the law had been complied with, and that the premises were lawfully constructed, and that fire escapes and standpipes were in position as the law required. He was not bound to investigate.

13 Am. & Eng. Enc. Law, 85; Willy v. Mulledy, 78 N. Y. 315, 34 Am. Rep. 536; Abrayan v. Manufacturers' Nat. Bank, 16 N. Y. S. R. 750.

Simpson, J., delivered the opinion of the court:

This is an action brought by the plaintiff to recover rent claimed to be due from the defendant. The plaintiff leased to the defendant, by written lease, a seven-room flat on the fourth floor of an apartment building in the city of St. Paul for one year from September 1, 1909. The building is four stories in height above the basement, and covers an area of about 7,500 square feet. There are four flats on each floor, making sixteen flats in all. Each flat accommodated four or more people, and was usually occupied by from two to four people. During the term covered by the lease to defendant there was not, either within or without said building, or in any way connected therewith, any noncombustible ladder or stairway or standpipe. Defendant, with his family of seven, occupied the leased premises until the latter part of February, 1910, when he moved and permanently vacated them. He paid the stipulated rent for the full time of his occupancy. This action is brought to recover rent for the remainder of the term. About a month before the defendant vacated the premises he asked the plaintiff to put fire escapes on the building, and when he moved out he assigned the absence of fire escapes as his reason for so doing.

The case was tried by the court without a jury. The court found to be true the facts already stated, and, in addition, that the apartment building was within class III, as defined by § 2365, chap. 36, Rev. Laws, 1905, relating to protection against fire, and that the plaintiff had failed to maintain the tenement building in the condition as to fire escapes required by the statute, and found, as a conclusion of law, that the defendant was entitled to judgment in his favor in said action. The plaintiff appeals from an order of the court denying his motion for a new trial.

1. The plaintiff questions the sufficiency

of the evidence to sustain the finding of the trial court that the apartment building here involved is within class III. of the statute relating to fire protection. Section 2365, Rev. Laws, 1905, defines buildings of class III. as follows: "Tenements, flat buildings, and boarding houses more than two stories high, accommodating more than twenty persons, whether in one family or more." Other related sections are as follows:

"2368. For each 5,000 feet of area, or fraction thereof, covered by a building in class three, there shall be provided one outside standpipe, as described in § 2367, and one noncombustible ladder or stairway for each twenty persons, or fraction thereof, that such building accommodates above the first story."

"2372. The proprietor and lessee of every building in any of the classes hereinbefore mentioned shall equip the same in the manner prescribed, and every failure to do so shall constitute a misdemeanor."

Penalties are prescribed for the commission of misdemeanors under the statute. While the evidence does not show the exact number of persons occupying the apartment building here involved at any given time, it does appear that it was built to accommodate more than sixty four persons, that during the term of the defendant's lease it was continually occupied for residence purposes, and that the number of persons usually residing thereon was a much greater number than the minimum fixed by the statute. The building was divided by a fire wall into two parts, with eight flats in each part. It is suggested that this division made two tenements of the building, within the meaning of the statute relating to fire protection. But, so considered, each part accommodated more than twenty persons and was within class III. of the statute. It fairly appears from the evidence that more than twenty persons actually resided in the part of the building in which the flat leased to the defendant was located during the time of defendant's occupancy.

2. A more important point urged by the plaintiff is that the conclusion reached by the trial court is not sustained by the findings of fact; plaintiff's claim being that, notwithstanding the statute, the lease between the plaintiff and the defendant was valid, and the plaintiff was entitled to judgment for the agreed rent thereunder. Such claim cannot be sustained. At the time of the making of the lease, and during the entire term covered thereby, the leased premises were not in the condition prescribed by the law of this state relating to fire protection. The plaintiff, by his failure to equip the building in the prescribed man-

ner, committed a misdemeanor. This violation of the law was a continuing one during the entire term of the lease, and affected directly and materially the premises leased. The absence of a fire escape, in the view of the law, made the leased premises dangerous and their occupancy opposed to the public policy expressed in the law. The permitted occupancy of the premises is the sole consideration for the promise to pay rent here sought to be enforced. Plaintiffs claim for rent cannot be separated from his unlawful act in failing to provide the premises with the prescribed fire escape. The instant case clearly falls within the rule established in this state in the case of *Ingersoll v. Randall*, 14 Minn. 400, Gil. 304. In that action, brought to recover for plaintiff's services in threshing for the defendant, the defense was interposed that on the machine used by the plaintiff the knuckles and rods were not covered as required by law. The court, in holding that the plaintiff could not recover, stated: "The statute before cited not only makes it a duty to cover the knuckles and rods, but it makes neglect or refusal so to do a misdemeanor to which a penalty is affixed. The plaintiff, then, in operating his threshing machine in threshing for the defendant without covering the knuckles and rods, was doing that which is prohibited by law. The threshing, which was the consideration of the defendant's promise, was unlawful, and therefore will not support the promise. *Bensley v. Bignold*, 5 Barn. & Ald. 335; *Cunard v. Hyde*, 2 El. & El. 1; *Chitty*, Contr. 658, and note 'h'; *Armstrong v. Toler*, 11 Wheat. 272, 6 L. ed. 472, and cases supra; *Emery v. Kempton*, 2 Gray, 257." The rule so laid down has never been departed from in this state, and has been applied in numerous cases: *Bisbee v. McAllen*, 39 Minn. 143, 39 N. W. 299; *Handy v. St. Paul Globe Pub. Co.* 41 Minn. 188, 4 L.R.A. 466, 16 Am. St. Rep. 695, 42 N. W. 872; *Stolz v. Thompson*, 44 Minn. 271, 46 N. W. 410; *G. Heileman Brewing Co. v. Peimeisl*, 85 Minn. 121, 88 N. W. 441; *Thomas Mfg. Co. v. Knapp*, 101 Minn. 432, 112 N. W. 989.

It is urged by counsel for the plaintiff that chapter 301 of the Laws of 1903 provided, as an additional penalty for failure on the part of the owner of a hotel to equip it with required fire escapes, that no action should be maintained for board, lodging, or accommodations therein, and that by the omission of such provision in reference to tenements, the legislative intent is shown not to make a failure to comply with the statute a defense to an action for rent of flats in tenement buildings. Chapter 301 of the Laws of 1903 was amended by chap-

ter 343 of the General Laws of 1905, and the special provision referred to concerning hotels was omitted from the amending act. Therefore the basis for the construction contended for by plaintiff's counsel no longer exists.

The unlawful act of the plaintiff in failing to equip the leased premises with a fire escape taints the entire consideration of the promise he here seeks to enforce. To permit a recovery upon such promise would tend to defeat the purpose of the statute. The statute is designed to protect persons permanently or temporarily in buildings of the enumerated classes to some extent from the dangers incident to conflagrations. The defendant cannot be required by the plaintiff to occupy or pay rent for premises maintained in a dangerous condition through the plaintiff's continuing unlawful act.

Affirmed.

Petition for rehearing denied.

MINNESOTA SUPREME COURT.

OLE LEAD, Resp.,

v.

HERBERT INCH, Impleaded, etc., Appt.

ERNST A. SCHULZE, Resp.,

v.

SAME, Appt.

HENRY GAZETT, Resp.,

v.

SAME, Appt.

(116 Minn. 467, 134 N. W. 218.)

Appeal and error — evidence — sufficiency.

1. It is held that the evidence in these several actions, which were tried together in the court below, is sufficient to support the verdict of the jury and the findings of the trial court, and that the record presents no reversible error.

Nuisance — barn — city.

2. A barn located in a thickly settled part of a city, in which a large number of horses are stabled, though not *per se* a nuisance, may become such by reason of the manner in which the same is managed and conducted.

Same — offensive odors.

3. If the owner thereof so manages the

Headnotes by BROWN, J.

Note. — The question whether a stable for horses is a nuisance is treated in the note to Oehler v. Levy, 17 L.R.A.(N.S.) 1025. And see the later case Templeton v. Williams, 35 L.R.A.(N.S.) 468, 39 L.R.A.(N.S.)

same that noxious and offensive odors escape therefrom, to the detriment, annoyance, and discomfort of adjoining property owners, it is a nuisance, and may be restrained in equity.

Same — equity.

4. Where such a nuisance is continuing in character, equity will interfere to protect offended third persons, although the owner thereof be solvent and able to respond in damages.

Same — damage — estimate.

5. In the case of a nuisance like that involved in this action, and where the damage to adjoining property owners cannot well be measured from a pecuniary standpoint, the injury is irreparable, within the meaning of the law, and equity will interpose, though the pecuniary damage be not shown to be great.

(January 19, 1912.)

APPEAL by defendant Inch from an order of the District Court for St. Louis County denying a new trial after verdict in plaintiffs' favor in an action brought to recover damages for the alleged maintenance of a nuisance by defendant upon premises adjoining those of plaintiffs. Affirmed.

The facts are stated in the opinion.

Messrs. Washburn, Bailey, & Mitchell, for appellant:

Damages cannot be recovered for the lawful use of the defendant's premises, even though there was some inconvenience accruing to the plaintiff.

Romer v. St. Paul City R. Co. 75 Minn. 211, 74 Am. St. Rep. 455, 77 N. W. 825.

Where the damages are but nominal themselves, an injunction should not issue. Pom. Eq. Jur. 3d. ed. § 1350; Smith v. Ingersoll-Sergeant Rock Drill Co. 12 Misc. 5, 33 N. Y. Supp. 70.

In granting or refusing an injunction, the court will be guided to some extent by the relative convenience or inconvenience to the parties.

Spelling, Inj. 2d ed. § 417; 2 High, Inj. p. 1231; Mountain Copper Co. v. United States, 73 C. C. A. 621, 142 Fed. 625; Balentine v. Webb, 84 Mich. 38, 13 L.R.A. 321, 47 N. W. 485; Richards's Appeal, 57 Pa. 105, 98 Am. Dec. 202; Madison v. Ducktown Sulphur, Copper & I. Co. 113 Tenn. 331, 83 S. W. 658; Wier's Appeal, 74 Pa. 230; Downing v. Elliott, 182 Mass. 28, 64 N. E. 201; Riedman v. Mt. Morris Electric Light Co. 56 App. Div. 23, 67 N. Y. Supp. 391.

As to whether stable is within restrictive covenant in conveyance of real estate, see note to Riverbank Improv. Co. v. Bancroft, 34 L.R.A.(N.S.) 730.

Messrs. Fryberger & Fulton, for respondents:

An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened, by a nuisance, and the nuisance may be enjoined or abated, as well as damages recovered.

Joyce, Nuisances, § 202; *Rapier v. London Tramways Co.* [1893] 2 Ch. 588, 63 L. J. Ch. N. S. 36, 2 Reports, 448, 69 L. T. N. S. 361; *Aldrich v. Howard*, 8 R. I. 246; *United States v. Luce*, 141 Fed. 408; *Robinson v. Smith*, 25 N. Y. S. R. 647, 7 N. Y. Supp. 38, affirmed in 53 Hun. 638.

Granting the injunction was not error.

Oehler v. Levy, 234 Ill. 595, 17 L.R.A. (N.S.) 1025, 85 N. E. 271, 14 Ann. Cas. 891.

Brown, J., delivered the opinion of the court:

These actions were brought to recover damages alleged to have been suffered by plaintiffs in consequence of a nuisance maintained by defendant upon premises adjacent to those occupied and owned by them. They were consolidated on the call of the calendar in the court below and tried together; the *Lead* and *Schulze* actions being submitted to a jury, and the *Gazett* action to the court, save as to the question of damages. In the two actions submitted wholly to the jury, verdicts were returned for the respective plaintiffs; in the *Gazett* action a verdict assessing plaintiff's damages at the sum of \$1 was returned, and the court therein made findings of fact and conclusions of law, awarding judgment therefor, and directing the issuance of a permanent injunction restraining the further maintenance of the nuisance. The action was dismissed as to defendant *Anker*. Defendant *Inch* moved for additional and amended findings in the *Gazett* case, which was denied in part and granted in part. Defendant thereafter moved for a new trial of all the actions on various grounds, and appealed from an order denying the same.

It is contended on this appeal (1) that the evidence does not justify the verdict of the jury or the findings of the court; (2) that the court erred in certain of its instructions and refusals to instruct the jury; (3) that incompetent evidence was erroneously admitted; and (4) that a permanent injunction in the *Gazett* Case was improperly granted.

The facts as disclosed by the evidence and findings of the court are substantially as follows: Defendant is a teamster employing in the conduct of his business a number of horses which he stables in a barn owned by him and located upon the land described 59 L.R.A. (N.S.)

in the complaint, in the city of Duluth. The barn was originally built fifteen or more years ago, and of sufficient capacity to stable a limited number of horses. For several years prior to the time defendant became the owner of the barn, it was not in use to any considerable extent, if at all, and had been practically abandoned as a stabling place for horses. During this period a large number of people, including plaintiffs, purchased lots in the vicinity of the barn and erected thereon dwelling houses, and the locality became a thickly settled residence part of the city of Duluth. Thereafter, and about five years prior to the commencement of these actions, defendant purchased the property and commenced stabling the horses used by him in his business as teamster, and so continued until some three years before the commencement of the actions, when he rebuilt and reconstructed the barn and so enlarged its capacity as to accommodate about thirty horses. About the same time defendant extended his business, and, in addition to horses used in his team work, constantly kept a number in the barn for sale. By these improvements in the barn it was made into a two-story structure, with room on one floor for thirteen and upon the other seventeen horses. Thereafter the court found that defendant allowed the barn to be used and kept in such a manner that there emanated therefrom noxious and offensive odors, varying in intensity and offensiveness from time to time, and to such an extent as to cause the atmosphere, especially in the summer time, to become polluted, which reached the houses and dwellings of plaintiffs, to their annoyance and discomfort; that during said time the horses so stabled, during both the night and day time stamped, pawed, and made loud and offensive noises, to the disturbance of plaintiffs and their families; that during said time defendant frequently carried and cleaned his said horses in an alley adjacent to the barn, allowing large quantities of hair, dust, and dirt, to be carried by the wind to and within the houses of plaintiffs, to their annoyance and discomfort; that defendant permitted the accumulation of manure to remain in a wagon upon the premises, which gave off additional offensive odors; that by reason of these facts plaintiffs were deprived of the free and comfortable enjoyment of their property; and that the barn and the manner in which it was kept constituted a nuisance. The court also found that the management of the barn during the last three years of defendant's occupancy thereof was entirely different than when plaintiffs purchased

their property and erected their dwellings thereon.

1. We have examined the record with care, and find therein ample evidence to justify the court and jury in finding the facts substantially as embodied in the foregoing statement. It would serve no useful purpose to discuss the evidence, and we leave this branch of the case without further comment. That the facts justify the conclusion that defendant's barn and the management thereof constitute a nuisance for which he is liable in damages to those who have suffered therefrom is clear. The case is brought by the facts within the provisions of § 4448, Rev. Laws, 1905, which are declaratory of the common law upon the subject, and entitle plaintiffs to the relief demanded.

2. The assignments of error challenging certain portions of the instructions to the jury, and the refusal of certain requests, are not sustained. The rules and principles of law upon the subject of both public and private nuisances are well settled, and a general discussion thereof seems unnecessary. 29 Cyc. 1152 et seq.; 2 Dunnell's Minn. Dig. 7240, and cases cited. A barn or stable wherein horses or cattle are kept is not a nuisance *per se*, although it may become a nuisance by reason of its location and the manner in which it is managed and conducted. *Albany Christian Church v. Wilborn*, 112 Ky. 507, 66 S. W. 285; *Joyce, Nuisances*, § 202. If the manner in which it is conducted results in noxious odors, disagreeable noises, to the discomfort and annoyance of adjoining property owners, it is a nuisance within the meaning of the law, regardless of the question whether defendant exercised due care to so manage the property as to avoid results of that nature. *Joyce, Nuisances*, § 202; *Berger v. Minneapolis Gaslight Co.* 60 Minn. 296, 62 N. W. 336. In other words, where the business casts off noxious and unwholesome odors, in fact annoying to and impairing the comfort of adjoining property owners, it is no defense to say that it was conducted in a reasonable and proper manner, and that the odors emanating therefrom were such as are ordinarily incident to the business when properly conducted. *Pennoyer v. Allen*, 56 Wis. 502, 43 Am. Rep. 728, 14 N. W. 609; *People v. Detroit White Lead Works*, 82 Mich. 471, 9 L.R.A. 722, 46 N. W. 735; *Aldrich v. Howard*, 8 R. I. 246; *Rodenhause v. Craven*, 141 Pa. 546, 23 Am. St. Rep. 306, 21 Atl. 774; *Bohan v. Port Jervis Gaslight Co.* 122 N. Y. 18, 9 L.R.A. 711, 25 N. E. 246.

There can be no question but that de-

fendant was conducting a lawful business, and it was not *per se* a nuisance; but the evidence justified the conclusion that the manner in which it was conducted created a nuisance as a matter of law. A careful reading of the charge of the learned trial court impresses us that the rules of law pertinent to the issues presented were clearly and fully stated to the jury. We construe the charge as a whole, and not segregated parts thereof, which, standing alone, might seem incomplete or incorrect. The evidence did not require the submission to the jury of the question covered by one of defendant's requests, to the effect that, if plaintiffs acquiesced in the improvements of defendant's barn, that fact should be taken into consideration by the jury in determining the issues involved. No acquiescence in the conduct of defendant's business, of a character to estop plaintiff, was shown, and the request was properly refused. We find, therefore, the assignments of error challenging the instructions to the jury not well taken.

3. Defendant complains of the admission over his objection of certain expert testimony. This evidence related almost wholly to the damages suffered by plaintiffs, and in view of the well-settled rule that the admission of expert evidence rests largely in the discretion of the trial court, and the further fact that the damages awarded were in no sense excessive, the conclusion must be that no prejudice resulted to defendant, conceding, for present purposes, that some of the evidence so objected to might have been excluded. The question to one of plaintiffs' witnesses, seeking to elicit information as to whether conditions had improved with reference to the management of the barn since the commencement of the action, was objected to as "immaterial, and calling for the conclusion of the witness." The objection did not call attention to the objection now urged, namely, that the question was incompetent, and there was no reversible error in overruling it. The answer to the question stated a fact, and not the conclusion of the witness. The other assignments in reference to this branch of the case do not require separate mention. We discover no reversible error in the admission or exclusion of the evidence.

4. In the *Gazett Case* the court ordered judgment for a permanent injunction, "perpetually enjoining the defendant, either by himself, his servants, agents, or any of them, from maintaining or permitting to be maintained on the property of defendant, . . . the barn and stable for horses in such numbers or in such manner

as to produce noise sufficient habitually to disturb the sleep or comfort of the occupants of the plaintiff's house, . . . or from maintaining or permitting to be maintained . . . a stable for horses in such numbers as to habitually produce odors or gases that shall be offensive to the senses of the plaintiff or his family in said house of the plaintiff, or to interfere with the comfortable enjoyment of plaintiff's house by himself and family," and restraining and enjoining specific acts not necessary here to repeat. The jury in this case awarded plaintiff \$1 as damages.

It is contended by defendant that the injunction was improperly granted, for the reasons (1) that plaintiff has suffered no substantial damage from the maintenance of the barn; and (2) that an injunction should not issue in any case where it appears that defendant is solvent and the complainant's injury may be compensated by the payment of damages. Neither contention can be sustained. The nuisance complained of is continuing in character, and the annoyance and discomfort arising therefrom are in the nature of things incapable of accurate, or even approximately accurate, measurement in dollars and cents. In such cases, the authorities say, whether the damage be great or small, the injury is practically irreparable, and equity will interfere to prevent its continuance. 29 Cyc. 1223; *Wahle v. Reinbach*, 76 Ill. 322; *Bushnell v. Robeson*, 62 Iowa, 540, 17 N. W. 888; *Friedman v. Columbia Works & Malleable Iron Co.* 99 App. Div. 504, 91 N. Y. Supp. 129. For the same reason the financial responsibility of the defendant is not controlling. To send the plaintiff to a court of law for redress by way of damages in such cases would not only compel him to submit to the conditions surrounding the nuisance, but also result in a multiplicity of suits. For these reasons well supported by the authorities, we hold that a proper case for an injunction was presented. Though in some respects the injunction which the court ordered issued is quite general in its commands, it is specific in some respects, and as a whole perhaps as definite as the law itself upon the subject. *Oehler v. Levy*, 234 Ill. 595, 17 L.R.A. (N.S.) 1025, 85 N. E. 271, 14 Ann. Cas. 891.

We find in the record evidence reasonably tending to support the findings objected to by defendant, and there was therefore no error in the refusal of the court below to strike them out. Nor was there error in the denial of defendant's motion for additional findings.

Order affirmed.

39 L.R.A. (N.S.)

MINNESOTA SUPREME COURT.

JOHN ERICKSON, Resp.,

v.

GREAT NORTHERN RAILWAY COMPANY, Appt.

(117 Minn. 348, 135 N. W. 1129.)

Fire — interference with extinguishment — negligence of firemen.

1. The firemen of a fire department in a city are not the servants or agents of the person whose property they attempt to save from fire, so that their negligence in failing to take the proper course in the extinguishment of the fire avails one who, by a negligent act, cut off the water supply by which the fire was being successfully subdued, and thereby proximately caused the destruction of the property.

Same — liability for interference.

2. Where a railway track is laid across a traveled public street in a city, a duty arises on the part of the railway company using it to exercise ordinary care to discover, and avoid injury to, persons or property rightfully on such crossing, so that where a fire hose laid by the fire department of such city across the crossing to extinguish a fire is cut by the railway running its locomotive over it, thereby interrupting the effort to

Headnotes by HOLT, J.

Note. — Firemen as servants or agents of owner of burning property.

For cases on the duty of steam railroad or street railroad company to avoid interference with extinguishment of fires, see the notes to *American Sheet & Tin Plate Co. v. Pittsburgh & L. E. R. Co.* 12 L.R.A. (N.S.) 382, and to *Houran v. Chicago, M. & St. P. R. Co.* 20 L.R.A. (N.S.) 1110.

The holding in *ERICKSON v. GREAT NORTHERN R. Co.*, that firemen are not the servants or agents of the owner of burning property, would seem to admit of no question.

In *Mott v. Hudson River R. Co.* 8 Bosw. 345, which was similar in facts to *ERICKSON v. GREAT NORTHERN R. Co.*, the court, in sending the case back for a new trial after a verdict for the defendants said: "It is quite clear that the defendants cannot be made to pay any damage which the plaintiff may have sustained by reason of the negligence of the firemen. But it does not follow that if the plaintiff's property was burned in consequence of the negligent severing of the hose carrying water to his buildings at the time on fire, he cannot recover of the defendants, if the severing of the hose was the result of the concurring negligence of the defendants' servants and the firemen. If this act was done by the concurring negligence of the two, in such sense that the hose would not have been cut if either had been free from negligence, then the plaintiff is entitled to recover, unless it be a sound proposition that the damages are too remote to present a case of liability.

extinguish the fire and causing destruction of the property, it is not necessary for the owner thereof, in order to recover damages for the loss, to plead and prove wanton negligence of the railway company in cutting the hose, or prove that the person operating the locomotive had actual knowledge of its presence on the crossing. It is sufficient to prove that the failure of the railway company to use ordinary care caused the cutting of the hose, and resulted in the destruction of the property.

(May 3, 1912.)

APPEAL by defendant from an order of the District Court for Clay County denying a motion for a new trial or for judgment *non obstante veredicto* after ver-

dict in plaintiff's favor in an action brought to hold defendant liable for the loss by fire of plaintiff's building because defendant cut the hose carrying water for the extinguishment of the fire. Affirmed.

The facts are stated in the opinion.

Mr. M. L. Countryman, with Mr. J. D. Sullivan, for appellant:

Actual notice to the engineer in charge of this engine was necessary, and in the absence of direct proof of actual notice, facts and circumstances must at least be shown from which actual notice to the engineer must be inferred.

American Sheet & Tin Plate Co. v. Pittsburgh & L. E. R. Co. 12 L.R.A. (N.S.) 382, 75 C. C. A. 47, 143 Fed. 789, 6 Ann.

In the case supposed, the firemen and the defendants were joint actors in the wrongdoing in such sense that, by the concurrence of the default of each, the injury was produced. . . . In the present case, the firemen, at the time of the casualty complained of, owed a special duty to the plaintiff in this action, and were engaged in performing it. . . . The defendants owed no other duty to the present plaintiff than it owed to every person owning property in the city of New York,—to use reasonable care and diligence not to frustrate or render ineffectual means in use to extinguish an existing fire, when such means consisted in part of hose rightly laid across or stretched along the track of its road. The ground on which the defendants are charged in such a case is that the wrong was done by an act in the doing of which it was an actor. The fact that others co-operated or concurred with it in effecting the wrong does not affect the question or measure of its liability. If negligence, in such a case, can be imputed to the firemen then present, or to any or either of them, and to only a part of them the result is the same. Whoever was guilty of and responsible for the concurring negligence, they and the defendants are the parties in fault; and it is by their and the defendants' concurring negligence that the loss and damage were caused. The defendants' liability is not affected by the consideration whether only one or several of the firemen are in law to be deemed guilty of the negligence in not taking proper and timely precautions to inform the defendants' servants of the existence and locality of the fire, and that hose was then lying on the track to obtain the supply of water requisite to extinguish it. The difficulty in the case occasioned by the charge is that the jury may have found the defendants guilty of negligence, and yet have rendered a verdict against the plaintiff, because they found the firemen also guilty of negligence, and that the injury was caused by the concurring negligence of the firemen and of the defendants' servants. An instruction to

render a verdict for the defendants, on finding such to be the facts, is erroneous."

In Metallic Compression Casting Co. v. Fitchburg R. Co. 109 Mass. 277, 12 Am. Rep. 689, where some of the firemen and apparatus were from another town, the opposite claim was made by the defendants, to wit, that those who laid the hose across the defendants' track were not the agents or servants of the plaintiff, and that therefore the plaintiff could not recover for cutting the hose,—to which the court said: "But assuming that the hose was properly laid across the track, yet the defendants contend that the plaintiffs have no cause of action, because the hose was not their property, nor were the men who had possession of it their servants. It is true that the hose was not their property, and the men in charge of it were not their servants. Their services were voluntary, and if they had gone away and taken the hose and engine with them, the plaintiffs would have had no legal claim against them. But we do not think that these circumstances are material. The men and the engine were in fact furnishing water to the plaintiffs, and were thereby extinguishing the fire. They were rendering the same service to the plaintiffs as if they were hired and were using the plaintiff's hose. The defendants cut off the supply of water, and this was as really an interference with the plaintiffs' possession as if they held the possession under a deed, and as if the men were laboring under a contract. The interference was tortious."

In the other cases of hose cutting the question does not seem to have been considered.

It has been held, as if a matter of course, that firemen are not within the protection of statutes enacted for the safety of employees. Hamilton v. Minneapolis Desk Mfg. Co. 78 Minn. 3, 79 Am. St. Rep. 350, 80 N. W. 693; Kelly v. Henry Muhs Co. 71 N. J. L. 358, 59 Atl. 23. The same has been held as to a member of the fire insurance patrol. Gibson v. Leonard, 143 Ill. 182, 17 L.R.A. 588, 36 Am. St. Rep. 376, 32 N. E. 182.

B. B. B.

Cas. 626; *Clark v. Grand Trunk Western R. Co.* 149 Mich. 400, 112 N. W. 1121, 12 Ann. Cas. 559; *Little Rock Traction & Electric Co. v. McCaskill*, 75 Ark. 133, 70 L.R.A. 680, 112 Am. St. Rep. 48, 86 S. W. 997; *Metallic Compression Casting Co. v. Fitchburg R. Co.* 109 Mass. 277, 12 Am. Rep. 689.

The fire department of the City of Moorhead in attempting to extinguish this fire were the agents and servants of respondent and if they, by their acts of negligence in leaving this hose unprotected and unguarded, contributed to the cutting thereof by appellant's engine, then, upon elementary principles, respondent ought not to be permitted to recover.

Metallic Compression Casting Co. v. Fitchburg R. Co. 109 Mass. 277, 12 Am. Rep. 689.

Messrs. Christian G. Dosland and Barger & Hicks, for respondent:

A railroad company is liable for loss caused by cutting hose laid to a fire.

American Sheet & Tin Plate Co. v. Pittsburgh & L. E. R. Co. 12 L.R.A. (N.S.) 382, 75 C. C. A. 47, 143 Fed. 789, 6 Ann. Cas. 626; *Metallic Compression Casting Co. v. Fitchburg R. Co.* 109 Mass. 277, 12 Am. Rep. 689; *Little Rock Traction & Electric Co. v. McCaskill*, 75 Ark. 133, 70 L.R.A. 680, 112 Am. St. Rep. 48, 86 S. W. 997; *Phoenix Ins. Co. v. New York C. & H. R. R. Co.* 122 App. Div. 113, 106 N. Y. Supp. 696.

It was not essential, under the law, that respondent should show that direct notice was given to the servants of appellant in charge of this locomotive that the hose was lying across the tracks.

Rawitzer v. St. Paul City R. Co. 93 Minn. 84, 100 N. W. 664; *Eckert v. Great Northern R. Co.* 104 Minn. 435, 116 N. W. 1024; *Galloway v. Chicago, M. & St. P. R. Co.* 56 Minn. 346, 23 L.R.A. 442, 45 Am. St. Rep. 468, 57 N. W. 1058; *Jacobson v. St. Paul & D. R. Co.* 41 Minn. 206, 42 N. W. 932; *Erickson v. St. Paul & D. R. Co.* 41 Minn. 500, 5 L.R.A. 786, 43 N. W. 332; *Klotz v. Winona & St. P. R. Co.* 68 Minn. 341, 71 N. W. 257.

The negligence of the firemen will not relieve the railroad from liability.

Mott v. Hudson River R. Co. 8 Bosw. 345; *Hill v. Minneapolis Street R. Co.* 112 Minn. 503, 128 N. W. 831; *Lee v. H. N. Leighton Co.* 113 Minn. 373, 129 N. W. 767.

The negligence of appellant, and not that of the firemen, was the proximate cause of the injury.

29 Cyc. 530, 531; *Fonda v. St. Paul City R. Co.* 71 Minn. 438, 70 Am. St. Rep. 341, 74 N. W. 166.
30 L.R.A. (N.S.)

Holt, J., delivered the opinion of the court:

The right of way of the defendant railway company, with three tracks thereon, is located directly south of and almost parallel with First avenue, in the city of Moorhead, Minnesota. This avenue runs east and west. At right angles thereto is Eighth street, running north and south, being the most traveled street going in that direction in the city. Front street is one block south of First avenue. Prior to the fire on January 2, 1911, plaintiff was the owner of Columbia Hotel, located between Front street and defendant's right of way. The main part was a three-story brick building 104 feet long on Front street and 40 feet wide. On the easterly side, and projecting closer to Eighth street than the main building, had been added two brick-veneered two-story structures, so that the northerly end of these additions were within 100 feet of defendant's tracks. A frame structure 15 feet by 17 feet, two stories, containing a washroom and toilets, was built in the angle formed by the main building and additions. Between it and the main building was a 6-foot passageway; but it was built against the addition, with doors opening into the same. About 7 o'clock in the morning of the date mentioned, smoke was noticed in the hotel, and shortly after a fire alarm was turned in. It appears there were only two regularly employed men in the fire department. One of these had charge of and drove the hose cart. The alarm was promptly responded to, the hose was attached to a hydrant at the northeast corner formed by the intersection of Eighth and Front streets, and then taken in through the main entrance of the hotel on Front street; but no fire, only smoke, was found there. The hose cart was thereupon driven north on Eighth street, and another hose attached to a hydrant located north of defendant's tracks, at the northeast corner of First avenue and Eighth street, and run south on the last-named street across the tracks, then behind the hotel to the frame building mentioned, containing the toilets, where in the fire had in the meantime been located. The water was turned on, and the fire was being brought under control, when the defendant backed a locomotive in a westerly direction from the depot, situate some 200 feet east of the east line of Eighth street, over and across the street where the hose was laid, and cut it. Before the cut section could be removed and other hose substituted, ten to twenty minutes elapsed, during which time the fire gained such headway that not only the frame structure where it started was destroyed, but prac-

tically the whole hotel. Plaintiff sued, alleging that the defendant negligently cut the hose; that, had it not so done, the fire would have been put out with but small loss; consequently the claim is that defendant's negligence was the proximate cause of the destruction of the hotel. The trial resulted in a verdict for plaintiff, and defendant appeals from the order denying its alternative motion for judgment notwithstanding the verdict, or for a new trial.

At the trial it appeared that at the crossing in question defendant had safety gates operated by a watchman from a tower some 10 feet high, located immediately north of the tracks and on the east side of Eighth street. When the hose was laid across the track, one of the firemen, who knew that the watchman was very deaf, pointed to the hose and motioned up and down the track. He testified that the watchman looked at him and toward the smoke from the fire. Because it did not appear that this watchman gave any notice to the engineer in charge of the locomotive which cut the hose, the court instructed the jury that any notice or knowledge the watchman may have had of the situation was immaterial. Unless a recovery must be based on the wanton negligence of the engineer, we fail to see why the evidence was not admissible. The watchman was there to guard against persons or property on the crossing. If he knew that the hose was on the crossing, and, from the motion of the fireman and the situation, knew that trains were not to pass, it would seem a duty devolved on him to act, and a failure so to do would tend to show negligence of defendant. The ruling testifies to the great care taken by the learned trial court in a case presenting the application of the law of negligence to a somewhat novel situation, and involving a large amount, to eliminate everything which by inference might be claimed to be unfair to the defendant.

Contributory negligence was not pleaded. It was not assigned as a ground for a new trial, nor is an assignment of error on that basis made in this court. But counsel, in his oral argument, contended, as we understood him, that it appeared from the evidence received without objection that there was no necessity for laying the hose across the tracks; that after it was there the engineer was not notified by the firemen of its presence; that this was negligence of the firemen, and they were plaintiff's servants in the matter of extinguishing the fire; hence their negligence is imputable to plaintiff, and no recovery may be had. *Hill v. Minneapolis Street R. Co.* 112 Minn. 39 L.R.A. (N.S.)

503, 128 N. W. 831; *Mellon v. Great Northern R. Co.* 116 Minn. 449, 134 N. W. 116. The answer to the contention is that the court, at defendant's request, submitted the question of apparent necessity of running the hose across the tracks to the jury, ruling that, if it was not necessary, plaintiff must fail; and, further, we are of the opinion that plaintiff is not responsible for the negligence of the fire department. It must be borne in mind that, while a fire department protects the private property threatened, it is one of the public governmental agencies of the city, for whose mistakes or negligence in subduing a fire the city is not liable to the individual injured thereby. This is placed on the ground that the department, in arresting fires, is discharging a public governmental or police duty. *Bryant v. St. Paul*, 33 Minn. 289, 53 Am. St. Rep. 31, 23 N. W. 220; *Grube v. St. Paul*, 34 Minn. 402, 26 N. W. 228. A fireman is not a servant of the owner of the property he is attempting to save, so as to come within the protection of chapter 7, p. 99, Laws of 1893, "An act for the Protection of Employees." *Hamilton v. Minneapolis Desk Mfg. Co.* 78 Minn. 3, 79 Am. St. Rep. 350, 80 N. W. 693.

The citizen whose property is threatened with destruction has absolutely no control over the public fire department fighting the fire. He may not interfere by attempted directions or orders. Indeed, his property may be destroyed if, in the judgment of the head of the department, it becomes necessary so to do to arrest a conflagration. Where there is no authority in an individual to interfere with or direct such a public governmental agency as a city fire department in the discharge of its duties, nor any responsibility is resting upon him as a taxpayer in the city to pay for the negligence of such agency, it follows that there is no relation of master and servant, or principal and agent, so as to transfer the negligence of the fire department to the owner of the property being consumed by fire, making available the defense of contributory negligence to one whose negligence caused or concurred in causing the loss. *Mott v. Hudson River R. Co.* 8 Bosw. 345. In this view of the case, the court did not err in refusing to give defendants first and third requests, which were that no recovery could be had, if there was no need of running the hose across the tracks.

Upon the oral argument counsel for the defendant candidly conceded that he could not attack the finding of the jury that the cutting of the hose caused the almost total destruction of the hotel, and that, had it not been cut, the fire would

have been extinguished with but a small loss. And the record amply sustains the verdict that plaintiff's loss in the amount found proximately resulted from the fact that defendant ran the locomotive over the hose.

We come, then, to the decisive question on this appeal, and which is the refusal of the court to instruct the jury, at defendant's request, that "before the jury can find a verdict in this case against defendant, they must be satisfied by a preponderance of the evidence that defendant's engineer, Kilbain, actually knew, when he backed his engine and tender from the depot west over the Eighth street crossing, of the presence of this hose, in time to have avoided running over it," and instead charging them in substance that it was not the duty of the engineer to look for hose stretched across the track, but, if he knew that a hose in use to put out a fire was across the track, it was his duty not to cut it if he could avoid doing so without danger to himself or other persons. If he did not know that it was across the track, but did know that a fire was in progress in the city near the track, and knew that the situation and conditions were such as to make it reasonable to anticipate that his engine might interfere with the work of extinguishing the fire, and after such knowledge he failed to exercise ordinary care under the circumstances to avoid cutting the hose, actionable negligence might be found. We are of the opinion that the court submitted the issue of defendant's negligence to the jury upon quite as favorable theory as it was entitled to.

The contention of the defendant that the rule of wanton negligence should have been applied cannot be sustained. The defendant did not own the ground where the hose was. It was a public street. The fireman have generally the right of way in public streets in going to a fire, and in stringing hose thereon a lawful use is made of the street. Indeed, if a necessity therefor exists, hose may be laid on private property and across railway right of way to subdue fires. So that, as far as defendant was concerned, the hose was on the tracks by right, and not by the act of either a licensee or a trespasser. The hose, then, being where it might lawfully be laid, and used at a place where defendant had not the exclusive right to be, but where the public has the right to travel, a duty was thereby cast upon defendant to exercise ordinary care in its use of the crossing. If, without fault of the owner, a large van had, in broad daylight, been stalled on defendant's tracks on this cross-

ing, and this locomotive, with tender, starting from a standing position 200 feet away, had backed down upon the van, could there be any escape from liability? The duty of the defendant, using the crossing, to exercise ordinary care to discover the presence of the obstruction thereon, and avoid injury or collision, is the same in the case of a van as in the case of fire hose strung over it. The difficulty of discharging this duty may vary. If, however, in a given case, the ordinarily prudent person, mindful of this duty of care, would, under the situation shown, discover the danger and avoid collision, and the defendant in such case fails so to do, negligence is proven. The defendant's engineer was familiar with the streets and tracks, and had so been for several years. He had stayed at the hotel overnight, and knew of the presence of smoke, or the smell thereof, when he left for the depot, where the locomotive was awaiting him. He waited in the depot some ten minutes for orders. The fire whistle blew. He claims he did not hear it. The testimony is that quite a volume of smoke came from the fire when he started to back the locomotive; also that, as he proceeded, he looked at the smoke. Volunteer firemen and others were going to the fire, or were around there. Though his view of the hotel was at some position of his travel obstructed, he had a clear view of the rear of the hotel for about 100 feet before reaching the hose. It was broad daylight, and he could have seen the hose, he admits had he looked for it, at a distance of more than 200 feet. He claims he looked at the crossing. No one was on the front part of the tender. The fireman on the locomotive was not called, nor his absence from the witness stand explained. These and other facts appearing in the evidence made a case for the jury upon the question of defendant's negligence in running over the hose.

We are cited to the case of *Clark v. Grand Trunk Western R. Co.* 149 Mich. 400, 112 N. W. 1121, 12 Ann. Cas. 559, as supporting defendant's contention, and so it does; but no substantial reason is given for the ruling, and we are not inclined to follow it. In the case of *American Sheet & Tin Plate Co. v. Pittsburgh & L. E. R. Co.* 12 L.R.A.(N.S.) 382, 75 C. C. A. 47, 143 Fed. 789, 6 Ann. Cas. 626, relied on by defendant, it will be noticed that there was no hose laid across the track. The train was stopped because the fire department wished to lay the hose across defendant's right of way at a place abandoned as a street, but through some misunderstanding of the engineer, the train started up and interfered for some minutes

tically the whole hotel. Plaintiff sued, alleging that the defendant negligently cut the hose; that, had it not so done, the fire would have been put out with but small loss; consequently the claim is that defendant's negligence was the proximate cause of the destruction of the hotel. The trial resulted in a verdict for plaintiff, and defendant appeals from the order denying its alternative motion for judgment notwithstanding the verdict, or for a new trial.

At the trial it appeared that at the crossing in question defendant had safety gates operated by a watchman from a tower some 10 feet high, located immediately north of the tracks and on the east side of Eighth street. When the hose was laid across the track, one of the firemen, who knew that the watchman was very deaf, pointed to the hose and motioned up and down the track. He testified that the watchman looked at him and toward the smoke from the fire. Because it did not appear that this watchman gave any notice to the engineer in charge of the locomotive which cut the hose, the court instructed the jury that any notice or knowledge the watchman may have had of the situation was immaterial. Unless a recovery must be based on the wanton negligence of the engineer, we fail to see why the evidence was not admissible. The watchman was there to guard against persons or property on the crossing. If he knew that the hose was on the crossing, and, from the motion of the fireman and the situation, knew that trains were not to pass, it would seem a duty devolved on him to act, and a failure so to do would tend to show negligence of defendant. The ruling testifies to the great care taken by the learned trial court in a case presenting the application of the law of negligence to a somewhat novel situation, and involving a large amount, to eliminate everything which by inference might be claimed to be unfair to the defendant.

Contributory negligence was not pleaded. It was not assigned as a ground for a new trial, nor is an assignment of error on that basis made in this court. But counsel, in his oral argument, contended, as we understood him, that it appeared from the evidence received without objection that there was no necessity for laying the hose across the tracks; that after it was there the engineer was not notified by the firemen of its presence; that this was negligence of the firemen, and they were plaintiff's servants in the matter of extinguishing the fire; hence their negligence is imputable to plaintiff, and no recovery may be had. *Hill v. Minneapolis Street R. Co.* 112 Minn. 39 L.R.A.(N.S.)

503, 128 N. W. 831; *Mellon v. Great Northern R. Co.* 116 Minn. 449, 134 N. W. 116. The answer to the contention is that the court, at defendant's request, submitted the question of apparent necessity of running the hose across the tracks to the jury, ruling that, if it was not necessary, plaintiff must fail; and, further, we are of the opinion that plaintiff is not responsible for the negligence of the fire department. It must be borne in mind that, while a fire department protects the private property threatened, it is one of the public governmental agencies of the city, for whose mistakes or negligence in subduing a fire the city is not liable to the individual injured thereby. This is placed on the ground that the department, in arresting fires, is discharging a public governmental or police duty. *Bryant v. St. Paul*, 33 Minn. 289, 53 Am. St. Rep. 31, 23 N. W. 220; *Grube v. St. Paul*, 34 Minn. 402, 26 N. W. 228. A fireman is not a servant of the owner of the property he is attempting to save, so as to come within the protection of chapter 7, p. 99, Laws of 1893, "An act for the Protection of Employees." *Hamilton v. Minneapolis Desk Mfg. Co.* 78 Minn. 3, 79 Am. St. Rep. 350, 80 N. W. 693.

The citizen whose property is threatened with destruction has absolutely no control over the public fire department fighting the fire. He may not interfere by attempted directions or orders. Indeed, his property may be destroyed if, in the judgment of the head of the department, it becomes necessary so to do to arrest a conflagration. Where there is no authority in an individual to interfere with or direct such a public governmental agency as a city fire department in the discharge of its duties, nor any responsibility is resting upon him as a taxpayer in the city to pay for the negligence of such agency, it follows that there is no relation of master and servant, or principal and agent, so as to transfer the negligence of the fire department to the owner of the property being consumed by fire, making available the defense of contributory negligence to one whose negligence caused or concurred in causing the loss. *Mott v. Hudson River R. Co.* 8 Bosw. 345. In this view of the case, the court did not err in refusing to give defendants first and third requests, which were that no recovery could be had, if there was no need of running the hose across the tracks.

Upon the oral argument counsel for the defendant candidly conceded that he could not attack the finding of the jury that the cutting of the hose caused the almost total destruction of the hotel, and that, had it not been cut, the fire would

Crim. Rep. 702; *People ex rel. Boenert v. Barrett*, 202 Ill. 287, 63 L.R.A. 82, 95 Am. St. Rep. 230, 67 N. E. 23; *Com. v. Dowdican*, 115 Mass. 133; *People v. Brown*, 54 Mich. 15, 19 N. W. 571; *Sylvester v. State*, 65 N. H. 193, 20 Atl. 954; *Ex parte Clendenning*, 22 Okla. 108, 19 L.R.A. (N.S.) 1041, 97 Pac. 650; *Gibson v. State*, 68 Miss. 241, 8 So. 329; *Re Strickler*, 51 Kan. 700, 33 Pac. 620; *Re Bloom*, 53 Mich. 597, 19 N. W. 200; *State v. Murphy*, 23 Nev. 390, 48 Pac. 628; *Tuttle v. Lang*, 100 Me. 123, 60 Atl. 893; *Ex parte Gordon*, 1 Black, 503, 17 L. ed. 134; *State v. Voss*, 80 Iowa, 467, 8 L.R.A. 767, 45 N. W. 898; *Re Markuson*, 5 N. D. 180, 64 N. W. 939; *People ex rel. Boenert v. Barrett*, 202 Ill. 287, 63 L.R.A. 82, 95 Am. St. Rep. 230,

67 N. E. 23; *Grundel v. People*, 33 Colo. 191, 108 Am. St. Rep. 75, 79 Pac. 1022; *Re Flint*, 25 Utah, 338, 95 Am. St. Rep. 853, 71 Pac. 531; *State ex rel. Davis v. Hunter*, 124 Iowa, 569, 104 Am. St. Rep. 361, 100 N. W. 510.

An indefinite suspension of sentence on conditions is, in practical effect, a conditional pardon.

State ex rel. Davis v. Hunter, 124 Iowa, 569, 104 Am. St. Rep. 361, 100 N. W. 510.

Mr. James R. McDowell, Assistant Attorney General, for the State:

The court has power to suspend the execution of the sentence.

1 Bishop, New Crim. Proc. § 1299, p. 799; *Gibson v. State*, 68 Miss. 241, 8 So. 329; *Sylvester v. State*, 65 N. H. 193, 20

that of the state or public on one hand, and that of the defendant on the other. Since the measure of the punishment to be inflicted in any given case (excepting some few, of which murder in the first degree is a conspicuous example) is left entirely at the discretion of the court, it would seem that, from the public point of view, it must be held that the public rights are presumably protected by whatever the judge in his discretion does in this respect. It is for him to determine whether the defendant shall pay a fine within the limits fixed by the statute, or suffer some imprisonment within limits similarly fixed. And it can well be argued from the standpoint of public policy that it is proper for the court, in those cases where it finds that the public interests will best be served by not presently imposing any sentence, to thus deal with the subject. Considerations of public policy may often properly induce a court to hold off inflicting punishment for such a time as that course seems discreet to the court. The power would seem to be analogous to the immunity that courts, in their discretion, may give an accomplice, to aid the prosecution (*State v. Graham*, 41 N. J. L. 15, 32 Am. Rep. 174), and is similarly exercised where one equally guilty has pleaded guilty, or *non vult*, and has aided the state in the trial of the others concerned in the commission of the crime. From the defendant's standpoint, the only legitimate objection, it would seem to me, to the action of the court in refraining from presently inflicting punishment, would be the undesirability of remaining in the indeterminate position resulting from a suspension of the pronouncement of judgment. But is not this essentially a matter within his own control? Undoubtedly any convicted defendant could compel the proper court, by mandamus, to pronounce judgment; and, in my view, if a court sought to postpone the sentencing, or suspend it, for any purpose or any period which would be clearly unreasonable, the defendant could fully protect his rights by objection, which would undoubtedly, in my view, result either in the trial court not attempting to exercise 39 L.R.A. (N.S.)

the jurisdiction in the face of objection, or in the supreme court holding that, in the face of an objection, the trial court acted improperly in unreasonably delaying the pronouncement of judgment, and subsequently pronouncing one. As a general principle, I should say that either the successful or the defeated party in any litigated proceeding, civil or criminal, could move for judgment at any time when and after the matter was ripe for judgment. But if the defendant acquiesces, or does not object, it is difficult to see how he can be said to be injured. It is necessary to remember that the defendant has been convicted; that the court has the power to inflict the full measure of punishment; that if a defendant thus in peril of suffering the full penalty of the law is not visited with it, many things may happen favorable to him, while nothing worse than his present plight can possibly happen. If a defendant thus circumstanced sees fit not to object, or to acquiesce, I do not see who else is concerned that can complain, nor how he can legitimately complain."

—statutes regulating suspension.

In *State v. Mallahan*, 65 Wash. 287, 118 Pac. 42, under statutes whose provisions do not appear, it was held that the court had authority indefinitely to suspend sentence, and later commit the defendant, where there had been a breach of the condition.

In *Ex parte Giannini*, — Cal. App. —, 122 Pac. 831, a statute gave the court power to suspend the imposing or the execution of sentence, to continue for such period of time not exceeding the maximum possible term of such sentence, upon such terms and conditions as it should determine, and where the defendant was convicted of a misdemeanor the possible maximum term of sentence for which was six months, it was held competent to impose any sentence less than this, and, notwithstanding such fixation, to place the defendant upon probation for the maximum term; and it was further held that where a defendant is placed upon pro-

86 Am. St. Rep. 490, 59 N. E. 1038; *Ather-ton v. Kansas City Coal & Coke Co.* 100 Mo. App. 591, 81 S. W. 223; *Slater v. Advance Thresher Co.* 97 Minn. 305, 5 L.R.A. (N. S.) 598, 107 N. W. 133; *Higgins v. Western U. Teleg. Co.* 156 N. Y. 75, 66 Am. St. Rep. 537, 50 N. E. 500.

Testimony of a physician called as an expert witness as to substantive conditions, where opinion is based on acts and statements of injured persons, is inadmissible.

Chesapeake & O. R. Co. v. Wiley, 134 Ky. 461, 121 S. W. 402.

Alleged admissions of a witness detailing circumstances surrounding an accident, but not forming part of the *res gestæ* and made a long time after such accident, are inadmissible to contradict such witness, where the alleged admissions themselves would be incompetent as evidence.

Parker v. Cumberland Teleph. & Teleg. Co. 25 Ky. L. Rep. 1391, 77 S. W. 1109.

Messrs. **Ramsey Washington** and **Howard M. Benton** for appellee.

Winn, J., delivered the opinion of the court:

The appellant is an undertaking concern. On October 5, 1910, it conducted the funeral of one John Lickert. The appellee attending the funeral. Upon the return trip from the cemetery, the driver of the carriage in which appellee was riding, at the direction of one of the occupants of the carriage, stopped in front of the Heidelberg Café. The two men occupants left the carriage and went inside the café. The driver wrapped his lines about the brake and went in also. The team ran away. Mrs. Borches jumped or was thrown from the carriage, and brought her action against the undertaking company to recover for the injuries which she claimed to have received. She recovered a judgment for \$597, and the undertaking company appeals.

The plaintiff alleged that the Radel Company had charge of the funeral; that she went to the funeral in a carriage furnished by defendant for that purpose; that the carriage was managed and under the control of defendant, its agents, and employees; and that, by reason of their negligence in leaving the horses unfastened and unattended the runaway and her injuries occurred. The answer did not deny that defendant furnished the carriage, but did deny that it was under the control of the defendant, its agents or employees, or that they were guilty of any negligence, or that the injury occurred. The evidence upon the plaintiff's side of the facts about the furnishing of the carriage, is, in substance, that plaintiff

attended the funeral as a relative of the decedent; that she was put into this carriage by a representative of the Radel Company; that a burial association of which decedent was a member had furnished, through the Radel Company, three carriages for the funeral; that the decedent's sister ordered three extra carriages from a representative of the Radel Company, that it was in one of these extra carriages that plaintiff was at the time of her injury; that the bill had been made out by the Radel Company against the estate of the decedent for the extra carriages, and been paid by the decedent's sister. The evidence upon defendant's side upon this question is, in substance, that these carriages were hired for the funeral; that they were hired by a representative of the Radel Company from the Queen City Livery Company, an independent concern; that the Radel Company kept no carriages; that it had no control over the carriage driver; that the livery company sent the carriages, under orders from the undertaker, to the house, thence to the cemetery, and thence back to the house.

We think it clear that, in arranging for the transportation of the decedent's relatives and family, the undertaking company owes the same contract obligation to each of them, though it may not know, save in the most general way, the number and names of those who are to be transported. It is a matter of common knowledge that, in the distressing surroundings of this nature, someone of the family, or some friend of the family, acts for all; and it is right that the obligations, whatever they may be, assumed or owed by the undertaker, should be held as contract obligations owed to all. The two facts stated above, as appearing upon the sides, are not in conflict. But the divergence of position comes in that the plaintiff insists that since the carriages were ordered of the undertaking concern and supplied by it, it, in effect, was the liveryman, and is answerable to the plaintiff not otherwise than as if the carriages had been its own; while the defendant's position is that the carriage was furnished by an independent contractor, the livery company, and that defendant is not responsible for any negligence of the independent concern's servants or agents.

The error in the Radel Company's conception of its case lies in its misunderstanding of the facts. Under the evidence, it undertook to supply the carriages. There is no evidence that in supplying them it was only to act as agent in procuring them, or that they were to be supplied by another or independent contrac-

tor, or that it was so understood by those to whom the carriages were to be supplied. Nor was the injury suffered by any third person, as against whom the fact of the independent service could be shown. The rule is clear beyond argument that one who undertakes by contract to do for another a given thing cannot excuse himself to the other for a faulty performance, or a failure to perform, by showing that he has engaged another to perform in his place, and that the fault or failure is that of another or independent contractor. It would be different, of course, if it were shown that the substituted performance, the engaging of another to perform, was with the knowledge and acquiescence of the one with whom he undertook his contract obligation. If it were shown here, to illustrate, that either the plaintiff, or the member of the family who engaged the carriages, knew that the Radel Company would not supply the carriages, or understood or assented that they were to be supplied by another, then the plaintiff's claim would be against that other, unless it should be shown by the evidence, as it was not, that the complete direction, authority, and control of the carriage and its owner were surrendered for the time being to the Radel Company.

The state of fact just supposed, *i. e.*, that it was understood in the contract with the Radel Company that the carriages were in fact to be supplied by another under a hiring by it, would bring the case within the rule argued by appellant, that, in an ordinary hiring from a livery company, the hirer, who exercises no control over the driver further than the right to generally direct where to go, is not the master, so as to render him liable in damages to a third person for injuries received through the negligence of the driver of the vehicle. The appellant's trouble in this respect, as above pointed out, lies in that the plaintiff was not a "third person;" *per contra*, she was a party to the contract made with the Radel Company where, in so far as the evidence upon the trial disclosed, that company itself was to furnish the carriages. The notes to *Frerker v. Nicholson*, 13 L.R.A.(N.S.) 1122, illustrate the distinction. The case to which the notes are appended seems to us to be unsound as applied to the facts at bar, in that it treats the occupant of the carriage as a third person, and not as one entering into the contractual relation with the inherent contractual right to look for reasonably safe transportation to the one who, so far as the record disclosed, bore the whole obligation to supply the carriage. The case of *Hershberger v. Lynch*, 9 Sadler 39 L.R.A.(N.S.)

(Pa.) 91, 11 Atl. 642, cited by appellant, was likewise the case of an injury to one driving his own vehicle a third person, who sought to recover from *Hershberger*, a livery stable keeper, damages for an injury by the latter's carriage which was temporarily engaged in the service of another liveryman. The court held with entire soundness that if the other liveryman only had the temporary control of the vehicle, with the right to its use and route, and without control over its servant, the right to discharge him and the like, *Hershberger*, and not the other liveryman, would be liable. We believe it would have been ruled differently had the injury been to one who had hired the carriage from the other liveryman, and without his knowledge had been supplied by the other liveryman with a carriage not his own.

The case of *Boniface v. Relyea*, 36 How. Pr. 457, is much relied upon by the appellant. The opinion sustains his position, save that it is not very clear that the undertaker himself agreed to furnish the teams. The proof rather went to show that he was to have entire superintendence of the funeral, and as such, among other things, was to see that carriages were present. But the fallacy of the argument of the learned judge in that case lies in that he eliminates altogether the contractual relation. He says, by way of illustrating the unreasonableness of the position, that if he were to hire a hackney coach from a public stand, and the driver should negligently injure another, he, the hirer, would be responsible; and it is upon such line of reasoning that he finds the undertaker there not liable. He should have extended his reasoning further. He should have illustrated the real position by putting himself in the position of one who, for hire, was supplying the carriage to another; and then, had the one he had undertaken to carry by contract been injured by the negligence of the driver, he would have more aptly illustrated the facts obtaining in his case. The error of the writer is apparent by the fact that he rests his case largely upon the case of *Laugher v. Pointer*, 5 Barn. & C. 547, 8 Dowl. & R. 550, 4 L. J. K. B. 309. Had he noted the distinction drawn here he would have observed that in that case the injured person was a third party entirely, who bore no contractual relation either to the owner or hirer of the vehicle.

The case of *Little v. Hackett*, 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep. 391, cited by appellant, is an authority for no other principle than the one conceded here, —that one who hires and uses a public carriage is not responsible for the negligence

of the driver, in the absence of complete control and dominion over him. It does not discuss at all the rights of one who contracts from another the right to use a vehicle, and his consequent right, if injured, to recover against that other, in the absence of any knowledge or agreement that the other supplied a vehicle not his own.

In the case of *Joslin v. Grand Rapids Ice Co.* 50 Mich. 516, 45 Am. Rep. 54, 15 N. W. 887, cited by appellant, *Joslin*, the plaintiff, was driving his own horse and buggy, and was injured by a collision with a wagon driven by an employee of the ice company. The case nowhere touches the question of a contract right, but purely turns upon the question as to who may be responsible for injury to a third and disinterested person.

The case of *Foster v. Wadsworth-Howland Co.* 168 Ill. 514, 48 N. E. 163, cited by appellant, is the case of the killing of a child, a third party, and is therefore not applicable here.

The case of *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922, cited by appellant, was the case of a third person injured by the negligent driving of a wagon. The question was as to whether he was entitled to recover against the owner of the wagon and general master of the driver, or against one to whom the wagon and driver had been sublet. There was no element of contract present.

The case of *Jahn v. McKnight*, 117 Ky. 655, 78 S. W. 862, cited by appellant, was one wherein *Jahn*, a telegraph messenger boy, while riding his bicycle on the street, had been struck and killed by a delivery wagon drawn by a runaway horse. The wagon in question was under hire to *McKnight & Company*, by its owner, who was in the habit of letting it out for hauling. In an effort to recover against *McKnight & Company*, it was held that under this state of fact the driver of the wagon was not the servant of *McKnight & Company*, and that there was no liability on their part for his negligence.

And so in all the vehicle cases to which our attention has been invited, or which we have examined upon our own initiative, with the possible exception of the *Boniface Case* and the *Frerker Case*, the injury was done to some third person, where there was an entire absence of any duty owed under contract. It may be that at the time the arrangements were made for the funeral, it was understood that in furnishing the teams the *Radel Company* was merely acting as the agent of the family in obtaining the teams; but we must take the record as we find it. It is matter of common knowledge that under-

takers do supply carriages and teams of their own. The record brought up here shows an engagement by the *Radel Company* to furnish the carriages. The trial court therefore properly overruled defendant's motion for a preemptory instruction in this aspect of the case; nor was there any error in so much of the instruction given, under the facts presented upon the former trial, as assumed that the driver was the agent of the *Radel Company*. If, upon the return of the case to the trial court, any evidence should be introduced showing any understanding or knowledge and acquiescence upon the part of the plaintiff, or the one who hired the carriages, either that in procuring them the *Radel Company* acted as agent or was to furnish the vehicles of another, the court will submit the question to the jury by an appropriate instruction, relieving the *Radel Company*, in case there was such an understanding; and this upon the well-established general authority that although a driver may be ordered by those who have dealt with his master to go to this place or that, to take this or that burden, to hurry, or take his time, nevertheless, in respect to the driver's conduct and the control of his horses, he remains subject to no orders but those of the man who pays him, and his master, and not the one who has dealt with the master, can be held liable therefor.

It is argued by appellant that in going into the café or bar the servant was upon an independent service of his own, and that therefore there was no obligation upon the master for any damage resulting from it. The conclusion is false, because the premise is false. The accident did not arise as the result of anything done by the driver while absent from the carriage, but from his neglect in leaving the carriage.

Appellant also complains of the admission of the testimony of two witnesses who were called by plaintiff in rebuttal, and who were permitted to testify as to a certain statement the driver of the carriage had made to them about the accident. The driver had been introduced by the defendant, and upon cross-examination by plaintiff had been asked whether he made such a statement, which he denied. Both when the question was asked of him, and when the witnesses were put on to show that he had made the statement, the court properly limited the jury's consideration of the testimony to its effect upon the credibility of the driver's testimony. There was therefore no error in its admission.

The conversation, of course, was not competent as substantive testimony, since

it occurred some three weeks after the time of the injury.

Complaint is also made of the admission of the testimony of Dr. Shaler Berry, a witness introduced on behalf of plaintiff, wherein he testified that he saw her in December after the accident; that she exhibited to him a scar about 2 inches long across the top of her head, which she said she had received from being thrown out of a carriage on the pike; that she was complaining that since the accident she had suffered from various nervous manifestations, dizziness, headache and the like. The witness further said that a physician could not prove whether a woman was sleepless or dizzy, and that he had to rely upon her statements for that. It was error to refuse this instruction. *cident* when he saw her. The testimony comes within the condemnation of like testimony in *Chesapeake & O. R. Co. v. Wiley*, 134 Ky. 461, 121 S. W. 402, and its admission was error.

There was testimony given by defendant to the effect that the driver left the carriage upon the invitation of its occupants, and an instruction was asked and refused, in substance, that, if the driver left the carriage at the invitation of its occupants, the defendant was not liable. It was error to refuse this instruction. Upon a retrial of the case an instruction will be given in substance as follows: "If the jury believe from the evidence that the driver of the carriage left at the invitation or request of the plaintiff, or at the request or invitation of any of its passengers in the presence of and without objection by the plaintiff, the law is for the defendant, and the jury will so find."

For the reasons given, the judgment of the trial court is reversed for proceedings consistent herewith.

MINNESOTA SUPREME COURT.

JOHN LEUTHOLD, Appt.,

v.

CHARLES A. STICKNEY, Respnt.

(116 Minn. 299, 133 N. W. 856.)

Landlord and tenant — absence of fire escape — waiver of rent.

The owner of a building, who, during the term of a lease thereof, unlawfully fails to equip such building with fire escapes, cannot maintain an action upon such lease for rent.

(December 22, 1911.)

Headnote by SIMPSON, J.

39 L.R.A. (N.S.)

APPEAL by plaintiff from a judgment of the District Court for Ramsey County in defendant's favor and from an order denying a motion for new trial in an action brought to recover rent claimed to be due and unpaid. Affirmed.

The facts are stated in the opinion.

Messrs. Edgerton & Edgerton, for appellant:

It was not the intent of the legislature to confiscate the property of the owner of a flat building or apartment for failure to comply with the law in regard to fire escapes, considering, for the sake of argument, that the law has been violated. Had the legislature ever intended that such additional penalty would be incurred, it was easy enough for it to say so.

De Mers v. Daniels, 39 Minn. 158, 39 N. W. 98; *Toledo Tie & Lumber Co. v. Thomas*, 33 W. Va. 566, 25 Am. St. Rep. 925, 11 S. E. 37; *Columbus Ins. Co. v. Walsh*, 18 Mo. 229; *Union Mut. L. Ins. Co. v. McMillen*, 24 Ohio St. 67; *Harris v. Runnels*, 12 How. 79, 13 L. ed. 901.

Where the statute annexes a penalty, contracts made without compliance with the statute are nevertheless valid, on the ground that the purpose of the statute was not to prohibit business, but to accomplish some collateral object.

Larned v. Andrews, 106 Mass. 435, 8 Am.

Note.—The effect of fact that property cannot be devoted to use intended without alteration to conform to police regulations is the subject of a note to *Rockwell v. Eiler's Music House*, — L.R.A. (N.S.) —.

As to effect upon lease of property for saloon, of passage of prohibitory laws during term, see notes to *Heart v. East Tennessee Brewing Co.* 19 L.R.A. (N.S.) 964; *O'Byrne v. Henley*, 23 L.R.A. (N.S.) 497; *Hecht v. Acme Coal Co.* 34 L.R.A. (N.S.) 773.

As to the enforcement of public officers, of restrictions or conditions as to the use of leased premises, as constructive eviction of tenant, see note to *Taylor v. Finnigan*, 2 L.R.A. (N.S.) 973.

As to the landlord's breach of covenant to repair or make improvements as defense to action for rent, see note to *Young v. Berman*, 34 L.R.A. (N.S.) 977.

And as to the landlord's breach of covenant to repair or make improvements as justification of abandonment of premises, see note to *Partridge v. Dykins*, 34 L.R.A. (N.S.) 984.

As to the validity of contracts in business which it is a misdemeanor to transact, see note to *Levison v. Boas*, 12 L.R.A. (N.S.) 575.

As to effect of passage before expiration of the time of performance of contract, of statute rendering performance impossible, see note to *American Mercantile Exch. v. Blunt*, 10 L.R.A. (N.S.) 415.

granted in the case at bar was not for the purpose of preventing an abuse of the court's process, or to prevent any injustice from being done appellant, but simply that it might be held over him *in terrorem*, thereby forcing him to refrain from further acts of lawlessness, and to become a more law-abiding citizen. Since the "great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind," it may be that courts ought to possess the power within certain limits to suspend the execution of a sentence during good behavior; but the question before us is not what power the courts ought to have, but what their power in fact is. Among the cases upholding the foregoing views are *Spencer v. State*, — Tenn. —, 38 L.R.A. (N.S.) 680, 140 S. W. 597; *State v. Abbott*, 87 S. C. 466, 33 L.R.A. (N.S.) 112, 70 S. E. 6, Ann. Cas. 1912 B. 1189; *Re Webb*, 89 Wis. 354, 27 L.R.A. 356, 46 Am. St. Rep. 846, 62 N. W. 177, 9 Am. Crim. Rep. 702; *Tanner v. Wiggins*, 54 Fla. 203, 45 So. 459, 14 Ann. Cas. 718.

We have examined all the cases called to our attention which are in real or apparent conflict with the views here expressed, and have re-examined those cited in support of our former opinion, and find that all of them are either not in point, or were decided upon a misconception of the inherent powers of a court, or of what the common law upon this point was. In *State v. Crook*, 115 N. C. 760, 29 L.R.A. 260, 20 S. E. 513, which was a case involving the power of the court to suspend the imposition of a sentence, and not of the execution thereof, the court, in upholding the power of the lower court so to do, frankly stated that it could find no precedent to support its decision. We are therefore of the opinion that we erred in holding that the lower court had inherent power, or any power at all, to suspend the execution of a sentence during the good behavior of a defendant.

It does not follow from this, however, that appellant must now go unpunished. That portion of the judgment which directed "that the jail sentence be suspended during the good behavior of the defendant" was void, and the defendant could have been taken into custody immediately upon the rendition of the judgment. The postponement of his imprisonment was presumably with his consent, for it does not appear that he at any time requested, as he had the right to do, to be taken into custody, and consequently he cannot now object to being called upon to serve it. *Concensus tollit errorum*. *Gibson v. State*, 68 Miss. 241, 8 So. 329. It is immaterial that a longer period of time than that for which appellant

was sentenced has elapsed since the sentence was imposed. While at large under this void order, to which he did not object, appellant was in the same situation that he would have been, had he simply escaped from custody. In such case the sentence is not satisfied until it has been actually served. *Ex parte Bell*, 56 Miss. 282; 1 Bishop, Crim. Proc. 4th ed. 1384; *Spencer v. State*, — Tenn. —, 38 L.R.A. (N.S.) 680, 140 S. W. 597; *State v. Abbott*, 87 S. C. 466, 33 L.R.A. (N.S.) 112, 70 S. E. 6, Ann. Cas. 1912 B. 1189; *Miller v. Evans*, 115 Iowa, 101, 56 L.R.A. 101, 91 Am. St. Rep. 143, 88 N. W. 198; *State v. State*, 104 Ga. 509, 42 L.R.A. 190, 69 Am. St. Rep. 175, 30 S. E. 858; *Tanner v. Wiggins*, 54 Fla. 203, 45 So. 459, 14 Ann. Cas. 718. We have carefully examined the cases cited in opposition to this view, and think they were erroneously decided. In our former opinion we held that the exercise by the courts of the power to suspend the execution of a sentence was not in conflict with that clause of our Constitution which gives to the governor the power "to grant reprieves and pardons;" but, since we have ascertained that he court below had no power to suspend the execution of appellant's sentence, it now becomes unnecessary for us to express any opinion upon this point, and all that was said in our former opinion relative thereto is hereby withdrawn.

The suggestion of error is overruled.

MISSOURI SUPREME COURT. (In Banc.)

HORACE B. CHURCH, Jr., Appt.,
v.

HERBERT S. HADLEY et al., Board of
Fund Commissioners, Resp'ts.

(— Mo. —, 145 S. W. 8.)

Bonds — state — emergency — destruction of state capitol.

1. The burning of the state capitol building creates an emergency for the securing of money with which to replace it, within the provision of a Constitution authorizing the submission to the voters of a proposition to issue bonds in case of unforeseen emergencies.

Note. — *Payment of commissions for sales of bonds as violating requirement that bonds shall not be sold for less than par.*

CHURCH v. HADLEY is in harmony with the great majority of the cases, which hold that a general authority to dispose of bonds at not less than par carries with it the implied authority to employ reasonable and proper

Same — commission for sale — validity.

2. The fund commissioners may, after they have failed to sell the bonds by their own efforts, pay a commission to brokers to dispose of them, under a statute providing for the issuance of a certain amount of bonds to build a state capitol, which shall be sold for not less than par, and the proceeds, which are estimated by the statute to equal the aggregate amount of bonds authorized to be issued, "more or less," appropriated to the construction of the building.

(Brown, J., dissents in part.)

(March 1, 1912.)

APPEAL by plaintiff from a judgment of the Circuit Court for Cole County, sustaining a demurrer to a bill filed to enjoin defendants from disposing of unsold state bonds and from paying a commission to brokers to dispose of the same. Affirmed.

The facts are stated in the opinion.

Messrs. W. C. Irwin and Silver & Dunn, for appellant:

A court of equity will not be permitted to accomplish indirectly what the law will not permit to be done directly.

Stowe v. Stowe, 140 Mo. 594, 41 S. W. 951.

Mr. Elliott W. Major, Attorney General, for respondents.

Graves, J., delivered the opinion of the court:

Plaintiff, a resident taxpaying citizen of this state, by his bill in equity, seeks to

enjoin the "Board of Fund Commissioners" of the state, which said board is made up of the governor, attorney general, state auditor, and state treasurer, (1) from in any wise disposing of all the unsold bonds directed by acts of the general assembly to be sold for the purpose of erecting a new state capitol building and purchasing additional grounds therefor, and (2) especially enjoining said Board of Fund Commissioners, constituted aforesaid, from entering into a contract with Francis Brother & Company, or any other person, persons, copartnership, or corporation, by which contract the said Francis Brother & Company, or any other person, persons, copartnership, or corporation, shall be allowed or paid any commission for services rendered in selling and disposing of said bonds. The petition also has a prayer for general relief.

The petition sets out and pleads the two several acts of the general assembly of this state, by which it avers an attempt is made to authorize the issuance and sale of \$3,500,000 state bonds, due in thirteen years, bearing interest at 3½ per cent for the purposes aforesaid. The petition further avers that the legislative act received at special election called therefor more than two thirds of the votes cast at such election, and such result was duly ascertained and proclaimed. The legislative acts referred to and set out in the petition will have to be discussed in the opinion, and further details may well be omitted at this point. The petition then thus proceeds:

That the defendants hereto, as said

assistance and pay commissions therefor, when in the judgment of the officers it is necessary or expedient to do so. *Manitou v. First Nat. Bank*, 37 Colo. 344, 86 Pac. 75; *State v. West Duluth Land Co.* 75 Minn. 456, 78 N. W. 115; *Ft. Edward v. Fish*, 156 N. Y. 363, 50 N. E. 973 (*obiter*); *Armstrong v. Ft. Edward*, 159 N. Y. 315, 53 N. E. 1116.

The reasons advanced by the courts for arriving at this conclusion are fully set out in the opinion above reported.

The contrary view was taken in *Scranton v. Vail*, 6 Luzerne Leg. Reg. 237, a common pleas decision, which held a municipal ordinance authorizing officers to allow necessary commissions whenever required for the conversion of the bonds void where the statute and Constitution prohibited the sale of the bonds at less than par.

A statute authorizing the officers to pay a commission for the sale of the bonds does not authorize the allowance of that commission to a purchaser of the bonds. *Wheeler's Appeal*, 108 Pa. 162, 1 Atl. 88, affirming *Schmertz v. Pittsburgh*, 17 Phila. 584. The court said in substance that the contract to allow the purchaser the commission upon the bonds purchased by him was practically an agreement to sell the bonds at less than

par, and was therefore without authority. One of the reasons advanced by the court why a purchaser cannot be regarded as an agent employed to make the sale is because his interests as purchaser would conflict with his duty as agent. To the same effect is *Franklin Ave. German Sav. Inst. v. Board of Education*, 75 Mo. 408 holding, however, that the deduction of a commission could not be urged as a defense to an action on the bonds.

And in *Hunt v. Fawcett*, 8 Wash. 396, 36 Pac. 318, it was held that the allowance of a commission to a purchaser, upon bonds sold at their face value, was a sale at less than par, within the prohibition of the statute, notwithstanding that the county might have issued 7 instead of 5 per cent bonds, and the bonds sold did not cost the county a greater rate of interest than 7 per cent on the amount realized.

On the question as to accrued interest as part of par value, within prohibition against sale of bonds at less than par, see note to *Smith v. State*, 35 L.R.A. (N.S.) 789.

As to issuance of corporate bonds at less than par as usury, see note to *Stirling v. Gogebic Lumber Co.* 35 L.R.A. (N.S.) 1106.

A. L. R.

Board of Fund Commissioners aforesaid, have caused said bonds, hereinbefore mentioned, to be printed, engraved, prepared, and executed in the form and with the recitals required and provided for in said act of the forty-sixth general assembly of Missouri, approved March 16, 1911, and hereinbefore set out and referred to, and have advertised, by public notice in the press of the state and otherwise, said bonds for sale at not less than par.

"That by reason of the fact that they bear an annual rate of interest of only 3½ per centum a year, said board has been able to dispose of only \$280,000 in amount of said bonds, and the remainder thereof, aggregating the sum of three million two hundred and eighteen thousand dollars (\$3,218,000), said board is unable to dispose of at par, and will be unable to so sell and dispose of the same at par, except on the payment of a commission of between 4 and 5 per centum of the proceeds of the sale or sales of said bonds to an agent or broker for his services in making the sale or sales thereof and in connection therewith.

"That said Board of Fund Commissioners have received from the firm of Francis Brother & Company, brokers of the city of St. Louis, Missouri, an offer to take at par the entire amount of said bonds so unsold, aggregating \$3,218,000 in amount, and to dispose of and to sell the same to a buyer or to buyers, provided said Board of Fund Commissioners will allow and pay to said Francis Brother & Company, a broker's or an agent's commission of 4 $\frac{2}{100}$ per centum of the proceeds of the sale of said bonds payable out of the same.

"That plaintiff concedes that said commission, if legal (which plaintiff denies), is a reasonable one, and probably the lowest commission for which said bonds can be disposed of.

"That the defendants hereto, as said Board of Fund Commissioners, are about to and will conclude and consummate with said Francis Brother & Company a contract of the character above indicated, that is, to take and dispose of said bonds at par, said Francis Brother & Company to be paid the aforesaid commission for their services in selling said bonds and in connection therewith, payable out of the proceeds of the sale thereof, unless said board and the members thereof shall be hindered and restrained from so doing by this honorable court.

"Your petitioner states that the issuance and sale of said bonds in the manner contemplated by said Board of Fund Commissioners, as hereinbefore indicated, will be wrongful, invalid, and illegal.

"Because the Board of Fund Commission-

ers of this state is without legal or competent authority under its constitution and laws, to sell or to dispose of its said bonds, aggregating an amount the sum of \$3,218,000; the power and authority purported to be conferred on said board so to do, being inadequate and insufficient in law, and not authorized by the Constitution of this state or by laws passed pursuant thereto or in conformity therewith."

The prayer was as above indicated. In the circuit court the defendants, constituting the Board of Fund Commissioners, demurred to this petition in this language: "Now come the defendants, Herbert S. Hadley, governor of Missouri, John P. Gordon, state auditor, Elliott W. Major, attorney general, and James Cowgill, state treasurer, constituting the Board of Fund Commissioners of the state of Missouri, and demur to the petition filed by plaintiff herein, and assign as grounds of demurrer the following: First. Said petition fails to state facts sufficient to constitute a cause of action. Second. There is no equity on the face of the bill filed by complainant herein. Third. Said petition and the matters and things therein, as stated and set forth, are not sufficient in law or in equity to entitle the plaintiff to the relief prayed for in the petition, nor to authorize the issuance of a restraining order or injunction prayed for therein. Fourth. Because the petition, upon its face, disclosed that the said defendants are authorized, under the laws and Constitution of the state, to issue and sell the bonds mentioned in said petition, and have the right and authority to pay a reasonable commission under the conditions and circumstances stated in said petition. Wherefore, defendants, for the reasons herein stated and covered, pray that the petition be dismissed, and that they be permitted to go hence without day and for costs."

This demurrer the circuit court sustained and entered its judgment accordingly. From such judgment, the plaintiff has appealed, and the cause reaches this court for final determination.

I. By act approved March 16, 1911 (Laws 1911, p. 416), the general assembly of Missouri, so far as it could, authorized the issuance and sale of \$3,500,000 in state bonds, and in the same act said: "The proceeds of said sale or sales shall constitute a fund to be designated as the capitol building fund, and shall be applied exclusively to the building of a new state capitol at the present seat of government of the state, including the furnishing and other equipment of said building and the purchase by the state of additional capitol premises adjoining those now owned by the state."

Under the Constitution, article 4, § 44, this act had to be submitted to a vote of the people. Such act was duly submitted by a second act, approved March 24, 1911 (Laws 1911, p. 250), and the petition admits that it was adopted by the required vote. The plaintiff charges, however, that the act of March 16th, supra, was not authorized by the Constitution, and that therefore the issuance and sale of any of the bonds therein authorized would be unlawful. To this contention we do not consent. Section 44 of article 4 of the Constitution reads: "The general assembly shall have no power to contract, or to authorize the contracting of, any debt or liability on behalf of the state, or to issue bonds or other evidences of indebtedness thereof, except in the following cases: First. In renewal of existing bonds, when they cannot be paid at maturity out of the sinking fund or other resources. Second. On the occurring of an unforeseen emergency or casual deficiency of the revenue, when the temporary liability incurred, upon the recommendation of the governor first had, shall not exceed the sum of \$250,000 for any one year, to be paid in not more than two years from and after its creation. Third. On the occurring of any unforeseen emergency or casual deficiency of the revenue, when the temporary liability incurred or to be incurred shall exceed the sum of \$250,000 for any one year, the general assembly may submit an act providing for the loan, or for the contracting of the liability, and containing a provision for levying a tax sufficient to pay the interest and principal when they become due (the latter in not more than thirteen years from the date of its creation), to the qualified voters of the state, and when the act so submitted shall have been ratified by a two-thirds majority, at an election held for that purpose, due publication having been made of the provisions of the act for at least three months before such election, the act thus ratified shall be irrepealable, until the debt thereby incurred shall be paid, principal and interest."

The act of March 16th is clearly authorized by the third exception in the section of the Constitution, supra.

The act itself declares the unforeseen emergency to be "the destruction of the state capitol by fire." The liability incurred exceeded \$250,000. The act provides for a tax sufficient to pay the interest and principal when they become due. By the act, the bonds do not run longer than thirteen years and may be paid in eight years. The act is drawn in strict compliance with the provisions of the Constitution. Plaintiff contends that the power to raise revenue under the provisions of the Constitution is

a special and limited one, and is to be strictly construed, and that the destruction of the state capitol by fire did not create an emergency within the meaning of that constitutional provision. We could concur in the views of plaintiff to the effect that this provision of the Constitution must be strictly construed, and yet upon other questions be forced to disallow his claim. Giving the Constitution the strictest construction, it cannot be said that the burning of the state capitol building, the necessary funds required to rebuild the same, is not just such an "unforeseen emergency" as the Constitution makers had in mind when they adopted that instrument; if not, then we are at a loss to understand the term "unforeseen emergency." Public buildings of this character are absolute requisites, and we feel that the unforeseen and sudden destruction of a state capitol building, and the immediate demand for funds with which to replace the same, is clearly an emergency such as contemplated by the constitutional provision, supra. This contention of plaintiff is therefore overruled.

2. The next question urged presents more difficulties, but in that we think the plaintiff is in error. The petition says that the Board of Fund Commissioners has tried to sell these bonds at par; that they have advertised them for sale both in and out of the state; that such board has only been able to find buyers for a very small portion thereof; that such board is now threatening to employ Francis Brother & Company to assist them in finding purchasers who will buy from said board the remainder of such issue at the par value thereof, and is threatening to contract with said Francis Brother & Company to pay them for their services in procuring purchasers of such bonds at par a commission of 4.21 per cent of the proceeds of such sale out of such proceeds. The question therefore is, Can a contract to pay a commission for procuring purchasers for these bonds be made by the board? We think so. First, it is a conceded fact that the defendants have tried to find purchasers and have failed. This might have been expected owing to the exceedingly low rate of interest (3½ per cent) which the bonds bear, and owing to the further fact that the members of such board are not in position to find purchasers, as would be some established brokerage company, with a clientele all over the country. Such boards are not usually in touch with the great mass of persons who invest in such securities. A large issue of bonds of this character might be sold to the clientele of any large brokerage firm, in small quantities to each client. Such companies usually have and can find persons

among their customers who could be easily induced to take one or more of such bonds even at a low rate of interest, but this would require work. What a brokerage firm could do in this way, the usual board charged with the sale of low rate bonds could not do. Again we say that the question is, Can this board, after having tried to perform the duties imposed upon it in the matter of selling these bonds, and after having failed to sell them, employ and pay a broker or brokerage firm a stipulated reasonable sum to find and procure purchasers who will take these bonds at their face value?

The power to make such a contract must be gathered from the laws of the state. There is no express provision of this law which authorizes the making of such contract, but we think the power, under the admitted facts herein, is clearly implied.

To get at the legislative intent of the powers of the Board of Fund Commissioners, we must go to all of the law relating to the given subject. We have thus far spoken of the act of March 16, 1911, which authorized the issuance and sale of \$3,500,000 of state bonds, and the act of March 24, 1911, which submitted the first-named act to a vote of the people, but on March 24, 1911, there was another act (Laws 1911, p. 108) approved, which created the "State Capitol Commission Board," and provided for its selection, organization, duties, etc.

The act of March 16th provides that the bonds shall not be sold for "less than par," but in the last act mentioned above, in § 10 thereof, we have this significant language: "That if the act of the forty-sixth general assembly, to be submitted to the voters of this state, referred to in the next succeeding section of this act, shall be ratified by two thirds of the legally qualified voters of this state, voting at an election held for that purpose, and it thereby becomes a valid and binding law, and the bonds authorized by said act are issued and sold pursuant thereto, the entire proceeds of the sale thereof shall be paid into the state capitol building fund, the (n) said proceeds (*which it is estimated will aggregate the sum of three and one half millions of dollars, more or less*) shall be, and the same with all interest accruing therefrom are, hereby appropriated to the construction of the state capitol heretofore referred to in this act, to the purchase of additional state capitol premises as contemplated by this act, and to otherwise carrying out its purposes and provisions, and also the purposes and provisions of the act of the forty-sixth general assembly of this state, to be ratified by the voters of the state, and referred to in the next succeeding section of this act."

ferred to in the next succeeding section of this act."

We have italicized the significant portion. This portion gives the legislative construction of what was meant by a sale at not less than par. It gives a legislative construction as to what the proceeds of such a sale might be. It shows that the general assembly had in mind that, although it had authorized and decreed the sale of \$3,500,000 at "not less than par," yet such sale when made might bring net proceeds of less than \$3,500,000. What did the legislature mean when it estimated the proceeds of the sale of \$3,500,000 bonds at not less than par at "more or less" than "\$3,500,000?" That body knew that it had conferred powers upon the Board of Fund Commissioners in general terms, and that there would be some expenses attached to the issuance and sale of these bonds, and that, if the sale could only be effected at par, then the net proceeds would be less than \$3,500,000. It also knew that, if the said board were fortunate enough to sell the bonds for more than par, the proceeds might be above that sum. If the legislature did not have in mind that the expenses necessary to a sale should be taken out of the money, there is no sense in the use of the term "more or less."

But in addition to this the same section appropriates this net sum "more or less" than \$3,500,000 to the construction of a state capitol, to the purchase of additional premises "and to otherwise carry out its purposes and provisions, and also the purposes and provisions of the act of the forty-sixth general assembly of this state, to be ratified by the voters of the state, and referred to in the next succeeding section of this act."

The power granted in this law is to sell bonds. The limitation of the power is that the actual sale shall not be less than par. The power of sale is granted in general terms, in so far as the means of sale is concerned. The statute granting the power does not undertake to prescribe the means and manner of sale.

In *State ex rel. Clark v. Gates*, 67 Mo. loc. cit. 143, *Sherwood*, Ch. J., thus announces the fixed rule in such cases: "If there is one principle in the law which finds abundant and oft-repeated recognition, it is this: That, where an agent is clothed with general powers, the means and measures necessary to effectuate the powers granted attend the grant of authority as inevitable incidents. *Edwards v. Thomas*, 66 Mo. 468. Thus, an agent employed to get a bill discounted may, unless expressly restricted, indorse it in the name of his employer; a broker employed to effect a policy of insur-

ance may adjust the loss and do all that is requisite towards such adjustment; an agent employed to issue process may receive the debt and costs; and, in general, *an agent has implied authority to use those means of which the principal could not but have foreseen the necessity, and therefore could not but have intended to authorize* (Smith, Mercantile Law, 175, 176, and cases cited); and the same principle which applies to private agents is *equally applicable in this regard to public ones.*"

The italics are ours. In this case we have a command to sell bonds to meet an emergency. Quick action is required. The whole trend of the several acts so shows. The power is granted in general terms, with but one single limitation, *i. e.*, the actual sale must be at not less than par. Before the sale bonds must be printed at a cost, yet there is no specific authority to incur this cost. There is certainly the implied power given this board to make such a contract as an incident to the power of sale. Bonds cannot be sold without public notice, and these publications cost, and contracts for such have to be made. This, too, is a necessary incident to the power conferred to sell. Nothing is said as to the means and methods to be employed in procuring purchasers, yet it is clear that the state (the principal in this case) contemplated that, in this emergency, some effective means should be used to secure purchasers who would take these bonds at not less than par. The declared emergency of the case required speedy and effective action. Under such circumstances, it is clear that the lawmaking power must have had in mind that if the ordinary and usual methods of sale diligently pursued and prosecuted, as in this case, had failed, then more active and heroic measures and means might be required, and might be used by the board to make the sale to meet the public exigency and emergency. The legislature was confronted with an emergency, and was enacting a law to provide for the same. Under such circumstances, bills are hurriedly drawn, and oftentimes, in general terms, leaving incidental powers to be implied from the general and specific powers granted.

We do not mean to say that this act would necessarily by implication authorize the Board of Fund Commissioners to resort to extreme methods to sell in the first instance, but what we do mean is that the law imposes upon them a duty to perform to meet an emergency; that if such board exhausts the usual means of exercising the power (as has been done in this case), then there is a clearly implied power to make such reasonable contracts for the securing of purchasers as the judgment of such board

dictates, and in such contracts to provide for the payment of a reasonable sum for the aid given in finding and procuring purchasers willing to buy such bonds from the board at a price not less than par.

Let us take the other side of the question. Suppose the Board of Fund Commissioners had advertised for purchasers. Suppose that such board had received bids for all of the issue at par. Suppose the judgment of the said board, in consideration of the condition of the money market, was such that they thought, in the exercise of their discretion, better bids could be gotten if they could interest some large financial agent with a nation-wide clientele, and would, in the exercise of their discretion, contract with such agent to pay him a commission on the bonds sold at the rate of 4.21 per cent if such agent would find for such board a purchaser or purchasers who would take the bonds at 5 per cent above par, would it be the duty of such board to employ these means? We think so. If it had made such a contract, would it be beyond the spirit of these several acts? We think not. In both instances the board would simply be exercising a power incidental to and a part of the general power granted. If the supposed contract would not be void for want of power, the threatened contract cannot be held void for want of power, dealing with statutes which breathe emergency from beginning to end, as we are in this case.

Thus far we have not discussed the case law, but have confined our suggestions to the laws themselves and the rationale thereof. We take next the case law upon the subject.

3. We are not without persuasive case law upon this question. In case of *Ft. Edward v. Fish*, 156 N. Y. 363, 50 N. E. 973, we have a discussion of implied powers in cases of this kind. That case was a suit to recover back for the village the sum of \$1,750 paid to Fish. Fish had bought of the water commissioners of the village \$50,000 of bonds of the village at less than par. The commissioners, finding a better purchaser, declined to deliver. The new purchaser refused to buy until Fish's alleged claim was cleared up so that the title would be unquestioned. By way of compromise the commissioners paid Fish the \$1,750, and this suit was to recover it back. This is but explanatory, but in the course of the opinion the question before us was discussed. In that case the commissioners were authorized to sell such bonds, but not to sell them "at less than the par value thereof." The power to sell with this limitation was in the case. In this case both the power and the limitation are as in the case at bar. The court in the course of its

remarks said: "What were their implied powers? Having made a contract that was expressly prohibited by law, had they implied power to get rid of that contract by a compromise? Implied power can be inferred only from the general scope of the actual power and the necessity of doing something essential to the efficient exercise thereof. The actual power was to borrow money by issuing and selling bonds at not less than par. The express power to issue bonds involved the implied power to pay for engraving, printing, and the like. The express power to sell bonds doubtless carried with it the implied power to pay counsel for an opinion as to the validity of the bonds, as was done in this case, and possibly to pay a commission to brokers for selling the bonds. These expenses were incidental to the duty imposed, and fairly came within the scope of the main power. But from what is the power to make the compromise in question to be implied? The contract was void and could not be enforced. There was no implied power to get rid of it, for, being void, it could not stand alone in court and any effort to enforce it would meet with defeat."

It will be observed that the court holds that from the express power to sell followed these implied powers: (1) To contract for printing, engraving, and the like; (2) to pay counsel for an opinion on the bonds; and (3) to pay a commission to brokers for selling the bonds. It will be noticed that the latter is not emphasized in this opinion because it was not involved in that case.

But we have a later case in which this question is involved, and which cites with approval this doctrine. In this later case of *Armstrong v. Ft. Edward*, 159 N. Y. 315, 53 N. E. 1116, Parker, Ch. J., quoted with approval the language we have quoted above. In the *Armstrong Case* the plaintiff was suing for commission alleged to be due him for selling waterworks bonds. The same power to sell existed as in the *Fish Case*. In fact, the same bonds were sold. The water commissioners were charged with the sale as in the *Fish Case*. *Armstrong* lost his case, both in the lower court and in the supreme court, but the judgment was reversed by the court of appeals. In the course of his opinion, Chief Justice Parker said: "The contract that was declared void in the case of *Ft. Edward v. Fish*, 150 N. Y. 363, 50 N. E. 973, related to a portion of the bonds that this plaintiff claims to have assisted in selling. While the question there presented is a very different one from that involved in this case, nevertheless this court did have occasion to consider the implied powers of the water commissioners.

Said the court, at page 372: "The actual power was to borrow money by issuing and selling bonds at not less than par. The express power to issue bonds involved the implied power, to pay for engraving, printing, and the like. The express power to sell bonds doubtless carried with it the implied power to pay counsel for an opinion as to the validity of the bonds, as was done in this case, and possibly to pay a commission to brokers for selling the bonds. These expenses were incidental to the duty imposed, and fairly came within the scope of the main power." This last case calls attention to the rule by which the authority of officers, such as the members of this board of water commissioners, to make contracts, may be determined. Where there is an express grant of power to them, it carries with it, by necessary implication, every other power needful and proper to the execution of the power expressly granted. *The authority to sell water bonds therefore carries with it the authority to secure such reasonable and proper assistance as may be requisite to bring about an advantageous sale of the bonds.* It is suggested that the rule permits the employment of brokers only to sell the bonds, but it is not so confined. It was not a broker that was selected in *New York v. Sands*, 105 N. Y. 210, 11 N. E. 820, and it quite frequently happens that men who are not brokers, and never have been, have such relations that they can dispose of bonds fully as advantageously as brokers. Those having charge of the selling of bonds have the right to exercise their discretion in selecting the agencies by which they shall make disposition of them, but in the selection of such agencies it is their duty to exercise their best judgment in the interest of the public whom they serve. The selection, therefore, must be made in good faith and with a fixed purpose to further the interests of the constituency represented."

The italics are ours. In this very case (both cases refer to the same village and the same bonds), the water commissioners were unable to get par, and contracted to sell the \$50,000 at less than par, and thereby made the void contract involved in the first suit, but by the assistance of *Armstrong* actually sold their bonds (including the \$50,000 contracted to *Fish* discussed in the *Fish Case*) for five per cent above par. It was with reference to this assistance from *Armstrong* that these remarks were made. In the *Armstrong Case*, supra, Chief Justice Parker also said: "(1) Did the board of water commissioners have the power to employ the plaintiff? (2) Did the plaintiff assist in bringing about the sale? (3) If he did, were the

services performed with the understanding between the board and himself that he should be paid for them? The answer to the second and third question must be found in the testimony, but the authorities dispose of the first question. *New York v. Sands*, supra, was an action brought to recover moneys paid to an agent for selling the bonds of the city of New York, the agent being at the time one of the municipal officers, namely, a commissioner of taxes. It was held that the courts will take judicial notice of the fact that, in the sale of bonds and negotiations for loans in behalf of states, municipalities, and governments, aside from their own fiscal agents, other agents are employed, and that the fact that an agent so employed was at the time a city officer did not deprive him of the right to receive and retain the agreed compensation. But it should be observed that, while the agent was a city officer, he was in no wise connected with the department of government charged with the sale and disposition of the bonds. In the course of the opinion, Chief Judge Ruger said: 'It is a matter of public history, of which courts will take judicial notice, that in the sale of bonds and negotiations for loans in behalf of states, municipalities, and governments, the services of their own fiscal agents are usually, if not invariably, supplemented by the employment of bankers, brokers, and other financial agencies to aid in raising moneys for public purposes. During the late war, the Federal government raised large sums by the issue and sale of treasury notes and bonds, which would have been practically difficult, if not impossible, but for the assistance rendered by extraneous financial agencies employed and paid by the secretary of the treasury.' In *Brownell v. Greenwich*, 114 N. Y. 518, 4 L.R.A. 685, 22 N. E. 24, the court said, in speaking of the action of the commissioners in turning the bonds over to another person for sale: 'It was not necessary that merely executive acts not involving the exercise of discretion should be done by the commissioners personally, but such acts might be done by another under their direction,'—citing *New York v. Sands*, supra. 'When a statute commands an act to be done, it authorizes all that is necessary for its performance. Hence the commissioners could lawfully employ Mr. Andrews as a broker to sell the bonds and invest the proceeds according to their instructions.'"

So we say in the case at bar the legislature no doubt anticipated that occasion might arise for more heroic action than the mere efforts of its own fund commissioners, 28 L.R.A. (N.S.)

and therefore indicated that the actual proceeds of the sale might be decreased by necessary expenses which might have to be incurred, and might be "less" than \$3,500,000. They wisely provided, however, that the interest accumulating upon this fund should go to and become a part of the fund, which interest will much more than offset the expense of selling the bonds.

It has been held, and we think rightfully, that although there is an express power given to pay a commission for the sale of bonds, yet such power does not authorize the allowance of that commission to a purchaser of the bonds. *Whelen's Appeal*, 108 Pa. 162, 1 Atl. 88. This case, however, does not reach the question here. In *New York v. Sands*, supra, we have a full discussion of the question of emergency being an element to be considered in determining the necessity of using outside assistance in procuring the sale of a large bond issue (four times the amount involved here), and other bonds shortly to mature created the emergency for quick action. The emergency there was not greater than the emergency here. That court held, and we think rightfully, that such was properly an element to be considered in determining the powers of the state's sales agents in the method and means to be adopted by them in the sale of such bonds.

In *Manitou v. First Nat. Bank*, 37 Colo. 344, 86 Pac. 75, we have another case in point. In that case there was given by the statute a general power to sell bonds, but such bonds must "not be sold for less than their face value." The case stated is this: "August 4, 1897, the town of Manitou, through its board of trustees, agreed in writing to pay M. A. Leddy \$1,200 for his services in placing or selling at par an issue of its waterworks refunding bonds, amounting to \$40,000. An unsuccessful attempt to dispose of the bonds had been previously made." Note that the contract called for a sale at par, and for such sale at par the agent should be paid \$1,200. The suit was a contest over the legality of the warrants issued in payment of this \$1,200.

The Colorado court, after quoting from the *Fish Case*, supra, as we have quoted above, said: "We believe that the above states the law to be applied to this case, and that, under the facts disclosed by this record, the contract made by the board of trustees with Mr. Leddy to pay him a commission for his services was within the implied powers of the municipal corporation; that the same was not *ultra vires* or illegal, and that the warrants issued in payment of the services rendered under the contract were valid and binding obligations of the

municipality. We are not without support in this conclusion. The supreme court of Minnesota, discussing the provisions of a statute of that state similar to the provisions of our statute (§ 4548b, *supra*), in *State v. West Duluth Land Co.* 75 Minn. 456, at page 467, 78 N. W. 115, said: "Under the provisions of § 4, chapter 289, *supra*, a sale of the bonds issued thereunder at less than par value was forbidden. The bonds now under consideration, \$140,000 in amount, were turned over to a broker for sale under a written contract with the board of county commissioners. In this contract, it was stipulated that the broker should pay for lithographing and printing the blank bonds, for legal advice and services, and all other expenses incident to a sale, for which, and as compensation in full, he was to receive the sum of \$14,000,—10 per cent of the face value of the bonds sold. On these facts we are asked to hold that there was a plain violation of § 4, and that the bonds are void. There might be cases where the facts would very conclusively show that an agreed compensation of ten per cent for the sale of the bonds was a palpable evasion of such a section, but we have no such case before us. We cannot say, as a matter of law, that, under the conditions of this contract, there was a violation of § 4, which forbids a sale of the bonds at less than par.'" The case from Minnesota relied upon by that court was in point there, and it is likewise in point here.

We are therefore of opinion (1) that the whole issue of \$3,500,000 bonds in this case is fully authorized by the Constitution; (2) that the legislative acts relating thereto are within constitutional bounds; (3) that the several legislative acts have been fully complied with; (4) that the facts of this case show a full and adequate effort upon the part of the Board of Fund Commissioners to sell these bonds without outside assistance; and (5) that under such facts there is, from the legislative acts, *supra*, a clearly implied power which authorizes such board to enter into a contract with some financial agent to procure for such board a purchaser or purchasers who will take such bonds at their par value, and in such contract to agree to pay and pay such agent, out of the proceeds of the sale, a reasonable commission for the services rendered.

The plaintiff by his petition states that the commission mentioned is a reasonable commission. The demurrer, of course, admits that fact. Upon that question we need not pass. The real purpose of this proceeding is to test the question as to whether or not a commission can be paid by the 39 L.R.A. (N.S.)

Board of Fund Commissioners to some financial agent for procuring purchasers for these bonds. It was so argued orally and is so briefed. We hold that the Board of Fund Commissioners have the right to contract to pay a reasonable commission for such services. Such board must exercise its best discretion in that matter. It is the duty of the board to get as favorable a contract as it can, all things considered. In such board is lodged a limited discretion which must be used in the interest of the state in the dealings which it has in connection with the subject-matter embraced in these several legislative acts. Such discretion must be used by the board in determining the reasonableness of the commission to be paid. From all this, it follows that the judgment, *nisi*, was right, and it is affirmed.

All concur, except Brown, J., who concurs in the first paragraph of the opinion, but dissents to the remainder thereof, and the result; Lamm, J., concurs in a separate opinion.

Lamm, J., concurring:

The close question in the case is that discussed in the second paragraph relating to the right to pay a commission to expert brokers in touch with barreled-up money seeking investment. As to the legality of the bonds, decided by the first paragraph, we all agree. There are other questions discussed in the second paragraph relating to other incidental outlays, on which there is no divergence of opinion, but the shoe pinches, as said, on the right to pay a broker's commission to aid in procuring a par buyer.

It was argued that the right to pay such commission was necessarily implied in any bond issue for city, state, school, road, drainage, or any other purpose for which an issue of bonds is provided by statutes or charters, unless the payment of such commission is directly forbidden by law. That is, that the officers, agents, or municipalities selling such bonds had the implied power to pay such commission in every case of a bond issue where the power is not expressly denied. That is a dangerous doctrine I do not subscribe to, and the opinion of my brother does not adopt that view of it. It may be some of the cases and authorities cited, in a broad way, sustain that contention, or head that way, but our brother's opinion stands on all of the facts of this particular case. The salient fact is a crying emergency in this state demanding a strong and quick remedy. All of the acts *in pari materia* show that such emergency must be read into the legislative

purpose, and breathes in every line. The records of this state are menaced by destruction from fire unless safely housed in suitable vaults. To that controlling emergency may be added other subsidiary facts and indications in aid of the opinion got at by analysis of the terms of the statutes, as shown by the opinion.

It was argued that we should hold a specific proposed contract with a named brokerage firm at a named figure would be legal. But the opinion does not hold that the board is authorized to make any specific contract with any specific broker at any named price. It holds, as I read it, that the board has authority to make some reasonable contract with some suitable brokers to assist in the sale of the bonds, if such assistance is necessary, and only then. The Board of Fund Commissioners is rightly left to judge of that necessity, as their informed judgments acting under the solemn sanction of their several official oaths may direct. They must assume and carry the responsibility for the proper exercise of the discretion we find is lodged in them.

It was argued that, if we sustained the right of this board to pay a commission, hereafter no public bonds of any sort would be sold in this state without paying a commission, and scandals would arise over unnecessary losses suffered by the people. But the opinion opens no door for such mischief to enter and vex the people, for its language must be read with the peculiar existing facts creating a present emergency whereby a remedy became necessary. I think the power to pay a commission springs only from an emergency creating such necessity, and that such necessity is within the intendment of the statutes.

It was further argued that, if we sustained the power of this board to pay a commission, then the board would at once proceed to do so on the theory that the facts exist at this immediate time requiring the board to pay such commission. In other words, the board, armed with or incited by our opinion, would cease all efforts on its own part to make a sale, and would at once contract to pay for the aid of brokers holding an "open sesame" to hoarded money. That it would make no further effort by personal interviews or advertisements on individual efforts in the east or elsewhere where bond investments are sought and interest runs low.

But that is an argument to be addressed to the board, and the matter rests with their judgment and their conscience. It may safely rest there. The opinion does not tell them to stop all effort to sell the bonds without paying a commission, and

the honorable officers charged with the duty of selling these bonds doubtless will exhaust every sensible or available means of avoiding the payment of a commission. The presumption is they will do their duty, and pay none except as a last resort when they are at the end of their row.

For these reasons, and those stated by my brother, I concur.

Graves, Ferriss, Woodson, and Ken-nish, JJ., concur in this concurrence.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ANN SHUGRUE et al.

v.

RICHARD H. LONG et al., Pliffs. in Err.

(— N. J. —, 82 Atl. 905.)

Wills — rule in Shelley's Case — devise to heirs.

1. Where there is a devise in trust to pay the net income to A for life, with a discretionary power in the trustees to use part of such income to pay off a mortgage encumbrance upon the land, and, after the death of A, a devise in fee simple to her "heirs at law," held, that the testator used the words "heirs at law" to designate the persons who at the time of A's death would be her heirs at law, and that consequently the rule in Shelley's Case does not apply.

Same — legal and equitable estates.

2. Where the particular estate for life devised is equitable and the remainder in fee is the legal estate, the rule in Shelley's Case cannot operate to increase the equitable life estate into a legal estate in fee simple.

Same — statutory provision.

3. A devise in the language of the 10th section of the statute of descents (2 Comp. Stat. 1910, p. 1921) would, in the absence of that section, have invoked the rule in Shelley's Case. Where, therefore, as in this case, the form of the devise would not have given rise to the application of that rule, the 10th section of the statute of descents will also be inapplicable.

(March 4, 1912.)

ERROR to the Supreme Court, Hudson Circuit, to review a judgment in plaintiff's favor in an action brought to recover possession of certain real estate. Affirmed.

The facts are stated in the opinion.

Headnotes by WHITE, J.

Note. — The rule in Shelley's Case is treated at length in the note in 29 L.R.A. (N.S.) 963, the particular question presented, when the life estate is equitable and the remainder in fee is legal, being discussed at pages 1025 et seq.

Mr. John Milton, for plaintiffs in error:

At common law the rule in Shelley's Case would have applied to the devise in question, and vested in Mary McBride (the first taker) an estate in fee simple.

15 Am. & Eng. Enc. Law, 320, note 2; Tingier v. Chamberlin, 71 Conn. 466, 42 Atl. 718; Allen v. Craft, 109 Ind. 476, 58 Am. Rep. 425, 9 N. E. 919; Chamberlain v. Runkle, 28 Ind. App. 599, 63 N. E. 486; Siceloff v. Redman, 26 Ind. 251; Re Sanders, 4 Paige, 293; Lane v. Lane, 106 Ky. 530, 50 S. W. 857; Kay v. Connor, 8 Humph. 624, 49 Am. Dec. 690; Crockett v. Robinson, 46 N. H. 454; Rank v. Rank, 120 Pa. 191, 13 Atl. 827; Riggan v. Love, 72 Ill. 553; Hennegar v. Deadrick, — Tenn. —, 54 S. W. 138; McCauley v. Buckner, 87 Ky. 191, 8 S. W. 196; Johnson v. Brasington, 156 N. Y. 181, 50 N. E. 859; Re Kenyon, 17 R. I. 149, 20 Atl. 294; Harris v. McLaren, 30 Miss. 571; Den ex dem. Wortendyk v. Wortendyk, 7 N. J. L. 379; Den ex dem. Doremus v. Zabriskie, 15 N. J. L. 404; State v. Engle, 21 N. J. L. 360; Hand v. Marcy, 28 N. J. Eq. 60; Kennedy v. Kennedy, 29 N. J. L. 187; Martling v. Martling, 55 N. J. Eq. 771, 39 Atl. 203.

The rule applies to equitable as well as legal estates.

Cushing v. Blake, 30 N. J. Eq. 697; Martling v. Martling, 55 N. J. Eq. 771, 39 Atl. 203; Challis, Real Prop. 134; Re White & Hindle's Contract, L. R. 7 Ch. Div. 201, 47 L. J. Ch. N. S. 85, 37 L. T. N. S. 574, 26 Week. Rep. 124; Warner v. Sprigg, 62 Md. 14.

The gift over is void.

Booker v. Tariwater, 138 Ind. 385, 37 N. E. 979; Rivard v. Gisenhof, 35 Hun. 247; Campbell v. Rawdon, 18 N. Y. 412; Clark v. Mosely, 1 Rich. Eq. 396, 44 Am. Dec. 229; 3 Greenleaf's Cruise, Real Prop. 106, § 37; 2 Jarman, Wills, 13; Otis v. Prince, 10 Gray, 582; Den ex dem. Stith v. Barnes, 4 N. C. (1 Car. Law Repos. 484) 6 Am. Dec. 547; Den ex dem. Chesson v. Smith, 4 N. C. (2 Car. Law Repos. 392); Norris v. Hensley, 27 Cal. 439.

Messrs. Collins & Corbin, for defendants in error:

The rule in Shelley's Case cannot be applied to the language of the will of Matthew Brady, deceased, because if at common law it could be so applied the 10th section of the statute of descents would now govern the case.

Lippincott v. Davis, 59 N. J. L. 241, 28 Atl. 587.

The statute cannot be applied to this case, because the rule would not have been applied at common law.

Keyport & M. P. S. B. Co. v. Farmers' Transp. Co. 18 N. J. Eq. 13; Lippincott v. 39 L.R.A.(N.S.)

Davis, 59 N. J. L. 241, 28 Atl. 587; Den ex dem. Hopper v. Demarest, 21 N. J. L. 535; Zabriskie v. Wood, 23 N. J. Eq. 541.

The rule in Shelley's Case cannot be applied to the devise of the premises in question, because the words "heirs at law," used in the gift in remainder, are there used as words of purchase; and because the quality of the life estate is different from that of the remainder.

Martling v. Martling, 55 N. J. Eq. 771, 39 Atl. 203; 25 Am. & Eng. Enc. Law, 648; Fearn, Contingent Remainders, 52; Jones and Lord Say and Seal, 1 Eq. Cas. Abr. 383, C. 4, 3 Bro. P. C. 113; 28 Am. & Eng. Enc. Law, 2d ed. 923.

On the face of the will, § 10 of the statute of descents does not cover its terms, and therefore cannot apply.

Zabriskie v. Wood, 23 N. J. Eq. 541; Tinsman v. Belvidere-Delaware R. Co. 26 N. J. L. 148, 69 Am. Dec. 565.

White, J., delivered the opinion of the court:

This was an action of ejectment, tried in the supreme court at the Hudson circuit before Judge Vail without a jury upon a stipulated state of facts, to recover possession of real estate (No. 132 Newark avenue) in Jersey City. The plaintiffs are the sister and the children of a deceased sister of Mary McBride; they being or including the persons who were at the time of her death her heirs at law. The defendants are the devisees under the will of Mary McBride, or those claiming under such devisees. The question in controversy is the application or nonapplication of the rule in Shelley's Case, and arises under the will of Matthew Brady, the father of Mary McBride, which provided as follows:

"Fifth. I give, devise, and bequeath unto my said executors and the survivors of them all my real estate in trust upon the following terms: . . .

"2d. To collect all the rents and revenues of the premises owned by me and known as No. 132 Newark avenue, in Jersey City aforesaid, and after payment of the water rents, interest on the mortgage, insurance and repairs, and other proper charges and expenses to apply the net revenues thereof towards the support and maintenance of my beloved daughter Mary, the wife of Hugh McBride, during her natural life, hereby giving to my said executors the discretion to save out of said revenue a part thereof so as to accumulate a fund to pay off the one-half part of the mortgage, now upon said premises and the premises adjoining, and after the payment of said mortgage, to pay over the whole of said

revenue to my said daughter Mary, during the term of her natural life."

(Third and Fourth. Authority given to collect rents of 130 Newark avenue and 482 Grove street, forming no part of the premises in question.)

"5th. After the death of my said daughter Mary McBride, I give, devise, and bequeath my said lot of land and premises known as No. 132 Newark avenue in Jersey City, aforesaid, unto the heirs at law of my said daughter Mary McBride."

At the time of the death of Matthew Brady, the testator, in 1878, Mary McBride had one son living, but he died unmarried and without issue in 1907, three years before her death, which occurred in 1910.

The plaintiffs claim under ¶ 5 of the 5th section of the will of Matthew Brady as remaindermen in fee after an equitable life estate in Mary McBride under ¶ 2 of the same section; whereas, the defendants contend that, by virtue of the rule in Shelley's Case, Mary McBride took an estate in fee simple under said two paragraphs, and consequently had the complete power to devise the property in question in fee simple, as she did, to defendants. Judge Vail, holding that the rule in Shelley's Case had no application, decided in favor of the plaintiffs, and the present writ is to review that decision.

The apt and technical words of limitation to create an estate in fee simple are "heirs forever" or, what means the same thing, "heirs," and consequently a devise to "A and his heirs forever" or to "A and his heirs" is exactly the same in legal effect as a devise to "A in fee simple." If therefore the devise in one clause of a will is "to A for life" (or other freehold), and then in the same or another clause of the same will there is a remainder to his "heirs," the latter is in effect a direction that at the exact instant of time when in death the spark of life shall pass from A's body he shall take an estate in fee simple in the same land, and as a consequence, by virtue of the rule in Shelley's Case, the law gives him an estate in fee simple from the first; that is, from the time of the vesting in him of the so-called life estate. When, however, after the devise to "A for life" the other provision of the will is that at A's death the land is devised in fee simple directly from the testator, and not as descending from A, to some designated or described persons other than A, the rule can have absolutely no application, and it is quite immaterial if in naming such other persons the testator, in order to designate them, has described them as the persons who at the moment of A's death were his "heirs," provided it is en-

tirely clear from a reading of the whole will that the use of the word "heirs" was to designate certain persons to take directly from the testator, and not by descent from A, as contradistinguished from that inheriting line theoretically springing and descending from A and extending through all time "forever," which is comprised in the technical meaning of the word "heirs" and whose only real effect or existence is as a measure of the quantity of estate in the land in question of which A died seised. While, therefore, it is well settled that the rule in Shelley's Case is absolutely and peremptorily controlling as "a rule of property," whenever it appears that the limitation over is to the "heirs," taking as such "heirs," of the life tenant, quite irrespective of the desire or direction of the testator that the first taker should take only a life estate (Lippincott v. Davis, 59 N. J. L. 241, 28 Atl. 587), nevertheless if it appears that the testator did not use the word "heirs" in this, its technical sense, but, on the contrary, used it as a mere *descriptio personarum* of the objects of his, the testator's, own direct bounty, the rule has no application whatsoever. Hargrave, Law Tracts, 574-576; Fearne, Contingent Remainders, 188. What will indicate such use by the testator of the word "heirs" in the latter and popular, as distinguished from its technical, sense, must necessarily vary in different cases.

In Peer v. Hennion, 77 N. J. L. 693, 29 L.R.A.(N.S.) 945, 76 Atl. 1084, the testator, after devising certain lands to his daughter Catherine, provided as follows: "The said lands heretofore given by me to my daughter Catherine are given for and during her natural life; and after her decease I do give and devise the said lands to such person or persons as shall be her heir or heirs of land held by her in fee simple." This language was held by this court to have been used by the testator to designate certain persons to be ascertained at the time of Catherine's death as objects of his direct bounty, and not as applying to Catherine's entire line of future heirs to the end of time, and consequently the rule in Shelley's Case was held to have no application. In Martling v. Martling, 55 N. J. Eq. 771, 39 Atl. 203, the conveyance was in fee to trustees in trust to permit the life tenant to receive and enjoy the rents and profits during her natural life, free from control by her husband, and in trust to sell and convey in fee simple at the direction of said life tenant, substituting the proceeds in the trust in place of the land so sold, and, upon the death of the life tenant, in trust to convey the unsold lands and to turn over the proceeds of the lands

which had been sold to the appointee of the life tenant, or, in default of appointment, to "her heirs at law or next of kin, as may be." The fact that the proceeds of a sale of real estate made during the lifetime of the life tenant were not to be paid to her, but were to continue in the trust, and at her death, in the absence of appointment by her, were to be paid to her "next of kin," moved this court to the view, as expressed in the opinion by Justice Depue, that, "construing this trust from all the limitations and provisions contained in it, it is clear that the terms 'heirs at law' and 'next of kin' in providing for the ultimate destination of the estate, although the disjunctive 'or' intervenes, should receive the same construction as to the point of time when these two classes of beneficiaries respectively are to be ascertained, and that the words 'heirs at law' as well as 'next of kin' should be construed to mean persons who either as heirs at law or next of kin come into existence at Mrs. Martling's [the life tenant's] death." In this opinion the classic doctrine laid down by Mr. Hargrave (*Hargrave, Law Tracts, 576*), and commended by Mr. Fearne (*Fearne, Contingent Remainders, 188*), was cited with approval, as follows: "If it shall be decided that the testator or donor did not mean, by the words of inheritance after the estate for life, to use such words in their full and proper sense, did not mean to involve the whole line of heirs to the tenant for life, and to include the whole of his inheritable blood, did not mean to engraft a succession on his preceding estate, and to make him the ancestor terminus for the heirs; but, instead of this, intended to use the word 'heirs' in a limited, restrictive, and untechnical sense, intended to point at such individual person, as should be the heir, or heir of the body, of the tenant for life at the moment of his decease, intended to give a distinct estate of freehold to such single heir, and to make his or her estate of freehold the groundwork for a succession of heirs, to constitute him or her the ancestor terminus and stock for the succession to take its course from,—in every one of these cases the premises are wanting upon which only the rule in Shelley's Case interposes its authority."

Another indication established by text-writers and decisions of a use by a testator of the word "heirs" as a word of purchase, and not as a word of limitation, occurs where the life estate is only an equitable estate, and the remainder is a legal estate. Thus where property is devised under an active trust for the benefit of a life tenant, and then the legal estate is devised at the death of the life tenant direct to his

heirs, the word "heirs" cannot be taken to have been used to indicate a succession of inheritance of the legal estate from the life tenant, because the life tenant never held the legal estate. Mr. Fearne in his work on *Contingent Remainders* (page 52) states this proposition as a rule as follows: "I shall now proceed to observe that where the estate limited to the ancestor is merely an equitable or trust estate, and that to his heirs, etc., carries the legal estate, they will not incorporate into an estate of inheritance in the ancestor, as (in general) would have been the case, if they had been both of one quality; that is, both legal or both equitable." Numerous cases are cited by Mr. Fearne in support of this rule, the leading one being *Jones and Lord Say and Seal, 1 Eq. Cas. Abr. 383, C. 4* which he states and comments on as follows: "Where a testatrix devised certain real estate to trustees and their heirs upon trust and in confidence, in the first place, out of the rents and profits thereof to pay the several legacies, devises, and bequests thereafter mentioned, and then (after giving several annuities for life) she appointed her trustees to pay all the rest and residue of the rents and profits of the premises to the proper hands of her daughter C. F., or as she by any writing, etc., should appoint, for and during the term of her natural life, and after her (the said daughter's) decease the trustees to stand seised of the premises to the use of the heirs of the body of her said daughter C. F. severally and successively as they should happen to be in priority of birth and seniority of age, and the heirs of their respective bodies in tail general, subject to the payment of the several annuities, and in case of failure of the issue of the body of her said daughter C. F. then to the use of Lady J. After the decease of the testatrix, C. F. and her husband suffered a recovery of the lands, and she afterwards died without issue. Upon her decease, Lady J. claimed the lands under the will by virtue of the remainder thereby limited to her. It was contended for the plaintiff (Lady J.) that C. F. took only a trust estate for life by the will, with a contingent remainder to the heirs of her body in tail general. That the direction to the trustees to pay the residue of the rents, etc., to the proper hands of C. F., who was a married woman, gave her a mere trust, and not a use executed by the statute. It was a trust for her separate use, and to construe it a use executed would be to subject it to the power and control of her husband. That the subsequent limitation to the heirs of her body severally, etc., was a use executed by the

statute, and could not be consolidated with the precedent trust limited to C. F. for life, so as to create an estate tail in her. That the subsequent words, in case of failure of issue of the body of C. F., then to Lady J., etc., did not create an estate tail in C. F. by implication, nor enlarge the precedent estate, because no legal estate vested in C. F. on the other side, it was contended that the legal estate passed to the trustees and their heirs; and, if it passed in fee, then all the subsequent uses were uses upon a use, and consequently trusts not executed by the statute; and, if the estate given to C. F. for life and the subsequent limitation to the heirs of her body were both trusts, they might be consolidated together and create an equitable estate tail, and that in this case, either both the estates were executed or neither. But Lord Chancellor King was of opinion that by the words of the will the use was executed in the trustees and their heirs during the life of C. F., and that she had only a trust in the surplus of the rents and profits during her life; but that by the subsequent words, *viz.*, that the trustees should stand seised to the use of the heirs of the body of C. F. subject to the payment of the annuities, etc., the use was executed in the persons entitled to take by virtue thereof, chargeable with the payment of the annuities, and therefore there being only a trust estate in the ancestor, and a use executed in the heirs of her body, those different interests could not unite, so as to create an estate tail by operation of law in the ancestor, and he decreed accordingly for the plaintiff." This rule seems also to have been passively approved by the Supreme Court of the United States in the recent case of *Vogt v. Graff* (1912) 222 U. S. 404, 56 L. ed. 249, 32 Sup. Ct. Rep. 134, where it is stated in the syllabus of the case that "the rule in *Shelley's Case* does not apply where the particular estate is equitable, and the estate in remainder legal."

Coming now to the present case, we find that the trust estate in favor of the life tenant, Mary McBride, is not only a trust in the trustees to collect and apply the net income, after the payment of water rents, mortgage interest, insurance, and repairs and other proper charges, towards the support and maintenance of the life tenant, but that there is also vested in the trustees an absolute discretion to reserve a part of said net income for the purpose of discharging a mortgage encumbrance against the property in question. This discretion thus reposed in the trustees is certainly quite inconsistent with the idea of an absolute fee simple in the life tenant, 39 L.R.A. (N.S.)

and would, of course, be completely destroyed by the creation of such an estate in her. Then, when we come to the subsequent paragraph wherein the testator, after the death of the life tenant, disposes of the remainder, we find that he does so not only in the form, "I give, devise, and bequeath," which he would naturally use in making a direct devise to definite persons, but he names the objects of his bounty as the "heirs at law" of his said daughter, the trust life tenant, thus seeming to indicate persons who at the time of her death would be her heirs at law. These expressions taken in conjunction with the evident purpose of the testator, as indicated by the previous paragraph (No. 2), wherein the trust life estate with the discretion in the trustees is created, and also in connection with the fact that the life tenant held only an equitable estate out of which her heirs, of course, could not inherit from her a fee, lead us to the conclusion that the testator used the words "heir at law" as a *designatio personarum*, and that consequently the rule in *Shelley's Case* cannot be applied.

A suggestion has been made, in which counsel both for the plaintiffs and for the defendants appear heartily to agree, that the 10th section of the statute of descents (2 Comp. Stat. 1910, p. 1921) has no application to this case. With this view we are also in accord. A devise in the language of that section before its enactment would clearly have invoked the rule in *Shelley's Case*, and, as the language or form of the devise in the present case is not subject to the application of that rule, the statute is necessarily equally inapplicable.

The judgment is affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

FRANCES DENT GROSS

v.

CECIL GROSS, Plff. in Err.

(— W. Va. —, 73 S. E. 961.)

Appeal and error — bill of exceptions — transcript of evidence — identification.

1. A vacation order of a judge certifies the presentation to him of bills of exception and a transcript of all the evidence, and certifies that for identification the bills were numbered as bills of exception by a number to each, and that the certificate of evidence was marked "Certificate of Evi-

Headnotes by BRANNON, P.

dence," and certifies that the bills were signed, and that the certificate of evidence was also signed by the judge, and the order says that bills and certificates were ordered to be made a part of the record. The bills refer to the "Certificate of Evidence" as part of them. The "Certificate of Evidence" is part of the record, and brings the evidence before this court.

Husband and wife — alienation of affections — action by wife.

2. A wife, though the husband be living, has the right of action in her sole name for wrongful alienation of her husband's affection, causing his separation from her.

Same — malice — burden of proof.

3. A father is liable to his son's wife for alienating the affection of the son from his wife, and causing him to separate from her, if the father is moved by malice towards the wife and without good faith and honest purpose and good motive for the welfare of his son. If his action is without malice, and springs only from what he honestly believes to be necessary for the welfare of his son, he is not liable; and the presumption is that he acts without malice and with such good motive until the contrary appears, and the burden is on the wife to show malice and absence of such good motive.

(March 12, 1912.)

ERROR to the Circuit Court for Randolph County to review a judgment overruling motions for new trial and for judgment for defendant *non obstante veredicto* in an action brought to recover damages for alienation of the affections of plaintiff's husband. Affirmed.

The facts are stated in the opinion.

Messrs. W. B. Maxwell and D. H. Hill Arnold, for plaintiff in error:

A parent in good faith may advise his child even to the extent of advice in matters pertaining to his domestic relations, actuated only by good motives and having in mind the best interests of his child, and the parent will not be liable, even though a severance of the domestic relation may result.

Multer v. Knibbs, 193 Mass. 556, 9 L.R.A.(N.S.) 322, 76 N. E. 762, 9 Ann. Cas. 958; Tucker v. Tucker, 74 Miss. 93, 32 L.R.A. 623, 19 So. 955; Reed v. Reed, 6 Ind. App. 317, 51 Am. St. Rep. 310, 33 N. E. 638; Tasker v. Stanley, 153 Mass.

Note. — As to right of wife under modern married women's acts to sue for alienation of the affections of her husband, see notes to Nolin v. Pearson, 4 L.R.A.(N.S.) 643, and Sims v. Sims, 29 L.R.A.(N.S.) 842.

As to liability of parent for causing separation of husband and wife, see note to Multer v. Knibbs, 9 L.R.A.(N.S.) 322, and see later case. Cochran v. Cochran, 24 L.R.A.(N.S.) 160, 39 L.R.A.(N.S.)

148, 10 L.R.A. 468, 26 N. E. 417; Hutcheson v. Peck, 5 Johns. 196; Oakman v. Belden, 94 Me. 280, 80 Am. St. Rep. 396, 47 Atl. 553; Holtz v. Dick, 42 Ohio St. 23, 51 Am. Rep. 791; Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397; Rice v. Rice, 104 Mich. 371, 62 N. W. 833; Glass v. Bennett, 89 Tenn. 478, 14 S. W. 1085; Brown v. Brown, 124 N. C. 19, 70 Am. St. Rep. 574, 32 S. E. 320; Bennett v. Smith, 21 Barb. 439; Love v. Love, 98 Mo. App. 562, 73 S. W. 255.

At common law a married woman could not maintain a suit of this character, because by her marriage her identity was completely merged in that of her husband, and a recovery would be a recovery for the husband, in his name; and while this is true, yet at common law a recovery might be had in some classes of cases in the joint names of the husband and wife, where the wife was the meritorious cause of action, such as in cases of assault and battery committed upon the wife, yet the recovery, when had, became and was the property of the husband alone.

Nolin v. Pearson, 191 Mass. 283, 4 L.R.A.(N.S.) 643, 114 Am. St. Rep. 605, 77 N. E. 890, 6 Ann. Cas. 658; Doe v. Roe, 82 Me. 503, 8 L.R.A. 833, 17 Am. St. Rep. 499, 20 Atl. 83; Morgan v. Martin, 92 Me. 190, 42 Atl. 354; Hodge v. Wetzler, 69 N. J. L. 400, 55 Atl. 49; Duffies v. Duffies, 76 Wis. 374, 8 L.R.A. 420, 20 Am. St. Rep. 79, 45 N. W. 522; Lonstorf v. Lonstorf, 118 Wis. 159, 95 N. W. 961; Lynch v. Knight, 9 H. L. Cas. 577, 5 L. T. N. S. 291, 8 Eng. Rul. Cas. 382; Lellis v. Lambert, 24 Ont. App. Rep. 653; Lawry v. Tuckett-Lawry, 2 Ont. L. Rep. 162; Norfolk & W. R. Co. v. Prindle, 82 Va. 122; Burnett v. Burkhead, 21 Ark. 77, 76 Am. Dec. 358; Beisel v. Gerlach, 221 Pa. 232, 18 L.R.A.(N.S.) 516, 70 Atl. 721.

Messrs. Linn & Byrne also for plaintiff in error.

Messrs. Fred O. Blue, Arthur S. Dayton, and W. E. Baker, for defendant in error:

A married woman may maintain an action for alienation of her husband's affections.

Williams v. Williams, 20 Colo. 51, 37 Pac. 614; Foot v. Card, 58 Conn. 1, 6 L.R.A. 829, 18 Am. St. Rep. 258, 18 Atl. 1027; Warren v. Warren, 89 Mich. 123, 14 L.R.A. 545, 50 N. W. 842; Lynch v. Knight, 9 H. L. Cas. 577, 5 L. T. N. S. 291, 8 Eng. Rul. Cas. 382; Holmes v. Holmes, 133 Ind. 386, 32 N. E. 932; Bennett v. Bennett, 116 N. Y. 584, 6 L.R.A. 553, 23 N. E. 17 (overruling Van Arnam v. Ayers, 67 Barb. 544); Baker v. Baker, 16 Abb. N. C. 293; Jaynes v. Jaynes, 39

Hun, 40; *Bassett v. Bassett*, 20 Ill. App. 543; *Haynes v. Nowlin*, 129 Ind. 581, 14 L.R.A. 787, 28 Am. St. Rep. 213, 29 N. E. 389 (overruling *Logan v. Logan*, 77 Ind. 558); *Wolf v. Wolf*, 130 Ind. 599, 30 N. E. 308; *Reed v. Reed*, 6 Ind. App. 317, 51 Am. St. Rep. 310, 33 N. E. 638; *Breiman v. Paasch*, 7 Abb. N. C. 249; *Warner v. Miller*, 17 Abb. N. C. 221; *Churchill v. Lewis*, 17 Abb. N. C. 226; *Manwarren v. Mason*, 79 Hun, 592, 29 N. Y. Supp. 915; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397; *Mehrhoft v. Mehrhoff*, 26 Fed. 13; *Waldron v. Waldron*, 45 Fed. 315; *Clow v. Chapman*, 125 Mo. 101, 26 L.R.A. 412, 46 Am. St. Rep. 468, 28 S. W. 328; *Railsback v. Railsback*, 12 Ind. App. 659, 40 N. E. 276, 1119; *Price v. Price*, 91 Iowa, 693, 29 L.R.A. 150, 51 Am. St. Rep. 360, 60 N. W. 202; *Nichols v. Nichols*, 134 Mo. 187, 35 S. W. 577; *Hodgkinson v. Hodgkinson*, 43 Neb. 289, 27 L.R.A. 120, 47 Am. St. Rep. 759, 61 N. W. 577; *Clark v. Harlan*, 1 Cin. Sup. Ct. Rep. 418; *Humphrey v. Pope*, 122 Cal. 253, 54 Pac. 847; *Noxon v. Remington*, 78 Conn. 296, 61 Atl. 563; *Betser v. Betser*, 186 Ill. 537, 52 L.R.A. 630, 78 Am. St. Rep. 303, 58 N. E. 249; *Nevins v. Nevins*, 68 Kan. 410, 75 Pac. 492; *Deitzman v. Mullin*, 108 Ky. 610, 50 L.R.A. 808, 94 Am. St. Rep. 390, 57 S. W. 247; *Rath v. Rath*, 2 Neb. (Unof.) 600, 89 N. W. 612; *Kuhn v. Hemmann*, 43 App. Div. 108, 59 N. Y. Supp. 341; *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085; *Gerner v. Gerner*, 185 Pa. 244, 40 L.R.A. 549, 64 Am. St. Rep. 646, 39 Atl. 884; *Hester v. Hester*, 88 Tenn. 270, 12 S. W. 446; *Knapp v. Wing*, 72 Vt. 334, 47 Atl. 1075; *Beach v. Brown*, 20 Wash. 266, 43 L.R.A. 114, 72 Am. St. Rep. 98, 55 Pac. 46; *Ash v. Prunier*, 44 C. C. A. 675, 105 Fed. 722; *Tucker v. Tucker*, 74 Miss. 93, 32 L.R.A. 623, 19 So. 955; 21 Cyc. 1619; *William v. William*, 20 Colo. 51, 37 Pac. 614; *Bailey v. Bailey*, 94 Iowa, 598, 63 N. W. 341; *Nevins v. Nevins*, 68 Kan. 410, 75 Pac. 492; *Rice v. Rice*, 104 Mich. 371, 62 N. W. 833; *Price v. Price*, 91 Iowa, 693, 29 L.R.A. 150, 51 Am. St. Rep. 360, 60 N. W. 202; *Servis v. Servis*, 172 N. Y. 438, 65 N. E. 270; *Gregg v. Gregg*, 37 Ind. App. 210, 75 N. E. 674.

Assignments of error relating to motions to set aside judgments, giving or refusing to give instructions, refusing or permitting evidence to go to the jury, cannot be considered when the evidence is not properly before the court.

Cummings v. Armstrong, 34 W. Va. 1, 11 S. E. 742; *Tracy v. Carver Coal Co.* 57 W. Va. 587, 50 S. E. 825; *Dudley v. Barrett*, 58 W. Va. 235, 52 S. E. 100; *Parr v. Currence*, 58 W. Va. 523, 52 S. E. 496; 39 L.R.A. (N.S.)

Coal & Coke R. Co. v. Joyce, 58 W. Va. 544, 52 S. E. 498; *McKendree v. Shelton*, 51 W. Va. 516, 41 S. E. 909.

Brannon, P., delivered the opinion of the court:

Frances Dent Gross brought an action of trespass on the case in the circuit court of Randolph county against her father-in-law, Cecil Gross, charging him with having alienated the affection of her husband, Ivan Victor Gross, and inducing him to separate from her, and she recovered a verdict and judgment for \$12,500, and Cecil Gross comes to this court for relief.

It is contended that no bill of exceptions brings the evidence before us so that we can review the case. The order of the judge says that the defendant presented fifteen bills of exception and also a transcript of all the evidence, and for their identification numbers the bills, and states that the transcript is marked "Certificate of Evidence," and orders that bills and said "Certificate of Evidence" be made part of the record. This certificate of evidence, so marked, is found in the record, and bills of exception, about which as parts of the record no question can be made, refer to it as "Certificate of Evidence." Thus this evidence has a distinct earmark of identification in the order of the judge and in bills of exception, so that there can be no difficulty in finding it. The point is technical and unsubstantial, too much so to shut a suitor out of court. *State v. Legg*, 59 W. Va. 315, 3 L.R.A. (N.S.) 1152, 53 S. E. 545; *Hughes v. Frum*, 41 W. Va. 445, 23 S. E. 604; *Kay v. Glade Creek & R. Co.* 47 W. Va. 467, 35 S. E. 973.

Does the declaration show good cause of action? As one ground of demurrer, it is said that, the declaration showing the plaintiff to be a married woman, she cannot sue in her own name. Here we meet with a question somewhat difficult, more so than at first it appeared to me. The authorities differ somewhat. By the common law the suit for a tort to the wife could not be sued by her alone, by preponderance of authority. This was on account of unity of husband and wife placing her under disability; but we have a statute saying that "a married woman may sue or be sued in any court of law or chancery." Is such a demand as this arising from tort, a mere claim for unliquidated damages, a property right, so as to be considered a separate estate of the wife? If so, there is no difficulty in saying that she may sue to enforce it under that statute giving her full capacity to sue. I think, with some hesitation, that it is a property right, as held in *Jaynes v. Jaynes*

39 Hun, 40. It has been held otherwise. *Gibson v. Gibson*, 43 Wis. 23, 28 Am. Rep. 532. It is true that it does not seem comprehended by §§ 1, 2 and 3 of chapter 66 of Code 1906. It is not property acquired "by inheritance or by gift, grant, devise, or bequest." It is a right to demand money. It must be in favor of someone. This tort was to the wife's injury. She is the meritorious cause of action. By the common law action for tort injurious to the wife must be by husband and wife. The right was in the wife, but, owing to disability, she could not sue alone. 1 Minor's Inst. 387. It is suggested that § 13 of chapter 66 specifies three cases where the married woman may be sued alone one being where the action concerns her separate property, and it is said that this § 13 limits the right of action under § 15, and must be read with it; but those two sections have different functions, one giving the right of action to the wife to sue in her own name, the other gives right to sue the wife without joining her husband,—two different purposes. I do not see how § 13 has anything to do with a suit by the wife, since it touches only suits against a married woman, and does not give action in her favor. We think that § 15 should be given a liberal construction to enable a married woman to sue, and that § 3 should be liberally construed to make such a demand separate property. The old rules of the common law laid down centuries gone, making the wife the inferior, practically a slave, have become wholly distasteful to enlightened public sentiment, and from statute and refusal of many courts to follow them have "gone glimmering through the dream of things that were, the school boy's tale, the wonder of an hour." The rule saying that for a tort against the wife she could not sue during wedlock, but could do so after its close, arose from the old rule stated by Blackstone thus: "The inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior, and therefore the inferior can suffer no loss or injury." 3 Bl. Com. 143. The old rule made the two persons a unit, and sunk the individuality of the woman in the individuality of the man. Her property rights were sunk largely. Therefore she could not alone sue to enforce her right. But in our day, when we look at not merely the letter, but the purpose, of acts giving the wife separate estate, and right to sue, and modern decisions, we conclude that old rules have perished, that a wife is not the legal inferior, but the equal, of the husband. Reflect that in sustaining the wife's capacity to sue we only say that her

incapacity to sue for a tort affecting her was only a disability to sue during wedlock, and that is removed by a broad statute giving her absolute right to sue. We do not go far. We do not legislate. The legislature has plainly legislated this result by fair construction of the letter and spirit of its acts. There are older cases denying the right of a married woman to sue for alienation of the affection of her husband. *Duffies v. Duffies*, 76 Wis. 374, 8 L.R.A. 420, 20 Am. St. Rep. 79, 45 N. W. 522; and *Doe v. Roe*, 82 Me. 503, 8 L.R.A. 833, 17 Am. St. Rep. 499, 20 Atl. 83. But in later days since the separate estate acts protecting the property of the wife, many many cases assert this right of action in the wife. *Cooley on Torts*, 475, says that twenty states concede this right of action to the wife in her own name. For the proposition that such action lies, I cite *Tiffany on Domestic Relations*, 78; note in 94 Am. Dec. 593; note in 20 Am. St. Rep. 88; *Williams v. Williams*, 20 Colo. 57, 37 Pac. 614; 15 Am. & Eng. Enc. Law, 864; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397; *Jaynes v. Jaynes*, 39 Hun, 40; *Gerner v. Gerner*, 185 Pa. 233, 39 Atl. 884, 40 L.R.A. 549, 64 Am. St. Rep. 646, and note. I refer particularly to the well-considered case of *Bennett v. Bennett*, 116 N. Y. 584, 6 L.R.A. 553, 23 N. E. 17. It holds that whilst, before the late statute of New York providing that "in an action or special proceeding a married woman appears, prosecutes, or defends alone or joined with other parties, as if she were single," the action had to be in the name of the husband and wife, yet that statute would entitle the wife to an action in her own name for the alienation of the affection of her husband. Our statute is to the same effect as the New York statute. As said above, if this demand is separate property, there can be no question that the wife can sue alone; but, even if we cannot regard it as separate property, then I would say that § 15, giving her right to sue, even if this demand be not property, it is an actionable right springing from a wrong to her, and she has a right to sue. That section alone vests in her power to sue, and thus abolishes former laws disabling her to sue alone because of the unity of husband and wife. This was so held in *Beach v. Brown*, 20 Wash. 266, 43 L.R.A. 114, 72 Am. St. Rep. 98, 55 Pac. 46, and *Seaver v. Adams*, 66 N. H. 142, 19 Atl. 776, 49 Am. St. Rep. 597, and cases in note. Some cases hold that without an enabling statute the wife may sue alone. *Foot v. Card*, 58 Conn. 1, 6 L.R.A. 829, 18 Am. St. Rep. 258, 18 Atl. 1027; *Williams v. Williams*, 20 Colo. 57, 37 Pac. 614. There is reason why we

should not expect the husband to unite in a suit against his father. And generally why should not a wife sue alone for such a wrong? Should the old unjust rule of the common law still prevail, allowing a husband to sue and pocket the proceeds? It is undoubted that a husband may sue for the seduction of his wife, and there is no reason why the wife should not have equal right to sue for seduction of her husband. The ground of action is the loss of consortium.

A second ground presented to sustain the demurrer is that the declaration should state that Cecil Gross is father of Ivan Gross, and allege that the defendant's act was not actuated by parental solicitude for the welfare of the son, and that it is not enough to charge malice, as in the case of a stranger, but the declaration must also negative good motive on the part of the father. We do not see that these points are tenable. It is enough to charge malice. This contention is rested on the law universally stated, that a parent is not liable for causing his child to separate from husband or wife, if the counsel given the child is such as he fairly and honestly considered to be called for by the life or health or welfare of his child. This is a favor shown to a parent, the law realizing the impulse of a father for an unfortunate child. To justify recovery, the plaintiff carries the burden of showing malice and of overcoming the presumption that he acted under the influence of natural affection, and for what he believed to be for the real good of the child. He may lawfully do so, if he honestly believes that the continuance of the marriage relation will injure health or mind, or destroy peace of mind, even though it turn out that he acted on mistaken premises or false information, and that the result of his intervention has been unfortunate. The rule is more liberal to the parent than to a stranger. *Multer v. Knibbs*, 193 Mass. 556, 9 L.R.A. (N.S.) 322, 79 N. E. 762, 9 Ann. Cas. 958. "In every suit of this character the prime inquiry is, from what motive did the father act? Was it malicious, or was it inspired by proper parental regard for the welfare and happiness of the child?" *Tucker v. Tucker*, 74 Miss. 93, 32 L.R.A. 623, 19 So. 955. The act must be shown to be malicious, "as all legal presumptions, in such cases, are that the parent will act only for the best interests of the child." *Reed v. Reed*, 6 Ind. App. 317, 51 Am. St. Rep. 310, 33 N. E. 638; *Brown v. Brown*, 124 N. C. 19, 70 Am. St. Rep. 574, 32 S. E. 320. In an early leading case on this subject (*Hutcheson v. Peck*, 5 Johns. 196), the great Chancellor Kent said: "If the

defendant did not stand in the relation of father to the plaintiff's wife, I should not, perhaps, be inclined to interfere with the verdict. But that relationship gives the case a new and peculiar interest. . . . A father's house is always open to his children, and, whether they be married or unmarried, it is still to them a refuge from evil, and a consolation in distress. Natural affection establishes and consecrates this asylum, . . . and, according to Lord Coke, it is 'nature's provision to assist, maintain, and console the child.' I should require, therefore, more proof to sustain the action against the father than against a stranger. It ought to appear, either that he detains the wife against her will, or that he entices her away from her husband from improper motives. Bad or unworthy motives cannot be presumed. They ought to be positively shown, or necessarily deduced from the facts and circumstances detailed. . . . The *quo animo* ought, then, in this case to have been made the test of inquiry and the rule of decision." Whilst such is the law, I think it sufficient to charge, as the declaration in this case does, that the defendant, "contriving wilfully, knowingly, wrongfully, unjustly, and maliciously intending to injure, prejudice, and aggrieve the plaintiff" in her enjoyment of the companionship, aid, society, comfort, protection, and happiness derived from her husband, did the acts.

There are a great many bills of exceptions and assignments of error. We have considerably gone over them. We have not found reversible error in evidence admitted or rejected. It is useless to detail it. Nor have we found error in instructions. As we have sought in this opinion to state the law applicable in such a case, we shall not incorporate the mass of instructions, as they do but reflect the law above stated. We think the court fairly and clearly presented the law suited to the case, leaving it to the jury to pass on the evidence. The court refused a peremptory instruction to the jury to find for the defendant, and overruled a motion for a new trial, and overruled a motion to render judgment for defendant *non obstante veredicto*. Thus we are called upon to say whether the verdict is warranted by the evidence. Here we state that this depends on a large volume of oral evidence, consisting of the conduct and action of the parties, letters, conversation, a great array of circumstances, and conflicting oral evidence. A verdict in such circumstance is well nigh conclusive. A verdict on evidence, not violating law, approved by a judge, is virtually above the touch of an appellate tribunal. On this principle, spoken by so many

precedents, this court acts in the present case. The jury found the action of the father malicious and without good motive. We are asked also to set aside the verdict for excessive damages. Here, again, we are confronted with that verdict. The law gives a jury in the matter of amount of damages in tort cases, where the damages are indeterminate, measured by no fixed measure or rule, almost unlimited discretion. Unless we can clearly find that bias, prejudice, passion, or corruption animated a jury, its estimate must stand. It is hard to fix such an imputation. So, in favor of the plaintiff stands that bulwark, the verdict, sometimes the bulwark of justice, sometimes of error and oppression. Speaking only for myself, I doubt whether the jury accorded to the defendant the favor allowed him by law as a parent in the distressing circumstances surrounding him. His son had been in a hospital from a three months' period of typhoid fever. He came from it weak in body, weak in mind, suffering from post typhoid insanity. He suffered from acute Bright's disease, and from orchitis, an ailment of the testicle. He had been nursed while in the hospital by the plaintiff, a young girl. A few days after leaving the hospital they were married, without knowledge of Ivan's family. Continuing ailing, he went for a few weeks' rest to visit a brother in Indiana. When he returned, he resumed work, clerking at his father's lumber plant, but unable to do the work. Leaving his wife at his father's home in Randolph county, he went to Pennsylvania to visit sisters of a former wife, who kept his three children by that wife; and while there was visited by his father; and while there he wrote his wife that the marriage was void, that she had taken advantage of him while weak in body and mind, and allured him into a marriage, and notified her of cessation of marriage relations. The father was in far off Oregon when this letter was written. No doubt the jury had the right to say that the father assented to this absence, or advised it. He knew of the son's condition. Two physicians, the hospital physician and one in Pennsylvania, as well as other persons, had told the father that continuance of married relations would either retard the son's recovery, or permanently ruin body and mind. I doubt whether the jury gave Gross the right of a father. I doubt whether the proof does overcome the presumption of law that a parent acts under such conditions honestly, with good faith, moved by parental love. I doubt whether the evidence comes up to the standard fixed by law. "The measure of proof must be exceedingly high." *Beisel v. Ger-* 39 L.R.A. (N.S.)

lach, 221 Pa. 232, 18 L.R.A. (N.S.) 516, 70 Atl. 721. Speaking again for myself, it seems to me that the damages found are heavy, almost confiscatory. If the defendant had murderously slain the plaintiff, her father could not have recovered beyond \$10,000. Under the circumstances, and there are those mitigating, I would say that the verdict is heavy. If on the jury, I would not have found it; but there it is. We are led to affirm the judgment.

Petition for rehearing denied March 12, 1912.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA, Appt.,
v.
R. F. RICE.

(158 N. C. 635, 74 S. E. 582.)

Municipal corporations — extraterritorial jurisdiction — form of government.

1. Statutory authority to exercise police power over territory outside their corporate limits is applicable to municipal corporations which are under commission form of government with initiative, referendum, and recall.

Same — forbidding keeping of hogs — authority.

2. Statutory authority to make rules for the preservation of health includes power to forbid the keeping of hogs within the territory over which the municipal authority has jurisdiction.

(Walker and Allen, JJ., dissent.)

(April 10, 1912.)

Note. — Power of municipality to prohibit keeping of live stock.

As to the power of municipal corporation to prevent stock yards within city limits, see note to *Colton v. South Dakota Central Land Co.* 28 L.R.A. (N.S.) 122.

As to right of municipal corporation to prohibit the keeping, standing, or exhibition of stallions and jacks, see note to *State v. Iams*, 11 L.R.A. (N.S.) 736.

The question as to consent of neighbors as a condition of obtaining a license or permit to erect or conduct livery stables, etc., is included in the note on delegation of power as to licenses, franchises, and buildings in *St. Louis v. Russel*, 20 L.R.A. 721.

A stable for horses as a nuisance is the subject of a note to *Oehler v. Levi*, 17 L.R.A. (N.S.) 1025.

And as to dairies as a nuisance, see subdivision 9, in the note to *Ex parte Lacey*, 38 L.R.A. 640.

STATE V. RICE, holding an ordinance pro-

APPEAL by the State from a judgment of the Superior Court for Guilford County granting defendant's motion, upon a trial in the Municipal Court, to quash a warrant for his arrest for the violation of a municipal ordinance forbidding the keeping of hogs within certain territory. Reversed.

The facts are stated in the opinion.

Messrs. T. W. Bickett, Attorney General, and A. Wayland Cooke, for the state:

It is entirely competent for the legislature to confer power to pass ordinances which will operate beyond the corporate boundaries of municipalities, for the purpose of suppressing or preventing nuisances which affect the inhabitants of the corporation, and for preserving the public health.

hibiting *in toto* the keeping of any hog in the town valid and reasonable as within the statutory power conferred upon the town to make rules for the preservation of health, is in entire harmony with *Darlington v. Ward*, 38 L.R.A. 332, where the earlier cases dealing with the validity of an ordinance forbidding the keeping of animals within the city limits are collected in a subdivision of that note.

So, in *Brunson v. Youmans*, 76 S. E. 128, 56 S. E. 651, which is set out in *STATE v. RICE*, it was said: "We are unable to see how the testimony which was only designed to show the condition of other lots than that of defendant could be a material circumstance in determining whether the town . . . had the power under statute and constitutional law to forbid the keeping of hogs within the corporate limits within 125 yards of a dwelling house in which persons lived, and provide punishment therefor. Whether such particular lots were large or small, low or high, sand or clay, drained or undrained, wooded or clear, cultivated or uncultivated, clean or unclean, would constitute no test of the power of the municipality to pass the ordinance in question."

An ordinance of a municipal corporation which declared that "no hogs shall be permitted to remain within the corporate limits. . . between the 1st of April and the 1st of October" is not, upon its face, so unreasonable as that it would be the duty of the courts to declare it void. *Smith v. Collier*, 118 Ga. 306, 45 S. E. 417.

Under legislative authority to define and abate nuisances a municipal corporation may forbid the keeping of hogs in a pen within the corporate limits and within 200 feet of any street or alley, and such regulation will not be declared to be unreasonable by the courts. *Miller v. Syracuse*, 168 Ind. 230, 8 L.R.A.(N.S.) 471, 120 Am. St. Rep. 367, 80 N. E. 411.

But in *Comfort v. Kosciusko*, 88 Miss. 611, 41 So. 268, 9 Ann. Cas. 178, it was said: "Section 2928 of the Annotated Code of 1892 empowers municipalities to suppress hogpens. It also gives the power to make regulations to secure the general
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McQuillin, Mun. Corp. 1904, p. 36 § 26; 28 Cyc. 703; *Gower v. Agee*, 128 Mo. App. 427, 107 S. W. 999; *Chicago Packing & Provision Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545; *Malone v. Williams*, 118 Tenn. 420, 121 Am. St. Rep. 1002, 103 S. W. 798; *State v. Hord*, 122 N. C. 1094, 65 Am. St. Rep. 743, 29 S. E. 952; *Darlington v. Ward*, 48 S. C. 570, 38 L.R.A. 326, 26 S. E. 906; *Brunson v. Youmans*, 76 S. C. 128, 56 S. E. 651; *Quincy v. Kennard*, 151 Mass. 563, 24 N. E. 860; *Smith v. Collier*, 118 Ga. 306, 45 S. E. 417; *Ex parte Glass*, 49 Tex. Crim. Rep. 87, 90 S. W. 1108; *Skaggs v. Martinsville*, 140 Ind. 476, 33 L.R.A. 781, 49 Am. St. Rep. 209, 39 N. E. 241.

health of municipalities, and to prevent, remove, and abate nuisances. The keeping of hogs in a municipality, or the erection of hogpens, may or may not be a nuisance, and it is only when they are such that a municipality has the power to interpose and suppress hogpens or prevent the keeping of hogs in a municipality. An ordinance which provides generally that hogs may not be kept in a municipality, without reference to whether they are or are not a nuisance, is too broad and sweeping in its provisions, and cannot be upheld. When the keeping of hogs within a municipality becomes a nuisance, no matter where they may be kept therein, it not only has the power, but it is its duty, to abate the same. In the case of *Darlington v. Ward*, 48 S. C. 570, 38 L.R.A. 326, 26 S. E. 906, cited by counsel, we think the court went too far. In truth, this case seems to stand by itself in the extent to which it has gone in upholding municipalities in the right to prohibit the keeping of hogs within its borders."

And in *Com. v. Rawson*, 183 Mass. 491, 67 N. E. 605, it was held that a town is not authorized to adopt a bill prohibiting the keeping of more than five swine, exclusive of their offspring less than five months old, which will prohibit one from conducting a swine business, so long as his premises are clean and the premises conducted in the best possible manner.

Likewise, in *Phillips v. Denver*, 19 Colo. 179, 41 Am. St. Rep. 230, 34 Pac. 902, it was held that provisions of a charter granting power to a city to regulate lawful occupations and business places, as well as to regulate and prevent the carrying on of business dangerous or detrimental to public health, and to declare, prevent, or abate nuisances, conferred no authority upon a city council to pass an ordinance prohibiting the location of a livery stable "in any block in which a school building is situated, or in any block opposite to a block in which a school building is situated," irrespective of the question whether the stable is well constructed, well regulated, and well conducted, and without specifying

Messrs. Sapp & Williams, for appellee:

The commissioners of Greensboro cannot declare that to be a nuisance which is not so in fact, and they have no right to destroy property or interfere with individual rights improperly under the pretense of preventing or removing nuisances.

State v. Webber, 107 N. C. 962, 22 Am. St. Rep. 920, 12 S. E. 598; State v. Horne, 115 N. C. 739, 20 S. E. 443; State v. Ray, 131 N. C. 814, 60 L.R.A. 634, 92 Am. St. Rep. 795, 42 S. E. 960; Ex parte Patterson, 42 Tex. Crim. Rep. 256, 51 L.R.A. 654, 58 S. W. 1011; State v. Taft, 118 N. C. 1190, 32 L.R.A. 122, 54 Am. St. Rep. 768, 23 S. E. 970; State v. Whitlock, 149 N. C. 542, 128 Am. St. Rep. 670, 63 S. E. 123, 16 Ann. Cas. 765; Re Sam Kee, 31 Fed. 680; St. Louis v. Edward Heitzberg Packing & Provision Co. 141 Mo. 375, 39 L.R.A. 551, 64 Am. St. Rep. 516, 42 S. W. 954; Evansville v. Miller, 146 Ind. 613, 38 L.R.A. 161, 45 N. E. 1054; Ex parte O'Leary, 65 Miss. 80, 7 Am. St. Rep. 640, 3 So. 144; State v. Hill, 126 N. C. 1144, 50 L.R.A. 473, 36 S. E. 326.

A municipal corporation is, as a general rule, restricted to its corporate limits in the exercise of its corporate powers.

Donable v. Harrisonburg (Switzer v. Har-

risonburg) 104 Va. 533, 2 L.R.A.(N.S.) 910, 113 Am. St. Rep. 1056, 52 S. E. 174, 7 Ann. Cas. 519.

Clark, Ch. J., delivered the opinion of the court:

The defendant, who lives outside the corporate limits of Greensboro, was indicted in municipal court of the city of Greensboro for unlawfully and wilfully "keeping and running hogs in a lot within $\frac{1}{4}$ of a mile of the corporate limits of the city of Greensboro," in violation of the city ordinance, which is set out, and which provides: "It shall be unlawful for any person, firm, or corporation to keep any hogs or pigs within the corporate limits of the city of Greensboro or within $\frac{1}{4}$ of a mile of said limits." On appeal from the municipal court the warrant was quashed and the state appealed.

The general assembly provides in the charter of Greensboro (Private Laws 1911, chap. 2, § 27) that all ordinances of the city of Greensboro enacted "in the exercise of police powers given to it for sanitary purposes or for the protection of the property of the city, shall apply to the territory outside of said city limits, within 1 mile of same in all directions." The legis-

any definite distance from school buildings within which a livery stable is prohibited. The court said: "The ordinance in question must, therefore, be subjected to the test of reasonableness; and the particular provision under consideration cannot stand, in any event, unless its adoption was a reasonable exercise of the incidental or general grants of power contained in the charter. . . . The ordinance in question is not directed against livery stables improperly kept or used, but against all livery stables within prescribed limits. There is nothing to indicate that there was anything improper in the construction, keeping, or use of defendant's stable. The sole contention on the part of the city, therefore, is confined to the single fact, that defendant had located and conducted his stable within the limits prohibited by the ordinance,—that is, in a block opposite to a block in which a school building was situated. The ordinance, however, does not undertake to declare that a livery stable conducted within the interdicted limits shall be deemed a nuisance *per se*. . . . An ordinance so uncertain, so indefinite, so unsuitable, and unsatisfactory to accomplish the desired object, cannot be regarded as reasonable; and so cannot be upheld under the authority supposed to be granted by the city charter."

Although in Caskey v. Edwards, 128 Mo. App. 237, 107 S. W. 37, the defendant, before the passage of an ordinance prohibiting the location, erection, or construction of a livery stable within 200

feet of a residence, had maintained a stable on land within the prohibited distance, it was held that she could not, under the pretense of repairing the old building, erect a new structure more than twice the size of the old and covering more than twice the area of the original.

In State v. Hord, 122 N. C. 1093, 65 Am. St. Rep. 743, 29 S. E. 952, which is set out in STATE v. RICE, it was held that the ordinance was not void because of discrimination in that it did not also prohibit one from keeping a hogpen within 100 yards of his own house. "It is an anomaly," said Mr. Justice Clark, "that the defendant, who has disobeyed the ordinance forbidding him to commit a nuisance upon the public, should be complaining that the town did not go further and forbid him being a nuisance to himself. He could refrain from that without official help."

And a municipality which has voluntarily passed under the dominion of act No. 136 of 1898 cannot, under any general or implied authority, "suppress" or "locate" at pleasure a lawful business which is not a nuisance *per se*, where the act confers authority, and specific terms, merely to prescribe regulations whereby the establishment in which such business is conducted shall be kept clean and in good order. Crowley v. West, 52 La. Ann. 526, 47 L.R.A. 652, 78 Am. St. Rep. 355, 27 So. 53, wherein it was held that it is incompetent for such municipality to enforce an ordinance, whether before or after its acceptance

lature has unquestioned authority to confer upon the town authorities jurisdiction, for sanitary or police purposes, of territory beyond the city limits. 28 Cyc. 704; 20 Am. & Eng. Enc. Law, 1148, and cases there cited. This is sometimes conferred for police protection, but oftener for the preservation of public health. Power is often granted to the town authorities to police the watershed beyond corporate limits, so that the city may have pure water; also to insure cleanliness, to protect the sewerage, and for many like purposes to protect the health of those living within the city. Among the most notable cases are *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *Chicago Packing & Provision Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545; *Emerich v. Indianapolis*, 118 Ind. 279, 20 N. E. 795; *Albia v. O'Harra*, 64 Iowa, 297, 20 N. W. 444; *State ex rel. Humphrey v. Franklin*, 40 Kan. 410, 19 Pac. 801; *Jordan v. Evansville*, 163 Ind. 512, 67 L.R.A. 613, 72 N. E. 544, 2 Ann. Cas. 96. There are many other cases to like effect, and none to the contrary. Among the late cases are *Gower v. Agee*, 128 Mo. App. 427, 107 S. W. 999; *Ex parte Glass*, 49 Tex. Crim. Rep. 87, 90 S. W. 1108. In this last case the court sustained an ordinance forbidding

the keeping of hogs within 1 mile of the courthouse. The court held that this was a matter within the discretion of the town commissioners, though it permitted hogs to be kept at places within town limits beyond that distance from the courthouse. In 2 Abbott, Mun. Corp. § 562, it is said: "It is, of course within the power of the state legislature to authorize . . . [a town] to pass ordinances . . . which shall have a restricted effect beyond their limits." In *Chicago Packing & Provision Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545, the court said: "Persons then desiring to engage in particular avocations in or near to cities must submit to have their pursuits limited and controlled, at least so far as the preservation of health and to a reasonable extent the comfort of the people may require. . . . The lives, the health, and the comfort of the people are the highest [claim], and demand the first and greatest protection. . . . They do have the right to be protected against all kinds of business that endanger life and health, and from intolerable nuisances that destroy their comfort. To accomplish this purpose, the power was conferred upon cities and villages to regulate these establishments for the distance of 1 mile be-

of the act of 1898, the effect of which is to permit four livery stables to be maintained in its business center, while the fifth stable and all others which may be hereafter established are to be relegated and confined to a designated locality remote from such center. It was said: "The proposition that the defendant can be thus discriminated against, and that his four competitors in business can be thus secured the monopoly, in perpetuity, of the livery-stable business in . . . cannot be seriously entertained." And see *Billings v. Cook*, 35 Mont. 95, 119 Am. St. Rep. 845, 85 Pac. 656, a very similar case, to the same effect.

In *People v. Davis*, 78 App. Div. 570, 79 N. Y. Supp. 747, it was held that § 799 of the New York Sanitary Code providing that "no live chickens . . . or other fowls shall be brought into or kept . . . in any yard . . . within the built-up portions of the city of New York, without a special permit, in writing, from the department of health, as subject to the conditions thereof," is not to be invalidated by the fact that at the time of its adoption no lawful authority existed in the health department to grant any such permit; especially where it appears that it has been ratified and confirmed by repeated legislative enactments. The court said: "That the health authorities of the city of New York have, for a long period of time, exercised and regulated by ordinance the right of granting permits of the character now questioned, is praec-

tically undisputable. While it is probable that no specific legislative authority exists for the regulation of the keeping and killing of poultry in the city of New York by limiting the act to such times and places as the health department may see fit to sanction by permit, the whole tenor and scope of the laws applicable to that city, and the history of the legislation upon the general subject of the public health, clearly indicate that such is the meaning and intent of the law; and that the power has been and is conferred upon the local authorities of confining the keeping and slaughtering of poultry within the thickly settled sections, to such places as the health officials, in the exercise of their judgment and discretion, may find to be possessed of sanitary adjuncts and surroundings consistent with a due regard for the public health and cleanliness. This view results from a consideration of the more extended powers conferred upon the department in the city from time to time, the general practice of issuing permits in this and other cognate matters which has existed for a long period with the legislative sanction, the express recognition by the legislature of the binding authority of the ordinances which provide for such permits, and the creation and growth of the Sanitary Code, also providing for such permits in numerous cases, adopted under the legislative authority, and from time to time ratified and confirmed by legislative enactment."

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yond their corporate limits, even if that should lap over and embrace a portion of territory included in the boundaries of another municipality. Each, to that extent, has the right to protect its inhabitants, and such establishments, located in such territory, are subject to the police power of both corporate bodies." The ordinance there sustained was for the regulation of the great packing houses located outside of Chicago, and which had been licensed by a neighboring town.

The argument that the town of Greensboro is governed under the commission form of government with "initiative, referendum, and recall," and therefore that its municipal authorities should have no control outside the city limits, is wanting in application. The question is not how the city authorities are chosen, but what power the legislature has conferred upon them over adjacent districts beyond the city limits, in which may be set up establishments, business, or other things which would be injurious to the health of its people. There is nothing in our Constitution which restricts the legislature in the exercise of its police power from conferring upon the municipal authorities of Greensboro such power. Indeed, the municipal court of Greensboro is given jurisdiction outside the city limits, and such jurisdiction has been affirmed at this term in *State v. Brown*, — N. C. —, 74 S. E. 580; citing *State v. Shine*, 149 N. C. 480, 62 S. E. 1080; *State v. Baskerville*, 141 N. C. 811, 53 S. E. 742, and divers other cases.

The city therefore had the same power to pass this ordinance and make it applicable to a district within a quarter of a mile outside the city limits as it had to prohibit "keeping any hogs or pigs within the corporate limits." The question, therefore, is whether it could pass such ordinance applicable within the city limits. In *State v. Hord*, 122 N. C. 1093, 65 Am. St. Rep. 743, 29 S. E. 952, the court held that the town authorities could forbid keeping a hogpen within the city limits. In that case the prohibition was against keeping a hogpen within 100 yards of the residence of another, which was, of course, practically an entire prohibition. In 2 Dillon, Mun. Corp. [§ 693] it is said that "the keeping of hogs and swine is a generally recognized subject of regulation by municipal ordinance." In *Darlington v. Ward*, 48 S. C. 570, 38 L.R.A. 326, 26 S. E. 906, it is said: "An ordinance cannot be held invalid because it is unreasonable when the power to pass ordinances on the subject is conferred by a constitutional statute." It is further held: "An ordinance making it unlawful to keep any hog within the corporate limits of a town

cannot be held void." In *Skaggs v. Martinsville*, 140 Ind. 476, 33 L.R.A. 781, 49 Am. St. Rep. 209, 39 N. E. 241, the court held that it would not "inquire as to the reasonableness of an ordinance, when the power exists to pass it." The same was held in the late case of *Brunson v. Youmans*, 76 S. C. 128, 56 S. E. 851, in which the court held valid a town ordinance which made it unlawful to keep any hogs within the town, —citing *Darlington v. Ward*, supra. Ordinances to prohibit hogs within a town have also been sustained in *Quincy v. Kennard*, 151 Mass. 563, 24 N. E. 860; *Smith v. Collier*, 118 Ga. 306, 45 S. E. 417; *Ex parte Glass*, 49 Tex. Crim. Rep. 87, 90 S. W. 1108.

Even if this court were of opinion that the ordinance is not sound public policy and might work hardship, we could not declare it invalid. The legislature has conferred jurisdiction upon the town commissioners "to make such rules and regulations, not inconsistent with the Constitution and laws of the state, for the preservation of the health of the inhabitants of the city as to them may seem right." Pr. Laws 1911, chap. 2, § 17. An appeal in such case must be to the lawmaking power. *Red "C" Oil Mfg. Co. v. Board of Agriculture*, (1912) 222 U. S. 380, 56 L. ed. 240, 32 Sup. Ct. Rep. 152. But, as a matter of fact, there are some 20,000 people within the limits of the town of Greensboro, and they have a right to be protected against such matters as their local legislature may deem unsanitary. If that body is wrong, it will be influenced by their constituents to repeal or modify the ordinance. But the authority to make the ordinance, and to extend its limits, not to exceed 1 mile, beyond the city boundaries, has been conferred by the legislature. Of their own volition the city authorities made the ordinance applicable only to the extent of one quarter of a mile beyond the city boundaries. The language of the ordinance forbids "keeping any hogs or pigs within the corporate limits of the city of Greensboro or within $\frac{1}{4}$ of a mile of said limits." The warrant charges that the defendant "did unlawfully and wilfully keep and run hogs in a lot within $\frac{1}{4}$ of a mile of the corporate limits of the city of Greensboro." It therefore comes within the terms of the ordinance. It does not appear what size the lot was, nor is it material. The ordinance prohibits "keeping hogs" within the limits named. In *Darlington v. Ward*, 48 S. C. 570, 38 L.R.A. 326, 26 S. E. 906, there was a single hog kept within a 2-acre lot. The court held that the question was not whether the keeping of that particular hog was injurious to the health of the town, but whether the town had authority to prohibit the "keeping of hogs" within

the limits prescribed, and whether the defendant had violated that ordinance. The court said that the nature and condition of the premises were immaterial, and that "the power of the town council to preserve the public health cannot be measured by the size of Ward's lot," nor by the cleanly condition in which he kept his premises. The court further said: "Courts 'cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking power.' No act of a legislature can be declared void or unconstitutional, unless it conflicts with some provision of the Constitution. Nor can any ordinance of a municipal corporation within the power conferred by the legislature, and not in conflict with the laws and Constitution of the state, be impeached in a court for unreasonableness. A critical examination of cases holding police regulations void, because unreasonable, will disclose that the attempted police regulations violated some constitutional guaranty. The right asserted by some courts to declare municipal ordinances invalid because unreasonable is limited to ordinances passed under the implied or incidental powers of the municipality." The greatest advance of the age probably is towards the preservation of the public health, and in measures for the prevention of disease. The legislature conferred power upon the municipal authorities of Greensboro to adopt sanitary regulations. In passing this ordinance, they acted within this authority, and doubtless upon the advice of the sanitary board. The necessity and the benefit of sanitation cannot be better shown than by a statement which recently appeared in a government publication, that in Cuba, a tropical country, under the impetus given by United States supervision, there is an expenditure now of 46 cents *per capita* for better sanitation and an annual mortality of 15 per 1,000 of the population, while in North Carolina, in naturally a healthy climate, there is an expenditure of only 1 cent *per capita* and a mortality of 18.3 per 1,000 of population, or 22 per cent greater. In view of such fact the courts will be slow to interfere with sanitary regulations which have been adopted by city authorities, presumably in accordance with the wishes of the most intelligent and advanced portion of its population, even if we possessed the power to interfere. It is not our province to review the action of boards of sanitation, within the limits of their powers. The judgment quashing the warrant is reversed.

Walker and Allen, JJ., dissenting.
39 L.R.A. (N.S.)

WEST VIRGINIA SUPREME COURT OF APPEALS.

K. E. HANGER et al., Trading as Hanger Brothers, Plffs. in Err.,
v.

CHESAPEAKE & OHIO RAILROAD COMPANY.

(— W. Va. —, 73 S. E. 713.)

Railroad — negligence — headlights.

1. It is negligence *per se* for a railroad company, in the nighttime, to run an engine backwards over its main track without a proper headlight on the tender sufficient to enable the enginemen, in the exercise of reasonable and ordinary care, to see ahead a reasonable distance, so as to avoid doing injury to dumb animals astray upon the track.

New trial — railroads — negligence absence of headlight.

2. Where a railroad company, in so operating an engine in the nighttime, runs over and kills a horse astray upon its track, and the evidence is such that the jury may reasonably infer that had there been a proper headlight on the tender, in front of the moving train, the enginemen, in the exercise of due and reasonable care, would probably have discovered the horse on the track in time to avoid injuring him, the question of negligence is one of mixed law and fact for the jury; and the court should not, for want of sufficient evidence to support it, set aside a verdict in favor of the owner of the horse, and award defendant a new trial.

(January 23, 1912.)

ERROR to the Circuit Court for Fayette County to review a judgment reversing a judgment of a Justice of the Peace in plaintiffs' favor in an action brought to recover damages for the killing of plaintiffs' horse alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Osenton & Horan, for plaintiffs in error:

It is incumbent upon a railroad company to use ordinary care to prevent injuries to animals that may come upon the railroad

Headnotes by MILLER, J.

Note. — Liability for killing or injuring live stock on track because of lack of proper headlight.

By the great weight of authority it is the duty of those in charge of locomotives to keep a lookout for live stock on or near the track, in order that they may prevent injury thereto. *Harris v. Missouri, K. & T. R. Co.* 24 L.R.A. (N.S.) 858, and note.

And the rule adopted by the few cases which have passed upon the question as to the liability of a railroad company for the killing of live stock due to insufficient headlight is that, to free the railroad company

track, and to use ordinary diligence to discover animals on the track, and to keep a careful lookout for stock on the track.

Blaine v. Chesapeake & O. R. Co. 9 W. Va. 252; *Baylor v. Baltimore & O. R. Co.* 9 W. Va. 270; *Coyle v. Baltimore & O. R. Co.* 11 W. Va. 94; *Hawker v. Baltimore & O. R. Co.* 15 W. Va. 628, 36 Am. Rep. 825; *Washington v. Baltimore & O. R. Co.* 17 W. Va. 190; *Layne v. Ohio River R. Co.* 35 W. Va. 438, 14 S. E. 123; 3 *Elliot*, Railroads, §§ 1205, 1206; *Eddy v. Evans*, 7 C. C. A. 129, 12 U. S. App. 697, 58 Fed. 151; 2 *Hutchinson*, Carr. note 1088, § 952; 3 *Wood*, Railroads, pp. 1847-1851; *Alabama G. S. R. Co. v. Moody*, 92 Ala. 280, 9 So. 238.

Messrs. Simms, Enslow, Fitzpatrick, & Baker, for defendant in error:

The authorities relied on by defendant in error are cited in the opinion.

Miller, J., delivered the opinion of the court:

Plaintiffs seek reversal of the judgment below, on appeal from the judgment of a justice, setting aside the verdict of the jury in their favor, for \$175, and awarding defendant a new trial.

The action begun before a justice was for damages for alleged negligence of defendant in killing plaintiffs' horse.

One of the questions presented in the court below, on the evidence, and by instructions to the jury proposed by defendant, and in the petition filed in this court, is whether the alleged negligence, if any, in killing the horse, was that of the de-

fendant or of the White Oak Railway Company, operating the engine and cars that killed the horse.

The evidence shows that the railway track where the killing occurred, the engine, and at least one of the cars, belonged to the defendant company, and that the movement of the train over said track was controlled by the train despatcher of defendant company, at Hinton. There is evidence that after the horse was killed servants of the defendant company took charge of its carcass, and buried it, and that when other animals had been killed on the same branch the defendant settled the damages. The point does not seem to be relied on in argument here, and we think we may properly regard it as having been abandoned.

The main question presented is whether it is negligence *per se* for a railroad company, in the nighttime, to run an engine backwards over its main track, as was done in this case, without a proper headlight on the tender, sufficient to enable the engineers, in the exercise of reasonable and ordinary care, to see ahead a reasonable distance, and to avoid doing injury to dumb animals astray upon the track? It is conceded that the horse was not killed at a public crossing, and that it was a trespasser on the defendant's right of way, and that defendant owed it no duty except to observe ordinary care to not wantonly and wilfully run it down and kill it. That this measure of duty is imposed by law upon a railway company with respect to stock estray upon its private right of way is fully established by prior decisions of this

from liability on that ground, it must maintain headlights having sufficient power to enable the engineer to see stock upon the track for a sufficient distance to enable him to stop the engine before colliding with it.

Thus in *Alabama G. S. R. Co. v. Jones*, 71 Ala. 487, a charge was sustained which in effect permitted the jury to find defendant negligent if it failed to provide a headlight of sufficient power to enable those in charge of the engine to see objects on the track, on a clear night, at a distance within which a collision could be avoided.

In *Alabama G. S. R. Co. v. Moody*, 92 Ala. 279, 9 So. 238, it is held that whether the headlight reflected its light far enough to enable the engineer to discover obstruction the size of the stock killed, in time to avoid a collision therewith, being a material question, testimony that headlights on other engines, at other times, on the same road, showed objects at a greater distance under similar circumstances, was admissible to show either that the headlight on that particular engine was defective, or that the engineer failed to keep a proper lookout.

In *Western R. Co. v. Mitchell*, 148 Ala. 35, 41 So. 427, the court says that the general rule is well settled in Alabama that it is

per se negligence, as matter of law, for a railroad company to run its trains in the nighttime with a headlight not having sufficient capacity to cast light upon the track so that the engineer may see obstructions for the distance within which the train may be stopped.

And to the same effect is *Western R. Co. v. Stone*, 145 Ala. 663, 39 So. 723.

In *Jonesboro, L. C. & E. R. Co. v. Guest*, 81 Ark. 267, 97 S. W. 71, evidence that the headlight was so dim that objects could not be seen more than 50 yards ahead of the engine, and that there was every opportunity for the engineer to have seen the horses in time to have avoided striking them had the headlight been in proper condition, was held to be sufficient to sustain a verdict for the plaintiff.

But if the engine is equipped with a proper headlight which becomes obscured from natural causes, such as rain, fog, or snow, the company is not obliged to cease running its trains or to run them at the peril of being liable for the killing of any live stock because of the obscured headlight. *Louisville & N. R. Co. v. Melton*, 2 Lea, 262; *Alabama G. S. R. Co. v. Jones*, supra.

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court. *Layne v. Ohio River R. Co.* 35 W. Va. 439, 14 S. E. 123, and the cases cited and reviewed therein.

This and other cases, with no less exactness, we think, require of a railroad company and its servants operating its trains, that they use like ordinary care in providing the means of discovering such stock on its track. Does this rule require of a railroad company operating trains at night, to equip its engines or cars with reasonably sufficient headlights and other appliances necessary to avoid doing injury to trespassing animals? It would clearly be negligence giving a passenger injured thereby right of action. But will it give right of action to the owner of animals killed by such negligence? By defendant's instruction number 3, given, the court below, in substance, told the jury that the railway company was not negligent in not having a headlight on the engine which ran over and killed plaintiffs' horse, unless the killing took place at a public crossing. As it was not killed at a public crossing the practical effect of the instruction, therefore, was to tell the jury that defendant was not negligent, and not liable. The jury evidently did not regard the instruction, for they found a verdict for plaintiffs notwithstanding the instruction.

In discussing the rule requiring of a railway company ordinary care and precaution to discover animals on its track and right of way, 3 *Elliott on Railroads*, § 1205, supported by numerous decisions cited, says: "It is held to be the duty of the company to use care to equip its locomotives with such headlights as would render a lookout effective." And in § 1206 this writer says: "The company is bound to use ordinary care to prevent injuries to animals, and where ordinary care requires the use of signals the company may be guilty of negligence in omitting them although they are not required by the statute." In *Layne v. Ohio River R. Co.* supra, it is also held that the servants of a railway company are "equally bound to adopt the ordinary precaution to discover danger as to avoid its consequences after it becomes known." Our case of *Kirk v. Norfolk & W. R. Co.* 41 W. Va. 722, 32 L.R.A. 416, 56 Am. St. Rep. 899, 24 S. E. 839, says: "If the servants of the railroad company in charge of a train, by exercise of ordinary care, can see and save domestic animals which have wandered on the railroad, it is their duty to do so; but this duty must be exercised consistently with the paramount duties they owe to the passengers on the train under their charge." What rule of reason or policy then could excuse a railway company, operating trains at night,

from equipping its engines with proper headlights to aid its servants in the performance of their duty? If it is the duty of its servants, by the exercise of ordinary care, to see and endeavor to save such animals, estray upon its track, there must certainly be a corresponding duty on the part of a railway company to use ordinary care in providing its trains with sufficient headlights in aid thereof. The proposition seems so fundamental and self-evident as not to require further elaboration. It is sustained not only by the authorities already referred to, but by 33 Cyc. 1218, and cases cited in note 57.

As opposed to this rule defendant's counsel cite and rely on *Melton v. Chesapeake & O. R. Co.* 64 W. Va. 168, 61 S. E. 39, point 2 of the syllabus, saying: "Signals or lights or watchman are not required on a backing train, elsewhere than at public crossings, to warn trespassers using the track for their own convenience as a foot-path." Does this rule, applicable to persons using the track, affirmed in this and in the prior decisions cited, apply also to dumb animals? In *Melton v. Chesapeake & O. R. Co.* the fact is emphasized that it was not claimed that the trainmen saw or could have seen Myers, the deceased, before hitting him with the backing engine. In *Huff v. Chesapeake & O. R. Co.* 48 W. Va. 45, 35 S. E. 866, the same rule was applied to a trespasser in the yards of the defendant company. It is there held that, unless guilty of wanton or gross negligence, a railroad company cannot be held liable in damages to persons so trespassing. In the present case the horse was not injured by a backing engine and tender, in the yards of the defendant, but outside, on the main track, and by an engine being operated in that way, in hauling a regular passenger train, and it was a dumb animal, not a live sentient person, of mature years, that was killed. Our decisions hold, with respect to dumb animals, as to helpless, insane, or infant persons, that a railroad company owes a duty to the owner to keep a careful lookout ahead to discover them upon the track and to use ordinary care to avoid injuring them. Besides the cases already cited, see cases cited in 11 Cyc. Dig. Va. & W. Va. Reports, pp. 586-599.

With respect to persons of mature years, possessed of all their faculties, a railroad company and its trainmen have the right to assume, unless circumstances indicate the contrary, that they will hear the approaching train, and get out of the way in time to avoid injury. Not so with respect to dumb animals and helpless persons. And, as we have already said, this duty must also in-

clude the corresponding duty to provide and keep in order sufficient headlights.

Our conclusion, therefore, is that a railroad company, in operating its trains in the nighttime over its main tracks, owes a duty to the owner of domestic animals to provide and keep installed and in order sufficient headlights to enable its trainmen, by the exercise of reasonable and ordinary care, to see them on the track in time to avoid injuring them, and that it is negligence to omit this duty, for which an action will lie, if its omission be the proximate cause of the injury.

If such be the law the remaining question is, did the court err in setting aside the verdict and awarding defendant a new trial? The evidence shows that there was a headlight on the tender of the backing engine, but that it had been broken, was out of repair, and that in place of having it repaired, the trainmen were using an ordinary train lantern hung out on the drawhead of the tender. The evidence is that this lantern did not enable the trainmen to see ahead for more than from 12 to 15 feet, while with a proper headlight they could have seen about a hundred yards ahead, and that the track was straight for some 400 or 500 yards back from where the horse was struck, with nothing intervening except the darkness of the night to obstruct their view; and that the distance from the point where the horse apparently went upon the track to the place where it was killed is about 175 feet, a bridge or culvert intervening, showing evidences of the horse's foot having slipped through the ties on the bridge. The trainmen say they were looking ahead, but did not see the horse. At what rate the train was traveling and within what distance it could have been stopped is not clearly shown by the evidence. Defendant's counsel claim in their brief that the train was moving at about the rate of 12 miles an hour. We know from the evidence that the train was moving backwards on a dark night with a light in front that would not enable the trainmen to see more than 12 to 15 feet ahead, and we may safely conclude that they were not going at a very great rate of speed.

On this evidence was the court below justified in setting aside the verdict? Defendant's counsel rely on *Toudy v. Norfolk & W. R. Co.* 38 W. Va. 694, 18 S. E. 896; *Maynard v. Norfolk & W. R. Co.* 40 W. Va. 332, 21 S. E. 733; *Lovejoy v. Chesapeake & O. R. Co.* 41 W. Va. 693, 24 S. E. 599; and *Kirk v. Norfolk & W. R. Co.* 41 W. Va. 722, 32 L.R.A. 416, 56 Am. St. Rep. 899, 24 S. E. 639, and characterize the killing of the horse in this case as one of inevitable accident, for which under those decisions L.R.A. (N.S.)

sions, defendant cannot be held liable. They say that the horse was killed because it was a very dark, rainy night, and the vision of the trainmen obscured thereby, and by the fact that the lantern on the tender did not throw the light far enough ahead to enable them to see the horse in time to avoid hitting, and killing it. This proposition, as we see, excludes the idea of negligence in failing to provide a suitable headlight, which we hold to be negligence *per se*. Both engineer and fireman swear they were looking ahead at the time the horse was evidently struck by their train, but did not see him, and to that extent performing their duty to the owner of the horse. Why did they not see him on a straight track of some 400 or 500 yards in time to avoid killing him? The jury might justly have inferred that it was because of the absence of a sufficient headlight. The question was one of mixed law and fact peculiarly within the province of the jury, and not one for the court, independently of the jury, to decide. As was said by Judge Snyder in *Johnson v. Baltimore & O. R. Co.* 25 W. Va. 570, apropos to this discussion: "If the engineer had discovered them [the horses] promptly as he should and would have done had he exercised due care, he could, by blowing his whistle and stopping his train, have, perhaps, prevented any collision and saved the horses. This was at least a probability for the consideration of the jury." So we may say in the case, if the engine had been provided with a sufficient headlight, the trainmen, who claim to have been looking ahead, as it was their duty to do, consistent with their paramount duty to the passengers, would in all probability have seen the horse of the plaintiff in time to have avoided killing him. At all events the probability was one for the consideration of the jury, and which they evidently resolved, as they had the right to do, in favor of the plaintiff.

Our opinion, therefore, is to reverse the judgment below, and enter judgment here in favor of plaintiff for the amount of damages as found by the verdict of the jury, with costs incurred here and in the court below, and it will be so ordered.

CONNECTICUT SUPREME COURT OF ERRORS.

TERESA TOMBARI

v.

JOHN P. CONNORS, Appt.

(85 Conn. 231, 82 Atl. 640.)

Master and servant — druggist — liability for negligence of clerk.

1. A druggist is not relieved from liability

ity for injuries caused by the negligence of his clerk in compounding a prescription by the fact that the clerk is a licensed pharmacist.

Druggist — filling prescription — care required.

2. A druggist, in the filling of prescriptions, must exercise the highest practicable degree of prudence, thoughtfulness, and vigilance, and the most exact and reliable safeguards, consistent with the reasonable conduct of the business.

Same — illegible prescription — care required.

3. A druggist who reads the name of a drug called for by an illegible Latin prescription, as one which he knows in the quantity specified is likely to do great harm, is bound to take reasonable precautions to ascertain that his reading is right.

(March 7, 1912.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Hartford County in plaintiff's favor in an action brought to recover damages for in-

Note. — Does the fact that a drug clerk is a licensed pharmacist relieve his employer from liability for his negligence or lack of skill.

The decision in *TOMBARI v. CONNORS*, that a druggist cannot escape liability for injuries caused by the negligence of his clerk in compounding a prescription, by showing that the clerk is a licensed pharmacist, is sound, and is supported by the scant authority upon the point.

Thus, in *Burgess v. Sims Drug Co.* 114 Iowa, 275, 54 L.R.A. 364, 89 Am. St. Rep. 359, 86 N. W. 307, it was held that a druggist was not relieved from liability for injuries caused by a prescription negligently put up, by the fact that the negligence was that of a registered pharmacist employed by him, which class alone was allowed by statute to fill prescriptions. The court said: "The master who undertakes to perform a service is liable for the negligence of his servant in performing the service undertaken. This proposition is too elementary to require the citation of authorities. It is true that the Legislature has provided, as a police regulation for the protection of the public, that to one who is not a registered pharmacist shall fill prescriptions; but when the defendants undertook, as a part of their regular business, that the prescription should be filled, it was wholly immaterial to the customer, so far as defendants' liability was concerned, whether the prescription was filled by one of the defendants or by an employee."

And in *McCubbin v. Hastings*, 27 La. Ann. 713, where a drug clerk negligently made a mistake in compounding a prescription, it was held that the fact that the clerk was a competent druggist did not relieve his employer from liability for his negligence. The court said: "It may, however, L.R.A. (N.S.)

juries alleged to have been caused by the negligence of defendant's clerk. Affirmed.

The facts are stated in the opinion.

Mr. B. F. Gaffney, for appellant:

The clerk who compounded the prescription in question was a competent druggist of experience and good reputation.

Smith v. Hays, 23 Ill. App. 244.

A compounding pharmacist cannot, and is not obliged to, know all the different ailments for which different prescriptions are compounded; but he is to exercise such care as would be proportionate to the gravity of the injury that would result from want of such care.

2 Shearm. & Redf. Neg. § 691; *Beckwith v. Oatman*, 43 Hun, 265.

If the prescription of a physician is so illegibly written that a druggist, notwithstanding ordinary care, makes such a mistake in mixing the ingredients as to cause or hasten the death of the patient who partook of it, the druggist is not liable in damages.

McClardy v. Chandler, 3 Ohio Dec. Re-

be assumed that he was competent. The defendant's liability would be none the less certain. The defendant is himself represented as being a most competent druggist. If he had made the mistake, would his proficiency in his calling shield him? Or would it not rather aggravate the fault? Incompetency and carelessness—and such mistakes arise from one or the other of these causes—result in the same way. Either or both produce suffering and sometimes death. And can it be that if a physician should prescribe for his slightly ailing patient a small quantity of calomel and soda, and the druggist were to substitute arsenic for soda, that he would shield himself from the consequences which might result, by saying, if the prescription was compounded by himself, that it was a mistake, and if the act of his servant, that he could not have prevented it? The law does not place a community in the position of being poisoned by mistakes, with no one to be held responsible therefor. If it was the master who did the wrong, the master is responsible. If it was his servant who did it, he is still responsible, for the master is responsible for the acts of his servant when done in the course of his usual employment."

For a note on master's liability as affected by restrictions upon freedom of selection and superintendence of employees, see *Farmer v. Kearney*, 3 L.R.A. (N.S.) 1105.

As to liability of master for injury done by servant to third person in use of dangerous agency placed in his custody, see note to *Galveston, H. & S. A. R. Co. v. Currie*, 10 L.R.A. (N.S.) 367.

And as to the duty of druggist or apothecary in the sale or compounding of drugs or medicines, see note to *Tremblay v. Kimball*, 29 L.R.A. (N.S.) 900.

J. T. W.

print, 1; 14 Cyc. 1086; 2 Shearm. & Redf. Neg. § 691.

The rule of liability applicable to a druggist is the same as that which governs the liability of professional persons whose work requires special knowledge or skill, and a person is not legally responsible for any unintentional consequential injury resulting from a lawful act, when the failure to exercise due and proper care cannot be imputed to him.

Allan v. State S. S. Co. 132 N. Y. 95, 15 L.R.A. 166, 28 Am. St. Rep. 558, 30 N. E. 482; Brown v. Marshall, 47 Mich. 576, 41 Am. Rep. 728, 11 N. W. 392; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Beckwith v. Oatman, 43 Hun, 265; Losee v. Buchanan, 51 N. Y. 488, 10 Am. Rep. 623; Carpenter v. Blake, 75 N. Y. 12; Morris v. Platt, 32 Conn. 75; Simonds v. Henry, 39 Me. 155, 63 Am. Dec. 611; Peters v. Johnson (Peters v. Jackson) 50 W. Va. 644, 57 L.R.A. 428, 88 Am. St. Rep. 909, 41 S. E. 190.

Mr. W. F. Mangan, for appellee:

A pharmacist is liable for the negligence of his clerk, even though the clerk be a licensed pharmacist.

Burgess v. Sims Drug Co. 114 Iowa, 275, 54 L.R.A. 364, 89 Am. St. Rep. 359, 86 N. W. 307; Hansford v. Payne, 11 Bush, 380; Quin v. Moore, 15 N. Y. 432.

Roraback, J., delivered the opinion of the court:

This action is against a druggist for the negligence of a clerk employed by him in filling a prescription. The prescription as intended by the doctor who wrote it called for powders to be taken three times a day, each one containing 5 grains of calumba, with other ingredients. The drug clerk who compounded the prescription substituted calomel for calumba. The defendant denied the negligence alleged in the plaintiff's complaint, and also based his defense upon the allegation that his clerk was a duly licensed pharmacist. The court of common pleas found the issues for the plaintiff, and held that the clerk should, by the exercise of due care, have read the prescription as calling for calumba, or at least that there was such doubt as to the correct reading as should have led him to inquire of the doctor, and that there was negligence in compounding the powders which he delivered to the plaintiff. The substance of the defendant's appeal is that the court erred in reaching the conclusions just stated.

The finding shows that in July, 1910, the defendant, who is a licensed pharmacist, owned and conducted a drug store in New Britain, and that one Benjamin Cutner, who is also a licensed pharmacist, was in 39 L.R.A. (N.S.)

his employ as a clerk. The plaintiff is living with her husband and children in New Britain. She is an Italian, and does not speak or understand the English language. On July 23, 1910, she was suffering from an attack of indigestion, and, with a friend who acted as an interpreter, went to a doctor's office in New Britain. The doctor diagnosed the plaintiff's complaint as indigestion, and gave her a prescription, with directions to have it filled at some pharmacy. Mrs. Tombari, with her friend, went to the drug store of the defendant, and gave the prescription to Cutner, the clerk, to be filled. The ingredients written in the prescription, as the doctor intended them to be read, are as follows: "Rhei, Calumba, Bismuth Sub., Sodii Bicarb, Zingibar, Fiat in Chart XXIV, One t. i. d." The interpretation as the doctor intended it to be read is as follows: "Rhubarb one drachm, calumba, subnitrate of bismuth, bicarbonate of sodium, and ginger, each 2 drachms. To be made into twenty-four powders. One three times a day." The clerk read the prescription as intended, except that he interpreted the second word to mean "calomel," instead of "calumba;" and he accordingly put up the powders, each containing 5 grains of calomel. Calumba is a mild bitter tonic, useful in functional disturbances of the digestive organs, and is not used frequently. Calomel is chloride of mercury, and is in frequent use in small doses as a purgative and stimulant of the liver. A prescription for 5 grains of calomel to be taken three times a day, making a total of 120 grains, or 2 drachms, in eight days, would be unusual, though not unprecedented in some violent diseases. The quantity of calomel compounded by the clerk attracted his attention, and he inquired of the plaintiff through her interpreter if she understood the dose, and had any special instructions from the doctor. The record does not disclose that any response was given to this inquiry. The taking of six of these powders by the plaintiff as prepared produced a very violent diarrhea and vomiting, by which she was rendered excessively weak, and also produced an excessive flow of saliva, which continually filled and flowed from her mouth; produced the unpleasant odor of mercury; and also produced great pain in her gums, and caused the temporary loosening of her teeth. Her lips and throat became swollen and painful. She sent for the doctor, who immediately discovered the mistake that had been made, and gave her remedies to relieve her of the effects of calomel.

It is elementary that the master who undertakes to perform a service is liable for the negligence of his servant who, when in

the scope of his employment, is performing the services undertaken. *McKiernan v. Lehmaier*, 85 Conn. 111, 81 Atl. 969.

The fact that Cutner, the defendant's clerk who compounded the prescription in question, "was a competent druggist of experience," does not relieve the defendant from a claim for damages for injuries sustained on account of negligence of his clerk. "The most skilful and competent may be, and human experience teaches us will be, sometimes negligent. Hence the fact that one is skilful and competent may prove that he will generally be more careful than the unskilful and incompetent; but it has no tendency to prove due care on a particular occasion." *American Straw Board Co. v. Smith*, 94 Md. 19, 50 Atl. 414; *Smith v. Middleton*, 112 Ky. 588, 56 L.R.A. 484, 99 Am. St. Rep. 308, 66 S. W. 388; *Burgess v. Sims Drug Co.* 114 Iowa, 275, 54 L.R.A. 364, 89 Am. St. Rep. 359, 86 N. W. 307.

The legal measure of the duty of druggists towards their patrons, as in all other relations of life, is properly expressed by the phrase "ordinary care," yet it must not be forgotten that it is "ordinary care" with reference to that special and peculiar business. In determining what degree of prudence, vigilance, and thoughtfulness will fill the requirements of "ordinary care" in compounding medicines and filling prescriptions, it is necessary to consider the poisonous character of so many of the drugs with which the apothecary deals, and the grave and fatal consequence which may follow the want of due care. In such a case ordinary care calls for a degree of vigilance and prudence commensurate with the dangers involved. The general customer ordinarily has no definite knowledge concerning the numerous medicines and poisons specified in the United States Dispensatory and Pharmacopœia, but must rely implicitly upon the druggist, who holds himself out as one having the peculiar learning and skill, and conceptions of legal duty, necessary to a safe and proper discharge of that duty. Ordinary care with reference to the business of a druggist must therefore be held to signify the highest practicable degree of prudence, thoughtfulness, and vigilance, and the most exact and reliable safeguards, consistent with the reasonable conduct of the business, in order that human life may not constantly be exposed to the danger flowing from the substitution of deadly poisons for harmless medicine. *Tremblay v. Kimball*, 107 Me. 53, 29 L.R.A. (N.S.) 900, 77 Atl. 405. See cases cited note 29 L.R.A. (N.S.) pp. 900-903.

The trial court has found that the defendant's clerk was negligent in compound-

ing the powders in question as he did, and then delivering them to the plaintiff. This conclusion is a question of fact, and must stand, unless it is inconsistent with the other subordinate facts which have been set forth in the finding. *Wolcho v. Rosenbluth*, 81 Conn. 358, 21 L.R.A. (N.S.) 571, 71 Atl. 566; *Metcalf v. Central Vermont R. Co.* 78 Conn. 614, 619, 63 Atl. 633. It is found that calumba was intended, and that calomel was given. Calomel was furnished by mistake. A prescription calling for 120 grains of calomel to be taken in twenty-four powders, one three times a day, is extraordinary, and, if taken as directed, was liable to be attended with serious results. Cutner was an experienced pharmacist, and, when he delivered the medicine as he had compounded it, he could have anticipated that an injury like that which actually occurred would naturally follow. He could have seen from the nationality and appearance of the plaintiff that she knew nothing of the property and uses of calomel. The prescription itself as he read it in connection with the surrounding circumstances excited his suspicion that calomel was not intended. The record does not disclose that he then made a reasonable effort to ascertain whether he might not be mistaken.

The defendant contends that the prescription was written in Latin, illegible, and doubtful as to what drug was really intended. Assuming this to be true, it did not lessen the duty of the clerk to be alert to avoid a mistake. If there was any reasonable doubt as to the identical thing ordered, the defendant's clerk should have taken all reasonable precaution to be certain that he did not sell one thing when another had been called for. The trial court has found that such precaution was not taken. There is nothing in any of the subordinate facts appearing in the record inconsistent with this conclusion.

There is no error.

In this opinion the other Judges concur.

MISSISSIPPI SUPREME COURT.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Appt.,

v.

STATE OF MISSISSIPPI EX REL. S. S. HUDSON, Attorney General.

(— Miss. —, 54 So. 670.)

Monopoly — combination between telephone companies — validity.

A contract by a telephone company doing

Note. — As to validity of contracts between telephone companies for exclusive connections, see note to *Home Teleph. Co. v. Sarcoxie Light & Teleph. Co.* ante, 124.

only long-distance business, with a local company doing no long-distance business, by which the former undertakes to furnish apparatus to the latter, and requires it not to extend its lines so as to transact long-distance business or make long-distance connections with other companies without the consent of the contracting party, does not violate a statute making unlawful any combination or contract in restraint of trade, or which shall monopolize or attempt to monopolize the production, management, or control of any kind of business.

(Smith, J., dissents.)

(March 20, 1911.)

APPEAL by defendant from a judgment of the Chancery Court for Marshall County in plaintiff's favor in an action brought to recover the penalties imposed by statute for an alleged violation of the anti-trust laws. Reversed.

The facts are stated in the opinion.

Mr. J. B. Harris for appellant.

Messrs. S. S. Hudson, Attorney General, W. P. Shinault, and W. V. Sullivan for the State.

Mayes, Ch. J., delivered the opinion of the court:

The proceeding in this case is brought by the attorney general under chapter 145, § 5002, Code of 1906, as amended by Laws of 1908, p. 124. This suit was instituted on the 28th day of September, 1909, against the Cumberland Telephone & Telegraph Company for an alleged violation of the anti-trust laws, and the purpose of the suit is to recover the penalties imposed by § 5004. The trial court rendered a judgment in favor of the state for the sum of \$116,400, holding that the contract which we shall set out in full a little later constituted a violation of the anti-trust laws, from which judgment this appeal is prosecuted. The minimum penalty allowed to be imposed under the statute is \$200 per day, and the minimum penalty was imposed by the trial judge, the time being fixed from the date of making the contract, which will hereafter be stated, to the date of filing of the bill as above specified, and making 582 days. The contract was made by the Cumberland Telephone & Telegraph Company on the 24th day of February, 1908, with the Oxford telephone system. The Cumberland Company is a corporation, but the Oxford system is unincorporated.

No testimony was taken, but the case was heard on the bill, answer, and exhibits; and the facts shown by same are substantially as follows: In the year 1901 W. H. Harvey owned and operated a purely local telephone system at Oxford, Lafayette county, Mis-

issippi, and had no long-distance facilities or connections. The Cumberland Telephone & Telegraph Company at that time was not doing business in Oxford, or in Lafayette county, but had a long-distance line extending through the country into many other portions of the state and into many other states. Harvey desired to obtain for his subscribers the advantage of a connection with a long-distance line, and, with this object in view, solicited the Cumberland Company to allow a connection to be made between its long-distance lines and his local system. The arrangement desired by the local system was finally arranged between the two on certain terms and conditions expressed in a written contract made between them on the 23d day of November, 1901. The contract of 1901 is not important in this case, so its terms will not be set out. Suffice it to say that the system continued to operate under the above contract as long as Harvey owned the local system and until some time in 1903, when L. F. Tool and W. J. Clark purchased the local system from Harvey, and, after the purchase, they continued to operate the system under the same contract made by Harvey with the Cumberland Company, until the 24th day of February, 1908, when the Cumberland Company and the then owners of the local system made a new contract. Since this last contract is the one which it is claimed violated the anti-trust statutes of the state, we set out all of the contract involved.

It is as follows, viz.:

"Whereas, the second party (the Oxford Telephone Company) is the successor to the rights and privileges created or established by reason of a certain contract entered into on the 23d day of April, 1901, by and between the first party and W. H. Harvey, of Oxford, Mississippi, and under which contract the first party furnished to said Harvey certain telephone apparatus, which apparatus was turned over to the second party, and the first party has, since the transfer of said apparatus by Harvey to second party, furnished second party certain telephonic apparatus; and

"Whereas, the first and second parties desire to enter into a new contract to cover connection between the telephone exchange system of second party in Oxford, Mississippi, and the systems of the first party:

"Now, therefore, in consideration of one (\$1) dollar each to the other in hand paid, the receipt of which is hereby acknowledged, the parties hereto mutually covenant and agree as follows:

"(1) Except as to amounts due from one party to the other under the aforesaid contract of date November 23d, 1901, and ex-

cept as to the responsibility of second party to first party for telephone apparatus furnished it, the said contract of date November 23d, 1901, shall be and the same is hereby superseded by this contract.

"(2) The second party agrees to ship to the first party at Nashville, Tennessee, freight prepaid, the switchboard furnished first party under the aforesaid contract of November 23d, 1901, within ninety days from the date hereof, and to pay for the use of said switchboard at the rate provided in said contract until the same shall have been shipped to first party as aforesaid.

"(3) The first party agrees to furnish at its Memphis, Tennessee, office to the second party the standard form of transmitter and the receiver used by it, at the rate of \$1 per annum, payable in advance for each set of instruments, consisting of one bi-polar receiver and one solid back transmitter, furnished; and second party agrees to pay for the use of such transmitters and receivers heretofore or hereafter furnished at said rate per annum at the office of first party, in Nashville, Tennessee, from date of this contract, and second party shall pay for the use of equipment furnished prior to the date of this contract at the rate provided in the aforesaid contract, dated November 23d, 1901. Each and every instrument embraced in the system of the second party shall be equipped with transmitters and receivers furnished by first party, and shall be used only on the telephone embraced in the system of second party in Oxford, Mississippi, and vicinity. Second party agrees not to extend its lines in such manner as to conflict with the business or interest of the first party or its subscribers, and not to make any connection, directly or indirectly, with any other telephone lines, nor to extend its lines outside of Lafayette county, Mississippi, without the written consent of the first party. In the event transmitters and receivers furnished hereupon become defective and are returned to the first party at Memphis, Tennessee, freight prepaid, first party will repay or replace same without additional charge.

"(4) Oxford shall be in the future, as in the past, the connection point between the systems of the parties hereto, and the second party agrees to make such connection for direct communication between its subscribers and the system of the first party as it may be called upon to make, it being expressly agreed and understood that second party shall be responsible to the first party for all messages sent from stations embraced in its system to points on the long-distance lines or connecting lines of first party, and that the messages sent over the

lines or connecting lines of first party shall be subject to the rules, rates, and regulations of the first party, and the second party shall receive a commission of 15 per cent on all moneys (except messenger fees) collected by it for messages sent from stations embraced in its system to points on the long-distance lines of the first party; but no commission will be allowed second party on moneys collected by it for messages sent over the lines of any other company than first party.

"(5) In the event the second party shall decide to cancel this contract before its expiration, or to dispose of its property, or the control of stock of its company, the first party shall, in the event second party shall decide to cancel the contract before its expiration, have the right to purchase the property of second party by arbitration, one arbitrator to be selected by each party, the two so chosen to select the third and fix the price, and each party shall be bound by the finding of such arbitrators; in the event the second party shall desire to sell the property or control of stock of the company, the first party shall have the refusal of such property or stock at the same price second party may be offered for the same.

"(6) A diagram of the lines of the second party is hereto annexed and made a part hereof.

"(7) Settlement for tolls shall be made monthly for the month next preceding.

"(8) In case of any failure of payment or other violation of any of the terms of this agreement by the second party, continued for ten days after notice or demand by the first party, or in case the second party shall become bankrupt or insolvent, the first party may at its option immediately terminate this contract by written notice to the second party, or to those in charge of its principal offices.

"(9) This contract shall become effective and be in force for five years from date hereof, and thereafter until thirty days written notice of intention to terminate the same be given by either party to the other."

The bill of complaint makes the contract on the 24th day of February, 1908, fully set out above, an exhibit to same, and asserts that its purpose and effect was to shut out competition, and to monopolize and control the prosecution and management of the telephone business. The bill concluded with a prayer for the recovery of the penalties provided for in § 5004 of the Code of 1906, and also prayed for an injunction to restrain the further continuance of the contract. The Cumberland

Company filed a lengthy answer to the above suit. We shall not undertake to give it in full, but will state only the material parts of same. It is stated in the answer that neither at the date of the contract nor at any time since then has the Cumberland Telephone Company been engaged in a local telephone business in Oxford or in the county of Lafayette, nor has the Oxford system then, now, or at any other time engaged in the long-distance business, nor was it facilitated for same or contemplating engaging in the long-distance business; that the Oxford system was in no sense a competitor, for the two companies were not seeking to do the same character of telephone business; that numerous contracts of this character are made, but the contracts are not made for the purpose of suppressing competition, or for the purpose of monopolizing, or attempting to monopolize, the control or management of the telephone business in the communities where made, but for the purpose of extending the telephone business, and giving communities telephone service and facilities which they could not otherwise obtain; that the provisions in the contract in reference to extending the lines of the local systems and making connections with other lines are solely for the purpose of protecting the Cumberland Company against such extensions and connections as would be ruinous to its business, and prevent its efficient service to its numerous patrons; that the contracts simply provide that the extensions and connections made by a local connecting line must be with the written consent of it, the licensor, in order that the facilities furnished the local company by the Cumberland Company shall not be used in a manner detrimental to its interests, and that of its numerous subscribers. In other words, the answer states that it is necessary for the proper conduct of its telephone business, and the proper service of its numerous subscribers, and the proper discharge of its public duties, that the Cumberland long-distance should have some supervision in the connections and extensions which are made by the local companies with which it contracts, and to which it furnishes apparatus and equipment, which otherwise might prove ruinous to the business and very detrimental to the public service. If no restrictions were placed upon extensions and connections, its lines might in a short time become connected with and used by other lines, over which it had no sort of control, and which are actual competitors, and which would greatly interfere with the Cumberland Company's business.

In short, the answer states that these contracts are made with noncompeting local
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telephone systems; the object of the contract being to give the local telephone systems with which they are made, and which are not in competition with the Cumberland system, all the advantage offered by the long-distance system of the Cumberland Company. In doing this and yielding its long-distance system to the patrons of the local phone system, the Cumberland claims the right to protect itself from abuse by requiring the local connecting system to use certain standard transmitters and receivers, and to patronize the Cumberland system alone in sending long-distance messages, and not to extend its lines so as to be detrimental to the interest of the Cumberland Company so long as the contract lasts, unless the local system obtains permission of the Cumberland. The facts further show, according to the answer, that there has not in fact been any monopoly or suppression of competition, because no competition ever existed or was in contemplation, nor does the bill allege that competition was desired or intended. It is alleged in the answer that the sole purpose of this contract is to protect the Cumberland Company in the use of its property, and that the restrictions placed on the contracts are for the legitimate, regular, and normal prosecution of the Cumberland's business. It is further shown that the Cumberland gives the same facilities to all local systems desiring them, reserving the right to make them exclusive when more than one local system is in operation at the same place, and that a copy of the contract is on file with the railroad commission of the state, and has been on file for many years; that the desire of local systems to take advantage of the facilities for long-distance arrangements offered by the Cumberland exceeds the ability of the Cumberland to furnish; and that these connections thus allowed greatly benefit the public.

In deciding this case, the distinguished chancellor places in the record a written opinion. The reason assigned by him for holding this contract in violation of the anti-trust statutes is put in the following language: "This case was submitted on bill, answer, and exhibits, without proof. Counsel for defendant urges that, the cause being thus submitted, the state is precluded from recovery on all allegations in the bill of complaint to which the answer is responsive. This is correct as to everything specifically denied, but the defendant in its answer admits entering into the contract, the illegality of which is the *crux* of this case. The real question then is: Was the contract violative of the anti-trust law?" We set out the above quotation for the purpose of showing that the court below shut

out all explanations made by the answer, and considered the case on the contract alone, holding that the contract on its face violated the anti-trust laws of the state, because it so far controlled the Oxford Company as to require it to send "all long-distance messages over the Cumberland's line," and because it "prohibited the Oxford Company from making any connection with other telephone companies, or extending its lines, so as to conflict with the business or interests of the Cumberland Company, without the written consent of the latter company," during the existence of the contract. While the trial court held that the contract was a violation of the anti-trust laws and imposed a penalty on appellant on account of same, the court refused to enjoin the continued operation under the contract.

As only one of the contracting parties was a corporation and the other was an individual, § 5005, Code of 1906, as amended by the Laws of 1910, p. 222, which prohibits one competing corporation from buying out the stock of another competing corporation, has no application, and there was, therefore, no law of this state which prevented either system from, in good faith, buying out the other; yet no law could compel either to allow a connection by the other. Under the contract, the local system became fully equipped as a local and a long-distance system, while the long-distance system interfered in no way with the local business of the local system, but received a small rental for transmitters and receivers furnished under the contract, and additionally obtained its subscribers as possible patrons of the long-distance facilities. In considering this contract, it must be considered in the light of the facts set up in the answer as explanatory thereof, since the questions here involved are questions of both law and fact. But, if this were not true, and we should consider this case on the contract alone without the explanations made by the answer, this contract standing by itself would constitute no violation of the anti-trust laws of the state, as we think will appear in the reasoning of the court a little later on in this opinion. The anti-trust laws of the state and the United States have been so frequently before the state and Federal tribunals, and every phase and feature so ably and exhaustively discussed, that any attempt to improve on these discussions would be vain. One of the ablest discussions to be found in the books on this subject is the case of *Yazoo & M. Valley R. Co. v. Searles*, 85 Miss. 520, 68 L.R.A. 715, 37 So. 939, wherein Justice Truly rendered the opinion of the court. We shall have occasion to refer still further to this case later on, as well as many others on the 39 L.R.A. (N.S.)

same subject. In considering this case, a little review of the anti-trust laws may help us to better understand their application and purposes. Section 5002 of the Code of 1906, as amended by the Laws of 1908, p. 124, makes unlawful as a trust and combine any "combination, contract, understanding, or agreement, expressed or implied, between two or more corporations, or firms, or associations of persons, or between one or more of either with one or more of the others," to accomplish many purposes specified in the act. In discussing this act we shall only set out those clauses which are involved in this litigation. The statute makes unlawful as a trust and combine any such contract, etc. (a) in restraint of trade; (k) or who shall monopolize, or attempt to monopolize, the production, control, or sale of any commodity, or the prosecution, management, or control of any kind, class, or description of business. If this contract is illegal, it falls under the inhibition of one or the other of the above clauses. When this statute was enacted, it introduced into the law no new definition of what constituted a "restraint of trade" or "a monopoly." It did not attempt to define either. These are questions to be determined in the light of the facts of each case and under the law relating to same as it stood before the statute was passed; otherwise there is no guide for the persons charged with the enforcement to be governed by. What does the statute mean when it prohibits contracts "in restraint of trade?" Does it mean that any contract which in any way restrains trade shall be illegal? If so broad a meaning should be given to the statute as this, it would involve a destruction and disaster to the commercial world never dreamed of by its authors, and not comprehended within the evil intended to be rectified. The statute only intended to include within its provisions those contracts in restraint of trade, those monopolies and attempts to monopolize that were invalid as against public policy before the enactment of the statute, and under it such contracts in relation thereto could not be enforced as between the parties. A contract in reasonable restraint of trade was valid before the enactment of the statute, where its design and purpose is not to create a monopoly; and such contract is valid now where "it is such only as to afford a fair protection to the interests of the party in whose favor it is given, and not so large as to interfere with the interests of the public." *Edgar Lumber Co. v. Cornie Stave Co.* 95 Ark. 449, 130 S. W. 452; 3 Paige, Contr. p. 588; 27 Cyc. 900, and notes; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; *Oregon Steam Nav. Co. v.*

Winsor, 20 Wall. 64, 22 L. ed. 315; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208; Merriman v. Cover, 104 Va. 428, 51 S. E. 817.

While contracts in restraint of trade, monopoly contracts, and monopolies were held to be illegal under the law as it stood before the anti-trust statutes, such contracts could be avoided and injury done thereby rectified only by the parties themselves. While this was the case, the evil continued because those persons were frequently satisfied by the parties engaged in the prejudicial and unlawful enterprise, and the public at large left to suffer. In order to obviate these difficulties, anti-trust laws have been enacted enabling the state in its sovereign capacity to sue for and recover penalties in all such cases; in addition to this, giving any member of the public suffering injury or damage the right to sue also. In other words, the law as to what it now takes to make a contract in restraint of trade to monopolize or attempt to monopolize any business remains the same, but the parties who may sue and the penalties have been broadened. As to what does nor does not constitute a monopoly within the meaning of the statute is not always easy to decide. The courts must be left to determine these questions when they arise. The question is one of mixed law and fact of necessity. To illustrate, suppose there are only two grocery stores in a town. Suppose the business of the town is so small as that a continuance of the two means a ruination of both. May not the one sell out to the other for the protection of both? This same illustration might be used in a countless number of instances. It is plain to be seen that it will not do to so construe the statutes as that one person may not sell to another when the very business life of the seller depends upon it. Yet there may be a character of business where these same acts would be held to be unlawful. But our own court has expressed the thought in the case of Yazoo & M. Valley R. Co. v. Searles, 85 Miss. 520, in part of opinion to be found on page 529 in such apt phraseology that we here quote it, viz.: "An analytical study of this section demonstrates that it was the legislative design to prohibit and provide punishment for the formation of any criminal conspiracy by which the interest of the public might be in any manner injured or jeopardized, whether such combination was intended to be in restraint of trade, to limit, reduce, or increase the price or the production of any commodity, or to hinder competition in the importation, manufacture, transportation, sale, or purchase of any commodity, or to do certain other

enumerated acts which would, in the judgment of the legislature, prove prejudicial to the interest of the public or any part thereof, or of any individual. . . . The design of the legislature was to protect the public, not to unlawfully restrict the transacting of business by either corporations or individuals. The various kinds of legitimate business rendered necessary by the multiform demands of public convenience, the manifold callings which are an incident of this progressive age, all demand that the individual right of contract shall be given full sway, conditioned only that the rights of the public and the welfare of the people and the public policy of the state shall be held sacred. Says Terral, J., in Houck v. Wright, 77 Miss. 483, 27 So. 617: 'The legislature, by the chapter in trust and combines, did not intend to debar a person from conducting his own private business according to his own judgment.' . . . 'It was not the purpose of the convention or the legislature to limit either the term used in the Constitution or in the statute by any narrow definition, but leave it to the courts to look beneath the surface, and, from the methods employed in the conduct of his business, to determine whether the association or combination in question, no matter what its particular form should chance to be or what might be its constituent elements, is taking advantage of the public in an unlawful way. Harding v. American Glucose Co. 182 Ill. 551, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577. In each case, therefore, under these provisions, the nature of the arrangement or combination is a question of fact to be determined by the court from the evidence before it or from the vice which inheres in the contract itself.' MacGinniss v. Boston & M. Consol. Copper & S. Min. Co. 29 Mont. 428, 75 Pac. 94; Ceballos v. Munson S. S. Line, 93 App. Div. 595, 87 N. Y. Supp. 811, and cases cited. Nor is the rule of construction different when applied to the Federal anti-trust statute. . . . 'This act of Congress must have a reasonable construction. It was not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants, and traders, or the usual devices to which they resort to promote the success of their business, to enhance their trade, and to make their occupations gainful, so long as those combinations and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the states.' Phillips v. Iola Portland Cement Co. 61 C. C. A. 19, 125 Fed. 594." Again the court says on page 528 of 85 Miss.: "Section 198, Constitution 1890, commands

the legislature to 'enact laws to prevent all trusts, combinations, contracts, and agreements inimical to the public welfare.' It must be observed at the outset that not all trusts, combinations, contracts, and agreements were to be prohibited because the great lawmakers who framed the fundamental law of this commonwealth as the same is embodied in our present Constitution well knew that such legislation would be palpably intrenching upon, if not absolutely violative of, the inherent rights of the citizen, and would be restrictive to an unwarranted degree of the privilege of contract which every man is entitled to enjoy under our form of government. Tiedeman, Pol. Power, § 244. No such legislation was authorized, because no such legislation was demanded. Only such trusts, combinations, contracts, and agreements were to be prevented as would be 'inimical to the public welfare.'"

We have quoted largely from the opinion in the Searles Case, because the rule laid down in that case is narrow enough to exclude from its scope unlawful contracts and agreements, combinations, and monopolies in their true sense, and yet broad enough to leave life in all legitimate undertakings and enterprises. If the anti-trust laws are given a scope sufficient to throttle and choke out lawful business transactions, its effect upon the public would be as detrimental as the evils which it is designed to break up. Under the law as it stood before the enactment of the anti-trust statutes, courts were astute enough to discover these unlawful enterprises and apply such correction as the law then gave power to apply. As the law now stands, differing only in the fact that some new causes of illegality have been added for the avoidance of these unlawful agreements and combinations, penalties made more severe, and the parties who may sue made more numerous, the courts may still be relied upon to discover and punish in all proper cases.

The contract in this case is simply this: The Cumberland Telephone & Telegraph Company had a long-distance line passing through Oxford, and Lafayette county. It was not doing any business of any kind in the town or in the country. The Oxford telephone system wanted to obtain for its patrons and itself the advantage of long-distance connections. The Oxford system proposed to the Cumberland to let it connect, and in consideration of this connection agreed to take certain improved transmitters and receivers and to pay a small rent therefor, further agreeing that, so long as it retained this connection under the contract, it "would not extend its lines so as to conflict with the business or in-

terests of the Cumberland Company, and would not make any connection with any other telephone lines; and would not extend its lines outside of Lafayette county, and would give its long-distance business exclusively to the Cumberland." What was unlawful about this agreement? What is unreasonable about it in the absence of proof showing that it was designed for the purpose of stifling competition or creating a monopoly? These two companies were not competitors. This contract bears every mark of a contract entered into in good faith and only for the purpose of affording a fair protection to the interests of the party in whose favor it was made, and not so wide in its scope and operation as to interfere with the interests of the public. If the Cumberland could not thus protect itself, the Oxford system, having obtained the right to connect, might have connected itself with other systems, and by its contract and through its exchange have connected all the systems around there with the long-distance lines of the Cumberland, thus using the Cumberland's line, not only for itself, but for other companies. The contract promoted the efficiency of both systems, and made both of greater use to the public as well as more valuable to the owners. If the contention that this contract is illegal is to prevail, the court must hold that while either of these systems could lawfully purchase the other, and stipulate that the selling system would not engage in business for a reasonable period of time and within a territory reasonably necessary for the protection of the purchasing company, yet when they do the lesser thing of only buying and selling the right to use the long distance in connection with the local business, leaving both systems to manage and control their business without interference by the other, the lesser contract is illegal. We shall not undertake in this case to lay down any fixed rule by which it may be determined in all cases what constitutes a monopoly. This question must be left to the facts of each case, but the fact must exist before the penalties can be imposed. A profitable case upon this subject is the case of *State v. Duluth Bd. of Trade*, 107 Minn. 506, 23 L.R.A. (N.S.) 1260, 121 N. W. 395. In the authorities cited in this case will be found nearly every decision in the United States, both state and Federal, on the subject involved in this case. In that case it is pertinently said: "It does not follow that every contract or combination which in any degree tends to restrict competition is illegal. So strict a rule would invalidate innumerable ordinary business transactions, which are unobjectionable and

necessary that business shall not completely stagnate. As said in *Hopkins v. United States*, 171 U. S. 578, 592, 600, 43 L. ed. 290, 296, 299, 19 Sup. Ct. Rep. 40: 'The contract condemned by the statute is one whose direct and immediate effect is a restraint . . . of commerce. . . . The act . . . must have a reasonable construction or else there would be scarcely an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce and possibly to restrain it.' The anti-trust statutes were never designed to forbid such transactions, and it has been universally held that contracts and combinations which tend to promote business, and which only remotely, incidentally, and indirectly restrain competition, are not forbidden. If the necessary effect of the combination is to stifle or to directly or necessarily restrict free competition, it is under the ban of the law, whatever may have been the intention of the parties. But if 'it promotes or but incidentally or indirectly restricts competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination, or conspiracy in restraint of trade within the true interpretation of this act, and it is not subject to its denunciation.'

The contract on the part of the Oxford system to give its long-distance messages to the Cumberland, exclusively for the period of the contract, was not in violation of the law. It was based upon a valuable consideration to both systems, and was not inimical to the public interest in any way. This character of contract is sustained by numerous authorities cited in brief of counsel for appellant. *Central Transp. Co. v. Pullman's Palace Car. Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; *St. Louis Drayage Co. v. Louisville & N. R. Co.* (C. C.) 5 Inters. Com. Rep. 137, 65 Fed. 39; *Oregon Short Line & U. N. R. Co. v. Northern P. R. Co.* (C. C.) 4 Inters. Com. Rep. 249, 51 Fed. 405; *United States v. Addyston Pipe & Steel Co.* 46 L.R.A. 134, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; *Louisville & N. R. Co. v. West Coast Stores Co.* 198 U. S. 497 49 L. ed. 1140, 25 Sup. Ct. Rep. 745.

Reversed and dismissed.

Smith, J., dissenting:

I am of the opinion that this contract, and the acts of the parties under it, constitute an attempt on the part of appellant to monopolize the long distance telephone business in Oxford and its vicinity within 39 L.R.A. (N.S.)

the meaning of subsection "k," chap. 119, Laws of 1908.

I doubt the validity of this contract at common law; but conceding that it was valid at common law, and conceding, as the fact is, that there was no competition between the parties to this contract at the time it was entered into, the result, in my judgment, must be the same. The effect of this contract was to remove, or to put it in the power of appellant to remove, at least one of its possible competitors, the local telephone company, to prevent the local company from doing business with anyone desiring to compete with appellant, and to practically prohibit all of the subscribers of the local company, as long as it operated the only exchange in the town of Oxford, from using the long-distance telephone facilities which might be offered to them by any possible competitor of appellant. That the monopoly may not have been complete does not negative the fact that appellant attempted to make it so. An attempt is simply an intent to do a thing, coupled with an act which falls short of the thing intended. That appellant may have had the right to purchase the exchange and equipments of the local company, as to which I express no opinion, is immaterial. By merely purchasing the exchange and equipments, appellant would not thereby have deprived anyone of the right to deal with other persons who might desire to compete with it. But had it gone further, and, after purchasing the exchange, required its subscribers to agree to use only its telephones, it would then have monopolized, or at least attempted to monopolize, the telephone business in that community. The mere furnishing of telephone facilities to a community does not, of course, constitute an attempt to monopolize the telephone business; but such an attempt is committed when, in addition to furnishing telephone facilities, an attempt is made to prevent the citizens of a community, by contract or otherwise, from dealing with possible competitors of the person furnishing such facilities.

OKLAHOMA SUPREME COURT. (Division No. 2.)

UNION TOWNSHIP, Plff. in Err.,
v.

OAKDALE TOWNSHIP.

(— Okla. —, 120 Pac. 968.)

Township — division — right to assets.

1. Where part of an existing township

Headnotes by BREWER, C.

was detached by an order of the county commissioners in 1904, and the part so detached was organized as a new township, no provision being made in the order, and no statute existing, for the division or apportionment of the assets of the old township, held, that the new township cannot recover of the old any part of the cash in the hands of the county treasurer and due the old township at the time of division, or received by the treasurer for it after division, from tax levies made prior to the division.

Same — rights and liabilities of old township.

2. Where a new township is created out of a part of the territory of an old one, unless some provision is made in the act creating the new, or exists under the statute, respecting the property and existing liabilities of the old township, the old township

retains the title to all the public property, except such as may be located in the detached territory, and is responsible for the debts contracted before the division.

(January 16, 1912.)

ERROR to the District Court for Washita County to review a judgment in plaintiff's favor in an action brought to recover taxes alleged to have been appropriated and converted by defendant to its own use. Reversed.

The facts are stated in the opinion.

Messrs. T. W. Jones and R. N. Linville for plaintiff in error.

Messrs. R. Brett and T. A. Edwards, for defendant in error:

The question of the division of taxes

Note. — Division of territory of municipality, town, or county as affecting its assets and liabilities, in absence of statute on the point.

This note is confined strictly to cases involving the division of municipalities, towns, or counties, and therefore does not include the cases of annexation, consolidation, or dissolution. As to the liability of territory annexed to a county, city, or other municipality, to pay the proportionate share of existing debts, see the note to *Blake v. Jacks*, 27 L.R.A. (N.S.) 1147. See also *White v. Fuller*, 38 Vt. 193, taking the view that the severance of territory from one town and its annexation to another simply transfers the right of municipal jurisdiction, and that therefore it does not affect the proprietary right in lands whose legal title it holds as trustee for a use which is perpetual. And, too, it is held that a county to which certain territory is added does not become liable for the debts of the county from which it was taken. (*Chickasaw County v. Sumner County*, 58 Miss. 619. The reason for the exclusion of cases of dissolution of towns is found in the distinction observed in *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 25 L. ed. 699, which recognizes the doctrine of *Laramie County v. Albany County*, 92 U. S. 307, 23 L. ed. 552, that where a new town is formed from the portions of an old one, the old corporation is responsible for all the old debts, in the absence of statute to the contrary, but holds that where a town is extinguished by merger into two others, the latter succeed to all the public property and immunities of the extinguished municipality, and they therefore become liable for all the debts previously contracted by it.

And it will also be observed that this note includes only cases in which it was assumed or decided that the division and its attendant proceedings were legal. For a case on the liability of the original county for debts of a county defectively organized from part of its territory, reference may be had to *George D. Barnard & Co. v. Polk County*, 6 L.R.A. (N.S.) 791.

And it remains to be noted that the decisions involving the division of school districts are not herein treated. As to the effect of changing boundaries of a school district upon the right in real property, see the note to *Pass School Dist. v. Hollywood City School Dist.* 26 L.R.A. (N.S.) 485.

It has been frequently declared in general terms that, in the absence of a specific statutory adjustment of the matter, the old corporation owns all the public property within her new limits, and is responsible for all debts contracted by her before the act of separation was passed; and that the new subdivision has no claim to any portion of the public property except what falls within its boundaries. The greatest number of cases in which this declaration is found hold only that the new corporation is not liable for any of the old debts. *Laramie County v. Albany County*, 92 U. S. 307, 23 L. ed. 552, affirming 1 Wyo. 137; *Askew v. Hale County*, 54 Ala. 639, 25 Am. Rep. 730; *Los Angeles County v. Orange County*, 97 Cal. 329, 32 Pac. 316 (*obiter*); *Johnson v. San Diego*, 109 Cal. 468, 30 L.R.A. 178, 42 Pac. 249 (*obiter*); *Tulare County v. Kings County*, 117 Cal. 195, 49 Pac. 8; *Cheyenne County v. Bent County*, 15 Colo. 320, 25 Pac. 508 (*obiter*); *Veazie v. Howland*, 47 Me. 127 (*obiter*); *South Portland v. Cape Elizabeth*, 92 Me. 328, 69 Am. St. Rep. 502, 42 Atl. 503 (*obiter*); *State ex rel. Minnesota R. Constr. Co. v. Lake City*, 25 Minn. 404; *Lodi Twp. v. Hackensack Improv. Commission*, 60 N. J. Eq. 229, 46 Atl. 782 (*obiter*); *McCully v. Tracy*, 66 N. J. L. 489, 49 Atl. 436; *People ex rel. McKenzie v. Ulster County*, 94 N. Y. 287 (*obiter*); *Currituck County v. Dare County*, 79 N. C. 565; *Gilliam County v. Wasco County*, 14 Or. 525, 13 Pac. 324; *Depere v. Bellevue*, 31 Wis. 120, 11 Am. Rep. 602; *Schriber v. Langdale*, 66 Wis. 616, 29 N. W. 547, 554; *Re Tremont & B. H. Counties*, 8 Wyo. 43, 54 Pac. 1073, citing to *dictum* *Laramie County v. Albany County*, supra.

The same general declaration is to be found in some of the cases denying the right of the new municipality to participate in the assets. *Washington County v. Weld County*, 12 Colo. 152, 20 Pac. 273 (involv-

must be determined upon equitable principles.

28 Am. & Eng. Enc. Law, 297; Towle v. Brown, 110 Ind. 65, 10 N. E. 626; Mt. Pleasant v. Beckwith, 100 U. S. 514, 25 L. ed. 699; Zwartman v. State, 109 Ind. 360, 10 N. E. 94.

Brewer, C., filed the following opinion:

This is a suit for money had and received. On January 22, 1908, the defendant in error, Oakdale township, as plaintiff below, filed its petition against Union township, plaintiff in error, as defendant below, in the district court of Washita county. The petition stated substantially the following state of facts: That prior to January 4, 1904, Union township embraced

all the territory in both plaintiff and defendant townships at the time of suit. That on January 4, 1904, the board of county commissioners of Washita county divided Union township, creating the south half thereof into Oakdale township. That at the time of such division and creation of plaintiff, there was certain cash in the hands of the county treasurer due defendant. That said funds were derived from taxes collected from persons on property situated in defendant township before division. That thereafter the county treasurer collected other taxes during the year 1904 under the levy of 1903 from said property, and paid them over to defendant. That one half of the property from which said taxes were collected was situated in

ing right to surplus in treasury); Cooke v. School Dist. No. 12, 12 Colo. 453, 21 Pac. 496, 719 (school fund); Hartford Bridge Co. v. East Hartford, 16 Conn. 149, affirmed in 10 How. 511, 13 L. ed. 518 (ferry franchise); People ex rel. Richberg v. School Trustees, 86 Ill. 613 (school fund); North Yarmouth v. Skillings, 45 Me. 133, 71 Am. Dec. 530 (*obiter*); School Comrs. v. School Comrs. 35 Md. 201 (*obiter*); Hampshire County v. Franklin County, 16 Mass. 76 (*obiter*); Clay County v. Chickasaw County, 64 Miss. 534, 1 So. 753 (county and school fund); Winslow v. France, 20 Okla. 303, 94 Pac. 689 (denying right of new county to share of funds of old); Reeves County v. Pecos County, 69 Tex. 177, 7 S. W. 54 (same). But, as pointed out under the next heading, this general statement has been questioned so far as it suggests that the new subdivision is entitled to the public property which falls within it.

Assets—generally.

See also *infra*, under the heading "Time" and its subdivisions.

In the light of general principle referred to, it is held that a provision in the act of separation that the town farm shall belong to the new town does not transfer to it the personal property belonging on such farm. Frankfort v. Winterport, 54 Me. 250.

And the right of a school district to a fund held in trust for it continues after the portion of a town in which the district is located is organized into a new town. Goulding v. Peabody, 170 Mass. 483, 49 N. E. 752.

It was held in Willite v. Mansfield, 23 Okla. 246, 99 Pac. 1087, that where the new county is formed from territory which embraces a high school building, it becomes the property of such county.

And it was said in North Hempstead v. Hempstead, 2 Wend. 109, that upon the division of a town, each community was entitled to hold in severalty the public property which fell within its limits, but this was *obiter dictum*, since it was further held in the case that even if one community had a right to property in the other after the 39 L.R.A. (N.S.)

division, such right had become barred by the lapse of time.

And it has been held that lots conveyed to a township for the purposes of a township hall which has been erected by money raised by taxation on all the property of the township passes to a city of the second class when it is formed from a city of the third class which embraced such lots and was a part of the township, at least where the lots were conveyed to the township and "its successor or successors," and were held in the township's governmental rather than proprietary capacity. Wellington v. Wellington Twp. 46 Kan. 213, 26 Pac. 415.

And it is held in Prescott v. Lennox, 100 Tenn. 591, 47 S. W. 181, that each division will hold in severalty for public purposes the public property which falls within its limits, in the absence of legislative regulations. This case involved a dispute as to the ownership of a lot, and supports its position by the citation of cases which really do not decide the point. Some of the cases so cited are appended to the statement of the so-called general rule, which is set out at the beginning of this note, and which really oversteps the mark in one particular. While it clearly intimates that after the division each municipality is entitled to the property that falls within it, it is to be observed that the cases (or most of them) which contain the intimation involved nothing that required a decision on the point. Indeed, anything that may be regarded as statements to that effect are characterized, in Winona v. School Dist. No. 82, 40 Minn. 13, 3 L.R.A. 46, 12 Am. St. Rep. 687, 41 N. W. 539, as purely *obiter*, unaccompanied by any real discussion of the question or citation of authority. The Winona Case holds that if a part of a municipal corporation is separated from it by annexation to another, or by its erection into a new corporation, unless some other provision is made in the act authorizing the separation, the old corporation (it not having been abolished) remains subject to all its liabilities, and retains all its property including that which, upon the change of boundaries, happens to fall within the limits of the other corpora-

plaintiff township after the division, and therefore one half of said taxes were the property of plaintiff. That defendant township had failed and refused to pay to plaintiff its said one half of taxes so collected, and had appropriated and converted them to its own use.

Demand and filing of claim for same with defendant and refusal to pay are alleged by plaintiff. The defendant filed demurrer and answer to petition. The demurrer was overruled, and defendant excepted. The cause was referred to a special referee. Defendant objected to introduction of evidence. The referee found the law and facts in favor of plaintiff over exceptions of defendant. The report was confirmed by the district court, and judgment entered for

plaintiff in the sum of \$525.41, interests and costs.

Several alleged errors are assigned and urged by plaintiff in error, but under our view of the case a consideration of the demurrer to the petition will dispose of the whole matter. The county commissioners, when they made the order creating plaintiff out of territory theretofore a part of defendant, made no attempt, by order or otherwise, to provide for any apportionment or division of the assets of defendant on hand, or to be collected from prior levies of taxes. No statute in force when this matter arose providing for such division or apportionment has been called to our attention, and we know of none.

The question, then, is: Where part of

tion. In other words, it is held that the old corporation retains all the corporate property regardless of situation. With respect to the rights in property where the old corporation is abolished, the court had this to say: "There is a line of cases, often confounded with, but clearly distinguishable from, that now under consideration, where the old corporation was entirely abolished, and new ones created out of its territory. In such cases it is well settled that the new corporations are to be deemed the successors of the old one, and as such liable for all its debts, and entitled to all its property. And in the absence of any legislative provision on the subject, it is held in such cases that each of the new corporations will take the property which happens to fall within its limits."

There is some authority for the position taken in the last case. Thus, it is held that, in the absence of statute, a township which holds land in trust for cemetery purposes continues to hold the property, notwithstanding the cemetery is embraced in a city carved from a part of the township territory. *Board of Health v. East Saginaw*, 45 Mich. 257, 7 N. W. 808.

And it was held in an early New Hampshire case that the title to land granted to a town for pious uses remained its property, notwithstanding the formation of a new town from a part of the former's territory, so as to include the land within the latter. *Union Baptist Soc. v. Candia*, 2 N. H. 20.

So, too, it was held that land conveyed to a town "for the use and benefit of the public, and to be improved for a public common, and no other purpose," remained the property of the town, notwithstanding its division so that the disputed land was included within the limits of the new town. *Troy v. Haskell*, 33 N. H. 533. This case was cited with approval in *South Hampton v. Fowler*, 52 N. H. 225.

And the last two cases were cited in *Greenville v. Mason*, 53 N. H. 515, as settling the law in New Hampshire, that when a town is divided by the creation of a new corporation, it still retains all its property, real and personal, the title thereto being un-

affected by the change, unless a different provision is made in the act authorizing the separation. The question arose in the *Greenville Case* over the right of the new town to share in a school fund donated by an individual.

—surplus.

The Colorado supreme court holds that the rule of nonparticipation in the old county's assets is applicable to a surplus of assets over liabilities. *Washington County v. Weld County*, 12 Colo. 152, 20 Pac. 273.

The view has, however, been taken that equitable principles should be applied in the apportionment of assets in the form of money, choses in action, or kindred property in existence at the time of the division; and that the application of such principles requires an equitable adjustment between the old and new townships of unexpended funds at least, where there are no debts of the old corporation to be provided for. *Towle v. Brown*, 110 Ind. 65, 10 N. E. 626, followed in a subsequent action between the same parties in 110 Ind. 599, 10 N. E. 628.

—fund appropriated to territory divided.

The new county has no right to a share of a fund for the reclamation of swamp lands, established in the old county in such a manner as to create a trust fund only in the latter, in the absence of a legislative distribution of the fund: and this, of course, notwithstanding the new county embraces a portion of the swamp lands previously located in the old. *Kings County v. Tulare County*, 119 Cal. 509, 51 Pac. 866.

—fund arising from tax on property in new division.

There are cases which involve the question as to which municipality has the right to collect taxes after the division, but such cases do not seem to involve the question whether the county adjudged entitled to make the collection is entitled to the full

an existing township is detached, and created into a new one, and no provision is made by statute, order, or otherwise for an apportionment of the assets of the old, is the new one entitled to part of such assets, and can it recover them in a suit for conversion or for money had and received? The defendant in error on this proposition relies mainly on the doctrine announced by the supreme court of Indiana

in *Towle v. Brown*, 110 Ind. 65, 599, 10 N. E. 626, 628. This authority supports its contention fully. It also cites *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 25 L. ed. 699. This case we do not think in point. Under the decisions of this court, the position of defendant in error cannot be sustained. In the case of *Winslow v. France*, 20 Okla. 303, 94 Pac. 689, Justice Williams, for the court, says: "It is well

amount collected. In other words, it is not purposed to consider herein cases which pass upon the matter of which municipality shall collect the taxes, but do not determine whether the municipality entitled to collect does so solely for its own benefit, or wholly or partially for the benefit of the other municipality. In this connection cases may be noted which hold that property transferred to the new division remains liable to the old corporation for a tax which became due before the separation (*Eskridge v. McGruder*, 45 Miss. 294); but in the absence of statute, the right of the authorities of the old corporation to sell property now embraced within the new, for such a delinquent tax, ceases upon the division of the territory, but the owner's property remaining within the old division may be sold for the entire tax (*Deason v. Dixon*, 54 Miss. 585).

The right of the old county to collect taxes previously levied by it upon property now located in the new corporation is not affected by the fact that they were not paid until the latter's formation. *Colusa County v. Glenn County*, 117 Cal. 434, 49 Pac. 457, subsequent appeal, 124 Cal. 498, 57 Pac. 477.

And the right of a township to liquor taxes within its territory attaches at the time the taxes become due, and is therefore not affected by the subsequent detachment of a part of its territory and its annexation to another municipality. *Springwells Twp. v. Wayne County*, 58 Mich. 240, 25 N. W. 329.

The new county is not entitled to that part of a fund which arose from a tax levied during the year of its formation and upon territory now within its boundaries, by the parent county, which has collected and is holding it under a statutory provision that all taxes due the state and county by persons residing in the new county, or upon property included within limits of the new county, shall be payable to the tax collector of the county from which such territory was taken, and the same shall be enforced and collected by the officers of the parent county. *Tift County v. Berrien County*, 131 Ga. 259, 62 S. E. 204.

And the new county is not entitled to any part of a fund arising from taxes collected between the date of the act authorizing its creation and the time when the organization was perfected. *Reeves County v. Pecos County*, 69 Tex. 177, 7 S. W. 54.

But it has been held that where the 39 L.R.A. (N.S.)

commissioners for the formation of the county and the division of the assets and liabilities have not apportioned an overdue tax previously levied by the old county upon a railroad, the old county cannot recover from the new the proportion of the tax paid to it by the railroad, where the payment was made upon the basis of a reassessment and apportionment by the state board of equalization in the ratio of the mileage of the railroad in the respective divisions. *San Diego County v. Riverside County*, — Cal. —, 55 Pac. 7. In this case it seems not to have been urged that the board of equalization was without power to make the reassessment. However, in a later California case it was held that where the taxes were lawfully levied by the old county before the formation of the new, the former was entitled thereto, and the state board of equalization was without power to make a reassessment after the formation of the new county and to apportion the same between the two divisions; and that where the tax was paid by the tax debtor in pursuance of such apportionment, the amount paid the new county was recoverable from it by the old. *Colusa County v. Glenn County*, 124 Cal. 498, 57 Pac. 477. The ground of the decision is that the statute authorizes a reassessment only where the first assessment is invalid; and this broad ground forestalls the making of any distinction between the two cases upon the ground that in the former the legislature authorized the commissioners to apportion the assets of the old county, whereas it made no such provision in the latter, but left the case free for the application of the general rule, which, it may be noted, the court did discuss.

—right of new corporation in assets when made liable for share of debts.

The rule that the new corporation cannot participate in the assets of the old is not affected by a provision that the new division shall be liable for its *pro rata* share of the existing debts of the old division, whether such provision be statutory (*Houston County v. Henry County*, 157 Ala. 246, 47 So. 710, subsequent appeal, 162 Ala. 488, 50 So. 311), or constitutional (*Washington County v. Weld County*, 12 Colo. 152, 20 Pac. 273).

Indeed, it is held that even where the new county is, under the statute creating it, liable upon bonds previously issued by the old county for the purpose of aiding

settled that if a new county is created out of the territory of an old county, or if part of its territory or inhabitants is annexed to another county, unless some provision is made in the act respecting the property and existing liabilities of the old county, that the old county owns all the public property except such as may be located within the detached territory, and is responsible for the debts contracted by it

a railroad by the purchase of its stock, it is not entitled to any portion of the proceeds of the sale of such stock. *Dare County v. Currituck County*, 95 N. C. 189.

But it is intimated in *Houston County v. Henry County*, supra, that the new corporation may lay claim to the funds of the old corporation which have been specially collected for or appropriated to the meeting of a specific obligation, at least where a statute makes the new corporation liable for its *pro rata* share of the existing debts.

Obligations—generally.

See also infra, under the heading "Time" and its subdivisions.

The operation of the general rule is not affected by a constitutional provision that every county which shall be created from territory taken from another shall be liable for a just proportion of the existing liabilities of the latter, for in such circumstances it is for the legislature to determine what is "a just proportion" of such obligations, or to provide the machinery for its determination; and until the legislature has done this, the old corporation cannot maintain an action against the new for any part of the debt. *Tulare County v. Kings County*, 117 Cal. 195, 40 Pac. 8.

And while it has been held that the operation of this rule should not be suspended in a particular case, upon the ground that it will work a hardship upon a corporation which has contracted a large indebtedness and will have a great amount of taxable property withdrawn from its power of taxation, and given to the new corporation (*Laramie County v. Albany County*, 92 U. S. 307, 23 L. ed. 552, affirming 1 Wyo. 137), the application of the rule has been denied in circumstances which literally came within it, where its application would have constituted more of a mockery of justice than anything else. For instance, it was held in *Brewis v. Duluth*, 3 McCrary, 219, 9 Fed. 747, that where the legislature carved a village out of the territory of a city in such a manner as to include within the village substantially all of the city's inhabitants and most of its taxable property, and apportioned the indebtedness of the city between it and the village in such a manner as to interfere with the rights of creditors, the holder of bonds previously issued by the city to meet the costs of improvements was entitled to maintain a bill in equity to en-

force against the village its proportionate share of the indebtedness, and that such proportion should be in ratio to the taxable property set off respectively to the city and the village.

And a tax is a debt within the meaning of the general rule, and therefore, when a county is divided, the old county may be compelled to pay the whole of the state levy charged upon the county at the time the division took place. *Gilliam County v. Wasco County*, 14 Or. 525, 13 Pac. 324.

Property which was within the corporate limits of a city at the time of the issuance of bonds, but which is now outside the corporation by reason of the reduction of its limits, cannot be assessed for the purpose of aiding in paying the bonds. *Miller v. Pineville*, 121 Ky. 211, 89 S. W. 261.

And it is held that a township remains liable upon bonds issued by it, notwithstanding that after the issuance of the bonds all but a small portion of its territory became incorporated into a new county which was formed from a portion of the county of which the township was formerly a part, and although some new territory was added to the township in the course of the change. *Taylor v. Pine Grove Twp.* 132 Fed. 565, followed in *Susong v. Cokesbury Twp.* 132 Fed. 567. These cases hold that neither the fact that a portion of the territory of the township remained in the old county, nor the fact that new territory was added to the township which was not a part of it at the time the bonds were issued, affected its liability thereon.

A fortiori, the liability of a township upon such bonds is not affected by the mere fact that it was wholly transferred from the old county into a new county. *Planters' & Sav. Bank v. Huie Twp.* 132 Fed. 627.

On the other hand, the view has been taken that where the territory of a township is transferred to a new county, the township is thereby abolished; and therefore, the subsequent division of such territory into two townships, one of which bears the name of the original township, does not render them the successors of the original township, so as to make them liable for its debts, at least where, due to the fact they were contracted without a vote of the people, they did not become a lien upon the territory. *Vandriess v. Hill*, 58 Kan. 611, 50 Pac. 872. The court stated in this case that the new county was the municipal successor of the old township,

ing liabilities of the old county, the territory or inhabitants detached from the original county lose all claim to share in the property belonging to the county from which it was taken. Whilst it is thus relieved from the indebtedness resting upon the latter, yet it incurs the liabilities and shares in the property of the county to

which it is attached, and is equally subject to assessment and taxation for that purpose. *Currituck County v. Dare County*, 79 N. C. 565; *Watson v. Pamlico County*, 82 N. C. 17; *Chicago, St. P. M. & O. R. Co. v. Cuming County*, 81 Neb. 374, 47 N. W. 1121; 1 Dill. Mun. Corp. § 123." The doctrine of the above case has been quoted

but that, since no liability for the debt was alleged against it, the matter of its liability need not be adjudicated.

It was held in *Watson v. Pamlico County*, 82 N. C. 17, that, just as territory detached from one county and added to another is relieved of the liability for the pre-existing indebtedness of the county from which it is taken, so it must contribute to the existing indebtedness of the county to which it is attached.

And the organization of a new township severs its territory from the school district within which it was formerly embraced, and, in the absence of statute, the township cannot be charged with debts created for school purposes which existed at the time of the division. *People ex rel. School Dist. No. 1 v. Ryan*, 19 Mich. 203.

But where a part of the territory of a county is formed into a new county and the boundary line between the two bisects a township, and each resulting township bears the name of the original township in its respective county, both townships remain liable for a pre-existing debt of the old one. *Plunkett's Creek Twp. v. Crawford*, 27 Pa. 107.

In *Higginbotham v. Com.* 25 Gratt. 627, it was held, in respect of a debt owed by the state of Virginia at the time of its dismemberment and the formation of the state of West Virginia, that each state was, as between herself and the creditor, bound for the whole debt, but it was intimated that, as between themselves, the states were liable ratably.

It is held in *Partridge v. Dennie*, 105 Minn. 60, 117 N. W. 234, that, in the absence of a specific statute on the question, the interested towns, through their proper officers, may, as between themselves, adjust and settle their respective rights and liabilities on such terms as they deem fair and just; and that an agreement entered into for that purpose will be valid and binding upon each town, at least after performance by one of the towns, though possibly not as against holders of the indebtedness.

—support of pauper.

A town formed from a portion of the territory of a city is not liable for the support of a pauper who has no settlement in the territory from which it was formed; and it cannot be charged there-with upon the theory that it is bound by a contract made by the city before the town's formation, whereby the city and another municipality adjusted a dispute in respect of a pauper family, by stipulating that a part of the family should be deemed to 39 L.R.A. (N.S.)

have a settlement in the city and the other part in such municipality. *Veazie v. Howland*, 47 Me. 127.

And it was held in an early Massachusetts case that, upon the division of a town and the formation of a new town, a pauper who had a settlement in the former, but was absent at the time of the division, continued to have his settlement in the former, notwithstanding that before his absence he had resided in the territory from which the new town was formed. *Windham v. Portland*, 4 Mass. 384.

—liability for injury by defective highway now in new division.

The new county cannot be held responsible for injuries caused by a defective highway received before its formation, merely because it now includes the territory in which the highway is located. *Askew v. Hale County*, 54 Ala. 639, 25 Am. Rep. 730.

And a township a part of whose territory has been made into a new township cannot escape liability upon a judgment previously rendered against it for injuries received upon a defective highway located in territory now within the new township, either upon the theory that, upon the division, the old township was abolished and that two new ones instead of one were created, nor because the statute prescribed no criterion for the apportionment of the liability between the townships. *Court-right v. Brooks Twp.* 54 Mich. 182, 19 N. W. 945.

—location of improvement as affecting liability for expense.

While the fact that a bridge for which bonds were issued is located in territory which remained in the old division does not affect the liability of property in the detached territory upon the bonds, which became a lien thereon before the detachment (*Marion County v. Harvey County*, 26 Kan. 181), the county in which the proceedings were taken and closed, for the condemnation of land to construct a road, is solely liable for damages to the landowners, notwithstanding the portion of its territory which concluded the road was incorporated into another county before the road was completed (*Jones v. Oxford County*, 45 Me. 419).

In this connection it has been said that the fact that a large portion of the taxable property and of the population in the old municipality has been transferred to the new one, and the further fact that the latter profits most from the improvement for which the obligations are incurred, consti-

with approval in *Wilhite v. Mansfield*, 23 Okla. 246, 99 Pac. 1087. To the authorities cited above may be added as strictly in point 1 *Cooley*, taxn. 3d ed. 414, 415; *Comins Twp. v. Harrisville Twp.* 45 Mich. 442, 8 N. W. 44. From the above authority it appears that the petition in this cause does not state a cause of action. There-

fore the cause should be reversed, with instructions to the trial court to set aside the judgment, sustain the demurrer, and dismiss the action.

Per Curiam.

Adopted in whole.

tute good reasons why the legislature ought perhaps to have made some provision for an equitable apportionment of the burden, but that they furnish no ground for any equitable relief by the court, either in favor of the old municipality or its creditors. *State ex rel. Minnesota R. Constr. Co. v. Lake City*, 25 Minn. 404.

The contention that the new county should be responsible for a portion of the old debts, since some of them were created in making improvements in a part of what had become its territory, was, to all appearances, ignored in *Laramie County v. Albany County*, 92 U. S. 307, 23 L. ed. 552, affirming 1 Wyo. 137.

And it has been held that the liability with which a town became charged for the debt of another town which was attached to it continued and was enforceable against it, and not against the attached territory, notwithstanding such territory was subsequently detached and formed into a town which bore the same name as before its previous attachment. *Shriber v. Langlade*, 66 Wis. 616, 29 N. W. 547, 554.

It has been further held that an old municipality which remains solely liable upon bonds issued for the construction of sewers retains title and control of such sewers, although they are embraced within the limits of the new corporation. *Bloomfield Twp. v. Glen Ridge*, 55 N. J. Eq. 505, 37 Atl. 63.

See also *Means v. Williamson*, 37 Me. 556, *infra*, under "Time—date of obligation."

—liability of territory exempt when detached.

The liability of detached territory upon bonds issued before the division is not affected by the fact that before the division a part of such territory was exempt as government land. *State ex rel. Robb v. Kiowa County*, 41 Kan. 630, 21 Pac. 601.

Time—when organization deemed complete.

It has been held that the new township does not become a complete and independent organization until its officers enter upon the discharge of their duties; and that therefore territory in the new township is subject to taxation under a vote of the old township authorizing a tax to raise a fund for railroad aid, before such complete organization of the new corporation. *Lamb v. Burlington, C. R. & M. R. Co.* 39 Iowa, 333.

And it is said in *Comins Twp. v. Harrisville Twp.* 45 Mich. 442, 8 N. W. 44, that a township is not completely organized for

the assessment, levy, and collection of taxes, until the election of its proper officers, and that, until then, the township from which it is set off may make the levy and collection.

But the commissioners of the parent county cannot bind the new subdivision by a tax levied after the passage of the act to lay out the new county, and for the expense of a public improvement thereafter to be constructed. *Pope v. Matthews*, 125 Ga. 341, 54 S. E. 152; *Yow v. Sullivan*, 129 Ga. 187, 58 S. E. 662.

—when fund available.

The old county retains a school fund collected, but not accredited to the school district, before the formation of the new county. *Cooke v. School Dist. No. 12*, 12 Colo. 453, 21 Pac. 496, 719.

—date of obligation.

The old corporation remains liable for a pre-existing debt, notwithstanding it was merged in a judgment before the division. *McCully v. Tracy*, 66 N. J. L. 489, 49 Atl. 436.

And the liability of a township for the expense of a road constructed by a duly appointed agent, whose appointment the statute authorizes in case of the township's neglect to build the road, is not affected by the fact that, owing to such neglect, the road was not constructed until after the formation of a new township from territory which embraced the road. *Re Page*, 37 Me. 553.

The making of the contract for the building of a bridge, and not the vote authorizing such contract, creates the liability of the town, and therefore, where such contract is not made until after the division of the town, the new town is not liable for any of the expense of construction. *Westbrook v. Deering*, 63 Me. 231.

So, the new township is not liable upon railroad aid bonds which, although voted before the division of the old township, were authorized upon condition that the railroad deliver to the township treasurer an equivalent in stock of the company, and such condition was not complied with nor the bonds issued until after the formation of the new township. *Pierson Twp. v. Reynolds*, 49 Mich. 224, 13 N. W. 525.

But funding bonds, although authorized and issued after the detachment, are a lien upon the detached territory, where they were issued in lieu of bonds which became a lien upon the entire county before any territory was detached. *Marion County v. Harvey County*, 26 Kan. 181. *L. A. W.*

OKLAHOMA SUPREME COURT.

ARDMORE STATE BANK, Plff. in Err.,
v.
I. R. MASON.

(— Okla. —, 120 Pac. 1080.)

Corporation — compelling transfer of stock.

1. A purchaser of bank stock may compel, by bill in equity, the transfer of the same on the books of the corporation, or he may sue in conversion and damages for the failure to so transfer.

Pleading — demurrer — sufficiency.

2. Where a general demurrer is filed to a petition, if any paragraph states a cause of action, the demurrer should be overruled.

Headnotes by ROBERTSON, C.

Note. — Corporation: priority as between lien of corporation and pledgee or bona fide purchaser of corporate stock.

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I. Scope.

This note does not include cases where the indebtedness to the corporation was for the stock itself or for an assessment upon the stock. It is limited to the question of priority of lien, and presupposes or assumes that the corporation has a lien as between it and the stockholder. Therefore the general question as to what is required to create a lien is excluded except in so far as the courts have drawn a distinction between what will create a lien between the company and the stockholder, and what will create a lien as between the company and a pledgee or assignee of the certificate of stock. The reader is reminded that the corporation has no common-law lien upon the stock of its stockholders. (10 Cyc. 580). The question of waiver of a lien is excluded.

For validity of pledge or other transfer of stock of corporation when not made on 39 L.R.A.(N.S.)

Pledge — statutory right — waiver.

3. The statute requiring the pledgee, before the sale of pledged property, to give notice and sell same at public auction, was enacted for the benefit of the pledgor; and he may waive, by stipulation, both the notice and the public sale, and in that event a private sale is valid.

Bank — loan — lien on stock — prior pledge — rights.

4. McL. owned ten shares, fully paid up, in the A. State Bank. On June 24th he was indebted to said bank for borrowed money in the sum of \$2,000. On the same day he borrowed \$5,255 from the F. State Bank, and secured the same by pledging, among other things, his ten shares of stock in the A. State Bank. On June 25th he paid in full his indebtedness to said A. State Bank, and from June 25th to July 8th he was not

books of company, as against attachments, executions, or subsequent transfers, see the notes to Mapleton Bank v. Standrod, 67 L.R.A. 656, and Everitt v. Farmers' & M. Bank, 20 L.R.A.(N.S.) 996.

For cases on restriction by by-law or articles of association on the right to sell shares of stock, see the note in New England Trust Co. v. Abbott, 27 L.R.A. 271.

II. Priority as affected by time of incurring indebtedness.

As will be seen, the question of importance is one of notice, not one of the time of incurring the indebtedness.

Thus the fact that the debt to the corporation is incurred after a pledge or assignment of the stock to a third party will not in itself prevent the priority of the corporation's lien in cases where the pledgee or purchaser is presumed to take notice that the corporation claims the right to a lien. Mobile Mut. Ins. Co. v. Cullom, 49 Ala. 558; People's Bank v. Exchange Bank, 116 Ga. 820, 94 Am. St. Rep. 144, 43 S. E. 269; Mt. Holly Paper Co.'s Appeal, 99 Pa. 513; Sproul v. Standard Plate Glass Co. 201 Pa. 103, 50 Atl. 1003; George H. Hammond & Co. v. Hastings, 134 U. S. 401, 33 L. ed. 960, 10 Sup. Ct. Rep. 727 (obiter).

The same was held where there was a transfer on the books in trust for the corporation, although the certificates were not produced, as they were held by the pledgee for an earlier debt. Platt v. Birmingham Axle Co. 41 Conn. 255.

While in the foregoing cases the lien was statutory, no doubt the same rule would apply where the lien was provided for by the articles of incorporation.

Such was evidently the theory of the court in Dempster Mfg. Co. v. Downs, 126 Iowa, 80, 106 Am. St. Rep. 340, 101 N. W. 735, 3 Ann. Cas. 187, where possibly some of the indebtedness to the company was later than the pledge.

In Gibbs v. Long Island Bank, 83 Hun, 92, 31 N. Y. Supp. 406, affirmed in 151 N. Y. 657, 46 N. Y. 1147, where the lien was

indebted to it in any sum whatever. On the latter date he borrowed \$1,500 from the A. State Bank. During the time in which he was not indebted to said bank, actual knowledge was given to said bank of the pledging of his ten shares of stock to the F. State Bank, yet, notwithstanding such knowledge, the last loan of \$1,500 was made. The contract of pledge stipulated that upon default of payment of the principal sum the pledgee might sell the pledged stock without notice and at private sale. On November 12th plaintiff bought, at private sale, the said shares and thereafter presented the same to the A. State Bank, and demanded that the certificate be canceled and a new certificate be issued, and that the said shares be transferred on the books of such A. State Bank, which was refused on the grounds that McL., the original own-

er and pledgeor, was then indebted to said A. State Bank, and that said bank had a statutory lien on said stock for such indebtedness, and also for the further reason that the by-laws of said A. State Bank prohibited a transfer of stock by its stockholders who were indebted to said bank either as principal or surety. Held:

First. That the statutory lien which the A. State Bank had against such stock on June 24th was discharged when the owner of such stock, on June 25th, paid all his indebtedness to said bank; and

Second. That after June 25th and up to July 8th, when McL., the owner of such stock, was not indebted to said bank, he had a right to sell, assign, or transfer by way of pledge the said stock, and that the same was free from statutory lien; and

Third. That when said A. State Bank,

provided for by the articles of association, the original debt to the company preceded that to the pledgee, and was paid, but the stockholder was continuously indebted to the company, which was given priority.

Within the foregoing rule, authority for the lien is unnecessary where notice thereof is upon the certificates of stock and there is no statutory prohibition of such a lien. See the following cases cited *infra*, III. a, 3: *Jennings v. Bank of California*, 79 Cal. 325, 5 L.R.A. 233, 12 Am. St. Rep. 145, 21 Pac. 852; *Stafford v. Produce Exch. Bkg. Co.* 61 Ohio St. 160, 76 Am. St. Rep. 371, 55 N. E. 162; *State Sav. Assn. v. Nixon-Jones Printing Co.* 25 Mo. App. 642.

On the other hand, where the bona fide pledgee or purchaser for value is not presumed to take notice of any claim to the right of a lien on the part of the company, his rights will be prior to those of the company although it claims upon an earlier debt. *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 102 Am. St. Rep. 115, 48 S. E. 226; *Bank of Holly Springs v. Pinson*, 58 Miss. 421, 38 Am. Rep. 330; *Anglo-California Bank v. Grangers' Bank*, 63 Cal. 359; *Driscoll v. West Bradley & C. Mfg. Co.* 59 N. Y. 96; *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249 (where the corporation probably had no lien at all).

The same has been held where there was a failure of constructive notice that the right to a lien was claimed by reason of the certificate referring to the articles, instead of to the by-laws (*Re McKain*, 7 Ont. L. Rep. 241); or because of the failure of statutory posting of by-laws (*Des Moines Nat. Bank v. Warren County Nat. Bank*, 97 Iowa, 204, 66 N. W. 154); or failure to place by-law upon the certificate, as required by resolution (*Brinkerhoff-Farris Trust & Sav. Co. v. Home Lumber Co.* 118 Mo. 447, 24 S. W. 129).

As to the effect of statutes on prior pledges, see *infra*, IV.

In Louisiana the question would seem to be one of time, not notice. Thus in *Pitot v. Johnson*, 33 La. Ann. 1286, where by the charter (not, it seems, a legislative charter) stocks could not be transferred "while any 39 L.R.A. (N.S.)

matured indebtedness to the association exists on the part of the holders," the court said it had already been decided "that a sale or pledge of the stock of an incorporated company is, under article 3158, complete, even as to third persons, by the delivery to the vendee or pledgee of the certificates of stock; and that notice to the corporation is not necessary to the perfection of the sale or pledge, or to protect the stock from seizure by the vendor's creditors, or from other rights of third persons arising subsequently to the sale or pledge." And the court said further: "It . . . appears that, at the date of the pledge, the holder of the stock owed nothing to the corporation. If notice had been necessary to the validity of the pledge, and had been given, it would not be pretended that, after such notice, indebtedness of the stockholder, arising subsequently, could, in any manner, operate to the prejudice of the rights of the pledgee. But since it is held that, without notice, and by the mere delivery of the certificates, the pledge is binding as to the corporation and all third persons, it logically follows that the pledge fastens on the rights of the pledgeor as they stood at the moment of the pledge, and cannot be affected by subsequent transactions between him and the corporation. A different question might present itself if the indebtedness to the company had existed at the date of the pledge."

III. The question of notice.

a. Notice to the pledgee or assignee.

1. Actual notice of prior debt and claim of lien.

It would seem free from doubt that one who lends upon, or buys, stock, knowing that the stockholder is indebted to the corporation which claims a lien thereon, must be postponed to the claims of the corporation, unless there be statutory prohibition against the corporation having a lien upon its own stock.

with knowledge of the pledge, again made McL. a loan, it did so at its peril, and that it was not entitled to a priority lien on such stock as against the pledgee, who had received such stock in hypothecation when there was no indebtedness to the issuing bank at the time when its second credit was extended to said McL., and that such subsequent loan to said McL. by said A. State Bank made it statutory lien subsequent and secondary to that of the pledgee of such stock; and

Fourth. The pledgee, by virtue of the stipulation between the parties, had a right to sell such pledged stock at private sale, without notice, on November 12th, and the purchaser became the equitable owner and entitled to the legal title to said stock by having the same transferred on the books of the said A. State Bank; and

Fifth. The by-laws of said bank which prohibited the sale of stock by a stockholder while indebted to the bank was made for the benefit of the corporation, and its provisions do not apply to bona fide purchasers of stock in good faith at pledgee's sale, especially when the corporation has actual knowledge of the pledge, and such pledge was made at a time when there was no statutory lien on the pledged stock, and the indebtedness by which the bank now claims its lien was created after the stock was pledged.

(November 14, 1911.)

ERROR to the District Court for Carter County to review a judgment in plaintiff's favor in an action brought to compel

2. Where no actual notice.

(a) Lien by express terms of statute.

It is a general rule that where, by express terms of statute, a lien is given to a corporation upon the stock for the stockholder's indebtedness to it, or where by statute express power is given to the corporation to refuse to transfer the stock of a stockholder so indebted, its lien is prior to the rights of a pledgee or a bona fide purchaser for value, that is to say, he must take notice of the statute. *Union Bank v. Laird*, 2 Wheat. 390, 4 L. ed. 260; *Mobile Mut. Ins. Co. v. Cullom*, 49 Ala. 558; *Platt v. Birmingham Axle Co.* 41 Conn. 255; *Reese v. Bank of Commerce*, 14 Md. 271, 74 Am. Dec. 536; *Russel Wheel & Foundry Co. v. Hammond, S. & Co.* 130 Mich. 7, 89 N. W. 590; *Michigan Trust Co. v. State Bank*, 111 Mich. 306, 69 N. W. 645; *Citizens' State Bank v. Kalamazoo County Bank*, 111 Mich. 313, 69 N. W. 663; *Schmidt v. Hennepin County Barrel Co.* 35 Minn. 511, 29 N. W. 200; *Dorr v. Life Ins. Clearing Co.* 71 Minn. 38, 70 Am. St. Rep. 309, 73 N. W. 635; *Moore v. Royal Oak Lumber & Supply Co.* — Mich. —, 137 N. W. 270; *Rogers v. Huntingdon Bank*, 12 Serg. & R. 77; *Sproul v. Standard Plate Glass Co.* 201 Pa. 103, 50 Atl. 1003; *Bohmer v. City Bank*, 77 Va. 455; *George H. Hammond & Co. v. Hastings*, 134 U. S. 401, 33 L. ed. 960, 10 Sup. Ct. Rep. 727 (*obiter*).

See also as asserting the rule, *Oakland County Sav. Bank v. State Bank*, 113 Mich. 284, 67 Am. St. Rep. 463, 71 N. W. 453, where, however, it was held that on the facts the corporation was estopped from claiming a lien.

In *People's Bank v. Exchange Bank*, 116 Ga. 820, 94 Am. St. Rep. 144, 43 S. E. 269, where there was a statutory lien in favor of the corporation, it was held that it is the right of the corporation to treat the stockholder as the rightful and legal owner of the stock, and to deal with him accordingly up to the time that it receives notice of the equity of another party, and that therefore loans made by a corporation to its stock-

holder after his stock has been pledged, but before the corporation is aware of it, are prior to the rights of the pledgee.

In *Farmers' Bank v. Iglehart*, 6 Gill. 50, where the legatee of a remainder interest in certain stock in a company, being indebted to the company, and while the life beneficiary was living assigned his interest to a purchaser for value, it was held that the company's lien under its statutory charter was prior to the rights of such purchaser.

In *Sproul v. Standard Plate Glass Co.* 201 Pa. 103, 50 Atl. 1003, where a stockholder, after assigning his stock as collateral security, became indebted to the company by a defalcation, and after the defalcation the company learned of the transfer or pledge of the stock, it was held that while a statute providing that no certificate should be transferred so long as the holder thereof was indebted to said company, unless the board of directors should consent thereto, did not give an express lien, it did give power to negative the transfer.

As the theory of the above rule is that the pledgee or assignee of the certificate is bound to take notice of the statutory lien, *a fortiori* the same result will follow when the statutory lien is asserted on the certificate. *German Nat. Bank v. Kentucky Trust Co.* 19 Ky. L. Rep. 361, 40 S. W. 458.

See also *dictum* in *Franklin Bank v. Commercial Bank*, 5 Ohio Dec. Reprint, 339, where the pledgee, by virtue of a statute, was prohibited from taking stocks as a pledge.

(b) Lien by articles of association.

It has also been held that a pledgee was required to take notice of a lien provided for by the articles of incorporation.

Thus, in *Dempster Mfg. Co. v. Downs*, 126 Iowa, 80, 106 Am. St. Rep. 340, 101 N. W. 735, 3 Ann. Cas. 187, where the corporation had no notice of a pledge at the time its claims arose (some at least of which preceded the pledge), it was held that its lien provided for in its publicly filed and recorded articles of incorporation was prior

the transfer on the books of the defendant bank of certain shares of stock purchased at pledgee's sale and for damages. Affirmed.

Statement by Robertson, C.:

This action was tried to the court on an agreed statement of facts, which statement contained all the facts save and except one question, as follows, to wit: "Did the Ardmore State Bank have notice at any time between the date of June 24, 1908, and July 8, 1908, that Richard R. McLish had pledged his ten shares of stock represented by certificate No. 3 to the First State Bank?"—which issue was submitted to a jury and was decided in the affirmative, and thus declared that the Ardmore

State Bank did have notice between the said dates that McLish had pledged his ten shares of stock, represented by certificate No. 3 of the First State Bank. Thereafter the court made its findings of fact and conclusions of law as follows:

Findings of Fact and Conclusions of Law.

(1) The court finds: That the Ardmore State Bank is a corporation incorporated under the laws of the state of Oklahoma, with a capital stock of \$25,000 paid up, and that the said bank was authorized by the state bank commission to do business on May 19, 1908, and that it opened for business at Ardmore on June 1, 1908.

(2) That Richard R. McLish was one of the organizers of said bank, and on June

to that of the pledgee, although there was no distinct statutory authority for the lien, and the certificate did not refer to the lien or the articles, and the pledgee had no actual notice of the articles or of the debt to the corporation.

Where the certificate refers to the articles of incorporation, a pledgee or assignee must take notice of their provisions. *Gibbs v. Long Island Bank*, 83 Hun, 92, 31 N. Y. Supp. 406, affirmed in 151 N. Y. 657, 46 N. E. 1147; *Leggett v. Bank of Sing Sing*, 24 N. Y. 283.

(c) Lien by by-law.

Where the lien is based on a by-law, while there is general agreement that, in the absence of statutory prohibition, it will be good as against the stockholder, there is some difference of opinion in the authorities as to its effect upon pledgees and bona fide purchasers. Some of the earlier cases hold that such a by-law will be authorized by general words in the statute, and therefore will be something of which a pledgee or bona fide purchaser is presumed to have notice, while the trend of the modern cases is to the contrary. Whether a by-law of this character enacted under express statutory authority would be a matter of which the present courts would require a pledgee or bona fide purchaser to take notice would seem at least doubtful.

Where by-law expressly authorized by statute.

In *Planters' & M. Mut. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585, *infra*, VII., where the court does not refer to the statute further than to say that the corporation's by-law was "passed in the exercise of its corporate powers," it seems that the statute expressly authorized a by-law restricting transfers of indebted stockholders; and the pledgee, who apparently had no actual notice of such by-law, was held bound by it. There appears to be no other case where this precise question has been decided, although there are cases which seem to disclaim holding that a pledgee or assignee would not

be deemed to have notice of a restricting by-law expressly authorized by the statute (and the question is of course included in the cases cited *infra*, holding that such a by-law authorized by general words in a statute must be taken notice of by pledgees and purchasers).

In *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 102 Am. St. Rep. 115, 48 S. E. 226, where there was no lien by the charter, but the statutes permitted a lien by by-law, as against transferees "with notice," it was held that as there was no notice of lien on the certificate that the pledgee was not required to take notice of such by-law, of which he had no actual notice, and that his lien was prior to that of the corporation whose debt existed at the time of the pledge.

Lack of express statutory authority.

The reader will understand that it is not the purpose of this note to discuss the question what statutory words will authorize a by-law restricting transfers by a stockholder indebted to the corporation, but only the question whether a pledgee or purchaser of the stock is bound to take notice of a by-law reserving the right to a lien adopted under a statute which, though not explicit on the point, is construed to authorize the same.

Some of the earlier cases hold that general statutory words are sufficient authority for such a by-law, and that a transferee must take notice of it.

Thus in *Cunningham v. Alabama L. Ins. & T. Co.* 4 Ala. 652, it was held that such a by-law was not inconsistent with the charter, which contained a provision that the certificate of stock "shall be assignable on the books of the corporation, to be kept at such place or places, and under such regulations, as the board of trustees shall establish;" and that a purchaser for value without notice of any encumbrance was not entitled to the transfer of stock, where the note of the firm of the transferrer was held by the corporation.

Similarly in *Pendergast v. Bank of Stockton*, 2 Sawy. 108, Fed. Cas. No. 10,918, such

4, 1908, there was issued to him certificate No. 3, representing ten shares of the capital stock of the par value of \$1,000.

(3) That on June 13, 1908, the Ardmore State Bank loaned to the said Richard R. McLish \$2,000, which was paid on June 25, 1908. That on July 8, 1908, the Ardmore State Bank made a second loan to the said Richard R. McLish in the sum of \$1,500, which amount was due and unpaid on November 12, 1908, at which time the plaintiff herein purchased the stock issued to the said Richard R. McLish by the Ardmore State Bank.

(4) That a meeting of the directors of the Ardmore State Bank was held January 12, 1909, at which meeting a dividend of 5 per cent was declared on the capital

stock of said bank, and the dividend on the \$1,000 stock standing in the name of Richard R. McLish was not paid to this plaintiff because the books of this bank showed said stock to be the property of the said McLish.

(5) That a short time subsequent to January 12, 1909, the plaintiff presented to the president and cashier of the bank certificate No. 3, representing \$1,000 of the capital stock of said bank issued to Richard R. McLish, and requested and demanded that said certificate be canceled, and, in lieu thereof, a new certificate be issued to this plaintiff by virtue of his having purchased this stock from the First State Bank of Ardmore on November 12th as aforesaid, and that the officers of the said

a by-law was held to be authorized by a statute providing that the stock should be transferable in such manner as should be prescribed by the by-laws, and that therefore an assignee of stock certificates (which apparently did not refer to the by-law) could not have them transferred, where at the time of the assignment the assignor was indebted to the company. The court, however, did not discuss the question of notice, but simply that of power.

In this connection, while there was notice of the by-law on the certificate, reference may be made to *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149, holding such a by-law authorized where by statutes the stock was assignable and transferable according to such rules as the board of directors should establish, and the company empowered to make and prescribe such by-laws and regulations, as to them should seem proper, touching the interest and business of the company, and that if at the time an assignee of stock applied to have shares transferred, there was an indebtedness from the assignor to the company, the company was not bound to transfer the stock. But the modern Missouri cases do not consider general statutory words as authority for by-laws of this character.

The better opinion is against the authority under indefinite statutes to pass by-laws restricting the transfer of stock by owners indebted to the corporation. *Bank of Atchison County v. Durfee*, 118 Mo. 431, 40 Am. St. Rep. 396, 24 S. W. 133; *Driscoll v. West Bradley & C. Mfg. Co.* 59 N. Y. 96.

In *Anglo-California Bank v. Grangers' Bank*, 63 Cal. 359, it was held that such by-law was inconsistent with a statute which provided: "Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock are personal property, and may be transferred by indorsement by the signature of the proprietor, or his attorney or legal representative, and delivery of the certificate; but such transfer is not valid except between the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the

parties by and to whom transferred, the number or designation of the shares, and the date of the transfer."

In *Bronson Electric Co. v. Rheubottom*, 122 Mich. 608, 81 N. W. 563, where the statutory provisions were very general, the court seems to have followed the doctrine that, generally speaking, a by-law creating a lien would not be binding upon an innocent purchaser for value, but would be otherwise binding and valid; and it held in this case that the pledgee having taken the stock as collateral security for an antecedent debt, and not having definitely agreed to forbear, could not be considered as a purchaser for value, and therefore its claim was subordinate to that of the company, which seems in fact to have arisen prior to the claim of the pledgee.

And the modern cases hold that where there is no clear authority by statute or charter to make such by-law, the pledgee or purchaser without actual notice of it will be preferred to the corporation. *Anglo-California Bank v. Grangers' Bank* and *Bank of Atchison County v. Durfee*, supra.

See also to similar effect *Brinkerhoff-Farris Trust & Sav. Co. v. Home Lumber Co.* 118 Mo. 447, 24 S. W. 129 (where, however, a resolution that the unauthorized by-law should appear upon the face of the certificate had not been carried out).

The same was held in *Bank of Holly Springs v. Pinson*, 58 Miss. 421, 38 Am. Rep. 330, where the charter provided that the board of directors might by by-law provide for the mode and manner of transferring the stock; but the case contained the further elements that notice of the by-law did not appear upon the certificate as the by-law required, and the corporation received in silence the notice given by the pledgee to it before advancing her money. And the court, besides holding that the pledgee was not required to take notice of the by-law, held further that the omission in the certificate of the notice required by the by-law was an engagement by the corporation not to assert the by-law against a person not having notice of it. The court said: "It seems to be well recognized that a by-law has no

bank refused to cancel said certificate and issue new certificate to plaintiff, because they claimed to have a lien on the stock of the said Richard R. McLish by virtue of the fact that the said McLish was indebted to them, and, under the statute, they had a lien on said stock for such indebtedness.

(6) That the said Richard R. McLish is now indebted to the Ardmore State Bank in an amount exceeding the book value and the market value or the par value of said stock.

(7) That the plaintiff herein purchased said certificate of stock from the First State Bank of Ardmore, Oklahoma on November 12, 1908, who obtained the same from Richard R. McLish on June 24, 1908, as

part security for a loan made to the said McLish by the First State Bank, and that the First State Bank held said stock until sold to the plaintiff herein as pledgee of the said McLish.

(8) That the said Richard R. McLish on the 24th day of June, 1908, made, executed, and delivered to the Ardmore Loan & Trust Company his promissory note for the sum of \$5,250 to become due and payable October 1, 1908, as part collateral of which he pledged the ten shares of stock in question, and that in said note the said McLish gave the legal holder of said note full power and authority to sell said ten shares of stock of the Ardmore State Bank, or any portion thereof, at public or private sale, at the option of the holder, on the

extracorporate force, and is only binding on those dealing with the corporation who have notice of it, or who deal with it under such circumstances that they are bound to take notice of it. A solution of the question will be found in the right determination of the categories in which notice is inferred. By-laws of private corporations are not in the nature of legislative enactments, so far as third persons are concerned. They are mere regulations of the corporation for the control and management of its own affairs. They are self-imposed rules, resulting from an agreement or contract between the corporation and its members to conduct the corporate business in a particular way. They are not intended to interfere in the least with the rights and privileges of others who do not subject themselves to their influence. It may be said with truth, therefore, that no person not a member of the corporation can be affected in any of his rights by a corporate by-law of which he has no notice. In some instances, as we have seen, if he have no actual notice he will be held to have constructive notice."

In *Just v. State Sav. Bank*, 132 Mich. 600, 94 N. W. 200 (referred to and quoted from in *ARDMORE STATE BANK v. MASON*) where the statutory lien covered only debts due, but a by-law extended it to debts whether due or not, it was held that a pledgee without notice of the by-law who extended the time of his claim when taking the pledge was a bona fide holder and entitled to priority over the company's unmaturing claim, but that the company had a subsequent lien to the pledgee by reason of a special agreement and the by-law.

In *New Orleans Nat. Bkg. Asso. v. Wiltz*, 4 Woods, 47, 10 Fed. 330, it was held that the corporation to hold a lien must show its authority for the restrictive provisions, in some statute or law of the state; but in that case a lien of the corporation would have been of no effect against third persons, there being no record as required by the local state law.

In *Bank of Attica v. Manufacturers' & T. Bank*, 20 N. Y. 501, where the statute declared that the shares should be transfer-

able on the books in such manner as might be agreed in the articles of association, it was held that a restricting by-law would not avail the corporation as against a purchaser of stock for value without notice of the by-law,—but the decision rested particularly on the lack of power.

3. Notice of lien on certificate.

In the absence of a statute prohibiting a lien to the corporation, a notice upon the certificate that its transfer is subject to the payment of the stockholder's debts to the corporation will give it a lien prior to the rights of pledgees or assignees for value of the certificate.

Thus in *Jennings v. Bank of California*, 79 Cal. 323, 5 L.R.A. 233, 12 Am. St. Rep. 145, 21 Pac. 852, where the certificate provided that the stock might not be transferred without the payment of the indebtedness "of the person in whose name the stock stands on the books of the bank," though there was no by-law to this effect nor any express statutory authority for it, it was held that stock in a bank corporation having been transferred for value, at a time when the holder was largely indebted to the corporation, the transferee could not object to the corporation's lien for advances made after the transfer, he having given no notice to the bank of the transfer, but allowed the assignor to continue to draw the dividends and to act as owner.

So, where the certificates of stock stated: "Not transferable by any stockholder liable to this company, as principal debtor or otherwise, without consent of the board of directors," and the stockholder pledged the certificate for a loan, and afterwards became indebted to the corporation which at the time had no knowledge of the pledge, it was held that the corporation's rights were prior to those of the pledgee, although there was no statute or by-law authorizing such a contract. *Stafford v. Produce Exch. Bkg. Co.* 61 Ohio St. Rep. 160, 76 Am. St. Rep. 371, 55 N. E. 162.

So, in *Morison-Wentworth Bank v. Ker-dollf*, 75 Mo. App. 207, where it was urged

nonperformance of the obligation expressed in said note, and without advertising the same and otherwise giving notice.

(9) The court further finds that the question as to whether the Ardmore State Bank at the time it made its second loan of \$1,500 to Richard R. McLish on July 8, 1908, had notice that McLish's stock was pledged to the First State Bank, could not be agreed upon by the plaintiff and defendant; the plaintiff contending that the Ardmore State Bank had notice and the defendant denying this. The question of fact was left to a jury, who, after hearing the testimony of the respective cashiers of each bank, found that Harold Wallace, cashier of the Ardmore State Bank, had been notified by J. B. Boone, cashier of

the First State Bank, that this stock was pledged to the First State Bank, and the court further finds that the Ardmore State Bank by reason of this notice to its cashier is chargeable with such notice.

(10) The court finds that the original indebtedness of McLish to the defendant bank existing on the 24th day of June, 1908, was paid by McLish on the 25th day of June, 1908, by check on the First State Bank of Ardmore, and that McLish had obtained the funds upon which this check was drawn by obtaining a loan from the First State Bank for which he gave a mortgage on various and sundry chattels, and, in addition thereto, pledged his ten shares of stock in the Ardmore State Bank.

that the by-law was invalid and contained a statement that it was agreed that the corporation shall have a lien, etc., it was held that an assignee of a certificate must take notice of such a lien.

In view of the claim which was made that the by-law was invalid, reference may be here made to *State Sav. Assn. v. Nixon-Jones Printing Co.* 25 Mo. App. 642, where a lien was claimed under a by-law passed by the board of directors composed of all the stockholders of the company, and this by-law was in substance upon the certificate of stock. It was held that the lien of the corporation for a debt incurred after a pledge of the stock, but before the corporation knew of the pledge, was prior to the lien of the pledgee.

But a reference on the certificate to the articles of incorporation will be no notice of a by-law. Thus in *Re McKain*, 7 Ont. L. Rep. 241, where the certificate of stock stated that the articles of the company were part and parcel of the contract, and were accepted as part of the contract between the company and the shareholder, and there was a by-law giving the company a lien on the stock of a shareholder for any indebtedness to the company, a shareholder owning two parcels of shares,—three shares which were fully paid and seven which were not fully paid,—assigned for value the certificate for the three shares, and it was held that the assignee was not bound to take notice of the by-laws of the company and was entitled to priority over the company's claim for the unpaid part of the seven shares.

Where other security is taken.

The taking by the corporation of other security for the stockholder's debt to it was held to be no waiver of the lien reserved by its charter, where the certificates state that the stock "is subject to all claims of the company against the owner." *Kenton Ins. Co. v. Bowman*, 84 Ky. 430, 1 S. W. 717.

The same was held where the statutory charter reserved a lien which was asserted on the certificate. *German Nat. Bank v. Kentucky Trust Co.* 19 Ky. L. Rep. 361, 40 39 L.R.A. (N.S.)

S. W. 458, where, however, there was also a by-law that the lien could not be waived.

Failure to post by-law.

Where the certificates stated that they were subject to the by-laws and articles of incorporation, it was held that a pledgee without actual notice of a restricting by-law was not bound by it, where it had not been posted as required by the statute, which provided that "a copy of the by-laws of the corporation, with the names of all its officers appended thereto, must be posted in the principal place of business, and be subject to public inspection." *Des Moines Nat. Bank v. Warren County Bank*, 97 Iowa, 204, 66 N. W. 154.

b. Where corporation has notice of the pledge or sale.

Where the corporation's claim against the stockholder arises after notice to it of the pledge or assignment, its lien is subordinate thereto. *ARDMORE STATE BANK v. MASON; Hotchkiss & U. Co. v. Union Nat. Bank*, 15 C. C. A. 264, 37 U. S. App. 86, 68 Fed. 76; *Curtice v. Crawford County Bank*, 56 C. C. A. 174, 118 Fed. 390, modifying 110 Fed. 830; *Bank of America v. McNeil*, 10 Bush, 54; *Bank of Kentucky v. Bonnie Bros.* 102 Ky. 343, 43 S. W. 407; *Conant v. Reed*, 1 Ohio St. 298; *White River Sav. Bank v. Capital Sav. Bank & T. Co.* 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197; *Bradford Bkg. Co. v. Briggs*, 3 Times L. R. 170; *Miles v. New Zealand Alford Estate Co.* 53 L. T. N. S. 219, 54 L. J. Ch. N. S. 1035, L. R. 32 Ch. Div. 266, 34 Week. Rep. 669.

Where by the articles of association the company had a lien for debts of its stockholders to it, whether due or not, the owner of shares pledged them for an antecedent debt, to a stranger, who promptly notified the company and later paid instalments on the shares, and, after giving the pledge, the owner guaranteed dividends to the company, which was pressing him with a claim that he had misrepresented the value of property sold by him to the company on its forma-

Conclusions of Law.

The court holds as the questions decisive of the case, that the First State Bank, the holder of the McLish note, had a right to offer for sale the ten shares of McLish stock at private sale under the authority contained in the note, and that I. R. Mason was a bona fide purchaser of same for value, and is legally entitled to have said shares transferred to him on the books of the bank.

The court holds that the lien of the Ardmore State Bank, by reason of McLish's first indebtedness of \$2,000, was removed by the payment of the indebtedness, and that in making the second loan of \$1,500 to McLish, by which the defendant bank

tion, it was held that the pledgee's right was superior to the right of the company on the guaranty. *Miles v. New Zealand Alford Estate Co.* 53 L. T. N. S. 219, 54 L. J. Ch. N. S. 1035, L. R. 32 Ch. Div. 266, 34 Week. Rep. 669.

In *Neamith v. Washington Bank*, 6 Pick. 324, it was held that a corporation which, after notice of the transfer of stock and the receipt of an instalment thereon from the transferee, lends money to the original stockholder, cannot claim that its loan was made on the faith of the stock, under a by-law giving a lien.

In *Hotchkiss & U. Co. v. Union Nat. Bank*, 15 C. C. A. 264, 37 U. S. App. 86, 68 Fed. 76, where, after a pledge of stock became known to the corporation, the stockholder embezzled money of the corporation, it was held that the pledgee's right was superior to that of the corporation, although no copy of a power of attorney authorizing the transfer had been filed with the corporation, as the statute required in order to hold such stock against anyone except the pledgee or his personal representatives; and the statute further provided that the corporation should at all times have a lien upon all the stock owned by any person therein for all debts due to it from him. The appellate court, while deciding the case upon the question of actual notice as equivalent to that required by the statute, doubted whether a debt by embezzlement would not give a lien under the statute. This last question was not raised by the appeal, but the lower court, on another branch of the case, directly decided that there was such lien for a debt by embezzlement.

Corporation may be put on inquiry.

In *Bank of Kentucky v. Bonnie Bros.* 102 Ky. 343, 43 S. W. 407, where a stockholder in a bank owed money to the bank, and afterwards obtained a loan from a third party, to which he assigned his bank stock as collateral, and thereafter the bank, having reason to be put on inquiry as to the pledge of stock, discounted other later paper 36 L.R.A. (N.S.)

seeks to assert its lien, was made by the bank at its peril, in view of its knowledge of the pledging of the stock, and, being chargeable with that knowledge, it virtually waived its right to an assertion of its statutory lien.

The court holds that the provisions giving the issuing bank a lien upon the stock do not mean a priority of lien as against a pledgee who has received the stock in hypothecation when there is no indebtedness to the issuing bank at the time of the hypothecation, and when its credit was extended to its stockholder at a time when his stock was known to be so hypothecated elsewhere. And such subsequent loan to its stockholder by the issuing bank made its lien secondary.

of the stockholder then held by another customer of the bank, it was held that the pledgee's lien, while secondary to that of the bank on the first loan, was prior to that of the bank on the second loan.

In *Bank of America v. McNeil*, 10 Bush, 54, it was held that where at the time of making a loan, the corporation, while knowing of an original pledge, might not have known that the original loan had been canceled, a new note being given for part thereof and a repledge made of the stock, nevertheless it was put upon its inquiry by its knowledge of the original pledge.

Knowledge of equity.

In *Prince Invest. Co. v. St. Paul & S. C. Land Co.* 68 Minn. 121, 70 N. W. 1079, it was held where a stockholder was bound in equity to transfer his stock to another corporation, and the corporation of which this was the stock was aware that in equity the stock belonged to the other corporation, that it was not entitled to any lien upon this stock by reason of obligations of the stockholder arising subsequent to its knowledge of the equity of the other corporation.

In *St. Paul Nat. Bank v. Life Ins. Clearing Co.* 71 Minn. 123, 73 N. W. 713, where a subscriber for certain shares of stock in a new corporation was at the same time indebted to a bank on notes secured by mortgages, he represented to the bank and to the new corporation that if the bank would release the mortgages, he would then mortgage the same property to the corporation to secure his note for his subscription, and in that way obtain from the corporation fully paid certificates of stock, which he would lodge with the bank to take the place of the released mortgages. This arrangement was carried out, and the stockholder afterwards becoming insolvent, it was held that the corporation could not assert as against the bank, the lien upon the stock of the corporation (but the waiver or estoppel was not by reason of its taking other security).

Statute.

In *Birmingham Trust & Sav. Co. v. Loui-*

The court further holds that the provision in article 12 of the by-laws of the defendant bank, namely, "no transfer of stock of this association shall be made by any stockholder who shall be liable to this bank, either as principal debtor or otherwise, without the consent of the board of directors, and certificates of stock shall contain, upon their face, notice of this provision," does not affect the rights of pledgee who receives the stock when there is no liability to the issuing bank, and the rights of pledgee being not affected, if he received the stock when there is no liability a subsequent loan by the issuing bank, before the sale of the stock, cannot affect the purchaser, as the purchaser be-

came subrogated to all the rights of the pledgee.

The court holds that the section of the state bank law regulating how a pledged stock should be sold when in the hands of a pledgee clearly means a public sale, but, as the pledgeor at a time when he was not indebted to the issuing bank stipulated that the pledgee could sell said stock at public or private sale at the option of the holder on the nonperformance of the obligations expressed in said note, and without advertising same or otherwise giving notice, it was a waiver which the pledgeor had a right to make, and the stock being sold at private sale, the purchaser obtained a good title, and one which the issuing bank cannot complain of in view

siana Nat. Bank, 99 Ala. 379, 20 L.R.A. 600, 13 So. 112, where by the statute the corporation had a lien on the stock for any debt or liability incurred to it by the shareholder, before notice of a transfer or of a levy thereon, the court, in holding that the corporation had no lien where it had notice of a pledge of the stock at the time it made its loan, said: "The lien which the corporation can assert and enforce against a prior transfer of the stock, though the transfer may create only an equity, binds the legal title of the shareholder, by the very terms of the statute. Like the protection extended to bona fide creditors, or subsequent purchasers, it is dependent on a want of notice of the transfer, if the debts or liabilities were incurred by the shareholder. The lien, being created by statute, is limited in operation and extent by the terms of the statute, and can arise and be enforced only in the event and under the facts provided for in the statute. If there is a levy on the stock, or a transfer of it, subsequent to the incurring of a debt or liability to the corporation by the shareholder, the levy or transfer is subordinate to the corporation's lien. But if the debt or liability does not precede the levy or transfer, the lien is subordinate, and must yield, unless the corporation dealt with the shareholder without knowledge or notice. Having knowledge or notice, in fair dealing, the corporation could not extend credit to the shareholder, relying upon the lien to displace whatever of right the levy or transfer may have conferred."

IV. Effect of changes in statutes, by-laws, etc., with respect to liens.

A number of cases have arisen construing changes in the statutes, by-laws, or articles of association with respect to liens.

In *Birmingham Trust & Sav. Co. v. East Lake Land Co.* 101 Ala. 304, 13 So. 72, where a stockholder had become indebted to the corporation prior to the statute giving the corporation a lien on shares for debts incurred before notice of a transfer or levy, and after the statute he transferred the

stock as collateral security for a debt owing to a third party, it was held that the lien of the company was superior to the lien of the third party.

Where a stockholder became indebted to the corporation at the time that the statute provided that every such corporation should have a lien upon all shares of stock for all debts due from the owners to such corporation, and after the repeal of this clause of the statute the owner of the stock pledged it to a third party, it was held that the corporation's lien was superior to that of the pledgee, there being a general statute preserving rights acquired under repealed statutes; but the court seemed to be of the opinion that, irrespective of such general statute, the result would have been the same. *H. W. Wright Lumber Co. v. Hixon*, 105 Wis. 153, 80 N. W. 1110, 1135.

Where the statute provided that no pledge of stock not consummated by an actual transfer to the name of the transferee should be effectual to hold the stock against any person but the pledgeor and his executors and administrators until a copy of the power of attorney for the transfer should be filed with the corporation, after a number of loans had been made on the security of stock in a certain corporation, a statute was passed which provided that every corporation "shall at all times have a lien upon all the stock owned by any person therein, for all debts due it from him;" thereafter another loan was made upon the security of additional stock of the corporation, and it was held that a subsequent loan made by the corporation to the stockholder had priority over all the other loans made by the pledgeor of which the corporation had no notice. *First Nat. Bank v. Hartford Life & Annuity Ins. Co.* 45 Conn. 22.

But in *People ex rel. Bosqui v. Crockett*, 9 Cal. 112, where after the transfer of shares for a valuable consideration the board of directors of a corporation passed a by-law that transfers would not be made while indebtedness existed, such board having power, under the charter, to pass such a by-law to operate prospectively, it was held that the transferee was prior in right to an

of its notice that the stock was hypothecated before it made its loan of July 8th, and all the resulting injury such notice put upon it.

The court therefore holds that the prayer of the petitioner should be granted, as it is clearly warranted by the facts and pleadings in the case.

S. H. Russell,
District Judge.

Thereafter, in accordance with such findings and conclusions, the court entered judgment in favor of plaintiff, requiring defendant to transfer such stock on its books and to issue new certificate of stock to plaintiff as of date November 12, 1908, to the end that said plaintiff might have

the dividends and other benefits growing out of said stock after November 8, 1908, to which judgment defendant excepted, and brings this appeal to reverse the same.

Messrs. H. C. Potterf and E. A. Walker, for plaintiff in error:

Plaintiff's prayer that defendant be compelled to transfer the ten shares of stock to him, and accrued dividends, and for damages, is in effect a suit in mandamus, and is not the proper remedy.

State ex rel. Stevenson v. Russell, 21 Okla. 58, 95 Pac. 463; 26 Cyc. 139; Tanner v. Gregory, 71 Wis. 490, 37 N. W. 830; 10 Cyc. 608, 609; Kimball v. Union Water Co. 44 Cal. 173, 13 Am. Rep. 157; Rex v. Bank of England, 2 Dougl. K. B. 526;

earlier debt of the stockholder to the corporation.

In Philadelphia S. S. Dock Co. v. Heron, 52 Pa. 280, where a stockholder died while indebted to the company, and after his death the company passed a by-law that transfers should not be made by anyone indebted to the company, etc., it was held that his administratrix, subsequent assignee for value, was entitled to have the stock transferred.

Where a debtor assigned stock in the defendant, an English corporation, as collateral security to his creditor, and subsequently, being unable to pay his debt, made his conveyance absolute, at the time of the pledge and for two years thereafter the articles of association of the defendant provided, in the case of shares not fully paid up, that the directors might refuse to register a transfer by a member against whom the company had an unsatisfied claim, and that the company should have a first and paramount lien upon such shares, registered in the name of any member for any debt due by him to the company. Prior to any notice of the pledge, the corporation amended its articles of association so as to give it a paramount lien against a stockholder's shares for any indebtedness from him to the company, whether the shares were or were not fully paid up, and during the whole time the pledgee was indebted to the corporation in an amount much exceeding the value of the shares. It was held that, whereas the corporation under the English law by its amendment would secure a lien upon the shares paramount to the one which the pledgee had obtained two years before, the corporation had a right prior to that of the pledgee. Hudson River Pulp & Paper Co. v. H. H. Warner & Co. 39 C. C. A. 452, 99 Fed. 187. (The report of the case seems to take for granted that the shares were fully paid up.)

In Sproul v. Standard Plate Glass Co. 201 Pa. 103, 50 Atl. 1003, it was held that where the indebtedness of a stockholder to the corporation arose prior to a repeal of the statute giving the lien, that such repeal would not affect the lien, there being nothing

in the statute to show that it was intended to have any retroactive effect.

V. Statute of limitation barring debt to corporation.

That the statute of limitations has barred an action by the corporation on its claim will not release its lien upon the stock, as that statute in general bars the remedy, and not the debt. Brent v. Bank of Washington, 10 Pet. 596, 9 L. ed. 547; Farmers' Bank v. Iglehart, 6 Gill, 50; Sproul v. Standard Plate Glass Co. 201 Pa. 103, 50 Atl. 1003; Geyer v. Western Ins. Co. 3 Pittsb. 41 (action between the company and a purchaser at execution sale, where there had been an execution attachment in which the company had been summoned as garnishee).

VI. Obligations matured or unmatured.

While it is not intended to take up the general question of what obligations are included within the expressions in statutes or by-laws, etc., of "debt," "due," etc., reference is here made to cases where the question has arisen in respect to priority of lien.

Where the statute provided that no stockholder "indebted to the institution" should be authorized to make a transfer or receive a dividend until such debt should have been discharged, etc., it was held that the assignees of stock were not authorized to have it transferred ahead of notes discounted, but not due, at the time the transfer was asked. Grant v. Mechanics' Bank, 15 Serg. & R. 140.

So, in St. Louis Perpetual Ins. Co. v. Goodfellow, 9 Mo. 149, it was held that the expression "indebted" to the company applies to obligations whether matured or not, but it does not seem clear from the report that the obligations in the case were unmatured at the time a transfer was demanded.

In Leggett v. Bank of Sing Sing, 24 N. Y. 283, it was held that an unmatured obligation is a debt "due" to the corporation within the meaning of such expression in the articles of association.

Baker v. Marshall, 15 Minn. 177, Gil. 136; *Dooley v. Gladiator Consol. Gold Mines & Mill. Co.* 134 Iowa, 468, 109 N. W. 864, 13 Ann. Cas. 297; *Jennings v. Bank of California*, 79 Cal. 323, 5 L.R.A. 233, 12 Am. St. Rep. 145, 21 Pac. 852; *Vansanda v. Middlesex County Bank*, 26 Conn. 144; *Union Bank v. Laird*, 2 Wheat. 393, 4 L. ed. 270; *Taylor v. Weston*, 77 Cal. 534, 20 Pac. 62; *Bohmer v. City Bank*, 77 Va. 445.

Messrs. Moore & Bass for defendant in error.

Robertson, C., filed the following opinion:

For convenience plaintiff in error will hereinafter be designated as defendant and defendant in error will be designated as plaintiff. Defendant relies upon five assignments of error for reversal, to wit:

"(1) The court erred in overruling de-

fendant's motion to strike out plaintiff's prayer for relief in its petition, wherein he prayed that defendant be compelled to transfer the ten shares of stock to him, and accrued dividends and for damages.

"(2) The court erred in overruling the defendant's general demurrer to the original petition of plaintiff.

"(3) The court erred in overruling the defendant's demurrer to plaintiff's reply to defendant's first amended answer.

"(4) The court erred in overruling the plaintiff in error's motion for judgment on the pleadings.

"(5) The court erred in overruling the motion of the plaintiff in error for a verdict after all the evidence had been heard."

Did the court err in refusing to strike out the prayer of plaintiff's petition? The striking out of the prayer would have had the effect of dismissing the action, or

The same was held *Re London, B. & S. S. Bkg. Co.* 34 Beav, 332, where the articles of the company gave it a lien upon a shareholder's shares "for all moneys due to the company from him," and provided that it might decline to register a transfer while the transferor was "indebted" to it. After the banking company had discounted bills of a certain individual he became a shareholder in the company, and later he deposited the shares as security for an advance by a third party, who promptly notified the company. At that time his bills with the company had not matured, and it was held that the lien of the company was superior to that of the pledgee.

But in *Re Stockton Malleable Iron Co.* L. R. 2 Ch. Div. 101, 45 L. J. Ch. N. S. 168, where the articles provided that the company should have a lien "for any moneys due to the company," etc., and that it might decline to register transfers of shares while the member was "indebted" to the company, it was held where there had been a transfer of the shares, and at the time they reached the company it held an unmatured bill of exchange accepted by the shareholder, that the shares must be transferred to the transferee. Counsel cited the foregoing case of *Re London, B. & S. S. Bkg. Co.* but the court did not refer to it.

Where under the statute a corporation is not required to transfer any stock while the owner is liable to it for any debt which shall be due and unpaid, it was held that where the pledgee took the pledge at the time when the obligations to the company were unmatured, but did not ask the company to transfer the stock until those obligations had matured, that the company had the priority; the court not passing on the question as to what would have been the case had the demand been made before the obligation had matured. *Michigan Trust Co. v. State Bank*, 111 Mich. 306, 69 N. W. 645, followed in *Citizens' State Bank v. Kalamazoo County Bank*, 111 Mich. 313, 69 N. W. 663.

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In *Reese v. Bank of Commerce*, 14 Md. 271, 74 Am. Dec. 536, where the statutory restriction upon transfers required the payment of "all debts actually due and payable to the corporation" by the stockholder requesting a transfer; and at the time that the transfer was first demanded by the pledgee, certain debts had matured and the transfer was refused without their payment, and after such demand and refusal other obligations had matured in favor of the company,—it was held that it would be necessary for the pledgee, in order to obtain a transfer, to pay all those obligations which had matured at the time of the transfer.

In this connection reference may be made to *Brent v. Bank of Washington*, 10 Pet. 596, 9 L. ed. 547, where the charter of a bank provided that debts "actually due and payable to the bank (days of grace for payment being passed) by a stockholder must be satisfied" before a transfer shall be made, etc., and a stockholder died indebted to the United States, and also indebted to the bank on several notes, one of which was unmatured at the time of his death, it was held that while the bank had no prior lien at law upon this note, that in equity such lien would be protected.

VII. Miscellaneous.

Where a shareholder transferred on the books of the company certain of his shares to a fictitious person, and afterwards became indebted to the company, and still later procured a person of the name of the fictitious person to transfer the shares to an assignee, to which assignee it seems the original shareholder had been indebted before the assignment, it was held that the corporation's rights under a statutory lien were superior to those of the assignee, as it was considered that the shareholder had not at any time parted with his shares, except by way of the assignment to his creditor, who

would have required an amendment to the petition asking for different relief. Defendant insists that the action, in effect, is one of mandamus, and, being such, is not a proper remedy in such a case as stated in the petition. With this contention of counsel we cannot agree. This action has few of the characteristics of mandamus, although the relief sought might possibly lead one to such an inference. A purchaser of bank stock has a right to compel, by bill in equity, the transfer of the same on the books of the corporation, or he may sue in conversion and damages for the failure to so transfer. Plaintiff elected to pursue the former course, and the authorities are practically unanimous in support of the rule above announced. "Stated generally, equity will compel a corporation to register a transfer of shares upon its books and to admit the transferee to

the rights of a shareholder, where he has become the purchaser of shares, and the certificate has been regularly transferred and delivered to him by the customary indorsement in blank." 10 Cyc. 605. Also: "Equity will under proper circumstances compel a corporation to transfer on its books shares of stock to the owner of the equitable title, and to issue to him certificates for the same." Ibid. In *Cushman v. Thayer Mfg. Jewelry Co.* 76 N. Y. 365, 32 Am. Rep. 315, where the same question was involved as the one under consideration, the court said: "The right of the plaintiff to maintain this action depends upon the question whether an equitable action will lie to compel a transfer of stock by a corporation to the owner of the same, or the plaintiff must seek a remedy by an action at law for damages. The latter action is frequently of no avail, and does not

was not a bona fide purchaser. *Stebbins v. Phoenix F. Ins. Co.* 3 Paige, 350.

In *Bank of Commerce v. Bank of Newport*, 11 C. C. A. 484, 27 U. S. App. 486, 63 Fed. 898, where the statute provided that the corporation should have a lien upon all stocks for debts of the stockholder to it, the firm of A. & Co., being stockholders of the corporation, sold its stock to B. & Co., indorsing the certificate in blank, and the corporation was notified of the sale and transfer, and made an entry on its books of the same, but did not issue a new certificate. B. & Co., later, after such notification, and while indebted to the corporation, delivered the certificate (indorsed as aforesaid) to a stranger as collateral security for advances made to them, and it was held that the company had a lien upon this stock superior to that of the pledgee, although a new certificate had not been issued.

In *Planters' & M. Mut. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585, where a firm owning stock in a corporation was indebted to the corporation, one of the partners retiring, the stock was turned over to the succeeding firm or its successor and the debt to the corporation somewhat reduced, but the certificates were not transferred on the books. One of the succeeding firms delivered the certificates to a third party in exchange for other collateral. (Whether the collateral replaced had originally been deposited upon a loan of the original firm or one of the succeeding firms was not clear, but apparently it was upon a loan of one of the succeeding firms.) And it was held that the equitable lien or right of the corporation under an authorized by-law continued throughout and was superior to that of the assignee, who held the stock as collateral.

In *Mt. Holly Paper Co's Appeal*, 99 Pa. 513, where the president of a corporation assigned certain shares of its stock to secure advances to a third party, and later the assignor became indebted to the corporation, it was held that the corporation's

rights under the statutory lien were prior to those of the pledgee, and that it was immaterial that the shares were invalid, as in excess of those which might be lawfully issued.

Where the owner had pledged his stock in a company to secure an indebtedness to a bank and for future advances which were made, and the company, in order to benefit one of its officers, who had a claim against such owner, purchased such claim, it was held that the company could not enforce against the bank its statutory lien; and that if such purchase was merely to get rid of an insolvent stockholder, the same result would follow. *White's Bank v. Toledo F. & M. Ins. Co.* 12 Ohio St. 601.

Where an owner of stock payable in five instalments, after paying two of them, assigned his stock to the plaintiff, who paid the other instalments, and at the time the company was notified of the sale, the assignor owed the company upon certain notes (for insurance premiums) only one of which was then due, it was held that the company was entitled to hold dividends accruing after such notification of the sale and up to the time the final instalment became due, as against the note which was due at the time of the notice. By the articles of association no transfer could be permitted to be valid until all the instalments were paid. *Bates v. New York Ins. Co.* 3 Johns. Cas. 238.

While without the scope of this note, it may be noted that in *Boyd v. Redd*, 120 N. C. 335, 58 Am. St. Rep. 792, 27 S. E. 35, where the stockholder in a company, after pledging his stock as collateral security for a loan, executed notes to a third party, which were afterwards deposited by such third party with the company, as collateral security for an indebtedness to it, it was held that the statute giving the company a lien upon stock for the indebtedness of a stockholder to it would not be construed to give the company a lien upon such stock for a debt contracted by the stockholder to a third person.

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always afford complete and full redress. It is easy to see that a party may have become the owner or purchaser of stock in a corporation, which he desires to hold as a permanent investment, which may be at the time of but little value,—in fact without any market value, whatever,—and its real worth may consist in the prospective rise which the owner has reason to anticipate will follow from facts within his knowledge. To say that the holder shall not be entitled to the stock because the corporation without any just reason refuses to transfer it, and that he shall be left to pursue the remedy of an action for damages, in which he can recover only a nominal amount, would establish a rule which must work great injustice in many cases, and confer a power on corporate bodies which has no sanction in the law. A court of equity will enforce a specific performance on a contract for the sale of real estate, and compel the execution of a deed by the vendor to the vendee, although an action at law may be brought to recover damages for the breach of the contract. Such a case bears a striking analogy to the one now presented, and the same principle is manifestly applicable where the remedy at law is inadequate to furnish the proper relief." See also *Mechanic's Bank v. Seton*, 1 Pet. 299, 7 L. ed. 152; *Western U. Teleg. Co. v. Davenport*, 97 U. S. 369, 24 L. ed. 1047; *Cecil Nat. Bank v. Watsontown Bank*, 105 U. S. 217, 22 L. ed. 1039; *Stafford v. Produce Exch. Bkg. Co.* 61 Ohio St. 160, 76 Am. St. Rep. 371, 55 N. E. 162; *Jennings v. Bank of California*, 79 Cal. 323, 5 L.R.A. 233, 12 Am. St. Rep. 145, 21 Pac. 852; *Hotchkiss & U. Co. v. Union Nat. Bank*, 15 C. C. A. 264, 37 U. S. App. 86, 68 Fed. 76; *Just v. State Sav. Bank*, 132 Mich. 600, 94 N. W. 200; *Curtice v. Crawford County Bank*, 56 C. C. A. 174, 118 Fed. 390. The refusal of the court, therefore, to strike out the prayer of plaintiff's petition, was not error.

Entertaining this view of the case, it therefore necessarily follows that the second assignment of error urged by the defendant is untenable, for without doubt the petition in this case is good as against a general demurrer. "Where a general demurrer is filed to a petition, if any paragraph states a cause of action, the demurrer should be overruled." *Hurst v. Sawyer*, 2 Okla. 470, 37 Pac. 817; *Guthrie v. T. W. Harvey Lumber Co.* 5 Okla. 774, 50 Pac. 84; *Hamenkratt v. Hamil*, 10 Okla. 219, 61 Pac. 1050; *Cockrell v. Schmitt*, 20 Okla. 207, 129 Am. St. Rep. 737, 94 Pac. 521; *Emmerson v. Botkin*, 26 Okla. 218, 29 L.R.A.(N.S.) 786, 138 Am. St. Rep. 953, 109 Pac. 531.
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This brings us to the third assignment of error, wherein defendant complains of the refusal of the trial court to sustain its demurrer to plaintiff's reply. Plaintiff in his reply alleges that he purchased the stock in controversy from the First State Bank of Ardmore at private sale, the same not having been advertised. Defendant contends that such sale was void, and that plaintiff acquired no rights as against defendant, and cites in support of such contention § 10, art. 1, chapter 6, Sess. Laws 1907-08, which reads as follows: "That any bank may sell any personal property which may come into its possession as collateral security for any debt or obligation due it, upon posting a notice in five public places in the county wherein the property is to be sold, at least ten days before the time therein specified for such sale, and which notice shall contain the name of the bank and the name of the pledgeor, the date of the pledge, the nature of the default, and the amount claimed to be due thereon at the date of the notice; a description of the pledged property to be sold and the time and place of sale." Plaintiff alleges that the shares of stock had been pledged by McLish on June 24, 1908, to the First State Bank of Ardmore to secure a note given it by him in the sum of \$5,255, and that said note contained the following provision: "And I do hereby give to the legal holder of this note full power and authority to sell said collateral security or any portion thereof at public or private sale at the option of the holder on the nonperformance of the above promise, and without advertising the same or otherwise giving me notice." And contends that the notice required to be given by § 10 of the statute, supra, may be waived by the pledgeor. And we are of the same opinion and especially, as in this case, where the Ardmore State Bank after June 24, 1908, had actual notice of the pledge by McLish to the first State Bank of the Stock, and McLish was not at that time indebted to the Ardmore State Bank. At common law a pledgee could not sell without judicial process, unless reasonable notice to the pledgeor to redeem, but this common-law rule can be waived as to notice, and a public auction can be waived; and McLish under the facts of this case is the only person who could take advantage of this failure to give notice or sell at public auction, and from the record it clearly appears that he specifically waived such rights, and at a time, too, when he was not indebted to the issuing bank. Public sale of pledged property may be waived by stipulation of the parties, and in that event a private sale is valid. *Carson v.*

Iowa City Gaslight Co. 80 Iowa, 638, 45 N. W. 1068; Fitzgerald v. Blocher, 32 Ark. 742, 29 Am. Rep. 3; Hyatt v. Argenti, 3 Cal. 151; Jeanes's Appeal, 116 Pa. 573, 2 Am. St. Rep. 624, 11 Atl. 862; 31 Cyc. 874, and many cases there cited. Had he at the time he made the pledge of stock been indebted to the issuing bank, he would have had no right to, nor could he have waived such notice to the detriment of the issuing bank, and the lien created by statute against the stockholder in favor of the bank would have been sufficient to protect the bank as against the pledgee.

This brings us to the last assignment of error, relied upon, *viz.*: "The court erred in overruling motion of defendant for a verdict after all the evidence had been heard." Counsel for defendant insist that by virtue of the provisions of article 12 of their by-laws, which have been approved by the state banking commission, McLish could not transfer his stock to anyone, because of the fact that he was indebted to the bank; but the record discloses that from June 25 to July 8, 1908, McLish was in no manner indebted to the Ardmore State Bank, he having paid all that he owed on the former date, and that during this time the Ardmore State Bank had actual knowledge that McLish had pledged his stock to the First State Bank. Hence, if the Ardmore State Bank thereafter, with full knowledge of the stock having been pledged, permitted McLish to become indebted to it in the sum of \$1,500, or any other sum, it did so at its peril, because, as found by the jury, it knew the stock owned by McLish had been pledged to the First State Bank. Surely the defendant could not prevent a transfer of stock when the owner of such stock was not indebted to the bank; and that McLish was not indebted to the Ardmore State Bank in any sum between June 25 and July 8, 1908, is an admitted fact by the bank. It does not matter what claims or liens the defendant bank may have had on the stock on or prior to June 24, 1908, because such liens, if any there were, had been discharged by McLish by paying all he owed the bank, and, when he had thus paid the bank all he owed it, the stock was clear, and the bank had no lien of any character on it, and McLish was its owner, and had a perfect right to pledge it to the First State Bank or anyone else whom he might choose. "Where a corporation has knowledge of a pledge of stock by one of its members, it will not be protected thereafter in extending credit to such member in reliance upon its lien on such shares." Helliwell, Stock & Stockholders, § 360, p. 676, note 37. "Where, by valid provision, a lien is

given to the corporation, an assignee or pledgee of a certificate takes subject to a lien for a debt to the corporation incurred by the transferor subsequent to the assignment or pledge, and before notice thereof is given to the corporation, especially where the statute or charter provides that no transfer shall be valid until made on the books of the corporation. The corporation cannot assert a lien for a debt contracted subsequent to notice of a pledge or transfer of the shares, even though the transfer is made in violation of a charter provision prohibiting the transfer of shares for a specified length of time after organization. Nor can the corporation assert a lien for a debt contracted after it has notice that the shareholder has agreed to transfer his shares and has been paid therefor." 26 Am. & Eng. Enc. Law, 2d ed. Stock & Stockholders, p. 872, and notes 6, 7, 8, and 9 thereunder. In Michigan the legal title or general property of shares of corporate stock is in the pledgee. In the case of *Just v. State Sav. Bank*, 132 Mich. 600, at page 606, 94 N. W. 200, 202, the court says: "Whatever may be the English rule, we think it is settled that the courts of this county repudiate the idea that a bona fide purchaser or pledgee of stock takes it subject to claims that may subsequently arise in favor of the corporation if it has notice of his purchase, and that notice of the purchaser's rights is sufficient to protect them, although a demand for a transfer of the stock on the books of the corporation be not made." *Prince Invest. Co. v. St. Paul & S. C. Land Co.* 68 Minn. 121, 70 N. W. 1079; *Conant v. Reed*, 1 Ohio St. 298; *Bank of America v. McNeil*, 10 Bush. 54; *Des Moines Loan & T. Co. v. Des Moines Nat. Bank*, 97 Iowa, 668, 66 N. W. 914; *Hotchkiss & U. Co. v. Union Nat. Bank*, 15 C. C. A. 264, 37 U. S. App. 86, 68 Fed. 76; *Cook, Stockholders & Corp. Law*, 532, 727. See also *Michigan Trust Co. v. State Bank*, 111 Mich. 310, 69 N. W. 645; *Oakland County Sav. Bank v. State Bank*, 113 Mich. 284, 67 Am. St. Rep. 463, 71 N. W. 453.

In Minnesota, where the statute is stronger and more comprehensive than our own, the rule is: "This provision relating to transfer on the books of the corporation is therefore solely for the protection and benefit of the corporation, but this protection does not go to the extent of empowering it to use its statutory authority as a weapon to deprive bona fide shareholders of their valuable property rights accruing prior to the claims of the corporation, obtained by it with notice of the rights of such shareholders. Corporations are bound equally as individuals by actual

notice of the rights of others; thus, 'if the agents of the corporation should, with notice of the rights of the equitable owner, assist the legal holder to transfer the shares in violation of the trust, the company would be liable therefor.' . . . Hence the lien which a corporation has upon the stock or property of its members invested therein, due from them to the corporation, is such as it has acquired in good faith. The rights of the corporation are not therefore superior and paramount in all cases to those of the stockholders simply because of their not registering or transferring the sale of stock on the books of the corporation. . . . Therefore, that as against the land company, no lien could attach to the stock for the indebtedness of Moore to the Prince Investment Company, holding the naked legal title only with notice of agreement to transfer the stock and the entire condition of the matter. If the adjudications in other jurisdictions are at variance with this rule, we do not feel disposed to follow them, as we think that this doctrine is more in harmony with the general principles applicable to the sale of personal property, and where notice is actually brought home to the parties to be affected by it." *Prince Invest. Co. v. St. Paul & S. C. Land Co.* 68 Minn. 121, 70 N. W. 1079. And this case was cited and approved in *St. Paul Nat. Bank v. Life Ins. Clearing Co.* 71 Minn. 123, 73 N. W. 713. In *Des Moines Loan & T. Co. v. Des Moines Nat. Bank*, 97 Iowa, 668, 66 N. W. 914, in discussing a similar statutory provision, the court says: "Where the holder of stock assigned the same to defendant as collateral, the corporation being notified thereof, but no actual transfer was made on the corporation books, and afterwards the stock was assigned to the corporation as security for the registered holder's indebtedness, the corporation, having had actual notice of the transfer to defendant, cannot maintain a superior claim to the stock on the ground that no transfer was formally made on the books as required by a by-law providing that no transfer shall be valid unless so made." In *White River Sav. Bank v. Capital Sav. Bank & T. Co.* 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197, a case where the charter provided a lien for the indebtedness of the pledgee, and refused to permit a transfer of stock until such indebtedness had been paid, a stockholder, with notice to the issuing bank, transferred certain shares of his stock; the issuing bank thereafter loaned the stockholder money, and, when the certificate was presented for transfer, the bank refused to make it upon its books until the indebtedness was paid. The court held that 30 L.R.A. (N.S.)

the holder of a certificate of stock assigned to him as collateral security by indorsement, with power of attorney to make the transfer, had the equitable interest, and that the legal title was in the assignor, though the corporation and other creditors were unaffected with notice, and the transaction was incomplete until the transfer was actually made on the books of the corporation, but also held: "Although a corporation charter provides that its stock shall be transferred only upon its books and that no transfer shall be valid until the assignor shall have paid all debts due from him to the corporation, yet the corporation cannot refuse to record a transfer of stock when it has notice thereof before the assignor becomes indebted to it." The same doctrine was upheld in *Curtice v. Crawford County Bank*, 56 C. C. A. 174, 118 Fed. 390; *Hotchkiss & U. Co. v. Union Nat. Bank*, 15 C. C. A. 284, 37 U. S. App. 86, 68 Fed. 76; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. ed. 1008; *Birmingham Trust & Sav. Co. v. Louisiana Nat. Bank*, 99 Ala. 379, 20 L.R.A. 600, 13 So. 112. In *Jones on Pledges and Collateral Securities*, § 223, p. 166, it is said: "But a corporation having notice that the stockholder has pledged his stock by a delivery of the certificate with a power to transfer the stock upon the books of the corporation cannot have a lien upon the stock for a credit afterwards extended to him upon the faith of its charter right to a lien to secure a stockholder's indebtedness. Such an equitable assignment of the stock affects one who has knowledge of it equally as much as if the transfer had been made upon the books. Notice to the executive officer of a corporation, such as the cashier of a bank, engaged in the active discharge of his duties, is notice to the corporation itself of such an equitable transfer; and such officer, knowing of the pledge of the stockholder's certificate to secure a promissory note, is presumed to know that it remains in pledge for a renewal of the original note. Knowledge of the original transaction should put the officer upon inquiry as to the state of the stockholders shares before the corporation gave him credit upon the faith of his having stock upon which a lien could attach in favor of the corporation." In *Bank of America v. McNeil*, 10 Bush, 54, the court, speaking through Mr. Justice Lindsay, says: "The indebtedness this lien is intended to secure is such as may exist at the time the stockholder attempts to dispose of his stock. It is manifest that the lien cannot become effectual for any purpose until the stockholder contracts a debt to the bank. Until this is done, his power to sell, give, devise, or

incumber his stock is as perfect and complete as is his right so to dispose of or encumber any other personal property he may own. He cannot pass the complete legal title to his stock except by a transfer entered upon the books of the bank, nor can he by any arrangement, not made known to the bank, deprive it of the right to look to his stock as an ultimate security for the payment of any indebtedness it may innocently permit him to incur; but he may, by bargain and sale, by gift, devise, or pledge, divest himself of title, and, when he has done so, and notice has been given to the bank, it has no right to extent credit to him upon the faith of his charter lien upon his stock."

It seems to us, therefore, in view of the foregoing authorities, that the only real question in this case is one of notice. The jury found that the defendant had actual notice that McLish had pledged his stock to the First State Bank, and that, too, at a time when he was not indebted to the issuing bank. It is going too far to say that, in view of his knowledge, the defendant bank had yet a lien on the stock superior to that of the pledgee or its assigns. We do not think the legislature intended to give to banks such an undue advantage in matters of this kind. Were such a thing necessary to protect the bank and its creditors, such intent might possibly be gathered from the statute, but this is not the case. The statute relied upon was not intended to restrict or hinder or control in any way a sale of bank stock by the owner, except in cases where he was indebted to the bank at the time of the sale. In the case at bar McLish was not indebted to the bank in any form between the 25th of June and the 8th of July; and any lien which the defendant may have had prior to June 25th had been fully satisfied and discharged, and after said date, when his stock was clear from the statutory lien, and McLish was not indebted to the bank, he had a right to sell, transfer, or encumber his stock in any manner he chose. If the defendant, with full knowledge of the pledging of the stock, ignored the ordinary rules of business, and permitted him to again become indebted, thereafter, and while his stock was pledged, it could not expect to hold said stock which was then pledged to another, under the statutory lien.

There is no merit in the contention that to uphold the sale of stock to plaintiff, under the circumstances of this case, would prove detrimental to the banking interests of the state. Banks have certain well-defined rights and privileges but those rights and privileges are no more sacred than are those of individuals, 39 L.R.A.(N.S.)

and certainly it was not the intention of the legislature to enact laws more beneficial to one class than another. To sustain defendant's contention would result in placing a premium on knavery and trickery, and would open a way whereby dishonest bank officials might prey on an unsuspecting public. On the other hand, banks pursuing a careful and conservative business will not suffer. Where a bank loans money, especially to one of its stockholders, it should investigate and assure itself that the security taken is ample. If it fails to do so, it will not be heard to complain; and surely no fair-minded person would ask that an innocent party be made to suffer on account of the negligence and carelessness of the officials, who had every opportunity of protecting their bank, and especially, as in the case at bar (where the bank knew that the stock had been pledged), it could not knowingly make other loans to the original owner of such stock and expect to hold as security therefor, under a lien known to have been discharged, property that had been pledged to another.

We can see no error in the record, and the judgment of the District Court of Carter county should be affirmed.

Per Curiam:

Adopted in whole.

WEST VIRGINIA SUPREME COURT OF APPEALS.

MARY C. COUCH

v.

SARAH F. EASTHAM, Appt.

(69 W. Va. 710, 73 S. E. 314.)

Dower — estate limited upon death without issue.

1. Where one is seised of an estate in land that is limited only on his dying without lawful children, the estate, being one that can pass to heirs if lawful children

Headnotes by ROBINSON, J.

Note. — Dower in conditional estates.

The case above reported appears to be the only one upon the question whether a widow is dowerable of an estate held by her husband upon a condition subsequent decided since the compilation of the note to Sullivan v. Sullivan, 22 L.R.A.(N.S.) 691, in which the decisions on the subject are collected.

As to the right of curtesy in determinable fees, see note to Carter v. Couch, 20 L.R.A.(N.S.) 858.

E. S. O.

are born, is an "estate of inheritance," in which the widow is dowable, though it expires by failure of issue.

Same — conditions of.

2. A widow is dowable to the extent of one third of the real estate whereof the husband, or any one to his use, at any time during the coverture, was seised of an inheritance, such as that issue of the marriage might inherit the same as heir to the husband, unless her right to dower therein has been lawfully barred or relinquished.

Will — construction — meaning expressed.

3. A will that is clear and unambiguous in its terms must be interpreted by those terms. The true inquiry is not what the testator meant, but what the terms used by him express.

(November 14, 1911.)

A PPEAL by defendant from a decree of the Circuit Court for Mason County in plaintiff's favor in a suit to establish a dower right in certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. Mollohan, McClintic, & Mathews, Rankin Wiley, and Harry Couch Eastham for appellants.

Messrs. J. S. Spencer and Somerville & Somerville for appellee.

Robinson, J., delivered the opinion of the court:

By this suit the widow of Peter S. Couch prays that dower be assigned her in the lands devised to her husband by the will of his father, Samuel Couch. Her right to dower therein is denied by the defendant, Sarah F. Eastham. The case presents a single question: Is the plaintiff entitled to dower?

The answer to the question must be determined by a consideration of the following paragraph in the will of Samuel Couch: "I give and devise unto my son Peter S. Couch the farm on which I reside in Mason County, West Virginia, containing about Nine Hundred and Fifty Acres, but it being my desire to divide my property as near equally as may be between my two children Peter S. Couch and Sarah Frances Eastham. I direct my said son Peter S. Couch to pay his sister Sarah F. Eastham the sum of Four Thousand Dollars and I hereby make the said sum of Four Thousand and Dollars a lien and charge upon the real estate aforesaid devised to said Peter S. Couch, until the same is paid to said Sarah F. Eastham or her heirs, but in event the said Peter S. Couch shall die leaving no lawful children surviving him, but leaving his wife Mary Catharine Couch surviving him, it is my will and desire that the title

to all my real estate aforesaid shall pass to and be vested in my daughter Sarah Frances Eastham or her children if she be not living upon the payment by her or her said children to said Mary Catharine Couch of the sum of Four Thousand Dollars, but in the event that said Mary Catharine Couch shall not then be living, it is my will and desire that said real estate shall pass to and vest in my said daughter, Sarah F. Eastham, or in case of her death to her children without the payment of anything in consideration therefor." A codicil to the will reduced the last named sum of \$4,000 to \$2,000.

This same paragraph of the will of Samuel Couch, twice before, in the lifetime of Peter S. Couch, has been involved in suits in this court. *Couch v. Eastham*, 27 W. Va. 796, 55 Am. Rep. 346; *Couch v. Eastham*, 29 W. Va. 784, 3 S. E. 23. But, of course, in neither of those cases was the character of the estate devised to Peter S. Couch viewed in relation to dower. Now that he has departed this life leaving no issue, and Sarah F. Eastham has paid to his widow the \$2,000 pursuant to the terms of the will and the codicil thereto, this subsequent controversy about the right of dower arises.

The will gave Peter S. Couch a defeasible fee in the land. He held an estate in fee simple, which would shift in the event of his dying without lawful children. The fee continued in him until he died without issue. If lawful children had been born to him, the estate was one which they could have inherited as his heirs. Since the estate of which he was seised was one that could pass to his heirs, it was an estate of inheritance. It is to estates of this character that dower attaches. Code 1906, chap. 65, § 1. "The widow is dowable of all the real estate whereof the husband, or any one to his use, at any time during the coverture, was seised of an estate of inheritance, such as that issue born of the marriage may, by possibility, inherit the same as heir to the husband, unless her right to such dower has been lawfully barred or relinquished." 2 Minor, Inst. 4th ed. 147. Though the estate of Peter S. Couch in the land expired when he died without leaving children, still his previous seisin of the estate of inheritance therein during the coverture is a basis of dower in his widow. "If the consort's estate expires by the regular efflux of the period originally marked out for its duration, leaving the previous seisin of the consort unimpaired, dower (and curtesy) are prolongations of the consort's estate, annexed by force of law." 2 Minor, Inst. 4th ed. 153. So, we must observe, Samuel Couch by his will vested such a title in his son, gave him such a seisin of the land,

that dower in the son's widow was annexed thereto, by force of law, as a prolongation of the son's estate. That Peter S. Couch held a defeasible fee, and that his widow is dowerable therein, unless her right has been lawfully barred or relinquished, is clear. *Tomlinson v. Nickell*, 24 W. Va. 148; *Nickell v. Tomlinson*, 27 W. Va. 697.

It is, however, insisted that Samuel Couch did not intend that the widow of his son should take dower in the land. What he did intend must be determined from the will itself. The will is clear and unambiguous. We cannot change it and thereby make a new will. The testator plainly gave his son an estate in which the widow of the latter was dowerable. This imports that the testator intended her to have dower, after the son's death. He must be presumed to have known the legal consequences of his will. Whether Samuel Couch could have so devised an estate of inheritance to his son by terms of the will as to cut off right of dower therein, we need not decide. The will does not undertake to cut off dower; it does not directly affirm that the son's widow shall have no dower. Nor does it say that the \$2,000 to be paid by Sarah F. Eastham to the son's widow shall be in lieu of dower. We cannot assume or conjecture that the testator meant that sum in place of dower when he says nothing to that effect. The plain import of the will from the terms used is that the widow of his son may take dower and receive the \$2,000 also. We cannot hold that the will means that Sarah F. Eastham is to have the immediate possession of all the land at the death of Peter S. Couch, for none of the terms used warrant that meaning. The will does not say that the possession of the land is to pass to Sarah F. Eastham if Peter S. Couch dies without lawful children and leaves a widow. It says the "title" to the land is "to pass to and be vested in" Sarah F. Eastham in that event. The use of these words is consistent with the right of dower claimed. "Title" does not mean "possession." Dower is mere right to possession, not title. In short, Samuel Couch gave to his son an estate in which he must have known that the son's widow could take dower, and used no words promulgating an intention contrary to her taking dower. Why he gave a dowerable estate, and why he also provided that a sum of money should be paid to the widow, is not for us to inquire. It is enough that we see that he did so by the plain language of his will. It may be that he meant to return to the widow at least a portion of the \$4,000 paid by her husband. Relative to this same will it was held in a former case: "In the interpretation of a will, the true inquiry is, not what the testator meant to express,

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but what do the words used express." *Couch v. Eastham*, 29 W. Va. 784, 3 S. E. 23.

The decree is a proper one. It will be affirmed.

Petition for rehearing denied January 12, 1912.

OKLAHOMA SUPREME COURT.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Plff. in Err.,

v.
L. O. ALLEN.

(— Okla. —, 120 Pac. 1090.)

Carrier — shipment to consignor's order — shortage — suit by purchaser.

Prior to the 17th day of October, 1907, L. O. A., of P., ordered from W.-M. Co. of O., a car of coal to be shipped from H. to F. On said date said car, containing 76,800 pounds, was shipped by W.-M. Co. over plaintiff in error's line of railroad, to W.-M. Co., at P. shipper's order, "Notify L. O. A." The bill of lading so drawn and draft for the amount of the invoice, including freight, were delivered for collection to W. F.'s agent at P., who was also the agent of plaintiff in error at P. The car of coal arrived at P. on the 28th day of November, 1907. After it arrived, and on the same day, L. O. A. paid the draft. L. O. A. completed the unloading of the car on November 30, 1907. After having weighed the coal unloaded from said car, he found that he had received 67,880, instead of 76,800, pounds, as called for by the bill of lading. A's receipt shows W.-M. Co. to be both the consignor and the consignee, and states, "Notify L. O. A." There is no contention that W.-M. Co. had assigned its right of action to A. Held, that A. was not entitled to recover, as he showed no title in himself prior to the time he paid the draft and received the bill of lading,—all damage occurring prior to that time.

(January 9, 1912.)

Headnote by WILLIAMS, J.

Note. — Right of one who is to be notified of arrival of goods consigned to another, to maintain action against carrier.

As is well known, the practice of "notifying" a person of the arrival of goods is resorted to when a vendor consigns goods to himself or to his own order, and the vendee is to be notified of the arrival of goods, and it to receive them from the carrier upon payment of draft drawn upon him, and the receipt of the bill of lading thereto attached. This situation, of course, immediately presents the question whether the title to the

ERROR to the County Court for Kay County to review a judgment in plaintiff's favor in an action brought to recover the value of coal alleged to have been negligently lost while in defendant's possession as a common carrier. Reversed.

The facts are stated in the opinion.

Messrs. W. F. Evans, R. A. Kleinschmidt, and W. C. Mitchell, for plaintiff in error:

At the time of the loss, the legal title to the car of coal was in the Wise-Moist Coal Company, and it only was entitled to recover.

4 Elliott, Railroads, § 1427, p. 64; Union Stock Yards Co. v. Westcott, 47 Neb. 300, 66 N. W. 422; Furman v. Union P. R. Co. 106 N. Y. 579, 13 N. E. 587; Atlanta Nat. Bank v. Southern R. Co. 106 Fed. 623; Hutchinson, Carr. 3d ed. § 187; 1 Mechem, Sales, § 774; Craven v. Ryder, 6 Taunt. 433, 2 Marsh. 127, Holt, 100, 16 Revised Rep. 644; Ruck v. Hatfield, 5 Barn. & Ald. 632, 24 Revised Rep. 507; Wait v. Baker, 2 Exch. 1; Van Casteel v. Booker, 2 Exch. 691; Ellershaw v. Magniac, 6 Exch. 570; Ward v. Taylor, 56 Ill. 494; Bellefontaine v. Vessaux, 55 Ohio St. 323, 45 N. E. 321; Willman Mercantile Co. v. Fussy, 15 Mont. 511, 48 Am. St. Rep. 698, 39 Pac. 738;

goods passed upon the delivery of the goods to the carrier, or upon the payment of the draft and the receipt of the bill of lading, or upon presentation of the bill of lading and delivery of the goods after the payment of the draft. In the few cases which have been found to involve the question in the foregoing title, it is agreed that the title does not pass until after the payment of the draft, and that therefore the vendee has no right of action for injury to or loss of the goods occurring before the title passed.

Where the plaintiff's name appears in the bill of lading only as the person to be notified of the arrival of goods consigned by and to another, the former does not have such an interest therein as will entitle him to recover for their loss. E. R. Dalbey & Co. v. Mexican C. R. Co. — Tex. Civ. App. —, 105 S. W. 1154.

And the payment of the draft subsequently to the loss of the goods does not operate to vest the title in the vendee as of the date of the loss, so as to entitle him to maintain an action against the carrier. Alabama G. S. R. Co. v. Mt. Vernon Co. 84 Ala. 173, 4 So. 350.

So, in Cudahy Packing Co. v. Dorsey, 26 Tex. Civ. App. 484, 63 S. W. 548, in which the vendor sent goods to the plaintiff, and attached the bill of lading to a draft, and sent it to a bank with instructions not to deliver the bill of lading until the payment of the draft, the court declared that, if the carrier was instructed by the vendor not to deliver the property until it was paid for, then it did not belong to the plaintiff at 39 L.R.A. (N.S.)

Dows v. National Exch. Bank, 91 U. S. 618, 23 L. ed. 214; Seeligson v. Philbrick, 30 Fed. 600; Berger v. State, 50 Ark. 20, 6 S. W. 15; Bergeman v. Indianapolis & St. L. R. Co. 104 Mo. 77, 15 S. W. 992; Pennsylvania R. Co. v. Stern, 119 Pa. 24, 4 Am. St. Rep. 626, 12 Atl. 756; North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 31 L. ed. 287, 8 Sup. Ct. Rep. 266; Libby v. Ingalls, 124 Mass. 503; Furman v. Union P. R. Co. 106 N. Y. 579, 13 N. E. 587; Joslyn v. Grand Trunk R. Co. 51 Vt. 92; First Nat. Bank v. Northern R. Co. 58 N. H. 203; Second Nat. Bank v. Cummings, 89 Tenn. 609, 24 Am. St. Rep. 618, 18 S. W. 115; Security Bank v. Luttgen, 29 Minn. 363, 13 N. W. 151; First Nat. Bank v. Crocker, 111 Mass. 163.

Mr. James Q. Louthan for defendant in error.

Williams, J., delivered the opinion of the court:

This proceeding in error is to review a judgment wherein the defendant in error, as plaintiff, sued the plaintiff in error, as defendant.

Prior to the 17th day of October, 1907, the plaintiff, L. O. Allen, of Peckham, Oklahoma, ordered from the Wise-Moist Coal

the time of the alleged injury, and he could not maintain an action for damages against the carrier.

And since the title does not pass to a vendee to whom the goods are not to be delivered until the payment of the draft and presentment of the attached bill of lading and the acceptance of the goods, he cannot claim a right of action for damages for delay in the shipment, upon the theory that the contract of shipment was made for his benefit by the vendor. Houston & T. C. R. Co. v. Robinson, — Tex. Civ. App. —, 131 S. W. 444.

But it has been held that where the bill of lading of goods consigned to the vendor, "notify" the vendee, bears an indorsement by the vendor to the vendee, which was dated before the delay occurred, the assignee is the owner of the goods at the time of the delay, and since, therefore, he alone sustains damages in consequence thereof, he has the right to bring an action against the carrier. Moore v. Atlantic Coast Line R. Co. 85 S. C. 19, 67 S. E. 11.

Another point, although really constituting but a step in the process of reasoning by which the time or manner of passing of title is determined, is sometimes made by the statement that when a vendor consigns goods to himself or to his own order, "notify" the vendee, the carrier becomes the agent of the vendor, to consummate the sale upon the delivery to the vendee of the bill of lading after payment of the draft.

Thus, it is held in Asheboro Wheelbarrow & Mfg. Co. v. Southern R. Co. 149 N.

Company, of Oklahoma City, Oklahoma, a car of Henryetta lump coal to be shipped from Henryetta, Oklahoma, to Peckham, Oklahoma. On said date, S. F. car No. 16,439, containing 76,800 pounds of Henryetta lump coal was shipped by the Wise-Moist Coal Company over defendant's line of railroad to themselves (Wise-Moist Coal Company), Peckham, Oklahoma, shipper's order, "Notify L. O. Allen;" and bill of lading so drawn, and draft for the amount of the invoice, including freight, were delivered for collection to the Wells Fargo Express Company's agent at Peckham, who was also the defendant's agent at Peckham. The car of coal arrived at Peckham on the 29th day of November, 1907, and after its arrival, and on the date therefor, plaintiff paid the draft.

Plaintiff completed the unloading of the car on the 30th day of November, 1907, and, after having weighed the coal unloaded from said car, found that he had received 67,880 pounds, instead of 76,800 pounds, as called for by the billing. Plaintiff's receipt shows the Wise-Moist Company to be the consignor and consignee, and states: "Notify L. O. Allen."

In Elliott on Railroads, vol. 4, 2d ed. § 1427, p. 64, it is said: "A direction in a

bill of lading to consignor's order, to 'notify' someone else, does not warrant the carrier in delivering the property to the person so to be notified without the production of the bill of lading. The use of the term 'notify' shows that the party to be notified was not intended as the consignee, but was simply to be advised of the arrival of the goods. The fact that a bill of lading is made out to the consignor's order makes this still plainer. Indeed, it has been held that such a contract is so plain and unambiguous that a custom in a certain city to deliver property under similar bills of lading to the person to be notified cannot be shown." See also authorities cited in footnotes 79, 80, and 81.

In 1 Hutchinson on Carriers, 3d ed. § 187, at page 203, it is said: "It is a common practice, where the bill of lading provides for delivery to the consignor's order, and has gone forward attached to a draft on the purchaser or other person by whom payment is to be made, to give directions that such person be notified of the arrival of the goods, in order that he may pay the draft and procure the goods. Such a direction to notify, however, does not dispense with the production of the bill of lading as in other cases; and if the carrier

C. 261, 62 S. E. 1091, that where goods are shipped to the consignor's order, the carrier is his agent, and the person to be notified is not brought into any contract relation with the carrier, and must look to the consignor for any damage sustained by a delay. It appeared in this case that the person to be notified did not pay the draft until after the goods arrived, but this fact seems not to have entered into a decision of the case, which is placed upon the ground that the vendor placed the goods in the hands of the carrier as his agent, to be sold and delivered to the person notified when the draft was paid, and that both title and possession remained in the consignor until that time.

It will be observed that it is recognized in *ST. LOUIS & S. F. R. CO. v. ALLEN*, that the vendee could have taken an assignment of the claim against the carrier for loss, and then could have brought suit. But it seems not to have been urged in the few cases discussed in this note, that the sending of a bill of lading attached to the draft and indorsed to the vendee operates, upon the payment of the draft, and the presentation of the bill of lading, and delivery of the goods, not only as a consummation of the sale, but also as an assignment of all claims against the carrier for loss or damage to the property. Such a position, it is thought, might well be made, and certainly it would have the practical effect of according, in most cases, a right of action to the person really made to suffer by the loss or injury. Of course, quite another question is

raised when, as in *Alabama G. S. R. Co. v. Mt. Vernon Co.* supra, it is contended that the payment of the draft operates to vest title in the vendee as of the date of the loss.

There are numerous cases which discuss the general question of when title passes under a contract of shipment, and many of such cases involve contracts in which the vendee appears in the bill of lading only as the person to be notified. But it will be observed that this note contains only such cases of this kind as arise from an attempt upon the part of the person to be notified to sue the carrier. Generally, as to the effect of attaching a draft to a bill of lading to prevent title passing on delivery of goods to carrier, see note in 2 L.R.A.(N.S.) 1078. The note in 4 L.R.A.(N.S.) 1056, on the liability of a carrier for property removed by or delivered to one whom it was directed to notify, has to do, of course, with whether the carrier is liable for misdelivery or conversion when it delivers the goods to the person to be notified without production of the bill of lading.

Somewhat analogous to the question indicated by the foregoing title is the question as to the right of an agent, factor, broker, or commission merchant to whom goods are consigned for sale, to maintain an action against the carrier for loss thereof or damage thereto. This question is discussed in the note in 26 L.R.A.(N.S.) 437.

Generally, as to the right of a consignee to maintain an action against the carrier, see the note in 36 L.R.A.(N.S.) 68.

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delivers the goods to the person so to be notified, without requiring him to produce the bill of lading, he will be liable for any loss thereby incurred. The very presence of the word 'notify' in such a case, it is said, shows that the person named is not intended as the consignee. And although it has been the custom for the carrier to permit the person to be notified to stop the goods at a point short of their destination, and there receive them, without producing the bill of lading, such custom, as against a bona fide transferee of the bill of lading, will furnish the carrier with no excuse for making delivery at an intermediate point to the person to be notified, without requiring him to produce the bill of lading." See also authorities cited in footnotes 15, 16, and 17.

In 1 *Mechem on Sales*, § 774, at page 648, it is said: "Where the seller takes a bill of lading which expressly stipulates that the goods are to be delivered, at the point of destination, to himself or agent, or to his order or assigns, there is the clearest possible evidence upon the face of the transaction that, notwithstanding such an appropriation of the goods as might have been sufficient to transfer the title to the buyer, the seller has determined to prevent this result by keeping the goods within his own control."

In *Dows v. National Exch. Bank*, 91 U. S. 618, 23 L. ed. 214, it was held: "The transmission of the invoices of goods does not pass the property in goods without the acceptance and payment of the drafts drawn against them. An invoice is not a bill of sale, nor is it evidence of a sale. A bill of lading, taken deliverable to the shipper's own order, is inconsistent with an intention to pass the ownership of the cargo to the person on whose account it may have been purchased. . . . Where there is any evidence to rebut the effect of the bill, it becomes a question for the jury, whether the property has passed. But where there is no such evidence, there is no necessity of submitting to the jury the question as to whether there was a change of ownership."

In *Seeligson v. Philbrick* (C. C.) 30 Fed. 600, it is said: "The principle of law is well established that, where property is destroyed by accident, the loss falls upon the holder of the legal title (*Grant v. United States*, 7 Wall. 331, 19 L. ed. 194), and the question here is, in whom was the title to the property destroyed, at the time of its destruction? Had there been a full and perfected sale, which passed the property from the plaintiffs to the defendant, so that he became bound to pay the price? Mr. Benjamin, in his treatise on *Sales of Personal Property*, has so clearly laid down

what may safely be accepted as the law upon the subject, that it is but necessary to examine the facts of the case in question in the light of his rules. The rules that would apply in this case are, first, where the goods, in pursuance of an order, are delivered to a carrier to be delivered to the buyer, the carrier is presumed to act as agent of the buyer, and delivery to the carrier is delivery to the buyer; but where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer, but to the captain, as bailee for delivery to the person indicated by the bill of lading. The fact of making the bill of lading deliverable to the order of the vendor is, when not rebutted by evidence to the contrary, almost decisive to show his intention to reserve the *jus disponendi*, and to prevent the property from passing to the vendee. Where a bill of exchange for the price of goods is inclosed to the buyer for acceptance, together with a bill of lading, if he refuse acceptance, he acquires no right to the bill of lading, or the goods of which it is the symbol. When the vendor deals with a bill of lading only to secure the contract price, the property vests in the buyer upon payment thereof. See *Benjamin, Sales*, 4th ed. § 399, and numerous cases there cited. These propositions of law are accepted as established by numerous decisions, and the Supreme Court has settled beyond any question what should control in this case."

In the case of *Willman Mercantile Co. v. Fussy*, 15 Mont. 511, 48 Am. St. Rep. 698, 39 Pac. 738, it is said: "By the established rules of commercial law, where goods are shipped at the risk of the purchaser and by his order, or if, by other evidence, the intention of the shipper is made apparent to part with his title, the carrier is held to be the agent of the consignee, and not the agent of the consignor. But if the seller does not intend to part with his title to and control over the property when he makes the consignment, the authorities regard the carrier as the consignor's agent, and not the consignee's. To get at the intention of the parties to such commercial transactions, the bills of lading are resorted to. If the vendor, when shipping, takes the bill of lading in his own name, this fact, when not rebutted by evidence to the contrary, is very strong proof of the intention of the vendor to reserve title in himself, and is almost decisive to prove the vendor's intention to retain the *jus disponendi* of the property, and to prevent the delivery of same to the vendee. *Dows v. National Exch. Bank*, 91 U. S. 618, 23 L. ed. 214; *Emery v. Irving Nat. Bank*, 25

Ohio St. 360, 18 Am. Rep. 299; Seeligson v. Philbrick (C. C.) 30 Fed. 600; Chandler v. Sprague, 38 Am. Dec. 404, and note, 5 Met. 308; McCormick v. Joseph, 77 Ala. 236; Forcheimer v. Stewart, 65 Iowa, 594, 54 Am. Rep. 30, 22 N. W. 886; Sohn v. Jervis, 101 Ind. 578, 1 N. E. 73; Jones v. Brewer, 79 Ala. 545; Moors v. Kidder, 106 N. Y. 32, 12 N. E. 818; First Nat. Bank v. McAndrews, 5 Mont. 325, 51 Am. Rep. 51, 5 Pac. 879. The plaintiff, the vendor in this case, dealt with the bill of lading with the manifest purpose of securing the payment for the apples; and the defendant, by his refusal to pay the draft, acquired no right to the bill of lading, or to the goods which it represented. Benjamin, Sales, 567; Farmers' & M. Bank v. Logan, 74 N. Y. 568. When the bill of lading was taken in the shipper's name, the presumption arose that he intended to retain the title in himself. This presumption must stand as conclusive until it is rebutted by affirmative proof on the plaintiff's part." See also Berger v. State, 50 Ark. 20, 6 S. W. 15; Libby v. Ingalls, 124 Mass. 503; Furman v. Union P. R. Co. 106 N. Y. 579, 13 N. E. 587; Security Bank v. Luttgen, 29 Minn. 363, 13 N. W. 151; Second Nat. Bank v. Cummings, 89 Tenn. 609, 24 Am. St. Rep. 618, 18 S. W. 115; First Nat. Bank v. Northern R. Co. 58 N. H. 203; Pennsylvania R. Co. v. Stern, 119 Pa. 24, 4 Am. St. Rep. 626, 12 Atl. 756; Bergeman v. Indianapolis & St. L. R. Co. 104 Mo. 77, 15 S. W. 992; Joslyn v. Grand Trunk R. Co. 51 Vt. 92; Ward v. Taylor, 56 Ill. 494.

There is no proof in the record to overcome or rebut this presumption; nor is there any evidence to show any loss after the car arrived at Peckham after the draft was paid. Had this car of coal, between the points of Henryetta and Peckham, been destroyed on account of some act of God, by which the carrier would not have been liable for such loss, upon whom would the loss have then fallen, under the facts as shown by this record—the consignor, the Wise-Moist Coal Company, or the defendant in error? Clearly upon the coal company, for the title was in them, and did not vest in the defendant in error until the payment of the draft with bill of lading attached. Had the title vested in the defendant in error when the coal was delivered to the railway company at Henryetta, and the bill of lading been held by the coal company as collateral security, in that event, had the car of coal been lost by an act of Providence or such circumstances as the railway company would not have been liable, then the loss would have fallen on the defendant in error, and the coal company would have sued him for the value of the car. 39 L.R.A. (N.S.)

There is no attempt in this record to prove that it was the understanding of the parties that the title to the car of coal was to vest in the defendant in error prior to the payment of the draft with the bill of lading attached. The defendant in error has not attempted to bring this action as an assignee of the Wise-Moist Coal Company, but on the theory that he was the owner of the coal alleged to have been lost on account of the negligence of the plaintiff in error at the time of such loss.

Under this record, it was the duty of the Wise-Moist Coal Company to deliver that coal to the defendant in error. The railway company was its agent in making the delivery, and the defendant in error could have maintained an action against the coal company for this loss, or the coal company could have assigned this claim to the defendant in error, and he could have prosecuted the action, as assignee, against the carrier for such damages.

The amount here involved is not large, and it is with regret that we have to reverse cases involving such a small amount; but the proposition of law involved in this case is plain. If the coal was lost as alleged by the defendant in error, the Wise-Moist Coal Company was at the time the owner of the same, and the action for such loss must be brought in the name of said coal company, or by its assignee.

It follows that the judgment of the lower court must be reversed, with instructions to grant a new trial and proceed in accordance with this opinion.

All the Justices concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

MARK BURSTEEN

v.

BOSTON ELEVATED RAILWAY COMPANY.

(211 Mass. 459, 98 N. E. 27.)

Carrier — property lost from car — duty to permit passenger to alight.

The conductor is not bound to stop a car between stations in a subway to permit a passenger to alight to recover property acc-

Note. — Carriers: duty to stop train or car for article dropped by passenger.

No authority has been found on this question in addition to BURSTEEN v. BOSTON ELEV. R. Co. and Henderson v. Louisville & N. R. Co. 123 U. S. 61, 31 L. ed. 92, 8 Sup. Ct. Rep. 60, which it cites, and

cidently dropped from the car, where to do so would involve risk of collision and place the passengers in peril.

(April 1, 1912.)

REPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court of an action brought to recover for the loss of a violin, which resulted in a verdict for defendant. Judgment on the verdict.

The facts are stated in the opinion.

Messrs. Louis S. Thierry and James E. Kelley, for plaintiff:

The plaintiff's violin, carried on a street car, comes within the designation of personal baggage.

Hawkins v. Hoffman, 6 Hill, 586, 41 Am. Dec. 767; Jordan v. Fall River R. Co. 5 Cush. 69, 51 Am. Dec. 44; Collins v. Boston & M. R. Co. 10 Cush. 506.

Although a railroad corporation is not responsible as a common carrier for an article of personal baggage kept by a passenger exclusively within his own control, it is liable for the loss of such an article by the negligence of the corporation, or its agents or servants, and without the fault of the passenger.

Kinsley v. Lake Shore & M. S. R. Co. 125 Mass. 54, 28 Am. Rep. 200; Clark v. Burns, 118 Mass. 275, 19 Am. Rep. 456; Whitney v. Pullman's Palace Car Co. 143 Mass. 243, 9 N. E. 619; American S. S. Co. v. Bryan, 83 Pa. 446.

The duty of a carrier to avoid injury to or loss of baggage by the stopping of its conveyance is not as imperative as is its duty to avoid, by such means, an injury to a passenger, but the fundamental principle governing the two cases is the same, the degree of imperativeness varying with the kind of conveyance, and the consequent danger and inconvenience incident to stopping on the particular occasion, as well as with the seriousness of the injury likely to be caused by not stopping.

Cincinnati, I. St. L. & C. R. Co. v. Cooper, 120 Ind. 469, 6 L.R.A. 241, 16 Am. St. Rep. 334, 22 N. E. 340; Chicago West Div. R. Co. v. Hughes, 69 Ill. 170; Jordan v. Fall

River R. Co. 5 Cush. 69, 51 Am. Dec. 44; Whitney v. Pullman's Place Car Co. 143 Mass. 243, 9 N. E. 619; First Nat. Bank v. Marietta & C. R. Co. 20 Ohio St. 259, 5 Am. Rep. 655.

The jury would have been warranted in finding that the getting off the car would not have been negligent, and therefore it is not open to the defendant to plead, as excuse of its refusal to allow the plaintiff to alight, that it was preventing him from doing, on the impulse of the moment, a reckless act.

McDonough v. Metropolitan R. Co. 137 Mass. 210; Briggs v. Union Street R. Co. 148 Mass. 72, 12 Am. St. Rep. 518, 19 N. E. 19; Flynn v. Connecticut Valley Street R. Co. 196 Mass. 587, 82 N. E. 1085.

Apart from the foregoing grounds of liability, the jury could have found that the defendant, by not allowing the plaintiff to alight, was guilty of a false imprisonment, for which it could be held liable in this action.

Pollock, Torts, 8th ed. 221; Harkins v. State, 6 Tex. App. 452; Miller v. Ashcraft, 98 Ky. 314, 32 S. W. 1085; Lincoln v. Shaw, 17 Mass. 410; Shattuck v. Woods, 1 Pick. 171; Com. v. Bagley, 7 Pick. 279; Johnson v. Tompkins, Baldw. 600, Fed. Cas. No. 7416.

The act was within the scope of the authority of the conductor.

Rown v. Christopher & 10th Street R. Co. 34 Hun, 471; Corbett v. 23d Street R. Co. 42 Hun, 587.

Mr. Cyrus Brewer, for defendant:

The conductor was under no legal duty to cause the car to stop under the circumstances, and therefore there can have been no breach of such duty from which negligence can be inferred.

Henderson v. Louisville & N. R. Co. 123 U. S. 61, 31 L. ed. 92, 8 Sup. Ct. Rep. 60; Hull v. East Line & R. River R. Co. 66 Tex. 619, 2 S. W. 831; Wells v. Alabama G. S. R. Co. 67 Miss. 24, 6 So. 737; Alabama G. S. R. Co. v. Carmichael, 90 Ala. 19, 9 L.R.A. 388, 8 So. 87; Lake Shore & M. S. R. Co. v. Pierce, 47 Mich. 277, 11 N. W.

which, in reaching the conclusion that the carrier was not bound in the circumstances to stop its train, said: "She did not intrust her bag to the exclusive custody and care of the defendant's servants, but kept it in her own immediate possession, without informing the defendant of the value of its contents, until after it had dropped from her hand through the open window. Even if no negligence is to be imputed to her in attempting to shut the window with the bag in her hand, yet her dropping the bag was not the act of the defendant or its

servants, nor anything that they were bound to forebear or to guard against; and after it had happened, she had no legal right, for the purpose of relieving her from the consequences of an accident for which they were not responsible, to require them to stop the train."

As to duty of sleeping car company as to baggage or personal effects of passenger, see the note in 9 L.R.A.(N.S.) 407.

As to the right of a passenger to carry baggage or packages in a street car, see the note in 30 L.R.A.(N.S.) 889. L. A. W.

157; *White*, Personal Injuries on Railroads, § 686; *Wood*, Railway Law, § 355.

In respect to the personal baggage of the plaintiff, there was no negligence on the part of the defendant.

Sperry v. Consolidated R. Co. 79 Conn. 563, 10 L.R.A.(N.S.) 907, 118 Am. St. Rep. 169, 65 Atl. 962, 9 Ann. Cas. 199; 4 *Elliott*, Railroads, 2d ed. § 1623; 2 *Nellis*, Street Railroads, §§ 339, 340; *Kinsley v. Lake Shore & M. S. R. Co.* 125 Mass. 54, 28 Am. Rep. 200; *Clark v. Burns*, 118 Mass. 275, 19 Am. Rep. 456; *Tower v. Utica & S. R. Co.* 7 Hill, 47, 42 Am. Dec. 36; *Talley v. Great Western R. Co.* L. R. 6 C. P. 44, 40 L. J. C. P. N. S. 9, 23 L. T. N. S. 413, 19 Week. Rep. 154; *Bergheim v. Great Eastern R. Co.* L. R. 3 C. P. Div. 221, 5 Eng. Rul. Cas. 464; *Gleason v. Goodrich Transp. Co.* 32 Wis. 85, 14 Am. Rep. 716; *American S. S. Co. v. Bryan*, 83 Pa. 446; *Weeks v. New York, N. H. & H. R. Co.* 72 N. Y. 50, 28 Am. Rep. 104.

Sheldon, J., delivered the opinion of the court:

The plaintiff does not contend that the jerk of the car and the resulting fall of his violin were due to any negligence of the defendant. His claim is that the conductor ought to have stopped the car and allowed the plaintiff to alight and at least attempt to recover his property. But this contention cannot be maintained.

The occurrence was in the Boston subway, where it is generally known, and we must take judicial notice, that the cars stop only at fixed stations, and all cars are run with the expectation that there will be no other stops. In this very case, another car was coming only about 20 feet behind the car in question. A sudden stop of the forward car would have involved imminent danger of a collision, and would have exposed both the plaintiff and the other passengers in each car to the risk of serious injuries. The established rule that a railroad company is not bound to stop a train between stations for the purpose of allowing a passenger to search for lost property, even of great value, governs the case. *Henderson v. Louisville & N. R. Co.* 123 U. S. 61, 31 L. ed. 92, 8 Sup. Ct. Rep. 60. Here, as in that case, the property lost was in the personal custody of the passenger, and the defendant's tracks in the subway are used in the same way as the tracks of a steam railroad upon the surface of the earth. As in that case, the plaintiff had no right to require the defendant, for the purpose of relieving him from the consequences of an accident for which it was not responsible, to stop its car "short of a usual station, to 39 L.R.A.(N.S.)

the delay and inconvenience of other passengers and the possible risk of collision." And see *Lake Shore & M. S. R. Co. v. Pierce*, 47 Mich. 277, 11 N. W. 157; *Wells v. Alabama G. S. R. Co.* 67 Miss. 24, 6 So. 737; *Alabama G. S. R. Co. v. Carmichael*, 90 Ala. 19, 24, 9 L.R.A. 388, 8 So. 87.

The case of *Chicago West Div. R. Co. v. Hughes*, 69 Ill. 170, has no resemblance in its facts to the case at bar.

There is no merit in the contention that the defendant by not allowing the plaintiff to alight was guilty of a false imprisonment, for which it now can be held. The declaration states no such cause of action, and what the conductor did was not wrongful.

Judgment on the verdict.

MICHIGAN SUPREME COURT.

JENNIE FLEMING, Appt.,

v.

JOHN J. GEMEIN.

(168 Mich. 541, 134 N. W. 969.)

Appeal — new trial — refusal — error.

1. It is error to deny a new trial where nominal damages only have been granted, to a woman against one who, after notice to refrain from doing so, sold intoxicating liquors to her husband, which resulted in his assaulting her, destroying her property, and materially damaging her means of support, and humiliating and disgracing her. **Wife — competency — civil damage action.**

2. A woman is a competent witness in an action under the civil damage act against one who sold intoxicating liquor to her husband after notice not to do so, to show his acts and conduct towards her during times of intoxication through liquor sold him by defendant.

(March 12, 1912.)

Note. — Competency of one spouse to testify as to misconduct of other spouse in action against a third person.

The general rule appears to be that in actions against third persons a husband or wife is competent to testify to any relevant matter bearing upon the conduct of the other spouse, in so far as such knowledge is gained from general observation, and not because of the existence of the marital relation.

Accordingly, it has been held that a statute prohibiting husband and wife from testifying for or against the other without his or her consent, and prohibiting either from testifying during the marriage or afterwards, to any communication made by one to the other during the marriage, must

A PPEAL by plaintiff from a judgment of the Circuit Court for Wayne County granting insufficient relief and denying a motion for new trial in an action brought to recover damages for unlawfully selling intoxicating liquors to plaintiff's husband. Reversed.

The facts are stated in the opinion.

Mr. William L. January, with Mr. Harry H. Wait, for appellant:

The statute gives an absolute right of action against those who have caused or contributed to the intoxication of plaintiff's husband, which results in injury; and does not predicate her right of recovery upon knowledge upon their part that he was a person in the habit of becoming intoxicated.

McMahon v. Dumas, 96 Mich. 467, 56

be construed to be limited to communications, and not to cover information imparted by act or acquired by observation, and does not disqualify a divorced wife from testifying as to the husband's condition when he was under the influence of intoxicating liquor during the time she was his wife. *Re Van Alstine*, 26 Utah, 193, 72 Pac. 942.

In an action by a wife upon a bond conditioned for the husband's faithful support of his wife and child, in which it was shown that he was in the habit of becoming intoxicated, the wife was permitted over objection to testify as to his intoxicated condition. The court said: "The husband's condition as to being intoxicated, unless it should appear to have been specially confided to the wife in the absence of others, cannot be regarded as in the nature of a confidential communication. Especially must this be so when the subject under investigation implies that the condition and conduct of the husband were an imposition upon the wife." *Stanley v. Stanley*, 112 Ind. 143, 13 N. E. 261.

And in accord with *FLEMING v. GEMIN* is *Maloney v. Dailey*, 67 Ill. App. 427, which was an action for selling intoxicating liquors to the husband, the wife being permitted to show the husband's conduct while under the influence of liquor, though no objection appears to have been made.

In an action by the wife for selling intoxicating liquors to her husband, in which defendants, for the purpose of mitigating the damages, showed that plaintiff accompanied her husband on numerous occasions to places where intoxicating liquors were sold, and there drank with him, she was permitted to show that her husband compelled her to go. *Hackett v. Smelsley*, 77 Ill. 109.

Action for criminal conversation.

The majority of the cases hold that one spouse is incompetent to show misconduct on the part of the other in an action for criminal conversation. *Cornelius v. Ham-39 L.R.A. (N.S.)*

N. W. 13; Radley v. Seider, 99 Mich. 433, 58 N. W. 366; *Re Miller*, 160 Mich. 309, 125 N. W. 2; *Rouse v. Melsheimer*, 82 Mich. 175, 46 N. W. 372.

It is the inherent power of the court to grant a new trial if the verdict is against the weight or contrary to the evidence.

Hintz v. Michigan C. R. Co. 132 Mich. 307, 93 N. W. 634; *Whipple v. Michigan C. R. Co.* 130 Mich. 460, 90 N. W. 287; *Radley v. Seider*, 99 Mich. 431, 58 N. W. 366; *Lucker v. Liske*, 111 Mich. 685, 70 N. W. 421.

Mr. James H. Pound for appellee.

McAlvay, J., delivered the opinion of the court:

Plaintiff sued defendant, who was engaged, in the city of Detroit, in the busi-

bay, 150 Pa. 359, 24 Atl. 515; *Sahms v. Brown*, 4 Pa. Co. Ct. 488, holding husband incompetent to prove the wife's adultery with defendant; *Carter v. Hill*, 81 Mich. 275, 45 N. W. 988, holding husband incompetent to prove facts tending to show adultery; *Knickerbocker v. Worthing*, 138 Mich. 224, 101 N. W. 540, holding both husband and wife incompetent to prove or disprove adultery.

And it has been held that the husband is incompetent to testify to any fact whatever in support of his action, by reason of the statute prohibiting the parties "to any action or proceeding instituted in consequence of adultery" to testify. *Graves v. Harris*, 117 Ga. 817, 45 S. E. 239.

Accordingly, it was held that the husband was incompetent to disprove the contention of the defendant that he had consented to and connived at the adultery of his wife with the defendant. *Ibid.*

And even after a divorce between the plaintiff and his wife, the husband is not a competent witness to testify to the charge of adultery in a suit brought against the alleged paramour of the wife, as being within the statutory provision that "in any action or proceeding instituted by the husband or wife in consequence of adultery," the husband and wife shall not be competent to testify. *Hanselman v. Dovel*, 102 Mich. 505, 47 Am. St. Rep. 557, 60 N. W. 978.

Note the New York cases in this subdivision, which hold that the statute has no application to an action for criminal conversation, because the wife is not a party.

But on the other hand, in *Roesner v. Darrah*, 65 Kan. 599, 70 Pac. 597, it was held that the husband was a competent witness in support of the action, except as to transactions or communications had with the wife.

And in *Woods v. Gledhill*, 56 Hun, 220, 9 N. Y. Supp. 266, it was held that the husband was competent to prove any fact tending to establish the misconduct alleged as the ground of the action, though it might

ness of conducting a saloon as a retail liquor dealer, under the statute, claiming damages for unlawfully selling malt, brewed, spirituous, and intoxicating liquors to her husband, who became and was an habitual drunkard to the knowledge of defendant, and after the defendant had been notified by her verbally and in writing not to sell to her husband, for the reason that he was an habitual drinker and an habitual drunkard. There is no question raised as to the sufficiency of the declaration in the case. The case was tried in the Wayne circuit court, and resulted in a verdict for 6 cents damages for plaintiff. A motion for a new trial was made on the ground, among others, that the verdict was contrary to the weight

of the evidence and clearly inadequate. This motion was denied.

Plaintiff asks a reversal on account of error assigned upon the rulings and remarks of the court in excluding testimony offered by plaintiff, upon certain portions of the charge to the jury, and upon the denial of the motion for a new trial. It will not be necessary to consider all of the errors assigned. Attention will be given to those of material importance.

The material facts appear from this record to be that plaintiff was married at Detroit in 1895 to William Fleming, a skillful and competent machinist, at that time and still in the employ of the Railway Steel Spring Company. That he was then earning \$2.50 a day, which in a year or two was raised to \$2.75 a day, and in Decem-

have the effect of implicating the wife. The court said: "But as the action was not against her, but against another person, the evidence proposed to be elicited would be against him and him alone," and that the case accordingly was not within the prohibition of the statute which declared that "a husband or a wife is not competent to testify against the other upon the trial of an action or the hearing upon the merits of a special proceeding founded upon an allegation of adultery."

And for the same reason it was held in *Smith v. O'Brien*, 24 N. Y. S. R. 708, 6 N. Y. Supp. 174, affirmed without opinion in 127 N. Y. 484, 28 N. E. 256, that the husband is competent to testify to the act of adultery.

In *Perry v. Lovejoy*, 49 Mich. 529, 14 N. W. 485, it was held that a letter written by the wife to her parents, stating that she was "sick" of her "home" because of her husband's cruel treatment, was competent evidence for the defendant in an action for enticing away the plaintiff's wife, in so far as it revealed and illustrated her state of mind and feeling toward her husband, as it was a part of the *res gestæ* and original evidence. To the same effect is *McKenzie v. Lautenschlager*, 113 Mich. 171, 71 N. W. 489.

Action for alienating affections.

In actions for alienating the affections of the other spouse, the plaintiff is competent to testify to the conduct of such spouse before and after the estrangement, indicating affection for plaintiff and the subsequent loss of it. *Leucht v. Leucht*, 129 Ky. 700, 130 Am. St. Rep. 486, 112 S. W. 845; *Sexton v. Sexton*, 129 Iowa, 487, 2 L.R.A. (N.S.) 708, 105 N. W. 314.

In *Sexton v. Sexton*, supra, it held that this was so notwithstanding the statutory provision that neither husband or wife can be examined as to any communication made by one to the other while married.

On the general question as to whether communications between husband and wife

tending to show affection or want of it are privileged, see note appended to this case in 2 L.R.A. (N.S.) 708.

So it is competent for the wife to testify as to her husband's unkind violent conduct toward her where the defense is that the separation was caused by plaintiff's maltreatment of the wife, and not on account of the influence and persuasion of the defendant. *Yowell v. Vaughn*, 85 Mo. App. 206.

Likewise, in *Millsbaugh v. Potter*, 62 App. Div. 521, 71 N. Y. Supp. 134, it was held that the wife was competent to show the husband's abusive language, unfounded charges of adultery, and unreasonable reprimand, for the purpose of showing that her affections were alienated by the plaintiff's own abuse and maltreatment, since such charges were not confidential communications, within the meaning of the statute prohibiting husband and wife from disclosing confidential communications.

The contrary view, however, was taken in *Huot v. Wise*, 27 Minn. 68, 6 N. W. 425, which was controlled entirely by a construction of the statute, the court pointing out that the statute did not merely lay down the rule disabling the husband and wife from testifying for or against each other, but also prescribed the application of and defined the exception to the rule of disability, which excluded a resort to the common law to determine the extent and exceptions to the rule.

And in *Rose v. Mitchell*, 21 R. I. 270, 43 Atl. 67, it was held that the wife was incompetent to show that her husband put her out of his house, on the theory that such testimony would tend to criminate the husband.

The husband is competent to testify in support of his action for alienating the wife's affections, as to her refusal to accompany him on various occasions upon being invited to do so, and afterwards going with the defendant. *Rudd v. Rounds*, 64 Vt. 432, 25 Atl. 438.

And in *Childs v. Muckler*, 105 Iowa, 279, 75 N. W. 100, the husband was permitted to

ber, 1903, he was appointed master mechanic at \$85 a month. About six months after the marriage he began to drink moderately, which continued for a year or two, when he began to drink to excess, during which period he would come home intoxicated, and spent practically all his earnings in defendant's saloon. This continued until 1901, when he was laid off from his work by the master mechanic. Defendant was notified at that time by the master mechanic not to sell Fleming any more intoxicating liquors. After that Fleming did not drink for about a year. He began again in 1902-

1903, and gradually grew worse until May, 1908. During this time he spent all his evenings, sometimes until midnight, at defendant's saloon, which was located next to the plant where he worked. He came home frequently intoxicated, using vile language towards his wife, and sometimes assaulting her violently and smashing her furniture. Prior to acquiring the habit of becoming intoxicated, and during the period when he quit drinking, Mr. Fleming always treated his wife with kindness and great consideration. During that time he turned over to her a large portion of his earnings,

testify that his wife accompanied the defendant on one occasion to a particular place when he was ready and willing to take her. The objection, however, seems to have been directed to the materiality of the evidence, rather than the competency of the husband to testify.

On indictment of paramour.

The earlier cases held that, in prosecutions against one for adultery, the husband or wife of the one with whom the offense was alleged to have been committed was not a competent witness to testify to the commission of the act. *State v. Gardner*, 1 Root, 485; *Howard v. State*, 94 Ga. 587, 20 S. E. 426; *State v. Welch*, 26 Me. 30, 45 Am. Dec. 94; *Com. v. Sparks*, 7 Allen, 534; *State v. Wilson*, 31 N. J. L. 77; *State v. Jolly*, 20 N. C. 108 (3 Dev. & B. L. 110) 32 Am. Dec. 656; *Com. v. Gordon*, 2 Brewst. (Pa.) 569; *Com. v. Geary*, 9 Pa. Co. Ct. 60; *Com. v. I. F. 12 W. N. C. 108*.

In *Howard v. State*, 94 Ga. 587, 20 S. E. 426, this rule was applied, although by statute persons accused of adultery must be severally indicted, and the acquittal of one would not operate to acquit the other.

In *State v. Wilson*, 31 N. J. L. 77, the husband of the woman with whom the defendant was alleged to have committed the offense was held incompetent to prove the criminal act, though the wife had been previously tried and acquitted for the same offense, and was not to be regarded as a party to the record, nor as interested in the least in the result of the trial, as the testimony of the husband could not endanger the wife.

In *State v. Jolly*, 20 N. C. 108 (3 Dev. & B. L. 110) 32 Am. Dec. 656, the question arose whether at the common law the divorced husband was a competent witness to testify against the paramour of the wife. It was said in the course of the opinion: "It is argued by the attorney general that the criminal conduct testified to in this case was itself an outrageous violation of the marriage vow,—a matter in respect to which confidence was not yielded by the wife, nor could have been asked by the husband. . . . We are not satisfied that the exception contended for is established by the reasoning urged in its support. The 36 L.R.A. (N.S.)

rule we deem a valuable one, and we view with apprehension any exception having a tendency, more or less direct, to promote cunning or to generate distrust where the best interests of society require that perfect frankness and confidence ought to prevail. If one exception be sanctioned because, from the character of the criminal act imputed, the dissent of the witness from its commission must be presumed, others may follow where the like presumption will be entertained, although not perhaps with equal confidence, and there will be danger of our having no rule capable of general and steady application."

In *State v. Gardner*, 1 Root, 485, the court held the husband incompetent in a prosecution against the paramour of the wife, upon the ground that the husband would be incompetent to testify against the wife in a prosecution against her, and in testifying against her paramour, he would in effect be a witness to the criminality of his wife. It was further urged that he might be interested in laying a foundation, by his testimony, for a divorce.

In *Com. v. Sparks*, 7 Allen, 534, it was said that such testimony ought not to be received in any proceeding or upon any trial; that as nothing would be more likely to exasperate the parties and be the means of implacable discord and dissension between them; that its admission would be a violation of that principle of public policy upon which the general rule of their exclusion as witnesses against each other is founded; and *State v. Welch*, 26 Me. 30, 45 Am. Dec. 94, and *State v. Gardner*, were cited with approval.

So the husband of the woman with whom the crime was alleged to have been committed was incompetent to testify that on a former occasion he had discovered defendant concealed behind the door of his wife's sleeping room. *People v. Fowler*, 104 Mich. 449, 62 N. W. 572.

On the other hand, it has been held that the husband or wife of the one with whom accused is alleged to have committed the offense is competent to prove the act of adultery. *Campbell v. State*, 133 Ala. 158, 32 So. 635; *Pruett v. State*, 141 Ala. 69, 37 So. 343; *State v. Bennett*, 31 Iowa, 24; *State v. Volland*, 57 Minn. 225, 58 N. W. 878; *State v. Marvin*, 35 N. H. 22; *State v. Wiseman*, 130 N. C. 726, 41 S. E.

with which she paid all the bills and home expenses. In 1903, when he was again drinking hard, he spent practically all his money in defendant's saloon, not furnishing his wife enough for support and to pay rent, and she was obliged to open a millinery store, from the proceeds of which she supported the family. This continued until 1908. Some time in October, 1906, he once came to the store intoxicated, threw her through the store door, and broke up some of the furniture. On account of this violence, she became sick and was unable to do her work. For three weeks she was

afraid to stay in the store, and rented a room or stopped with her neighbors. She notified defendant verbally not to sell her husband liquor, at which time he said it was none of her business how her husband spent his money. She also, October 6, 1906, served a written notice on him forbidding him selling to her husband intoxicating liquors, for the reason that he was in the habit of getting intoxicated and was an habitual drinker. Defendant continued to sell and furnish him liquors to drink until as late as March, 1908. From an account furnished by defendant in a garnishee suit

884; *Heacock v. State*, 4 Okla. Crim. Rep. 606, 112 Pac. 949; *Morrill v. State*, 5 Tex. App. 447; *Alonzo v. State*, 15 Tex. App. 378, 49 Am. Rep. 207; *State v. Nelson*, 39 Wash. 221, 81 Pac. 721; *State v. West*, 118 Wis. 469, 90 Am. St. Rep. 1002, 95 N. W. 521.

And in *State v. Bridgman*, 49 Vt. 202, 24 Am. Rep. 124, it was held in a prosecution for adultery that the husband of the woman with whom the offense was alleged to have been committed was competent to testify to circumstances which did not directly criminate the wife.

In *State v. Dudley*, 7 Wis. 664, it was held that the husband was competent to prove his marriage with the woman with whom accused was alleged to have committed the offense.

In *State v. Vollander*, 57 Minn. 225, 58 N. W. 878, it was pointed out that the statute provided that the prosecution for adultery could only be commenced on the complaint of the husband or wife, and the court reasoned that if it be consistent with public policy that the injured party alone may institute the prosecution, it cannot be inconsistent with it that he or she may support it against the paramour by testifying to the fact within his or her knowledge; that it would be strange if the party may make complaint, but may not give evidence in support of it. To the same effect is *Morrill v. State*, 5 Tex. App. 447.

And in *Heacock v. State*, 4 Okla. Crim. Rep. 606, 112 Pac. 949, it was held that adultery is a personal offense against the injured husband or wife, under the statute which provided that prosecutions for adultery can be commenced and carried on against either of the parties to the crime only by his or her own husband or wife, or by the husband or wife of the other party to the crime, and that the husband of one of the parties was competent to prove the offense even though the guilty parties were jointly indicted for the offense, where another statute expressly provides that a husband or wife is a competent witness against the other in a criminal prosecution for a crime committed by one against the other.

fact of his wife's adultery, in a controversy over the distribution of the deceased wife's estate, between the husband electing to take against the will and others claiming under the will, where his testimony does not involve the disclosure of confidential communications made by her to him. *Hayes's Estate*, 23 Pa. Super. Ct. 573.

So the husband's testimony as to the wife's conduct with an adulterer was received in *Bigelow v. Sickles*, 75 Wis. 427, 44 N. W. 761, in an action by the wife for malicious prosecution.

A wife is competent to testify as to threats and violence of her husband which induced her to sign a deed conveying her real estate, in an action by her to recover the land, where the husband was not a party to the suit. *Vicknair v. Trosclair*, 45 La. Ann. 373, 12 So. 486.

The wife is competent to testify concerning her husband's condition and appearance after an accident, in an action by her upon an insurance policy, as those facts did not come to her knowledge by reason of the marital relation. *Aetna L. Ins. Co. v. Bethel*, 140 Ky. 609, 131 S. W. 523.

And in *French v. Ware*, 65 Vt. 338, 26 Atl. 1096, it was held that a divorced wife was competent to testify to facts observed by her during the marriage relation as to the former husband's ability to labor, which tended to contradict his testimony in regard to the same facts, and tended to discredit him as a witness in his action for damages for assault and battery. After pointing out that the subject was not regulated by statute in that jurisdiction, and after reviewing a number of cases, the court said: "When the marriage is dissolved by death or divorce, no reason exists why the survivor should not be competent to testify as fully as in a suit between third parties, although the testimony might bear against the other party to the dissolved marriage. From these decisions it is fairly deducible that a widow or divorced wife is competent to testify to any facts or acts occurring during the married life which did not come to her knowledge in confidence growing out of the marital relation, although they may tend to show the husband had committed a fraud, or to discredit him as a witness, or indirectly to show that he has been guilty of a crime." A. L. R.

Miscellaneous.

A husband is a competent witness to the
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brought against Mr. Fleming for a claimed balance on saloon account of \$138.20, it appears that he had sold and charged plaintiff's husband for liquors about \$800. This did not include any drinks for which cash had been paid. It appears that Mr. Fleming quit drinking in 1908, and at the time of the trial in December, 1909, continued to abstain from all intoxicants. There is practically no dispute in the record as to the foregoing facts. The only witness for the defense was defendant, whose direct examination was brief. He admitted selling to Mr. Fleming both before and after notice. He claimed that Mr. Fleming never became "intoxicated, and never lost any time for his work." He admitted that plaintiff and her young son used to come to his place quite frequently after Mr. Fleming to get him to go home.

Of the errors assigned we will first consider the denial of a new trial. From this record it is apparent that the verdict of 6 cents damages was contrary to the great weight of the evidence, and grossly inadequate. The undisputed evidence tended to show that defendant sold plaintiff's husband intoxicating liquors after being notified that he was an habitual drinker, and in the habit of becoming intoxicated, and did become intoxicated upon liquors so sold to him by defendant; that this plaintiff suffered materially in the matter of her support; that she suffered personal violence and was made sick by her husband's assaults; that her property was destroyed; and that she suffered damages to her feelings in shame, humiliation, and disgrace, all by reason of the conduct of her husband, caused by the unlawful sale of liquors made to him by defendant; and there was abundant evidence tending to show that she was entitled to substantial damages for such injuries. The court was in error in denying such motion.

Upon the offer of evidence by the plaintiff relative to the acts and conduct of the plaintiff's husband when he was intoxicated at the times referred to in the statement of facts, the court refused to allow plaintiff to testify. Several errors are assigned upon such rulings and the interjection of prejudicial remarks by the court, as follows: "Q. Will you describe what took place on this occasion, how Mr. Fleming acted, and what he did?" The court excluded the answer upon the ground that it was a privileged communication, counsel for defendant having made no objection for that reason. In a long statement by the court he refused to change his ruling, because "such testimony would tend to disrupt the family relation and create inter-

minable litigation." The examination of the witness proceeded: "Q. What did he do on these occasions?" Counsel for defendant made the same objection. "Q. Leave out what he said to you, what did he do? A. He struck me. The Court: You are getting that in. It is inimical to the family harmony." The court sustained an objection, and ruled the testimony out. The wife was clearly a competent witness to testify as to the conduct of her husband when intoxicated from the effects of liquor unlawfully sold to him by defendant. The court was in error in excluding such testimony.

We have examined the other material errors assigned, and, although we think that they are meritorious, we do not consider it necessary to discuss them, for the reason that it would be of no benefit to the profession, and there is no probability that they will recur upon a new trial.

The judgment of the Circuit Court is reversed, and a new trial ordered.

UTAH SUPREME COURT.

STATE OF UTAH, Resp't.,

v.

JOSEPH GURR, Appt.

(— Utah, —, 120 Pac. 209.)

Larceny — possession of recently stolen property — bill of sale — effect.

The production by one found in possession of property recently stolen, of a signed and witnessed bill of sale of the property from a stranger, supported by unimpeached testimony of himself and the witnesses that he purchased and paid for it, is not sufficient to overcome the statutory presumption of larceny arising from such possession, so as to authorize the setting aside of a conviction for lack of evidence to support it.

(December 27, 1911.)

Note. — Production of bill of sale as repelling inference or presumption of guilt from possession of recently stolen property.

It will be seen that in *STATE V. GURR* it was unsuccessfully claimed by the defendant that a "reasonable," corroborated, and uncontradicted explanation of his possession of the stolen property destroyed any probative force of such possession, and that such explanation included a bill of sale from a stranger, supported by the testimony of the prosecuting witnesses.

This question as to an unimpeached bill of sale does not seem to have been hitherto decided.

In *State v. Webb*, 18 Utah, 441, 56 Pac.

APPEAL by defendant from a judgment of the District Court for Uintah County convicting him of grand larceny. Affirmed.

The facts are stated in the opinion.

Messrs. John T. Pope and J. W. N. Whitecotton, for appellant:

The inference of defendant's guilt growing out of his possession of the animals, which are shown to have been stolen from one Teague, is completely overcome by the testimony of himself and the two witnesses who saw the bill of sale given, and witnessed it.

State v. Brown, 36 Utah, 46, 24 L.R.A. (N.S.) 545, 102 Pac. 641; *McMahon v. People*, 120 Ill. 581, 11 N. E. 883; *Thompson v. Hynds*, 15 Utah, 389, 49 Pac. 293;

State v. Marquardsen, 7 Idaho, 352, 62 Pac. 1034, 14 Am. Crim. Rep. 493; *State v. Seymour*, 7 Idaho, 257, 61 Pac. 1033; *State v. McKinney*, 76 Kan. 419, 91 Pac. 1068; *People v. Hart*, 10 Utah, 204, 37 Pac. 330.

Messrs. A. R. Barnes, Attorney General, and George C. Buckle, for the State:

If defendant's explanation is unreasonable or improbable on the face of it, it is not incumbent upon the prosecution, in order to secure conviction, to assume the burden of showing the falsity of the explanation. The question as to the sufficiency and credibility of the explanation is for the jury.

25 Cyc. 138; *State v. King*, 122 Iowa, 1, 96 N. W. 712; *State v. Marshall*, 105 Iowa, 38, 74 N. W. 763; *State v. Mandich*, 24 Nev. 336, 54 Pac. 516; *Thomason v. State*, —

159, where the court declined to disturb a conviction for larceny of cattle, there were two bills of sale dated on two successive days, apparently by different makers, which together covered all of the cattle in question and some others; the first bill was offered by the state with the consent of the defendant, and the other he offered himself. The defendant testified that the matter of his purchase of the cattle was opened by a letter received by him from a man at Leamington who he said signed the first bill of sale, and who introduced him to the signer of the second bill; that the brother of the defendant, who was apparently a witness to the first bill, was not present at the time, but he afterwards asked him to sign it as witness, and he did so in pencil and the defendant afterwards traced the signature in ink; that he wrote the body of both bills of sale himself; that the difference in dates was a mistake, for, while the cattle were bought on the two succeeding days, both bills were executed on the second day. The state gave testimony to the effect that the signatures to both bills were in the same handwriting, and that there was no man in the vicinity of Leamington of the name signed to the first bill of sale. This case is criticized in *State v. Potello*, — Utah, —, 119 Pac. 1023, as possibly holding that, in larceny the recent possession of stolen property is itself sufficient to warrant a conviction; but the court there said: "While we think there is some doubt as to the holding in that case on this point, yet we think, from the statement of facts as disclosed by the opinion, that was there some direct evidence of the taking. There certainly was a showing in that case on the part of the state, of an untruthful explanation with respect to the defendant's possession."

In *Pitsnogle v. Com.* 91 Va. 808, 50 Am. St. Rep. 867, 22 S. E. 351, where the facts are not reported, the court said, in holding that under the Virginia statute proof of embezzlement would be sufficient to convict upon a common-law indictment for larceny: "It is contended that the proof of embezzlement is insufficient. It appears that the defendant lent Edmond Bolden \$6 for thirty 39 L.R.A. (N.S.)

days, and that, as security for the loan, he received in pawn Bolden's watch. The testimony of the defendant contradicts that of the commonwealth in certain particulars, but the great weight of evidence sustains the contention of the commonwealth, and, from that, it appears that Bolden pawned his watch with the defendant, who at the time gave a receipt which correctly stated the transaction; that he appropriated the watch to his own use, and by falsely and fraudulently substituting another and different paper for the one originally executed, he attempted to convert a transaction which was originally a loan into a sale, and thereby vest the property of the watch in himself. We cannot conceive of evidence more conclusive of his guilt, if the witnesses who testify are worthy of belief. Their credibility was submitted to a jury, and the jury having found a verdict in accordance with their testimony, it is beyond the power of the court to disturb it."

In *Holley v. State*, 21 Tex. App. 156, 17 S. W. 159, the court, in setting aside a conviction for the larceny of four head of cattle, simply stated that it did not think that the conviction should stand on the testimony set out in the case. In that case the owner testified that the defendant showed to him what he claimed was a bill of sale for the cattle, the signatures to which were unknown to the witness, and told him that he had bought the "chance" in the cattle from a stranger that he met on the train, who pointed out generally the range or part of the country where they might be. He said that if they belonged to the witness, he would get them from the person to whom he in turn had sold them, if the witness would put him to no trouble in the way of getting witnesses, etc., as to his transaction with the stranger; and he caused them to be so given up to the owner. When sold by the defendant they were freshly branded with the brand of the defendant. There was some evidence of good character, but this seems to have been the only evidence on the part of the defense, and it does not appear that the bill of sale was offered in evidence.

In *Sparks v. Oklahoma*, 76 C. C. A. 594,

Tex. Crim. Rep. —, 41 S. W. 638; *State v. Brown*, 25 Iowa, 561; *Van Straaten v. People*, 26 Colo. 184, 56 Pac. 905; 1 McClain, Crim. Law, § 618, p. 628; *State v. Overson*, 30 Utah, 22, 83 Pac. 557, 8 Ann. Cas. 794; *State v. Webb*, 18 Utah, 441, 56 Pac. 159.

Frick, Ch. J., delivered the opinion of the court:

The appellant was charged with the crime of grand larceny committed by stealing fourteen head of cattle, the property of one S. W. Teague. Appellant was tried, convicted, and sentenced to a term of imprisonment in the Utah State Prison, and appeals.

The only errors assigned are that the evidence is insufficient to sustain the verdict and judgment, and that the court erred in not granting a new trial.

There is no dispute with regard to the ownership of the cattle, nor that they were stolen. There is no direct evidence that appellant stole the cattle in question, but there is uncontradicted evidence to the effect that a short time after the alleged bill of sale hereinafter referred to is dated, he was seen at Horseshoe Bend, on Green river, Utah, where Teague, the owner of the cattle in question, kept or ranged his cattle, and at that time appellant had in his possession some of Teague's cattle. Appellant explains this by the statement that, after he purchased the cattle in question, he drove them to Green river, which is some distance from Vernal, where he claimed to purchase the cattle from Pierce, for the purpose of grazing them. There is also undisputed evidence that quite a number of the stolen cattle, if at all, were branded with Teague's

brand, with which appellant was acquainted. Appellant was thus found in possession of some of Teague's cattle a short time after they had been stolen or taken from the range. At the time it was discovered that appellant had possession of the stolen cattle, he had already disposed of some of them to a butcher, and the brand on the hides was identified as Teague's brand. Appellant explained his possession, stating that he had purchased the cattle in question from one W. F. Pierce, who was a stranger, whom neither appellant nor anyone else knew, and who apparently disappeared immediately after he had sold the cattle to appellant. As evidence of such sale, appellant produced and introduced in evidence the following bill of sale:

Vernal, Utah, August 18, 1909.

For value received this certifies that I this day have sold to J. E. Gurr, fourteen head of cattle branded "A. N." on left side, three calves branded "W." on left side, for the consideration of two hundred and twenty-five dollars (\$225). F. W. Pierce.

Witness:

J. H. Cook

his

M. X Mott.

mark

Both Cook and Mott, witnesses to the bill of sale, testified on behalf of appellant. They said that they were present when appellant purchased the cattle from Pierce; that he was a stranger to them, and that they had not seen him before nor saw him after the alleged sale of the cattle to appellant; that they saw appellant pay Pierce some money at the time the bill of sale

146 Fed. 371, where a conviction for larceny of steers was reversed on the ground that incompetent and irrelevant testimony was admitted on behalf of the state, the fact that the defendant offered a bill of sale of the steers is not alluded to in the opinion.

A fabricated bill of sale has been offered by the state as in *State v. Webb*, supra. So in *Williams v. State*, 27 Tex. App. 466, 11 S. W. 481, where the defendant and his accomplice, when arrested, were searched, and on one or the other of them was found what purported to be a bill of sale, the state offered this bill in evidence, and proved that it was in the handwriting of the defendant, and that the signature of one of the witnesses to it was a forgery, and that the other signatures were in the handwriting of the defendant. In affirming the conviction for theft, the court said: "It was not error to admit in evidence, against the defendant, the bill of sale found in his possession, or in the possession of the party with him. This bill of sale described the stolen horses, and was manufactured, as the 30 L.R.A. (N.S.)

evidence shows, by the defendant. That it was taken from the possession of the defendant while he was under arrest, and without authority of law, did not render it inadmissible evidence against him."

In *Territory v. Doyle*, 7 Mont. 245, 14 Pac. 671, the court said, in affirming a conviction for larceny of mules: "It is alleged as an error that the court admitted in evidence a certain bill of sale found on the defendant when he was arrested. There was no error in admitting this bill of sale in evidence. The defendant had it in his possession, and it described the stolen mules which he was driving. The fact that the brands did not exactly correspond, and that the vendee in the bill of sale was one Murphy, and not defendant, was properly left to the jury, with the other evidence tending to prove it to be a forgery; and whether it was or was not in the handwriting of the defendant and whether or not he claimed any right to the mules thereunder, were circumstances for the consideration of the jury."

B. B. B.

was executed and the cattle delivered, but could not say how much. They also corroborated appellant in some other statements made by him. Appellant testified that he paid Pierce at the time of the delivery of the cattle the sum of \$50, and thereafter on the same day, paid him the additional \$175, which he obtained from his home at Vernal. The cattle were alleged to have been purchased about 4 miles south of Vernal. There are other facts and circumstances, but, in view that we cannot weigh or determine the probative force of the evidence, we shall refrain from setting forth more of it than is necessary to a full understanding of the points decided.

Counsel for appellant contend that, in view that in this case there was no direct evidence that appellant stole the cattle; that the only evidence relied on by the state is that the cattle were stolen, and that appellant had possession and had exercised dominion over them shortly after they were stolen; that appellant had made a reasonable explanation of his possession of the cattle, which was corroborated by witnesses whose testimony was not denied or disputed, and the witnesses not impeached by the state; that, therefore, there was no legal evidence of the guilt of appellant, and hence the verdict must be declared without support in the evidence as matter of law.

It must be conceded that the cases of *State v. Marquardsen*, 7 Idaho, 352, 62 Pac. 1034, 14 Am. Crim. Rep. 493, and *State v. Seymour*, 7 Idaho, 257, 61 Pac. 1033, support counsel's contentions. It is there held that, where the only evidence of guilt is that property recently stolen is found in the possession of a person, and such person makes a reasonable explanation of his possession, which is corroborated and is not disputed by the state, the jury may not ignore the explanation, and a verdict of guilty will not be permitted to stand. It is somewhat singular, in view that the *Seymour* Case decided by the same court that decided the *Marquardsen* Case, and only about six months before the latter case was decided, that no mention of the former case is made in the latter. Nor is there any case cited in either of the Idaho cases in support of the doctrine there laid down. In addition to those two cases, appellant's counsel also cite the case of *McMahon v. People*, 120 Ill. 581, 11 N. E. 883; *State v. McKinney*, 76 Kan. 419, 91 Pac. 1068, and *People v. Mock Yick Gar*, 14 Cal. App. 334, 111 Pac. 1039. The first two cases involved the question of the sufficiency of the evidence to convict upon a charge of larceny where the accused was found in possession of recently stolen property. The facts in those cases, however, are distin-

guishable from those of the case at bar. The last case cited above is from the California court of appeal, but is not in point here.

The conviction in this case is based upon Comp. Laws 1907, § 4355, which reads as follows: "Larceny is the felonious stealing, taking, carrying, leading, or driving away the personal property of another. Possession of property recently stolen, when the party in possession fails to make a satisfactory explanation, shall be deemed prima facie evidence of guilt." Pursuant to such section the court charged the jury as follows: "In a criminal case the burden is upon the state to prove, beyond a reasonable doubt, the guilt of the defendant; and that where property alleged to have been stolen is found in the possession of the defendant, and the defendant makes a reasonable explanation of such possession, which is not challenged by the state, then the defendant is entitled to an acquittal, if the jury believes the explanation to be true." No exception was taken to this charge, and no complaint is made with regard thereto, except that the jury must have ignored or disregarded it, or they would have acquitted the appellant. While the charge is perhaps open to criticism in some respects, and for that reason we do not approve it, yet in view that no exception was taken, we need not now pause to consider it further. As already indicated, if the cases from Idaho are to be strictly followed, then, perhaps, the explanation of appellant's possession, whether true or false, in view that it was not denied by the state, and neither he nor his witnesses impeached, should be held sufficient to entitle him to an acquittal. But we think that the weight of authority and the better reason are opposed to the doctrine laid down in the Idaho cases, and hence are adverse to counsel's contentions. In *State v. Brown*, 25 Iowa, 566, Mr. Chief Justice Dillon, in discussing the probative force of an explanation made by an accused in whose possession recently stolen property was found, says: "But, where the claim is that he bought the property of a stranger, this is not necessarily such an explanation as obliges the state specifically to disprove it." In *State v. Marshall*, 105 Iowa, 38, 74 N. W. 763, the rule in the headnote, which reflects the decision, is stated thus: "The truthfulness of an explanation of the possession of stolen goods, although not contradicted, must be determined by the jury." To the same effect are *State v. King*, 122 Iowa, 1, 96 N. W. 712, and *State v. Mandich*, 24 Nev. 336, 54 Pac. 516. In 25 Cyc. 138, the rule generally prevailing is stated

in the following language: "Whether the explanation is reasonable is for the jury. And a reasonable explanation will not necessarily lead to acquittal. Even if a reasonable account is given, the question of guilt is still entirely for the jury, and defendant is not entitled to an instruction that the prosecution must show the account to be false." The authorities in support of the foregoing text are referred to in the footnotes.

If counsel's contentions are correct, then the whole matter hinges on whether the explanation which the accused makes concerning his possession is in the judgment of this court reasonable or not. If the jury should find it unreasonable, but we should deem it reasonable, we would be compelled to reverse the findings of the jury. This would require us to pass upon the weight to be given to the testimony of the accused and his witnesses respecting the explanation, although the jury had seen and heard them testify, which we had not. Such a rule would, in effect, require the jury to believe or accept every reasonable explanation made by the witnesses, although in the judgment of the jury there were good reasons for disbelieving the statements made by them respecting the possession of the property. Counsel, however, contend that, if a reasonable explanation is made and we refuse to interfere, the jury can arbitrarily disregard every explanation, and thus convict innocent men. While it may be possible that a jury may err with regard to both the reasonableness and truthfulness of an explanation, yet such an error is possible with regard to any inculpatory fact which the jury must find from the evidence in order to convict the accused. The question, so far as this court is concerned, is not whether the jury ought to have found the accused guilty under the evidence, but the question is, Is there any substantial evidence to support the findings of the jury?

Since writing the foregoing we have had occasion to pass upon the meaning and effect that should be given § 4355, *supra*, in two well-considered opinions written by Mr. Justice Straup, namely, in *State v. Potello*, — Utah, —, 119 Pac. 1023, and in *State v. Converse*, — Utah, —, 119 Pac. 1030. We there held that the question of whether the explanation respecting the possession of property recently stolen is reasonable or satisfactory is ordinarily a question for the jury, the same as is any other question of fact. If the evidence is such that all reasonable minds should arrive at the conclusion that the explanation is reasonable and satisfactory, then, and then only, does it become a question of law to

be determined by the court. If, however, after a full, fair, and impartial consideration of all of the evidence relating to the explanation, reasonable minds may differ, and may thus arrive at different conclusions with regard to whether it is reasonable and satisfactory or not, the finding of the jury must control. In this case there are abundant circumstances relating to the possession of the cattle and appellant's explanation of his possession, from which different minds may draw different inferences or conclusions. Moreover, the veracity of appellant and his witnesses was a question for the jury. True, as is said by Mr. Justice Straup in the cases before referred to, a jury may not without cause ignore or disregard competent and material evidence. The jury may, however, disregard evidence given or statements made by the accused or his witnesses if there is a good reason for doing so, and, in the event the jury have for good cause refused to believe a witness or witnesses, we cannot control their judgment.

Without going into further detail, it must suffice to say that, after a careful consideration of all the facts and circumstances in evidence in this case, we are of the opinion that, under the rule laid down in both of the cases to which we have referred, the finding of the jury that the possession of the cattle in question by appellant was felonious, and that his explanation of such possession was not satisfactory, is supported by the evidence. If we should hold otherwise in this case, cattle stealing from our vast ranges would become a comparatively safe, rather than a hazardous undertaking, unless someone actually knew of or saw the accused drive them from the range.

The judgment is affirmed.

McCarthy and Straup, JJ., concur.

MINNESOTA SUPREME COURT.

SARAH M. DAVIDSON, Resp't.,

v.

FRANK W. HURTY, Appt.

(116 Minn. 280, 133 N. W. 862.)

Specific performance — contract agent — parol evidence.

1. A real estate company entered into a Headnotes by LEWIS, J.

Note. — Character of contract as affecting right of undisclosed principal to sue thereon.

This note is supplementary to a note in 29 L.R.A. (N.S.) 472.

As shown in the above note, the general

contract with defendant whereby it agreed to sell him certain real estate upon stipulated terms. The company was not the owner of the property, and the contract contained a provision that it should be approved by the owner. Plaintiff was the owner, and her husband was her business manager, and he indorsed upon the contract the words: "Approved. W. P. Davidson." Plaintiff then carried out all of the provisions of the contract, and tendered a deed with the usual covenants, executed by herself and husband. Held:

1. Plaintiff's remedy was by specific performance, as the undisclosed principal; and parol evidence was admissible to prove that she was the owner, that her husband acted with her authority, and that she had complied with the terms of the contract.

Contract — sale of real estate — real owner.

2. It was immaterial that the real owner was not disclosed on the face of the contract.

rule permitting an undisclosed principal to sue on a contract made by his agent, even though the contract was made by the agent in his own name without anything therein indicating the agency, is subject to many exceptions. One of the important exceptions is where the application of the rule would violate the right to choose with whom one will have business dealings. This doctrine has especial application to executory contracts where entered into by the parties in the belief that they were contracting with each other as principals. In such cases, by the great weight of authority, the general rule does not apply, and either party may refuse to proceed with the contract upon ascertaining that the other party was acting merely as agent for an undisclosed principal.

The cases holding contrary to this doctrine, as to executory contracts entered into by the parties under the belief that they were contracting with each other as principals, do not distinguish between executed and executory contracts, and cite as authority cases wherein the general statement is made sustaining the right of an undisclosed principal to sue on a contract made by his agent, but which are based for the most part, if not entirely, upon executed contracts. These cases involve a different principle. As shown in *DAVIDSON v. HURTY*, citing to the point the note in 29 L.R.A. (N.S.) 472, where the agent, acting in behalf of his undisclosed principal, has fully performed the contract, and performance has been accepted by the other party, although without knowledge of the undisclosed principal, the latter may maintain an action in his own name to recover the consideration for performance. This rule, however, is not in conflict with the exception above referred to.

A case wherein the distinction referred to apparently is not drawn is *Hawkins v. Windhorst*, — Kan. —, 123 Pac. 761, holding that an undisclosed principal may sue 39 L.R.A. (N.S.)

Evidence — parol — sale of real estate — varying.

3. Such evidence did not necessarily vary or contradict the terms of the contract as to the ownership of the property, since his approval of the contract was consistent with plaintiff's ownership, and defendant was not misled thereby.

Same — statutory provision — true owner — agency.

4. Section 3609, R. I. 1905, which prohibits contracts for the sale of real estate between husband and wife, did not prevent the introduction of parol evidence to prove that the wife was the owner, and that her husband acted with her authority.

(December 22, 1911.)

APPEAL by defendant from a judgment of the District Court for Ramsey County in plaintiff's favor and from an order denying a motion for a new trial in an action brought to enforce specific perform-

for breach of a contract entered into by his agent as principal, for the sale of a drove of cattle, although the agent represented the cattle to be his, and they were purchased by the purchaser with that understanding and belief on his part. In reaching its conclusion the court applies the general doctrine that an undisclosed principal may sue on a contract by his agent. Considering the question as to the right of every person to choose for himself with whom he will have business dealings, the court, while conceding the proposition, says that the consent need not be expressed, but may be implied from circumstances, and adds: "The making of an ordinary business contract, without in some way indicating that the personality of the other party is regarded as material, implies consent that it may be enforced by a third person, if it was made in his behalf. Otherwise, the enforcement of a contract by an undisclosed principal could always be defeated by the assertion of the other party that he had made no contract with him, and the rule referred to would be nullified. . . . In order that one party to a contract may refuse to recognize an undisclosed principal merely because he does not wish to have business relations with him, he must not only have had the purpose to deal solely with the person with whom his negotiations were had, but he must also have made his purpose in that regard manifest."

Another case sustaining the right of an undisclosed principal to sue on a written contract made by an agent in his own name is *Schmucker v. Higgins-Roberts Grain Co.* 28 Okla. 721, 116 Pac. 184, involving an action for damages by the undisclosed principal, based upon the refusal of the purchaser to receive property purchased of the plaintiff's agent, after the fact of the agency appeared. In this case, however, there was correspondence between the parties subsequently to the disclosure of the agency, indicating a recognition by the purchaser of

ance of a contract for the purchase of real estate. Affirmed.

The facts are stated in the opinion.

Messrs. John D. O'Brien and Dillon J. O'Brien, for appellant:

There was a complete written contract between Watson P. Davidson and Frank W. Hurty, by the terms of which Davidson represented himself to be the owner of the property, and agreed to convey it to Hurty by warranty deed.

Clampet v. Bells, 39 Minn. 272, 39 N. W. 495; Morton v. Stone, 39 Minn. 275, 39 N. W. 496.

If, under this contract, upon its face with Watson P. Davidson, in which he undertakes to give his personal warranty of title, anyone for whom Davidson was acting could intervene and enforce the payment of the purchase price without any warranty of title, they could do more than Davidson himself, for he could not enforce the contract without giving his warranty of title.

Steiner v. Zwickey, 41 Minn. 448, 43 N. W. 378; George v. Conhaim, 38 Minn. 338, 37 N. W. 791; Birmingham Matinee Club v. McCarty, 152 Ala. 571, 13 L.R.A. (N.S.) 156, 44 So. 642, 15 Ann. Cas. 238; Kelly v. Thuey, 102 Mo. 522, 15 S. W. 62.

Where the proposed oral evidence to establish the relation of undisclosed principal involves a contradiction of the statements or recitals of the written contract, it will not be received.

Humble v. Hunter, 12 Q. B. 310, 17 L. J. Q. B. N. S. 350; Clark & S. Agency, § 634, p. 1165; Mechem, Agency, § 770.

If the contract was with Davidson as owner, the defendant was entitled to a warranty deed from Davidson, warranting the title to the land. This is a covenant

which, if effective at all, runs with the land and adds to its value.

Norman v. Wells, 17 Wend. 149; Shep. Touch. 186, quoted in note in § 254 of Rawle, Covenants; 11 Cyc. 1081; Kettle River R. Co. v. Eastern R. Co. 41 Minn. 471, 6 L.R.A. 111, 43 N. W. 469; Warvelle, Real Prop. 320; Mygatt v. Coe, 152 N. Y. 457, 57 Am. St. Rep. 521, 46 N. E. 949.

Mr. B. H. Schriber, for respondent:

Plaintiff can claim the benefit of the contract as an undisclosed principal, notwithstanding the contract is one required by the statute of frauds to be in writing.

Fry, Spec. Perf. § 258; 31 Cyc. 1508, 1600; Haines v. Starkey, 82 Minn. 230, 84 N. W. 910; Stromme v. Rieck, 107 Minn. 177, 131 Am. St. Rep. 452, 119 N. W. 948; Keystone Iron Co. v. Logan, 55 Minn. 537, 57 N. W. 156; Brown v. Hoag, 35 Minn. 375, 29 N. W. 135; Svanburg v. Fosseen, 75 Minn. 357, 43 L.R.A. 427, 74 Am. St. Rep. 490, 78 N. W. 4.

Parol evidence is admissible to charge the principal on a simple contract wherein the agent appears as principal, and that too whether the principal is disclosed or not.

31 Cyc. 1658, 1660; Fry, Spec. Perf. ¶ 258; Brady v. Nally, 151 N. Y. 258, 45 N. E. 547; Exchange Bank v. Hubbard, 10 C. C. A. 295, 26 U. S. App. 133, 62 Fed. 112.

A vendor in a contract for sale of land may enforce specific performance.

Abbott v. Moldestad, 74 Minn. 293, 73 Am. St. Rep. 348, 77 N. W. 227.

The doctrine of part performance is usually invoked by a vendee, but there may be such part performance by a vendor as to take the case out of the statute.

36 Cyc. 686; Brown v. Hoag, 35 Minn.

the undisclosed principal as a party to the transaction. The decision itself, however, is apparently based upon the application of the general doctrine that an undisclosed principal may sue on a contract made by his agent in the name of the latter.

In this connection, and as illustrating the distinction between an executory contract entered into by the parties under the belief that they were contracting with each other as principals, and a contract entered into by the parties with the knowledge that one of them was acting for an undisclosed principal, as regards the application of the rule under consideration, attention is called to the case under annotation, *DAVIDSON v. HURTY*, wherein the court specifically enforced an executory contract for the sale of real estate, but the contract contained a provision that it was made subject to the owner's approval without specifying the owner. It therefore bore upon its face conclusive evidence that the purchaser entered into it with the intention of relying upon 39 L.R.A. (N.S.)

the responsibility of and contracting with some unknown person. The fact that it was thereafter approved by a written indorsement thereon by another agent of the undisclosed principal, without the indorsement disclosing the agency, could not affect the ultimate right of the undisclosed principal. The contract having been signed by competent parties, there is a conflict among the cases as to whether its validity was affected by the statute of frauds, since in fact it was executed by one party as agent. As bearing on this question, see note in 8 L.R.A. (N.S.) 733, considering the rule as to whether the statute of frauds relating to sales of real property may be satisfied by a memorandum which discloses that one of the parties acted for an undisclosed principal. And see also note in 24 L.R.A. (N.S.) 315, on the question of the admissibility of parol evidence that one of the persons who signed an instrument relating to real property was the agent for an undisclosed principal. A. G. S.

376, 29 N. W. 135; Slingerland v. Slingerland, 39 Minn. 197, 39 N. W. 146; Williams v. Stewart, 25 Minn. 516; Jorgenson v. Jorgenson, 81 Minn. 428, 84 N. W. 221; Malins v. Brown, 4 N. Y. 403; Gross v. Milligan, 176 Mass. 566, 58 N. E. 471.

Lewis, J., delivered the opinion of the court:

Plaintiff was the owner of lot 2, fronting on Sibley street, in the city of St. Paul, and on the 22d day of August, 1910, she entered into a contract with a manufacturing company to build thereon a three-story and basement brick building, 125 feet deep, with 50 feet frontage, and entered into a lease of the building to the company for the sum of \$5,000 per year for five years. Her husband, W. P. Davidson, was her business representative, and attended to the business of negotiating the lease and construction of the building. After a considerable amount of work had been done in excavating and preparing for the foundation, defendant instituted negotiations with the Sperry Realty Company for the purpose of inducing Mr. Davidson to abandon the construction of the building on lot 2, for the reason that, if erected, it would interfere with the light, then accessible, to certain store buildings fronting on Seventh street, which belonged to members of defendant's family. In furtherance of these negotiations, the Sperry Realty Company entered into a contract with defendant on the 29th day of September, 1910, whereby it agreed to convey lot 2 to the defendant in consideration of \$27,500, \$2,500 of which was paid at the execution of the contract, \$10,000 to be paid upon delivery of the deed, and the balance on or before five years. The contract contained the statement that it was made subject to the owner's approval, but it did not specify who the real owner was. Having been informed of the execution of the contract, Mr. Davidson notified defendant that he was negotiating a contract with the manufacturing company to change the location of the building from lot 2 to the adjoining lot 3, and, in case such an arrangement was made, that he would sell to the defendant lot 2, according to the terms of the contract signed by the Sperry Realty Company. About the same time Mr. Davidson indorsed upon that contract these words: "Approved. Watson P. Davidson." Mr. Davidson then purchased lot 3 from the owner, a third party, and entered into a contract with the manufacturing company to erect for it a building upon that lot, secured their cancellation of the lease on lot 2, caused the excavation on lot 2 to be partially filled, and proceeded with the erection of the

building on lot 3. In accordance with the terms of the Sperry Realty Company contract, plaintiff furnished an abstract of title, which was examined by defendant's attorney, and was perfected in accordance with such attorney's request. Defendant refused to complete the contract, and this action was brought by Mrs. Davidson as the undisclosed principal to recover the \$10,000 and for specific performance. The trial court found for the plaintiff.

Witness Sperry and Mr. Davidson both testified, against objection, that defendant was informed that Mrs. Davidson was the owner of lot 2, but was absent from the city; and that defendant agreed to accept the contract with Mr. Davidson's approval indorsed thereon. Defendant denied this, and the court did not determine the issue thus made. It conclusively appears from the evidence, however, and the court so found, that Mr. Davidson was acting as the agent of his wife, and that she approved of his conduct in all that he did. The burden of proving that Mr. Davidson was in fact the plaintiff's agent, and had authority to conduct the negotiations, was upon the plaintiff, and whether parol evidence was admissible for that purpose is the principal question in the case.

The general rule that an undisclosed principal may sue on a contract made by his agent in his behalf is subject to several exceptions. Formerly it was held that the rule applied only to simple contracts, but in *J. B. Streeter, Jr. Co. v. Janu*, 90 Minn. 393, 96 N. W. 1128, it was held that the distinctions between simple contracts and contracts under seal were obliterated by Laws 1899, chap. 86, p. 88, even as applied to a contract sought to be enforced against an undisclosed principal. The rule does not apply to contracts which are personal in their nature, such as guaranty or indemnity. This exception is based on the ground that it is the right of every party to choose with whom he will have business dealings; and ordinarily the courts will not enforce an executory contract in behalf of an undisclosed principal, where the other party thereto objects to performance on the ground that he executed the contract under the belief that the agent was the real party to it, and that he would not have entered into it with the undisclosed principal of such agent, or where it appears clearly that exclusive credit was given to the agent. *Birmingham Matinee Club v. McCarty*, 152 Ala. 571, 13 L.R.A.(N.S.) 156, 44 So. 642, 15 Ann. Cas. 237; *Edwards v. Ezell*, 2 Tex. App. Civ. Cas. (Willson) 208; *Brown v. Morris*, 83 N. C. 254; *Sullivan v. Shailor*,

70 Conn. 733, 40 Atl. 1054; Cowan v. Curran, 216 Ill. 598, 75 N. E. 322.

But it has generally been held that where the agent, acting in behalf of his undisclosed principal, has fully performed the contract, and performance has been accepted by the other party, although without knowledge of the undisclosed principal, the latter may maintain an action in his own name to recover the consideration for performance. Note to *Shields v. Coyne*, 29 L.R.A.(N.S.) 472. In *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300, it was held without qualification that a principal may maintain an action in his own name to enforce a contract for the purchase of real estate; it being immaterial whether the principal was known or unknown, or whether the party supposed he was dealing with the agent personally on his own behalf.

The rule excluding parol evidence to contradict or vary a written contract does not exclude parol evidence to show that a person named in a written contract, or signing the same, was the agent of an undisclosed principal. *Wm. Lindeke Land Co. v. Levy*, 76 Minn. 364, 79 N. W. 314. It is immaterial that the contract is required by the statute of frauds to be in writing. Such proof does not vary or contradict the writing, but merely establishes a collateral fact; that is, the authority under which the agent acts. *Kingsley v. Siebrecht*, 92 Me. 23, 69 Am. St. Rep. 480, 42 Atl. 249; *Hunter v. Giddings*, 97 Mass. 41, 93 Am. Dec. 54; *Clark & S. Agency*, § 529. It has been held that an undisclosed principal cannot sue on a contract, when parol evidence of the agency would contradict its express terms. *Clark & Skyles* make this statement in § 534, and cite *Humble v. Hunter*, 12 Q. B. 310, 17 L. J. Q. B. N. S. 350, where the party to the contract declared himself to be "the owner of the ship."

In the present case the contract for the sale of lot 2 to the defendant was executed by the Sperry Realty Company, and in the body of it no mention is made of the ownership; but it contained an indorsement after the signatures that it was made subject to the owner's approval. Mr. Davidson did not sign it, but approved it by writing his name thereon. Conceding that parol evidence will not be received to vary the terms of a written contract, whereby in express terms a party assumes a position peculiarly personal, this contract does not fall under that class. Mr. Davidson's approval did not necessarily amount to a representation that he was the owner. On the other hand, his approval was consistent with his conduct as his wife's agent and with her ownership. It does not appear 39 L.R.A.(N.S.)

that defendant was induced to enter into the contract by any representation that Mr. Davidson was the owner, and the record fails to disclose evidence from which it might be inferred that defendant would have refused to make the contract of purchase direct with Mrs. Davidson.

Section 3609, Rev. Laws 1905, which prohibits contracts for the sale of real estate between husband and wife, did not prevent the fact of ownership and authority in the husband from being shown. While part performance alone may not be sufficient, yet the doctrine of estoppel is applicable where the owner and the agent have proceeded in good faith in reliance on the contract and the other party has not been prejudiced. This statute does not enable a purchaser to recover back purchase money from a wife, paid pursuant to the terms of a contract for the sale of her real estate executed by the husband by signing her name; she being willing to comply therewith. *Keystone Iron Co. v. Logan*, 55 Minn. 537, 57 N. W. 156. And it does not stand in the way of the enforcement by the wife of a contract for the sale of her real estate executed by her husband as her agent. *Stromme v. Rieck*, 107 Minn. 177, 131 Am. St. Rep. 452, 119 N. W. 948. Such contracts are not void for all purposes, and it is immaterial whether the wife's ownership is disclosed by the terms of the instrument. The plaintiff acted in good faith, canceled the lease on lot 2, purchased another lot, and erected the building thereon, all in reliance on defendant's agreement to complete the purchase of lot 2. She caused the title to be perfected in accordance with defendant's demands, and even tendered a deed executed by herself and husband, with the usual covenants, in which Mr. Davidson joined.

Affirmed.

Petition for rehearing denied.

MISSOURI SUPREME COURT. (In Banc.)

JOHN SALMON, Appt.,
v.
KANSAS CITY.

(— Mo. —, 145 S. W. 16.)

Master and servant — public contract
— independent contractor — supervision
of work.

1. A contract for the construction of a

Note. — There seems to be no other reported case involving the question of the effect of an independent contractor's finan-

sewer for a lump sum is not prevented from being independent, so as to relieve the municipality from liability for injuries to the contractor's employees, by the fact that the city engineer is given general supervision over the work, with power to require the discharge of incompetent employees, since such provisions are inserted in the contract merely for the protection of the city.

Same — blasting — streets — rights of employees.

2. The rule that a municipal corporation cannot avoid liability for injuries caused by blasting which it permits in its streets; by letting the work to an independent contractor, does not apply in favor of the latter's employees; at least not in case the injury is to one drilling the holes, from negligence of the foreman in failing to discover an unexploded charge.

Same — incompetent contractor — injury to employee — liability of owner.

3. The employee of one who has undertaken to construct a sewer for a municipality cannot hold it liable for injuries inflicted upon him because of the incompetence of the contractor, even though the incompetence consists of inability to respond in damages for injuries negligently inflicted upon him.

Municipal corporation — blasting in street — neglect to require license — liability.

4. A municipal corporation is not liable for injury to the employee of an independent contractor for sewer construction which requires blasting in a public street, because it did not require the contractor to secure a license which its ordinances make a requisite to the doing of that kind of work.

(Valliant, Ch. J., and Kennish and Brown, JJ., dissent.)

(February 29, 1912.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Jackson County sustaining a demurrer to a petition filed to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

cial irresponsibility upon the employer's nonliability for the former's negligence. The precise ground of the decision in *SALMON v. KANSAS CITY* is, of course, that the employer owes no duty to the contractor's servant, in respect of the contractor's financial responsibility. Whether he is charged with any duty toward the servant in respect of intrinsically dangerous operations is another question. The decision seems to proceed upon the assumption that the employer's duty toward third persons, of employing a financially responsible contractor, is at least no greater than his duty to em-

ploy one who is competent. Generally as

to the effect of employing an incompetent contractor, see subdivision II. of the note to *Louisville & N. R. Co. v. Tow*, 66 L.R.A. 941.

Mr. N. F. Heltman, for appellant:
Blasting was intrinsically dangerous to the plaintiff, which the city contemplated and knew,—plaintiff being within the zone of danger as contemplated by the city.
Mather v. Rillston, 156 U. S. 391, 39 L. ed. 464, 15 Sup. Ct. Rep. 464, 18 Mor. Min. Rep. 165; *Wetherbee v. Partridge*, 78 Am. St. Rep. 486, and note, 175 Mass. 185, 55 N. E. 894; *Joliet v. Harwood*, 86 Ill. 110, 29 Am. Rep. 17; *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495, 28 Atl. 32; *Carman v. Steubenville & I. R. Co.* 4 Ohio St. 416; *Logansport v. Dick*, 70 Ind. 65, 36 Am. Rep. 166; *Wiggin v. St. Louis*, 135 Mo. 568, 37 S. W. 528; *Moll, Independent Contractors & Employer's Liability*, pp. 124-293; *St. Louis & S. F. R. Co. v. Madden*, 77 Kan. 80, 17 L.R.A.(N.S.) 788, 93 Pac. 586; *Brannock v. Elmore*, 114 Mo. 55, 21 S. W. 451; *Barry v. Terkildsen*, 72 Cal. 252, 1 Am. St. Rep. 55, 13 Pac. 657; *Rook v. New Jersey & P. Concentrating Works*, 76 Hun. 54, 27 N. Y. Supp. 623; *Albert v. Sweet*, 116 N. Y. 363, 22 N. E. 762; *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.* 71 N. H. 522, 60 L.R.A. 116, 53 Atl. 807; *Lottman v. Barnett*, 62 Mo. 159; *Calvert v. Springfield Electric Light & P. Co.* 231 Ill. 290, 14 L.R.A.(N.S.) 782, 83 N. E. 184, 12 Ann. Cas. 423; *Chicago Bridge & Iron Co. v. La Mantie*, 112 Ill. App. 43; *Metropolitan West Side Elev. R. Co. v. Dick*, 87 Ill. App. 40; *Horne v. Nicholson*, 56 Mo. 220; *Cameron v. Vandergriff*, 53 Ark. 381, 13 S. W. 1092; *Kelly v. Tyra*, 103 Minn. 176, 17 L.R.A.(N.S.) 334, 114 N. W. 750, 115 N. W. 636; *Lottman v. Barnett*, 62 Mo. 159.

If a person intrusts the performance of work, of a kind likely to result in harm to third persons unless cautiously and skillfully done, to a manifestly unfit person, as an independent contractor, the employer will be responsible for the consequences of such contractor's incompetency.

Mullich v. Brocker, 119 Mo. App. 332, 97 S. W. 549; *McGrath v. St. Louis & H. Constr. Co.* 215 Mo. 209, 114 S. W. 611; *Williams v. Missouri P. R. Co.* 109 Mo.

As to whether the statutory duty of an employer to guard place or machinery is owing to employees of a contractor, see the note to *Kanz v. J. Neils Lumber Co.* 36 L.R.A.(N.S.) 269. Generally as to the common-law liability of a contractor for unsafe appliances or places of labor, see the note to *Bright v. Barnett & R. Co.* 26 L.R.A. 524.

475, 18 S. W. 1098; *Francis v. Kansas City, St. J. & C. B. R. Co.* 127 Mo. 663, 28 S. W. 842, 30 S. W. 129; *Dillon v. Hunt*, 11 Mo. App. 247, 105 Mo. 154, 24 Am. St. Rep. 374, 16 S. W. 516; *Horner v. Nicholson*, 56 Mo. 222; *Nashville v. Brown*, 9 Heisk. 1, 24 Am. Rep. 289.

It was the duty of the city to take precautions to prevent the damage and injury.

Chicago v. Dermody, 61 Ill. 431; *Ray v. Poplar Bluff*, 70 Mo. App. 252; *Fink v. St. Louis*, 71 Mo. 52; *Eberson v. Continental Invest. Co.* 118 Mo. App. 73, 93 S. W. 297; *Dillon v. Hunt*, 11 Mo. App. 247, affirmed in 105 Mo. 154, 24 Am. St. Rep. 374, 16 S. W. 516; *Gerst v. St. Louis*, 185 Mo. 191, 105 Am. St. Rep. 580, 84 S. W. 34; *Brannock v. Elmore*, 114 Mo. 55, 21 S. W. 451.

Messrs. *John G. Park* and *A. F. Smith*, for appellee:

Defendant is not liable in damages to private persons, resulting from a failure to enforce its ordinances.

Harman v. St. Louis, 137 Mo. 494, 38 S. W. 1102; *Moran v. Pullman Palace Car Co.* 134 Mo. 641, 33 L.R.A. 755, 56 Am. St. Rep. 543, 36 S. W. 659; *Sallee v. St. Louis*, 152 Mo. 615, 54 S. W. 463; *Butz v. Kavanaugh*, 137 Mo. 503, 59 Am. St. Rep. 504, 38 S. W. 1104; *Mehan v. St. Louis*, 217 Mo. 35, 116 S. W. 514; *Ryan v. Kansas City*, 232 Mo. 471, 134 S. W. 560, 985.

The construction company is an independent contractor, and must answer for its own wrongs, if any, and the wrongs, if any, committed in the course of its work by its agents, servants, and employees.

Rogers v. Florence R. Co. 31 S. C. 378, 9 S. E. 1059; *Louisville & N. R. Co. v. Cheatham*, 118 Tenn. 160, 100 S. W. 902; *Good v. Johnson*, 38 Colo. 440, 8 L.R.A. (N.S.) 896, 88 Pac. 439; *Louisville & N. R. Co. v. Hughes*, 134 Ga. 75, 67 S. E. 542; *Thomas v. Altoona & L. Valley Electric R. Co.* 191 Pa. 361, 43 Atl. 215; *Pioneer Fireproof Constr. Co. v. Hansen*, 176 Ill. 100, 52 N. E. 17; *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017; *New Albany Forge & Rolling Mill v. Cooper*, 131 Ind. 363, 30 N. E. 294; *Johnson v. Helbing*, 6 Cal. App. 424, 92 Pac. 360; *Casement v. Brown*, 148 U. S. 622, 37 L. ed. 585, 13 Sup. Ct. Rep. 672; *Smith v. Milwaukee Builders' & T. Exch.* 91 Wis. 360, 30 L.R.A. 504, 51 Am. St. Rep. 912, 64 N. W. 1041; *McKinley v. Chicago, S. F. & C. R. Co.* 40 Mo. App. 457; *Barry v. St. Louis*, 17 Mo. 121; *Crenshaw v. Ullman*, 113 Mo. 633, 20 S. W. 1077; *Blumb v. Kansas City*, 84 Mo. 112, 54 Am. Rep. 87; *McGrath v. St. Louis & H. Constr. Co.* 215 Mo. 209, 39 L.R.A. (N.S.)

114 S. W. 611; *Uppington v. New York*, 165 N. Y. 222, 53 L.R.A. 550, 59 N. E. 91; *Froelich v. New York*, 199 N. Y. 466, 93 N. E. 79.

There is no liability on the part of a city where work is done under contract directed by law.

O'Hale v. Sacramento, 48 Cal. 212; *Krause v. Sacramento*, 48 Cal. 221.

On petition for rehearing.

Mr. Francis M. Hayward, also for appellee:

Blasting, under the circumstances of this case, is not so intrinsically or necessarily dangerous to third persons as to make the case at bar an exception to the general rule.

12 Am. & Eng. Enc. Law, 2d ed. 512; 16 Am. & Eng. Enc. Law, 2d ed. 208; 19 Cyc. 9; 26 Cyc. 1556; *McCafferty v. Spuyten Duyvil & P. M. R. Co.* 61 N. Y. 178, 19 Am. Rep. 267; *Blumb v. Kansas City*, 84 Mo. 112, 54 Am. Rep. 87; *Edmundson v. Pittsburgh, McK. & Y. R. Co.* 111 Pa. 316, 2 Atl. 404; *French v. Vix*, 143 N. Y. 90, 37 N. E. 612; *Symons v. Allegany County*, 105 Md. 254, 65 Atl. 1067; *Houghton v. Loma Prieta Lumber Co.* 152 Cal. 500, 14 L.R.A. (N.S.) 913, 93 Pac. 82, 14 Ann. Cas. 1159; *Kendall v. Johnson*, 51 Wash. 477, 99 Pac. 310; *Tibbetts v. Knox & L. R. Co.* 62 Me. 437; *Cuff v. Newark & N. Y. R. Co.* 35 N. J. L. 574; *Stalder v. Huntington*, 153 Ind. 354, 55 N. E. 88; *James v. McMinimy*, 93 Ky. 471, 40 Am. St. Rep. 200, 20 S. W. 435; *Wetherbee v. Partridge*, 175 Mass. 185, 78 Am. St. Rep. 486, 55 N. E. 894; *Louisville & N. R. Co. v. Smith*, 134 Ky. 47, 119 S. W. 241.

An employee of an independent contractor cannot recover from the employer of the contractor, even if the work whereby he is injured is intrinsically dangerous.

Peoria, B. & C. Traction Co. v. O'Connor, 149 Ill. App. 598; *Foster v. Chicago*, 197 Ill. 264, 64 N. E. 322; *Louisville & N. R. Co. v. Smith*, 134 Ky. 47, 119 S. W. 241; *Smith v. South & W. R. Co.* 151 N. C. 479, 66 S. E. 435; *Avery v. Southern R. Co.* 137 N. C. 130, 49 S. E. 91; *Reilly v. Chicago & N. W. R. Co.* 122 Iowa, 525, 98 N. W. 464; *Engler v. Seattle*, 40 Wash. 72, 82 Pac. 136; *Branstrator v. Keokuk & N. W. R. Co.* 108 Iowa, 377, 79 N. W. 130; *Hanna v. Chattanooga & N. R. Co.* 88 Tenn. 310, 6 L.R.A. 727, 12 S. W. 718; *Schip v. Pabst Brewing Co.* 64 Minn. 22, 66 N. W. 3; *Kilta v. Kent County*, 162 Mich. 646, — L.R.A. (N.S.) —, 127 N. W. 821.

The plaintiff's injury was not due to blasting as such, but to the failure to inspect the charges unexploded, and therefore collateral to the work, and he cannot recover.

Butler v. Hunter, 7 Hurlst. & N. 826, 31 L. J. Exch. N. S. 214, 10 Week. Rep. 214; French v. Vix, 143 N. Y. 90, 37 N. E. 612; Samuelson v. Cleveland Iron Min. Co. 49 Mich. 164, 43 Am. Rep. 456, 13 N. W. 499; Laffery v. United States Gypsum Co. 83 Kan. 349, — L.R.A.(N.S.) —, 111 Pac. 498, Ann. Cas. 1912 A, 590; St. Paul Water Co. v. Ware, 16 Wall. 566, 21 L. ed. 485; Missouri Valley Bridge & Iron Co. v. Ballard, 53 Tex. Civ. App. 110, 116 S. W. 93; Dill. Mun. Corp. 3d ed. 1030.

Ferriss, J., delivered the opinion of the court:

Appeal from a judgment of the circuit court of Jackson county sustaining a demurrer to the petition filed by plaintiff, charging negligence resulting in personal injuries. The petition was filed on the 15th day of July, 1905, and covers nearly thirty printed pages. The suit was filed against Kansas City and Robert J. Boyd Paving & Construction Company, but subsequently dismissed as to the construction company.

It appears from the petition that on the 13th day of May, 1901, Kansas City entered into a contract with the construction company for constructing a district sewer in said city by said company. In the course of the ensuing work plaintiff was employed by the construction company as a common laborer, and was engaged in drilling holes for blasting rock which was encountered in the work of excavation. The petition charges that the method of preparing the blasts was as follows: The drillers, of whom plaintiff was one, would drill a series of holes about 2 feet apart, after which such holes would be loaded with giant powder or dynamite by one Kelleher, foreman, and one Moriarity, designated as the powder man, employees of the construction company, who would then shoot said holes by means of fuses; that it was usual and customary to count the number of holes in a given series before exploding same, then count the explosions to see whether they corresponded with the number of holes, and afterwards to inspect and examine the holes so exploded for missed shots; that the plaintiff and his gang had nothing to do with the loading or exploding of the holes, nor with the subsequent inspection, but that after the holes had been exploded and inspected plaintiff and his gang would be ordered to drill another series of holes; that on the afternoon of Saturday, July 13, 1901, a series of holes which had been drilled by plaintiff were attempted to be exploded by the said foreman and powder man; that on the following Monday plaintiff and his gang were ordered by foreman Kelleher to go back to the place where such

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series of holes had been exploded to drill a new series; that one hole of the former series remained unexploded; and that while at work drilling the new series a driller who was working near plaintiff caused said unexploded shot to be exploded with such force and violence as to seriously injure the plaintiff.

The plaintiff makes the proper averments to negative any contributory negligence on his part. There seems to have been no controversy as to the liability of the construction company for the negligence of its superintendent. The real controversy in the case is whether Kansas City is liable. The petition proceeds upon the theory that, because of the power of control reserved in the contract to the city's engineer, the construction company was not an independent contractor, and hence the city is liable. In stating below the substance of the petition, we adopt the italics as they appear in the abstract filed by plaintiff. We do not apprehend that these italics appear in the original contract, but use them because they indicate the parts of the contract on which the plaintiff particularly relies.

Plaintiff alleges that the city ordered the construction of the sewer; sets out certain ordinances of the city which provide for the appointment of a city engineer whose duty it should be "to supervise the construction of public and district sewers," also to prepare plans, specifications, and estimates of the cost of all public and district sewers ordered by the council, to report to the board of public works all violations of any contract, to sign all contracts on behalf of the city for public improvements, and to superintend their execution. The petition sets out § 883 of the Revised Ordinances of Kansas City for 1898, as follows: "Permit for Blasting.—No person shall do or cause to be done any blasting within the city limits without *first obtaining from the city engineer a permit therefor*, which shall be issued only on condition that the *city engineer* is satisfied that the applicant is in every particular a safe, careful, and suitable person to use, and an expert in the use of, all explosives used in blasting, but *no permit shall, under any circumstances, be issued to anyone until the applicant therefor has entered into a bond to Kansas City in the sum of not less than \$100 or more than \$10,000, as the city engineer may require, with at least two securities, to be approved by the city comptroller, conditioned that such person will carefully and prudently use such explosive, and will pay any and all damages caused any person by the use thereof. And any person can sue on such bond in his own name for any damage caused him by the use of such explosive.*"

The petition sets out *in hac verba* the contract between the city and the construction company. This contract is extremely lengthy, is in the usual form of municipal contracts for public works, giving specifications as to the character of the work to be done, materials to be used, all under the supervision of the city engineer. The contract provides that the party of the first part (the construction company), having made the lowest bid, agrees to complete the work in a substantial and workmanlike manner, "in conformity with the plans of such work on file in the office of the city engineer of Kansas City, in strict obedience to the directions which may from time to time be given by said city engineer or his authorized agents, in accordance with the following specifications." The specifications provide: "The contractor shall not blast any rock or allow the same to be done on this work without taking such precautions, by covering or otherwise, as shall prevent damage or injury to person or property." That streets and alleys shall be restored "to the satisfaction of the engineer," surplus earth to be removed to such distance "as may be designated by the engineer," the foundations of the sewer to be either of broken stone, plank, concrete, or masonry, as shall be "ordered by the city engineer," the location of manholes and catch-basins to be changed, or omitted altogether, "if deemed best by the city engineer," no broken bricks to be allowed, "except for closures, or as shall be otherwise specially directed." Then follows a specification as to the character of cement to be used, providing certain tests to be conformed to, "except in such portions of the work as the city engineer may otherwise direct." The character of the concrete is specified, also the manner of preparing it, "unless otherwise ordered by the city engineer." House connections to be worked into the brickwork "in such manner as the engineer may direct." The masonry work to be suspended during freezing weather. "But the city engineer shall have the right to direct that the work shall be continued under such conditions as he shall prescribe." Also that during a suspension of the work from any cause, the same shall be suitably covered and the trenches filled "if the engineer so directs;" the syphon trap used to be satisfactory "in the opinion of the city engineer." Then follows a specification as to maintenance. The sunken trenches to be immediately filled, and if on a paved street, the pavement to be repaired by the contractor at his expense, "on receipt of notice from the city engineer so to do." That if the contractor fails to comply with said "notices from the city engineer for two days,

then the city may cause the work of grading" to be done. Then follow some general specifications: "(2) The first party shall commence work at such points as the engineer may direct, and shall conform to his directions as to the order of time in which the different parts of the work shall be done, as well as to all his other instructions as to the mode of doing the same." The next paragraph provides that if the contractor is not present, orders shall be given to the superintendents in charge, and by them received and obeyed, and that "if any person employed on the work shall refuse or neglect to obey the directions of the engineer, or his duly authorized agents, in anything relating to the work, or shall appear to the engineer to be incompetent, disorderly, or unfaithful, he shall, upon the requisition of the engineer, be at once discharged, and not again employed on any part of the work." It is further provided that "the engineer shall be the judge" of any work that may be included in the contract by implication; also that the contractor shall do such extra work as "the engineer may specially direct," and that if the price for same is not stated in the contract, the price shall be fixed by the engineer." Next, that the contractor shall, "upon being so directed by the engineer," remove, rebuild, or make good, at his own cost, any work which the "latter shall decide to be defective." The work is to be begun within ten days unless "the engineer shall specially direct otherwise in writing." Provision No. 8 is that, if "in the opinion of the engineer" the work is not being prosecuted with sufficient force, the engineer may notify the contractor to employ such additional force "as he deems sufficient," and upon failure to comply with such notice, "the engineer may put on such additional force at the cost of the first party; or he may, at his option, declare this contract annulled; and the power is reserved to the city engineer by Kansas City to suspend or annul this contract, or to suspend the doing of any work thereunder," for any failure on the part of the contractor to fulfill same, and the decision of the engineer is to be conclusive. The contractor is required to observe all city ordinances in relation to obstructing the streets, maintaining signals, keeping open passageway, and protecting same, "and generally to obey all laws and ordinances controlling or limiting those engaged on the work." Then follows a clause by which the contractor agrees to indemnify the city and save it harmless on account of any injuries or damages received or sustained by any party or parties by the acts of the contractor. Next is a provision that "the city engineer shall, in all cases, determine the amount and qual-

ity of the several kinds of work" to be paid for, and that "he shall decide all questions which may arise relative to the execution of the contract," and that "his estimates and decisions shall be final and conclusive." It is further provided that the contractor "*is subject to the city charter and ordinances in general.*" Then follows the agreement as to prices to be paid for the work, among others, "for each cubic yard of *solid rock excavated.*" Then a provision that no payment is to be made until the work has been completed "*to the satisfaction of the city engineer,*" and that there will be used brick only which has been approved "*by the city engineer.*"

This contract was entered into by the construction company, as party of the first part, the National Surety Company, party of the second part, and Kansas City, party of the third part; the National Surety Company being surety for the contracting company for the faithful performance of the contract. The said party of the second part agreed "*that the said party of the first part will well and faithfully perform each and all of the terms and stipulations in the foregoing contract,*" and further agreed that the work was to be begun within ten days, "*unless the city engineer shall specially direct otherwise.*" The contract is signed by the city engineer on behalf of the city, and was duly approved and confirmed by the city council.

The petition, after reciting the contract, proceeds to aver that the work of constructing said sewer was commenced and prosecuted by *defendants*, and that the defendants and each of them had in their employment, and under their superintendence and control, a gang of men to which plaintiff belonged, and that the foreman, Kelleher, was a vice principal of defendants.

The various specifications of negligence charged against the city are scattered through this lengthy petition in a somewhat confused and inconsequent manner. We have, however, carefully analyzed the same, and find the specifications of negligence may be stated as follows:

(1) That the defendants knew, or might have known by the exercise of due care, that there was an unexploded shot in one of the drill holes, but that they negligently and carelessly failed to remove said danger or to warn plaintiff thereof, and negligently ordered plaintiff and his gang to go to said place and drill a new series of holes in close proximity to said unexploded charge.

(2) That the injury to plaintiff resulted from the immediate carelessness and negligence of the foreman, Kelleher, and the powder man, Moriarity, who were working under the direction and control of the de-

fendants; that they were not safe, careful, or suitable persons for the performance of their duties, were not experienced, and were not competent; that the defendants knew of such incompetency, and were negligent in intrusting them with the work; and that defendants knew that Moriarity was utterly incompetent.

(3) That the defendants negligently and carelessly failed and refused to obey the terms of § 883 of the ordinances, set out above, and that they carelessly and negligently violated said ordinance, in that they failed to compel a compliance with said ordinance, which required them to employ expert licensed blasters; that the blaster employed by them was incompetent and nonexpert, and had no license; that it was within the power, and it was the duty, of the city, in the exercise of its reserve power and control over the work, to see that no person should be permitted to do said work of blasting except one qualified under said ordinance; and that the blaster who was employed had not qualified under said ordinance.

(4) That the city reserved and had the power to direct and control the manner of performing said work of blasting, and to direct and control all the workmen, and was careless and negligent in failing to exercise such care and control, and negligently caused the same to be done without reasonable care and prudence; that the defendants were negligent in failing to superintend and control the manner of performing said work of blasting in all its details; that the engineer had the power and authority to control and direct all the workmen as to the manner of doing the work, and especially the manner of doing said work of blasting, but negligently failed to exercise such control.

(5) That said series of holes to which said unexploded shot belonged was excessively, unusually, and unreasonably large in number, and that the foreman and powder man were negligent in attempting to explode same at one time.

(6) That the defendants were careless in failing to provide and use on said job reasonably safe explosives or safe and suitable fuses.

(7) That defendants were negligent in failing to provide said foreman and powder man with proper, usual, and reasonable tools and instruments with which to search and examine for unexploded powder.

(8) That defendants negligently failed to provide said foreman and powder man with proper, usual, and reasonable tools and instruments for cleaning out old drill holes and removing powder from unexploded charges or missed shots, and failed to pro-

vide any tools or instruments whatever for said purpose.

(9) That the construction company was at the time of entering into said contract a corporation organized under the laws of Missouri; that it was an insolvent and irresponsible corporation, and was not a fit, proper, or suitable corporation for the city to enter into said contract with; and that said defendant city was negligent and careless in entering into said contract with said construction company, in that said company was an insolvent, irresponsible company, and not a fit, proper, or suitable corporation for said work; and that the defendant city, at the time of entering into said contract, and throughout the performance of said work, had knowledge of the foregoing facts, or by the exercise of ordinary care would have had knowledge thereof.

(10) That said engineer had authority and power to cause the discharge of all incompetent, disorderly, and unfaithful servants engaged on said work, and was negligent in failing to cause the discharge of said foreman and powder man, and, further, in failing to cause the selection and employment of a qualified blaster,—one qualified under the terms of § 883 of said ordinance.

(11) That the defendants and each of them failed to use reasonable care to provide plaintiff with a reasonably safe place in which to work, and negligently failed to use reasonable care to keep said place of work reasonably safe.

It is further averred in said petition that explosives could be used for blasting in said sewer only by an expert; that such work required special ability, skill, and training; that said unexploded charge was not a risk necessarily incident to said employment; that it was a danger which "could have been obviated by the adoption of reasonable measures of precaution by the defendant; that the defendants negligently failed to take usual and reasonable measures of precaution to guard plaintiff against said danger;" that the risk was not necessarily liable to happen on account of the nature of the business, and was not naturally incident to said employment, where reasonable care was used by the superintending powers to avoid the danger of such unexploded charges; that unexploded shots of that character "are not usual or ordinary risks in sewer construction business in Kansas City or elsewhere, where reasonable care was used by the superintending powers to avoid such danger." It is further averred that said risk was created and continued by the negligence and carelessness of the defendants, and could have been obviated, removed, and avoided by the use of reasonable care on the part of defendants, which 39 L.R.A.(N.S.)

care defendants negligently failed to use; that "it was through the immediate negligence and carelessness of said foreman, Kelleher, and said powder man, Moriarity, that said unexploded shot was left existing unexploded, unsearched for, and unremoved from said place."

It is apparent from reading the contract incorporated in the petition, and above abstracted, that the actual work of constructing the sewer was performed by the employees of the contracting company, which, under the contract, furnished the labor and material; so that wherever in the petition the plaintiff speaks of the defendants, including the city, it is not intended to be asserted that the city was in actual, physical charge of the details of the work, but that by operation of law the employees of the contracting company were the servants of the city; so that, in so far as the pleader charges negligence upon the city, it is a legal conclusion.

The above specifications of negligence charged against the city, with the exceptions of Nos. 3 and 9, may be grouped together for the purposes of this discussion. The liability of the city predicated upon them is made by the plaintiff to rest upon two propositions: (a) That the control and direction of the work reserved to the city by the terms of the contract negative the theory that the construction company was an independent contractor so far as concerns the acts of negligence alleged to have caused the injury to plaintiff, and made the city directly responsible, as master, for such negligence; (b) that owing to the dangerous nature of blasting, the defendant city was under obligation, as a matter of law, independent of the terms of the contract, to see to it that proper precautions were taken to protect plaintiff. This latter proposition is not clearly developed in the petition, but it has been fully argued by both sides; and as the petition could be amended, if necessary, it is in the case and should be disposed of.

I. The petition proceeds upon the theory that, under the contract between the city and the construction company, the city reserved the direction and control of the immediate acts which, because of their negligent performance, resulted in injury to plaintiff, and the city is therefore responsible for such acts.

As the material parts of the contract are set out *in hæc verba* in the petition, the court will look to the contract itself and construe it according to its terms, regardless of the construction placed upon it by the pleader. Following settled rules of construction, we consider the circumstances of its creation, the object sought to be ac-

complished, and the terms of the entire instrument. So considered, does a fair construction of this contract sustain the contention of plaintiff? Counsel for plaintiff asserts in his brief as his basic propositions the following: "The contractor was not independent as to blasting. As to blasting, the contractor was subservient, and was completely under the power of control of the defendant. As to blasting, the relationship of principal and agent subsisted between the city and the alleged contractor. The contractor was insolvent and incompetent, and had not qualified to do blasting, and had no person in his employ competent to do blasting. The defendant reserved and assumed absolute control over the blasting. Responsibility follows from the defendant's power of control over the blasting. Responsibility follows control."

Leaving the question of the alleged incompetency of the contractor for later discussion, we will consider the contract. It is in the usual form of contracts for municipal public works, specifying at length and in detail the work to be done and materials to be used; all material and labor to be furnished and paid for by the contractor, who is to be paid for a completed sewer a lump sum to be ascertained by the dimensions thereof. In order to secure a satisfactory job, the owner (Kansas City) reserves to its engineer large powers of supervision and control as to quality of material and the method or mode of construction. Obviously, however, these powers are reserved to protect the interests of the city, and not in the interest of the contractor or his servants, nor for their protection. Neither the contractor nor his servants would have ground for complaint should the city fail to exercise such power of supervision. The engineer assumed no duty to plaintiff by the terms of the contract. The plaintiff did not look to the city inspector to protect him from unexploded charges. His reliance was on the foreman employed by the contractor. The contract must be construed as a whole, not upon detached phrases which in themselves in a proper relation might be apt enough to sustain plaintiff's claim. Taken as a whole, it is plain enough that the powers given to the city engineer are solely for the purpose of securing compliance with the specifications provided in the contract. By no fair construction can the provision authorizing him to direct the mode of doing the work be held to mean that it is his duty to step in between the contractor and his servant, and direct the latter in the details of his operations. The provisions emphasized by the pleader, taken as a whole, and considered in connection with the entire in-

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strument, cannot modify the view above expressed. Fairly construed, such provisions do not prevent the full application of the doctrine of independent contractor to the construction company. The right to require the discharge of incompetent workmen is a privilege retained by the city for its protection. This provision is inserted to enable the city to secure good work at the hands of competent workmen, not to protect employees against incompetent foremen. The city has no power to discharge directly an employee of the contractor. A contract of this character was construed in *Blumb v. Kansas City*, 84 Mo. 112, 54 Am. Rep. 87. In that case we said of a similar provision: "It did not give the engineer or the city the right to discharge them, and this permission had no reference to the manner of doing the work, but only to the workmanship, the character of the work, and the quality of the materials used." The nature of such supervision reserved by the owner is aptly defined by the supreme court of Michigan in *Samuelson v. Cleveland Iron Min. Co.* 49 Mich. 164, 43 Am. Rep. 456, 13 N. W. 499. In that case a mineowner let the operation of his mine to a contractor, who was to mine and deliver the ore to the owner at a specified price per ton. It would seem to have been conceded that the written contract created the relation of independent contractor. A miner employed by the contractor was injured by a falling roof, improperly supported. The employee sued the owner, and relied upon this clause in the contract: "The making of it [the mine] safe hereby devolving on said first parties [contractors] under the supervision, advice, and direction of said superintendent" (for the owner). The court said: "The owner assumes towards no one the duty to supervise; he does not stipulate to supervise; he only contracts for a privilege. If the mineowner in this case had dismissed the superintendent and sent no one to inspect the working, no miner could explain that a duty owing to him was being neglected." Further, it was said that the inspection by the owner was for the purpose of protecting his own property. In the same case it was said that, if the mine had been in an unsafe condition at the time it was handed over by the owner, he might have been liable on the theory that he invited others into unsafe premises without warning of the danger.

In the case at bar the contract does not authorize the city to give direct orders to the workmen. The city does not hire them nor pay them. The liability of the master for the negligence of his servant arises from the fact that he selects the servant with a view to his skill, and is therefore

responsible for such selection. There is no such basis here for imputing responsibility to the city.

In the case of *Carman v. Steubenville & I. R. Co.* 4 Ohio St. 399 (cited by plaintiff), discussing whether the owner or contractor is liable, the court suggests this distinction: "In the one case the principal [owner] selects the servant or agent with a view to his skill and care, and not only retains the control over all his operations, but also has the power to dismiss him at any time for misconduct. In the other, the contractor assumes this position, leaving the employer no control over the work or the persons by whom it is executed, but simply the right to require the thing produced, or the result attained to be such as the contract has provided for."

A contract similar in general character to the one before us, but in some respects giving greater power to the engineer, was construed in *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495, 28 Atl. 32. The petition sought to hold the borough liable for injuries resulting from negligent blasting in the construction of a sewer at the hands of a contractor. It was contended there, as it is here, that in regard to the blasting the contractor was not independent, and that by the reservation of control in the contract the borough assumed the responsibility for the acts complained of, namely, the manner of blasting. The contract provided that certain rock should be excavated "with as little blasting as possible, and under the immediate supervision and direction of the engineer [for the borough] or his assistant" (italics ours); that "if any person employed by the contractor on the work shall appear to the engineer to be incompetent or disorderly, he shall be discharged immediately on the requisition of the engineer." Commenting on this contract, the court says: "But on the whole we are inclined to think that the weight of authority upon this question justifies us in holding that the reservations of control, being but partial, and existing in certain respects only, did not prevent the existence of the relation of contractee and independent contractor; but the general control over the work, as to the manner and method of its execution, the oversight and direction of the performance of the actual manual labor, especially in the particulars in the execution of which the plaintiff claimed that the injury to its property was caused, notwithstanding the prescribed limitations, remained in the contractor; that the persons doing the work were his servants, not those of the defendant; and that these considerations relating to general control constitute the true test by which to determine whether

the relation be that of employer and contractor, or that of master and servant."

There is no claim in the petition in the case before us that the city, through its inspectors, in fact directed the acts which it is alleged caused the injury to plaintiff.

In *Foster v. Chicago*, 197 Ill. 264, 64 N. E. 322, it was insisted that the city was liable for an injury received by a servant of the contractor engaged in excavating for a sewer, and due to improperly protecting the walls, on the ground that under the contract the city "remained in a position of control." The contract is not set out in terms in the report of the case, but enough appears to show the relation of what was said by the court to the question under discussion. The language of the court is so apt in this regard that we quote it at some length: "It is true that the contractor agreed to perform all the work 'under the immediate direction and superintendence of the commissioner of public works, and to his entire satisfaction, approval, and acceptance;' but the work he agrees so to perform is that prescribed in the contract, and it is evident, we think, that this direction and superintendence relate to results,—to the character of the workmanship,—and not to methods, unless by the use of improper methods the character of the workmanship was rendered unsatisfactory. . . . The contract does not include the direction, management, and control by the city of every detail of the work. The contractor was not required to take his orders, day by day, from the city. He was to be guided by the contract and the specifications constituting a part thereof. He was not a mere servant and employee. He was an independent contractor; the city retaining such supervisory power as it might, from time to time, find it necessary to exercise to insure compliance with the contract and to obtain the result called for thereby. The contractor employed and paid his own laborers. The deceased was his employee. The difference between an independent contractor and a mere servant is not determined solely by the retention of a certain kind or degree of supervision by the employer. It is to be determined by the contract as a whole,—by its spirit and essence,—and not by the phraseology of a single sentence or paragraph. Being a contractor, and not a mere servant of the city, the latter cannot be held liable for his negligence in the performance of his work. . . . This is not a case where a party, when passing along or using a public street, has been injured because of the negligence of the city in permitting or causing a sewer to be constructed or other work to be carried on in such street, creating a danger to passersby, for which proper safeguards have

been negligently omitted. In *Springfield v. La Claire*, 49 Ill. 476, cited by the appellant's counsel, the question was whether there was a duty resting upon the city growing out of the franchise conferred upon it to keep its public streets in a safe condition for the passage of travelers and others having occasion to use them, and the question was properly answered in the affirmative. But the deceased in the case before us was not a passenger or a traveler over the street when injured, and there is no analogy between the case so cited, or others of like character referred to by appellant's attorneys, and the circumstances of the case at bar."

We rule against the plaintiff on the proposition that the contract reserved to the city the control of the acts complained of.

II. It is urged that, even if the city is not liable by contract, it is still liable because of its failure to perform a duty to plaintiff imposed upon it by law; that blasting is so intrinsically dangerous that it becomes the duty of the city, when it authorizes its use in public work, to guard third persons, including the servants of an independent contractor engaged in the work, from the incidental danger. The industry of counsel for plaintiff in error has brought to our attention numerous cases, as well as conclusions of text-writers, recognizing that the law imposes upon municipalities and owners of property certain obligations toward others which cannot be escaped by interposing an independent contractor as the active doer of the things complained of. Owners have been held liable to servants of a contractor for hidden intrinsic dangers lurking in premises upon which others are invited, without warning, to work. *Clark v. St. Louis & S. R. Co.* 234 Mo. 396, 137 S. W. 583; *Young v. Waters-Pierce Oil Co.* 185 Mo. 634, 84 S. W. 929; *Ryan v. St. Louis Transit Co.* 190 Mo. 621, 2 L.R.A.(N.S.) 777, 89 S. W. 865; *Calvert v. Springfield Electric Light & P. Co.* 231 Ill. 290, 14 L.R.A.(N.S.) 782, 83 N. E. 184, 12 Ann. Cas. 423. Also private owners, and municipalities as well, have been held liable for the consequences of acts which they have authorized and which are intrinsically dangerous to others, no matter how carefully performed, where the danger arises from the act itself, and not from the manner in which it is done. We have to do with the proposition last stated, and particularly as applied to the liability of a municipality authorizing blasting in a public street by an independent contractor. The liability of the municipality and that of a private owner rest upon the same fundamental proposition, namely, that one must not authorize acts upon his property which in

themselves constitute a nuisance or a menace to the lives or property of others; and it is no defense to show that the performance of the inhibited act is delegated to an independent contractor. The city is also under obligation to keep its streets safe for travel.

It is said that blasting is intrinsically dangerous, and that therefore the city is liable for injury resulting therefrom. The doctrine as laid down in this regard by the authorities is that the city cannot escape whatever duty arises from the use of this dangerous agency by delegating the act to an independent contractor. As to the extent of the duty imposed upon the city, the authorities are not uniform. It has been held that this duty is to use due care only to prevent injury. *Booth v. Rome, W. & O. Terminal R. Co.* 140 N. Y. 267, 24 L.R.A. 105, 37 Am. St. Rep. 552, 35 N. E. 592. It has also been held that in some instances, where blasting is done in the street, the city is liable in any event, and cannot defeat a recovery by showing due care. We are not called upon to lay down an exact rule on this point, because whatever duty the city owes it owes to the public, and not to the servants of the contractor. This is not a case of imperfect appliances furnished by the city, nor one of inviting persons into premises unsafe at the time of the invitation. It is a case where liability is claimed because of the intrinsic danger attending the use of explosives. No text-writer and no case cited extends the protection of this doctrine to an employee of the independent contractor. We have examined the numerous cases cited by plaintiff to support the proposition that blasting is so intrinsically dangerous that, when the city authorizes its use by an independent contractor, it becomes liable for resulting injury. We may concede that these cases properly declare the law without approaching the question involved in the case before us. All of the cases relied upon deal with injuries inflicted upon persons disconnected from the work, as, for instance, passers-by on the street or adjacent property owners, and where the injury results from the violent explosion of rock or earth incident to a blast. No man can tell where a rock hurled into the air without direction will fall, and therefore danger to persons and property in the vicinity to be anticipated, and so far as possible to be guarded against.

The doctrine of the cases referred to has no reference to a servant of the contractor engaged in blasting; certainly not when, as here, the injury to the servant results from the sheer negligence of the contractor or his foreman in failing to protect the laborer in

work which in itself is not inherently dangerous. The drilling of a hole for a charge of dynamite is certainly not an inherently dangerous task. The negligence of the foreman, which it is charged was the immediate cause of the injury, was not the natural and obvious result of blasting; so that, even if the doctrine of cases involving the rights of outsiders be extended to the servant of the contractor, the servant in this case would not come within the rule. It cannot be said that because the city is liable to adjacent persons and property, when it authorizes the use of an inherently dangerous agency (which is the doctrine of the cases relied on), therefore any employee engaged in the quarry may hold the city for any negligence of the contractor or his foreman. Counsel confuses the case of the servant of the contractor, who is injured by reason of the negligent manner in which the blasting is done, with the case of a third person on the street who is injured by the blast itself, without reference to the manner in which the blast is set free. In the latter case the injury results from violent expulsion upon the street and adjacent property of rock and earth authorized by the city. This expulsion of rock and earth occurs in the proper execution of the work. The plaintiff was not injured in the proper execution of the work, but solely by reason of the negligent manner in which it was performed, *i. e.*, the negligent failure to detect the unexploded charge. It does not appear that the plaintiff was in any danger from the proper explosion of a blast. Indeed, such danger is expressly negatived in the petition, which avers that the danger was not a necessary one, nor incident to the work in which plaintiff was engaged.

In *Missouri Valley Bridge & Iron Co. v. Ballard*, 53 Tex. Civ. App. 110, 116 S. W. 93 (a case in point upon the facts), the servant of the independent contractor sued the owner. The court, after stating the general doctrine of liability of the owner to the public, says: "The exception within which the verdict of the jury has brought this case finds its best illustration in those cases where public streets have been made dangerous by excavations or otherwise, and where in the nature of things the safety of the traveling public has been endangered, unless needed precautions have been taken to prevent it. In such a case, as has been often said, the injuries are the direct result of the very thing which the employer authorized to be done; and he cannot, therefore, escape liability by farming out the work to an independent contractor. It is in the nature of a nondelegable duty, owing to those whose life or limb is thus jeopardized. But where, as here, the injury is the

result of an act or fault purely collateral to the work to be done, and is the result entirely of the wrongful act of the independent contractor or his workmen, the employer should not be held liable."

If the owner directs the contractor to perform an act which is dangerous to others, even if carefully performed, he is liable to others for the consequences. In such case the injury results not from the mode in which the act is done, but from the doing of the act by the most careful mode. The danger is incident to the act itself. Hence the owner is responsible for the consequences of the act. On this principle rest the numerous decisions in cases where blasting throws rocks which cause damage. As was said by the supreme court of Arkansas in *St. Louis, I. M. & S. R. Co. v. Yonley*, 53 Ark. loc. cit. 508, 9 L.R.A. 604, 13 S. W. 333, 14 S. W. 801: "If one employs another to perform a work which from its nature is necessarily dangerous to the property of a third person, the employer cannot escape liability for the injury thereby done. In such cases the injury flows from the doing of the act as its natural consequence, and not from the manner in which the act is done." But aside from the differential facts above referred to, the doctrine of liability of the city to outsiders, supported by plaintiff's cases, is not extended by either reason or authority to include the servant of the contractor. If the foreman himself had been injured by his own negligence averred in the petition, it would hardly be claimed that the city would be liable; yet the doctrine for which plaintiff contends would protect the foreman, or even the contractor himself, from the consequences of his own negligence. It would be a strange anomaly in jurisprudence were we to hold that an employer is liable to the servant of an independent contractor because of the negligence of the contractor or his foreman in the performance of some casual act in the course of the work. The owner owes no legal duty to such servant to protect him from the negligence of his foreman. There is no parallel between the relation of the city to plaintiff and its relation to the public and adjoining owners. In the case of *Loth v. Columbia Theatre Co.* 197 Mo. 354, 94 S. W. 854, we refused to apply the doctrine of independent contractor where a passer-by was injured by the lowering of a large sign; but we said: "The injury in the case at bar resulted directly from the acts called for and made necessary by the contract, that is, the changing and replacing of the sign, and not from acts which were merely collateral to the contract; and if by the negligence and carelessness of the men handling the sign

it fell upon and injured plaintiff, the company is liable as if it had directly performed such acts." But supposing the sign, through careless handling, had injured one of the workmen engaged in the work, would it be claimed that the owner was liable?

The true rule of liability is thus stated by Dillon, in his work on *Municipal Corporations*, (§ 1723, vol. 4): "Where the work contracted for necessarily constitutes an obstruction or defect in the street, of such a nature as to render it unsafe or dangerous for the purposes of public travel, unless properly guarded or protected, the employer (equally with the contractor), where the injury results directly from the acts which the contractor engaged to perform, is liable therefor to the injured party. But the employer is not liable where the obstruction or defect in the street causing the injury is wholly collateral to the contract work, and entirely the result of the negligence or wrongful acts of the contractor, subcontractor, or his servants. In such a case the immediate author of the injury is alone liable."

The authorities cited by plaintiff are in line with the statement of the law. In *Schip v. Pabst Brewing Co.* 64 Minn. 22, 66 N. W. 3, a servant of the contractor sued the owner for injuries. He offered to prove that the contractor was incompetent and known to be so by the owner, and also that the building being removed was in a dangerous condition. These offers were rejected by the trial court. On appeal, the supreme court says: "For the purposes of the case we will assume that plaintiff could have proved these offers, and was entitled to do so, if it would result in proving a cause of action against defendant. Counsel for appellant have cited no case which has held the owner liable to the servant of the contractor under such circumstances. There are many cases which hold that the owner of premises cannot, by employing a contractor, relieve himself from the continuing duty which he owes to the public and to the adjoining owners not to maintain a nuisance on his premises, or license anyone else to do so. But we can find no case which holds that the owner owes any such continuing duty to the servant of the independent contractor engaged in the very work of abating the nuisance." See also latter paragraph of citation from *Foster v. Chicago*, 197 Ill. 264, 64 N. E. 322, where it was held that the servant of the contractor could not recover from the owner. In *Peoria, B. & C. Traction Co. v. O'Connor*, 149 Ill. App. 598, a laborer employed by the contractor for a street railway company sued the railroad company for injuries received on account of a defective derrick

rope used in hoisting an iron pole on the street. The court, after stating the rule that protects persons using the streets, said: "If appellee had been injured while using such public street or ground as a passer-by thereon, appellant could not have relieved itself of liability for its negligence in creating such condition, merely because the construction company had failed to do its duty. Appellee when injured was not in the exercise of his right as a citizen to use the public street. There was no causal connection between the negligence and the accident, and the particular place where the same occurred. We are therefore of opinion that the rule in question is inapplicable in the present case." To the same effect, see *Louisville & N. R. Co. v. Smith*, 134 Ky. loc. cit. 60, 119 S. W. 244, where, under similar circumstances, the court said: "Of course, a very different question would be presented if by reason of the prosecution of this work a train had been derailed, and a passenger injured; for in such case the duty of the company to furnish the passenger with safe passage is such that it could not excuse itself for any negligent act on the part of an independent contractor or that in any wise impaired the safety of its track; but no such question as that is presented here. No such relation existed between deceased and the railroad company. The railroad company was under no duty to deceased, since the relation of master and servant did not exist between them. The duty which it owed to the traveling public to maintain its track in a safe condition for the passage of its trains did not in the least obligate it to look out for the safety of deceased who was an employee of an independent contractor engaged in a separate and distinct undertaking." Like rulings are found in *Reilly v. Chicago & N. W. R. Co.* 122 Iowa, 525, 98 N. W. 464; *Engler v. Seattle*, 40 Wash. 72, 82 Pac. 136; *Hanna v. Chattanooga & N. R. Co.* 88 Tenn. 310, 6 L.R.A. 727, 12 S. W. 718. The cases of *Covington & C. Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 76 Am. St. Rep. 375, 55 N. E. 618, and *Wetherbee v. Partridge*, 175 Mass. 185, 78 Am. St. Rep. 486, 55 N. E. 894, on which plaintiff strongly relies, are not in point, as they involve injuries to outsiders or adjacent property. These and other cases hold to the doctrine of *Dillon v. Hunt*, 105 Mo. 161, 24 Am. St. Rep. 374, 16 S. W. 516. *Scott v. Springfield*, 81 Mo. App. 312, held the city liable for injuries to the servant of a contractor, but on the ground that the city retained the actual control, and that hence the contractor was not independent. And so it is with other cases holding the employer liable. These cases are not in point, in view of the con-

struction which we have given above to the contract under consideration.

From the foregoing reasoning and authorities, it is clear that, even conceding that blasting is intrinsically dangerous, there would be no liability in this case, as a matter of law, on the part of the city to plaintiff for injuries caused by the negligence of the contractor's foreman.

III. It is claimed that the petition avers that the contractor was incompetent, and known to the city to be so. The charge in the petition falls short of this. Here it is: "That said Robert J. Boyd Paving & Construction Company was at the time of entering into said contract and still is a corporation, organized and existing under the laws of Missouri; that it was an insolvent and irresponsible corporation, and was not a fit, proper, or suitable corporation for the city to enter into said contract with, and that defendant city was negligent and careless in entering into said contract with said Robert J. Boyd Paving & Construction Company, in that said company was an insolvent, irresponsible company, and not a fit, proper, or suitable corporation for said work; and that the defendant city at the time of entering into said contract, and throughout the performance of said work, had knowledge of the foregoing facts, or by the exercise of ordinary care would have had knowledge thereof."

The unfitness alleged must be referred to the alleged insolvency. Furthermore, for reasons given above, a charge of incompetency would not help plaintiff. The city owes no duty to the servant of the contractor to provide him a competent and skillful employer. In *Schip v. Pabst Brewing Co.* supra, the court (64 Minn. loc. cit. 25, 66 N. W. 4) said: "Neither has our attention been called to any case where the owner was held liable on the sole ground of failing to exercise with due care a temporary duty of employing a competent contractor (after which his responsibility would cease), but in every case there was a continuing duty not to maintain a nuisance on his premises himself, or license others to do so. It is often laid down as one of the conditions required to relieve the owner from liability, that he shall employ a competent contractor. But this language (where it is not mere *dictum*) is always used in cases where the owner owes such continuing duty, and the work to be performed by the contractor will necessarily result in a nuisance to the public or the adjoining owner, unless great or extraordinary care is taken to prevent it from doing so."

The following cases are cited by plaintiff on this point: *Brannock v. Elmore*, 114 39 L.R.A. (N.S.)

Mo. 55, 21 S. W. 451; *Dillon v. Hunt*, 82 Mo. 155; *Mullich v. Bocker*, 119 Mo. App. 332, 97 S. W. 549. But these cases refer to the obligation which the owner owes to outsiders. No case has been cited, or found by us after extensive research, which extends this obligation to a servant of the independent contractor.

IV. The pleader attempts to predicate liability against the city because of the alleged violation of § 883 of the ordinance, requiring a license to qualify one to do blasting. On this point it is sufficient to say that the law is settled in this state that a city is not liable for failure to enforce its ordinances. *Ryan v. Kansas City*, 232 Mo. 471, 134 S. W. 566, 985; *Loth v. Columbia Theatre Co.* 197 Mo. 328, 94 S. W. 847.

Tested by the foregoing reasons and authorities, the petition fails to state a case against the defendant city.

The demurrer having properly been sustained, the judgment of the Circuit Court is affirmed.

Lamm, Woodson, and Graves, JJ., concur.

This cause in Division 2 was assigned to **Bond, C.**, and his opinion, concurred in by **Roy, C.**, was approved by said division. As rewritten by **Bond, C.**, since the majority opinion, it is adopted as the dissenting opinion of **Valliant, Ch. J.**, and **Kennish and Brown, JJ.**

Bond, C.:

Plaintiff sues Kansas City (a municipal corporation) and the Robert J. Boyd Paving & Construction Company (a business corporation) to recover for personal damages sustained by the belated explosion of a stick of dynamite, employed in blasting rock to make a course for a sewer in process of construction under a contract between the defendants.

The gist of the allegations of plaintiff's petition is, to wit: That the defendant city exists and is governed under a special charter, whereby it is empowered to enact ordinances for causing and regulating sewer construction, in pursuance of which it has employed a large number of sewer inspectors. That it is required by its ordinance to employ, and has employed, a city engineer, skilled in the science of engineering, and assistants. That its engineering department supervises the construction of public and district sewers. That its city engineer is required to prepare plans, specifications, and estimates of the costs of all public work, and report all violations of any contract for the doing of such work,

and to superintend the execution thereof. That no person is allowed to do any blasting within said city without first obtaining from the city engineer a permit therefor, issuable only on the condition that he is satisfied that the applicant is "in every particular a safe, careful, and suitable person to use, and an expert in the use of, all explosives used in blasting," and has entered into a bond conditioned that such person will carefully and prudently use such explosive. That said city passed an ordinance for the construction of a "district sewer in sewer district No. 144, approved March 29, 1901," and entered into a contract with its codefendant for constructing a sewer in said district. That said contract, among other things, provided that the work done thereunder should be "in conformity with the plans of such work on file in the office of the city engineer in Kansas City, and in strict obedience to the directions which may, from time to time, be given by said city engineer or his authorized agents, and also in accordance with the following specifications: "The contractor shall not blast any rock or allow the same to be done on this work without taking such precautions, by covering or otherwise, as shall prevent damage or injury to person or property." That in pursuance of the aforesaid contract, the defendants and each of them employed a gang of men, of which plaintiff was a member, who were under the immediate superintendence, direction, and control of a foreman, "who was a vice principal of defendants, with power to direct them in the performance of their duties." That plaintiff was a member of a gang of drillers under said foreman, and that it was the duty of the plaintiff and the members of his gang by the use of steel drills, about 6 feet and 4 inches long and having bits $1\frac{1}{4}$ inches in diameter, to drill holes in the rock through which said sewer was to be constructed, and "that the drilling of said holes under the direction of said foreman was the sole duty of the plaintiff and the members of the drilling gang." That the work performed by them consisted of drilling "a series of holes about 2½ feet deep and about 2 feet apart," after which the said foreman and powder man (under his immediate direction and control) "would load said holes with giant powder or dynamite, putting about 2½ sticks of said explosive in each hole, then putting on the cap and fuse for each hole, then tamp each hole full with sand and dirt, and leaving the fuses extending out of each hole, and then said foreman would light said fuses and shoot said series of holes." That it was usual and customary to count the number of said holes before exploding

them, and then to keep count of the number of explosions as they took place so that it could be known whether any had failed to occur. That the count of the noises of the respective explosions was then verified by an examination of the respective holes which had been loaded with dynamite. That the plaintiff and the members of his gang had nothing to do with the loading and exploding of said holes, nor of the subsequent examinations of the place, nor with the cleaning out of unexploded powder. That these duties were performed by said foreman and said powder man, who were required, after finding from examination that it was safe so to do, to employ a different gang of men to clean up the broken rock caused by said series of explosions. After that was done, "the plaintiff and his gang of drillers would be ordered to drill another series, and this process would be repeated until the excavation was made as deep as desired."

The petition then alleges, to wit: That on the afternoon of July 13, 1901, a series of holes which had been drilled by the plaintiff and his gang of drillers was attempted to be exploded by said foreman (Kelleher) and said powder man (Moriarity). That said July 13th was Saturday, and no work was done in said sewer on the Sunday following. That Saturday and Monday the broken rock caused by the explosion of Saturday was cleaned up by the other set of men under said foreman (Kelleher), with which other set of men plaintiff had nothing to do. That by reason of the negligence and carelessness of the defendants, through said foreman (Kelleher) and said powder man (Moriarity), one of the loaded holes in said series of holes, which said foreman and said powder man had not caused to explode on Saturday, was left filled with dynamite. That the existence of said loaded and unexploded hole was unknown to plaintiff and the gang of drillers with whom plaintiff was working. That the existence of said unexploded hole and the danger thereof to the plaintiff was known to defendants, or would have been known to them and each of them by the exercise of ordinary care on their part, prior to the time of the injury to the plaintiff herein alleged. That on Monday, the 15th day of July, 1901, the defendant contractor and the defendant city, through their foreman (Kelleher), negligently ordered plaintiff and his gang of drillers to go back to the place where said series of holes had been attempted to be exploded on the Saturday previous, for the purpose of drilling another series of holes at said place. That in pursuance of said negligent order said plaintiff and the other drillers in his said gang of

drillers went back to said place for the purpose of drilling a new series of holes. And that while one of said gang of drillers was at work drilling a hole near the place where plaintiff was also drilling, his work caused the dynamite which had been negligently left in one of the holes since the Saturday previous to be exploded with great force and violence and to the injury of plaintiff in the following manner: "The total and permanent loss of the sight of both of his eyes, great injury to body, his private parts, his chest, face, forehead, a broken jaw, causing long illness and suffering and mental anguish, and the permanent inability thereafter to do any work, so that he has become an object of charity and an inmate of the poor farm." The petition then adds: "That at the time said other driller was at work near the plaintiff, neither he nor the plaintiff had any knowledge or warning whatsoever of the existence of said unexploded shot or charge at said place; that said unexploded shot or charge constituted a latent danger in plaintiff's said place of work; that said latent danger was known or would have been known by reasonable care, to the defendants and each of them, as well as to their said powder man and their said foreman, and to the inspectors of the defendant city, who were present on said work throughout the construction of said sewer, superintending said work and giving orders to the foreman and men at work thereon, in time to have enabled said defendants and their said foreman, powder man, and inspectors to have removed said unexploded dynamite, and to have warned the plaintiff of the existence thereof; that the defendants and their foreman, powder man, and inspectors negligently and carelessly failed to remove said danger, and negligently and carelessly failed to warn the plaintiff of the existence thereof, but through their foreman negligently and carelessly ordered said plaintiff and his gang of drillers to go to said place and drill a new series of holes at said place where said unexploded charge of dynamite, a highly explosive powder, had been left."

The petition charges: That said foreman (Michael Kelleher) and said powder man (Maurice Moriarity) "were not safe, careful, or suitable persons to use said explosive, and were neither of them experts in the use of said explosive." That neither of them "were competent persons for said work of blasting; that the defendants and each of them were negligent in intrusting said work to said foreman and said powder man," whose incompetency and lack of expertness in the use of said explosive were known to each of the defendants; that the defendants and each of them negligently

failed to select and employ on said sewer construction a blaster who was qualified for the work under the provisions of ordinance No. 883, requiring all such persons to make proof of competency and procure a license before doing any blasting within said city, which ordinance, and every other ordinance pertaining to the work of constructing the sewer, the contract expressly stipulated should be complied with in the doing and progress of the work; that this covenant of the contract was negligently violated by both the defendants; that the work in respect to which said carelessness occurred and which caused plaintiff's injury was the work of blasting with giant powder or dynamite; that both defendants knew the necessity of said blasting and the necessity to use that dangerous explosive in removing the 2,450 cubic yards of rock excavation provided for in their contract; that both defendants knew the incompetency and unfitness of their said foreman and powder man, by reason of which the unexploded stick of dynamite was left in the rock at the place where plaintiff was negligently ordered by them to drill a new series of holes, without any warning or knowledge whatsoever of the proximity of his work to the unexploded stick of dynamite. The petition then specifically charges that the defendants knew that said powder man, "by reason of his age and infirmities and general deficiencies, was utterly incompetent to be the powder man on said job;" that through the negligence of this incompetent powder man and incompetent foreman the missed shot of dynamite was not discovered and removed, and plaintiff was ordered to work at a place dangerously near thereto, without any knowledge or information whatever of the existence of his peril. The petition also charges that the codefendant of the city was an insolvent corporation; "and was not a fit, proper, or suitable corporation for the city to enter into said contract with," and that the city was negligent in making said contract, for it knew, or by reasonable care could have known, these facts; that neither the construction company nor its foreman nor blaster had any license or permit, as required by the city ordinance, to do blasting on said work; and that the defendant city and its codefendant negligently and carelessly violated their contract, requiring that such license should be procured before the work was done.

The contract set out in the petition empowered the engineer to direct the "mode" of doing the work, and provided that if any person "refused or neglected" to obey his instructions, or appeared to him to be incompetent, that such person should "be at

once discharged;" that the engineer should have power to annul the contract for good cause, and his decision should be conclusive of the existence of such cause on all litigation between the parties, and should preclude any damages therefor. The petition also pleaded that the legal effect of the contract vested the defendant city with full control and direction as to the manner of doing the work, the materials to be used, and the result to be accomplished in its entire performance. To this petition the defendant city interposed a general demurrer, which was sustained. Plaintiff voluntarily dismissed as to the defendant construction company, and appealed from the order sustaining the demurrer and dismissing his petition.

I. In considering this appeal it must be constantly borne in mind: That Kansas City is a municipal corporation, and, as such, possesses a double capacity,—the one public or governmental, the other private or contracting. That in the exercise of its first function it can incur no civil liability to any person. That in the exercise of its second faculty it is suable by any aggrieved person, and is subject to the same control which the courts exert over all persons. That in the work of constructing sewers, whether directly or by letting to contract, Kansas City acts only within its business powers, and for its contracts and torts in the prosecution of that work is open to suit in the same manner and to the same extent as a private person doing or causing to be done the same work. *Donahoe v. Kansas City*, 136 Mo. 665, 38 S. W. 571; *Dolan v. Laclede Gaslight Co.* 145 Mo. 550, 46 S. W. 1133; *Ely v. St. Louis*, 181 Mo. 723, 81 S. W. 168; *State ex rel. Abel v. Gates*, 190 Mo. loc. cit. 550, 2 L.R.A. (N.S.) 152, 89 S. W. 881; *Barree v. Cape Girardeau*, 197 Mo. loc. cit. 389, 6 L.R.A. (N.S.) 1090, 114 Am. St. Rep. 763, 95 S. W. 330; *Broadwell v. Kansas*, 75 Mo. 213, 42 Am. Rep. 406; *Werth v. Springfield*, 78 Mo. 107; *Wegmann v. Jefferson*, 61 Mo. 55; *Thurston v. St. Joseph*, 51 Mo. 510, 11 Am. Rep. 463. That the defendant city, like every municipal corporation, is under a primal duty, which it cannot delegate, to keep its streets and sidewalks in a condition of reasonable safety for the use of persons acting with ordinary care. *Ryan v. Kansas City*, 232 Mo. 471, 134 S. W. 566, 985; *Russell v. Columbia*, 74 Mo. 480, 41 Am. Rep. 325; *Welch v. St. Louis*, 73 Mo. 71.

II. Plaintiff's petition must be reviewed under the rule prescribed for that purpose by statute, to wit: "In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally

construed with a view to substantial justice between the parties." Rev. Stat. 1909, § 1831. Now, the petition in this case is met by a general demurrer only. This form of attack does not reach any indefiniteness or imperfection of statement less than at total omission of all allegations from which any cause of action may be fairly implied or inferred. *Rodgers v. Western Home Town Mut. F. Ins. Co.* 186 Mo. loc. cit. 255, 256, 85 S. W. 369; *Eads v. Gains*, 58 Mo. App. loc. cit. 594; *State ex rel. Williams v. Carroll*, 63 Mo. 156; *Marie v. Garrison*, 83 N. Y. 14-23.

The only defense urged by the defendant in this case is that the allegations of the petition demonstrate that the contract between it and the contracting company created the relation of owner or proprietor and independent contractor, and hence that it is not responsible in damages, either to the public at large or the servants of the contractor, for any injury caused by the wrongful or negligent conduct of the contractor or its representatives in the performance of the work. In order to maintain this defense, the defendant city must show, from the allegations of the petition, that relation was legally created. There are cases in which it is held that the owner or proprietor may be sued by his own servants for the tortious acts and negligences of the independent contractor or his representatives. *Herdler v. Buck's Stove & Range Co.* 136 Mo. loc. cit. 16, 37 S. W. 115; *Burnes v. Kansas City, Ft. S. & M. R. Co.* 129 Mo. loc. cit. 56, 31 S. W. 347; *Leslie v. Rich Hill Coal Min. Co.* 110 Mo. 31, 19 S. W. 308; *Sackewitz v. American Biscuit Mfg. Co.* 78 Mo. App. loc. cit. 153; *Bartley v. Trorlicht*, 49 Mo. App. 231-233; *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *The Magdaline (D. C.)* 91 Fed. 798; *Chicago & A. R. Co. v. Eaton*, 194 Ill. 441, 88 Am. St. Rep. 161, 62 N. E. 784. As the plaintiff in this case was not ostensibly the servant of the city, his right to recover, like that of any innocent passerby, who might have been injured in the same way, must depend upon the legal relationship of the city and the contracting company, as it is disclosed by the facts stated in the petition.

This reduces the matter to a single issue of law, based upon the fair legal intendment of the facts pleaded: Does the transaction between the parties show as a necessary legal conclusion that the construction company became an "independent contractor" as that status is defined by law?

If one person is set to work upon the property of another, he must act in one of two capacities: First, as the servant or agent of the owner, who is therefore re-

sponsible for his acts in the course of his employment; or, second, as an independent contractor, by virtue of a contract sufficient in law to create that relation, in which case his torts and negligences cannot be imputed to the owner by its servants or the public. There is no middle position which can be occupied by one person who is in possession and at work on the property of another by the owner's consent or permission. He must be there either on behalf of the owner, or on his own behalf under a valid contract to that effect; for he could only be on the premises otherwise by a trespass, and that is neither claimed nor could it be claimed under the case made in this petition. Now, the law has distinctly and positively adjudged the elements necessary to the formation of a contract whereby one becomes an independent workman on the property of another. It follows that any agreement with the owner which lacks any element necessary to make the workman an independent contractor leaves him occupying the only other condition which has been shown to remain, that of representative, agent, or servant of the owner. The legal formula of a contract adequate to create the relation of independent contractor between a workman and the owner of the property has been crystalized into certain and positive requirements which have been again and again quoted in exact language and adopted by the appellate courts of this state in an unvarying current of authority. It is thus expressed: "The general rule is that one who has contracted with a competent and fit person, exercising an independent employment, to do a piece of work, not in itself unlawfully or attended with danger to others, according to the contractor's own methods and without being subject to control, except as to the results of his work, will not be answerable for the wrongs of such contractor, his subcontractors, or his servants, committed in the prosecution of such work. An independent contractor . . . is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." 2 Thomp. Neg. p. 899, § 22; *Gayle v. Missouri Car Foundry Co.* 177 Mo. loc. cit. 446, 76 S. W. 987; *Fink v. Missouri Furnace Co.* 82 Mo. 276, 52 Am. Rep. 376; *Hilsdorf v. St. Louis*, 45 Mo. 98, 100 Am. Dec. 352; *Long v. Moon*, 107 Mo. 334, 17 S. W. 810; *Crenshaw v. Ullman*, 113 Mo. loc. cit. 639, 20 S. W. 1077; *Lancaster v. Connecticut Mut. L. Ins. Co.* 92 Mo. 460, 1 Am. St. Rep. 739, 5 S. W. 23; *Dillon v. Hunt*, 82 Mo. 150; *Loth v. Columbia Theatre Co.* 197 Mo. loc. cit. 354, 94 S. W. 847; *Mullich v. Bocker*, 119 Mo. 30 L.R.A. (N.S.)

App. loc. cit. 337, 97 S. W. 549; *Wharton*, Neg. § 181; *Brannock v. Elmore*, 114 Mo. loc. cit. 62, 21 S. W. 451; *McGrath v. St. Louis & H. Constr. Co.* 215 Mo. loc. cit. 209, 114 S. W. 611.

To obtain the shield of an independent contractor, the owner or proprietor must: First, select "a competent and fit person," engaged in an independent calling; second, the work committed to him must be neither "attended with danger to others" nor unlawful; third, the contractor must be allowed to do the work according to his own methods and only subject to control by the owner "as to the results of his work." Without the concurrence of each and all of these conditions, the condition of independent contractor cannot legally exist. The decisions in this state have not only affirmed this doctrine by the adoption of the foregoing definition, but they have held, on the various occasions when it became necessary to consider the effect of the absence of any one of these legal requirements, that the relationship of owner and independent contractor was thereby prevented, and that the owner was left responsible just as if he did the work on his own behalf. As far as necessary we will cite these instances *seriatim*.

First. As to the necessity of contracting with "a competent and fit person." The case was thus: The defendant was excavating his lot for the purpose of erecting a house thereon. The excavators were independent contractors. Plaintiff was injured by a fragment of a rock thrown into the air by the blasting made by the excavators contrary to the safeguards of a city ordinance. The court held that the ordinance in question was a wise and valid regulation, and made for the protection of persons and property from injury, and had it been observed the injury to plaintiff "would not probably have occurred;" that the evidence showed that the owner was acquainted with the careless methods of blasting adopted by the contractors; and that this would entitle the plaintiff to recover. Adding: "An employer cannot relieve himself from liability by giving the contract to one who is known to be incompetent or negligent,"—citing cases. *Brannock v. Elmore*, 114 Mo. loc. cit. 62, 21 S. W. 453. Again, plaintiff's two-year-old child fell into a vault left uncovered by an independent contractor in construction work on the owner's premises. The court held under these facts that there could be no recovery solely for the following reasons: "It is not alleged, and there is no evidence tending to prove, that the contractor was not a competent person to do the work. The work was not in itself of a dangerous character, did not necessarily create a nuisance nor involve a trespass upon

the property of others, and the defendant did not interfere in the direction of its performance. In such case the defendant [the owner] cannot be held liable for the negligence of the contractor, and the action of the court might well be sustained on this ground." *Wiese v. Remme*, 140 Mo. loc. cit. 298, 299, 41 S. W. 799. In a recent case, speaking of the effect of failure on the part of the owner to select a fit and competent person, this court, after showing that the work complained of was not dangerous, but was caused by the mere "negligence" of an independent contractor or his servants in the execution of it, added: "In the latter case the contractor alone is liable unless the owner is in default in employing an unskilful or improper person as contractor." *McGrath v. St. Louis*, 215 Mo. loc. cit. 209, 114 S. W. 617. The court, accordingly, held in that case that, there being nothing dangerous in the character of the work to render the owner liable, and the injury having been caused by the mere negligence of a competent and fit contractor, the defendant city was not liable to the plaintiff for damages so received. This question was also ruled in the St. Louis court of appeals. There the injury complained of resulted from damage to plaintiff's property from being run into by a horse which had been delivered by the defendant for the purpose of having it broken to harness. The question arose whether the party undertaking to do this was an independent contractor. After defining what was necessary to constitute him as such, and advertising to the evidence tending to show that he lacked competency for that employment, the court said: "But a proprietor will not be exonerated from liability for negligence in the doing of work which he lets out to an independent contractor, unless he used care to select a competent person as contractor,—one who not only had an occupation, but reasonable skill in performing the tasks pertaining to it. If a person intrusts the performance of work, of a kind likely to result in harm to third persons unless cautiously and skilfully done, to a manifestly unfit person, as an independent contractor, the employer will be responsible for the consequence of such contractor's incompetency. Breaking horses to harness is not necessarily dangerous to others, if properly done; and in selecting a contractor to do work of that character, a proprietor need only use ordinary care to choose a competent person. But if he is careless in selecting, he remains liable. [Citing cases.] It follows that if Bocker carelessly selected an incompetent person to break the horse, he was liable for an injury resulting from his contractor's negli-

gence." *Mullich v. Bocker*, 119 Mo. App. loc. cit. 339, 97 S. W. 551.

The basic idea of this principle is that a person exercising a special calling must possess reasonable skill and qualification for that work, without which he is not in reality a contractor, builder, architect, or manufacturer, as the case may be; and that the owner, having knowledge of such deficiency, cannot supply it by mere agreement, and thereby make him in law what he is not in fact. The effect of these decisions is in strict accord with the foregoing definition which they apply as the test of the status of an independent contractor. Hence, where the contract of the owner fails on account of the known incompetency of the ostensible independent contractor to create that relation with him, the contractor is thenceforward only to be regarded in law as acting on behalf of the owner; and the owner's responsibility is then measured by the settled rules of master and servant. This has been distinctly ruled in each of the four cases last cited, so far as the general public can be affected. Why does not the same principle apply when an action is brought against the owner by an employee of such ostensible contractor, and when it is shown that the injury occurred solely by reason of his inefficiency and incompetency, and that these were known to the owner at the time he attempted to employ the contractor?

There can be no distinction in the right to recovery of such servant and a member of the general public, if, as has been shown, such a contract between the owner and contractor was legally insufficient to serve its purpose, and therefore left the parties in the only other possible relation, to wit, that of owner or proprietor who has put another, whose incompetency he knows, to the doing of constructive or other work on his property. The reason given for an attempted distinction is that the owner has no contractual relations with the employees of the workman. The answer is that the owner has no contractual relations with the general public, and yet his liability to one of them for an injury resulting from the employment of an incompetent contractor is unquestioned under the decisions in this state. It must follow that no distinction can exist in the two cases founded on the want of contractual relations, and that it cannot be scientifically held that redress may be had by one which is not obtainable by the other, unless some other distinction can be found in the cases. The truth is that, if the existence of contractual relations is at all necessary, then in law and in fact the servant of a contractor who has been employed with actual knowledge

of his incompetency is in contractual relations with the owner, because the effect in law of an employment so made is to make the contractor the mere representative of the owner. This is a greater reason why such servant should not be shut off from a recovery which is open to a member of the general public having no contractual relations with the owner either in fact or in law. If a higher right exists in either case, it attaches to the position of servant of the pseudo contractor, for the owner or proprietor knew when he employed him of his unskilfulness and incompetency, and knew that he must bring to his work ordinary laborers, like the plaintiff, who would probably suffer injury by reason of his want of skill and capacity, and that such would be the direct result of the contract made by the owner. With such knowledge and so contracting, the owner can, in reason, possess no greater defense when sued by the servant of the alleged contractor than if sued by a member of the general public, injured in the same way. Suppose, when this injury occurred, a lounge on the streets of the city had been struck by the same explosion which injured the plaintiff. As to such passer-by the liability of the defendant city is settled under the foregoing decisions in this state, under the averments of the petition, that such injury was caused by the incompetency of the man in charge of the work, which was known to the city at the time he was employed. Can the plaintiff be in a worse position than that of the street lounge? Plaintiff was employed to do manual labor, and pursuing that calling, and with no knowledge, thought, or warning of the danger which impended from the interposition between him and the city of an incompetent contractor, was his situation less protectable by the law than that of the vagrant injured at the same time, place, and manner?

It is submitted this statement of the concrete facts, to which the position assumed on behalf of the city leads, necessarily proves that it cannot be maintained with any regard to logic and principle or to justice and harmony in the administration of the law. The rule that an owner is disabled by law from making an incompetent person his independent contractor by merely agreeing so to do, with knowledge of his incompetency, is clearly and explicitly held in all the courts of Missouri. But it is said there is a different ruling in a case cited from Minnesota. *Schip v. Pabst Brewing Co.* 64 Minn. 22, 66 N. W. 3. As to this case, the learned annotator of the Lawyers' Reports, after citing it, adds: "But the weight of authority is opposed

to the restricted doctrine thus enounced." He states further that it is contradicted by numerous decisions elsewhere which exempt an employer from liability only who has used reasonable diligence to select a "competent contractor,"—citing cases. And adds conclusively, to wit: "The doctrine that the employment of an incompetent contractor is culpable negligence which raises a cause of action in favor of anyone who is injured by conditions or occurrences which would not have existed or happened if the contractor had been competent, is also sustained by categorical statements and explicit decisions,"—citing the Missouri cases and numerous decisions of other states. 66 L.R.A. 942, notes by the annotator. It can hardly be that the courts of Missouri should be asked to overturn the settled rule announced in its own decisions in favor of the irrational doctrine and unsupported view of the Minnesota court. We therefore rule that the petition in this case did state a prima facie cause of action for injuries suffered by the plaintiff in consequence of the negligence of the incompetent corporation, acting in the role of independent contractor, and in consequence of the negligence, unfitness, and want of qualification of its foreman (Kelleher) and its blaster (Moriarty); all of which was known to the defendant city when it made the contract for letting the work and during prosecution thereof, as is shown by the statements in plaintiff's petition, which are to be taken as true in reviewing the ruling sustaining the general demurrer.

III. The next essential comprised in the above-quoted definition is, to wit, that the owner cannot delegate his responsibility for ordinary care on the part of the contractor employed to perform work which is "attended with danger to others." The violation of this requirement of the law has been repeatedly presented and adjudged in the decisions in this state, and it has been settled that such responsibility on the part of the owner is nondelegable; and no case has been presented in this state wherein he was permitted to divest himself of that duty by letting the work to another person. In one of the earliest cases an employee of the contractor engaged in altering a building was injured by the falling of a wall. He sued the owner of the property, who made two defenses: First, a denial of negligence; and, second, a plea that the entire work was done by contractors in accordance with plans of an architect, and that the injury sued for arose thereafter "from the carelessness of contractors," etc. Under this plea defendant's evidence tended to show that a carpenter working for the

contractor negligently removed a prop, causing the wall to fall upon the plaintiff. As to this defense and the evidence tending to sustain it, the court conceded that the accident happened after the turning over of the premises to the contractor, and said: "But if the defendant's plans of rebuilding, as recommended by his architect, required the use of materials and structures that were unsafe, his responsibility, for any injury accruing by reason of such plans, was not transferred to the contractors." And again the court said: "There can be no question of the liability of defendant, if the damage resulted from inherent defects in the old wall, which the contractors were directed to make use of in the new building." The verdict and recovery by the plaintiff were affirmed. *Horne v. Nicholson*, 56 Mo. loc. cit. 222. The same principle was held to entitle an adjoining proprietor to recover of the owner of a building for injuries caused by its being negligently pulled down by an independent contractor; the court saying: "It is immaterial in such a case whether the work be done by the proprietor or by an independent contractor." *Dillon v. Hunt*, 105 Mo. loc. cit. 161, 24 Am. St. Rep. 374, 16 S. W. 518.

Again, the right of an adjoining proprietor for damages to her property caused by the excavating work of an independent contractor engaged in the service of another was held to exist against the owner who employed the contractor, if the petition had stated that the work was in its nature dangerous to the property of others; the court saying: "In cases of this character it seems that the principal is liable for any injury that is occasioned by reason thereof, notwithstanding the relation of *respondent superior* may not exist, and the party doing the work is an independent contractor." *Crenshaw v. Ullman*, 113 Mo. loc. cit. 640, 20 S. W. 1079, citing 2 *Thomp. Neg.* § 24, p. 901.

Again, the job of lowering signs had been let to an independent contractor. A passer-by was injured. The owner, and not the contractor, was sued. The court held that a recovery could be had, adding: "But the injury in the case at bar resulted directly from the acts called for and made necessary by the contract,—that is, the changing and replacing of the sign,—and not from acts which were merely collateral to the contract; and if by the negligence and carelessness of the men handling the sign it fell upon and injured plaintiff, the company is liable as if it had directly performed such acts." *Loth v. Columbia Theatre Co.* 197 Mo. loc. cit. 354, 94 S. W. 39 L.R.A. (N.S.)

854, citing *Covington & C. Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 76 Am. St. Rep. 375, 55 N. E. 618; *Deming v. Terminal R. Co.* 169 N. Y. 1, 88 Am. St. Rep. 521, 61 N. E. 983; *Lowell v. Boston & L. R. Corp.* 40 Mass. 24, 34 Am. Dec. 33; 16 Am. & Eng. Enc. Law, 2d ed. 196.

It is not claimed that these decisions do not settle the principle that an owner cannot shift to another his duty to see that "work attended with danger," if done on his property, shall be performed without negligence. But it is urged: First, that this rule cannot be invoked by an employee or servant of the contractor; and, second, that the blasting contracted for in this case was not work attended with danger to others. This first objection is completely within reasoning whereby it was shown above that the contention that an owner might be liable to the public, but not to the servants of the contractor, for injuries caused by the owner's employment of a person known to be unfit and incompetent to perform the work, is without any support either in reason or authority. All that was then said applies with equal conclusiveness to the renewal of that objection at the present time. No valid reason can be given why such a distinction should be made. The legal principle upon which the liability of the owner depends is that he shall not directly nor indirectly put his property to such use as probably to injure others, without at the same time assuming responsibility for such injuries in so far as they are caused by his own negligence or the negligence of his substitute in the work. This creates a nondelegable duty, as to which it has been said with conclusive logic: "It is a contradiction in terms to speak of an absolute duty as being susceptible of delegation. If it can be delegated in any particular instance, it ceases, *ex hypothesi*, to be absolute." 2 *Labatt, Mast. & S.* § 559.

We have been totally unable to find any precedent which announces a logically tenable ground for the doctrine that the owner, resting under a personal duty cast upon him by law as an essential incident to his ownership of property, may commit a breach of that duty without incurring liability to any person thereby injured, whether his own servant or the servant of one who (as contractor with the owner for doing that duty) negligently fails in its performance, or to a stranger. The duty being an imperative one and put upon the owner by law, he must perform it himself with due care, or answer for due care on the part of any other person to whom he may transfer its performance.

For this reason he cannot make the transferee of that duty an independent contractor under settled principles of law. This incapacity of the owner is explicitly noted in the words of the definition of that relation quoted above and uniformly adhered to in this state.

The next objection is as to character of the work. Was this work "attended with danger to others?" In the cases illustrative of dangerous work, above cited, we find that it was held to apply to turning over to an independent contractor the task of remodeling a building. The danger in that case grew out of the falling of an existing wall, caused by the pulling away of a prop by one of the servants of the contractor to the injury of another. In the next case the danger arose to adjoining property from excavating work necessary to the erection of a building, done by an independent contractor. In the third case, the danger ensued from the work of lowering a sign attached to a projecting beam in front of the Columbia Theater. In each of these cases it was expressly adjudicated that the given work was "attended with danger to others." In the case at bar the contract called for blasting by dynamite a mile and a third (2,450 yards) of solid rock. Is it conceivable that this work was less dangerous than the three former instances in which it was so held? Is it not clear that the destructive natural force called into play by igniting sticks of dynamite inserted into bodies of solid rock is infinitely more dangerous than remodeling a standing wall, or excavating a cellar, or lowering a sign? No possible misapprehension existed in the minds of the city authorities, for they passed a law that this particular work (blasting) should not be done within the limits of the city without a thorough ascertainment of the skillfulness and competence of the person doing the same, and without a license thereafter so issued to him, based on that finding. This clearly shows that the city knew the peril likely to ensue from such work, and adopted a valid safeguard to prevent injuries therefrom. It is apparent the city not only had knowledge of the true character of the work in question, but provided a safeguard (which it did not comply with) for minimizing the danger. This knowledge possessed by the city of the dangerous character of the work is one which is also within the judicial knowledge of the courts. In the case of *Fitzsimons & C. Co. v. Braun*, 199 Ill. loc. cit. 394, 59 L.R.A. 421, 65 N. E. 250, it is said: "The nature and power of dynamite as an explosive have been demonstrated by universal experience, and it is 39 L.R.A. (N.S.)

a matter of common knowledge that the use of dynamite as an explosive is intrinsically dangerous, and of this the courts will take judicial notice." This was affirmed in the case of *Chicago v. Murdock*, 212 Ill. loc. cit. 12, 13, 103 Am. St. Rep. 221, 72 N. E. 47, where it was also held that the city could not divest itself of the character of principal by letting contract of that sort for the making of a public improvement within its limits, and that it was liable for damages caused by the negligence of the contractor on the doctrine of *respondet superior*. Again, the supreme court of Connecticut, after an exhaustive examination of the authorities and in conformity with the text of Cooley on Torts, said: "We think, also, that the operation of blasting with dynamite is 'intrinsically dangerous;' that the court should have taken judicial notice that it is so. . . . It is as sound a rule of law as of morals, that when, in the natural course of things, injurious consequences will arise to another from an act which I cause to be done, unless means are adopted by which such consequences may be prevented, I am bound, so far as it lies within my power, to see to the doing of that which is necessary to prevent the mischief. Failure to do so would be culpable negligence on my part. [Citing an English case.] Certain of the provisions in the specifications, to which reference has been made, were apparently inserted in recognition of this principle. [This case was sewer construction.] But in such cases it is not sufficient that the employer contracts with another to use the care to prevent harm, which the hazardous nature of the stipulated work requires. He is bound, at his own peril, to see to it that such care is used. And he is responsible, as for his own negligence, if it is not." *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. loc. cit. 527, 528, 28 Atl. 39.

We think in reason, experience, authority, and from the very terms of the contract made by the city, it is evident that the work of blasting as stipulated for was "attended with danger to others;" that this fact was known to the city at the time of the letting of the contract; and that the petition under review also states a *prima facie* cause of action against said city for the injury to plaintiff, caused by the negligence of the contractor or its representatives in the prosecution of the work. This reasoning does not involve, as has been suggested, the liability of the owner to the independent contractor himself. The latter plies his particular trade for livelihood. This implies a representation on his part that he is possessed of the requisite skill

and competency. When he solicits employment in his own calling, he cannot ask the employer, who knows nothing of his special craft, to indemnify him against his own lack of qualification for his own trade, or against his own negligence. Such a notion is contrary to the axioms of the law. *Volenti non fit injuria*. Broom, Legal Maxims 5th ed. p. 270, note. On the other hand, the mere laborers employed by the person assuming to be a fit contractor have no skill in his particular mystery, nor are they expected to do other than manual work. This fact is well known to all employers and the public in general. Hence the relationship of owner to them is essentially and radically distinct from that which he bears to the master of the handicraft. The principle we affirm is that, in turning over work "attended with danger" to a contractor, the owner assumes no liability whatever with respect to him, but does assume that the dangerous work shall be performed with ordinary care, and that this responsibility extends to the common laborers, whom the owner knows must be employed by the contractor to assist in doing the work, as well to strangers.

The case of *Blumb v. Kansas City*, 84 Mo. 112, 54 Am. Rep. 87, is in irreconcilable conflict as to its ruling with the established law in this state. In the *Blumb Case* a lady was using a street whereon a contractor with the city was engaged in blasting to construct a sewer. The evidence showed that the city engineer who superintended the work had knowledge "that the men engaged in the work were guilty of carelessness in making the blast;" that neither the city nor its engineer took any steps "to stop this careless blasting." Plaintiff recovered \$2,000. It was nevertheless held that this should be reversed, and that it was not necessary under those facts for the city "to suspend or cancel the contract let." If that doctrine could be sound, then the established rule in this state, enounced in every other case in which it has come up for review, that the city is under an absolute duty to keep its streets reasonably safe, must be repudiated. This undeleagable duty on the part of the city is, however, maintained in the following cases: *Ryan v. Kansas City*, 232 Mo. 471, 134 S. W. 566, 985; *Benton v. St. Louis*, 217 Mo. loc. cit. 700, 118 S. W. 418, 129 Am. St. Rep. 561 (the latter citing all the cases); *Lindsay v. Kansas City*, 195 Mo. loc. cit. 178, 93 S. W. 273. The duty in question is nowhere stated with more pith and clearness than by Lamm, J., in the case of *Benton v. St. Louis*, supra, where it is said: "It [the city] cannot shirk that

duty, or shift it over to, or have it with, others. So much is the clear law in Missouri." In the light of this settled rule in this state, the *Blumb Case* is illy considered, and on this point it should be overruled.

IV. Wholly independent of the liability of the defendant city arising from its abortive attempt by contract to make a competent contractor out of a corporation and its managers and representatives whom it knew at the time of the contract were not such, and wholly aside from its effort to delegate to such corporation and persons its absolute duty to be responsible for the careful performance of work attended with danger, there is another distinct ground for the creation of a cause of action against the defendant city, which is positively alleged and stated in the petition in this case. It is this: The petition alleges that the city, contracting through its engineer with the construction company, stipulated and covenanted that each and all of its ordinances applicable to the doing of the work in question should be complied with (including the ordinance regulating blasting and requiring competent and licensed persons for that duty). This obligation assumed by the city enured to the benefit of all persons who could be injured by its breach. The defendant city, according to the allegations of the petition, committed an intentional and known breach of this contract and duty assumed by it, and became liable for this neglect to any person thereby injured. This was not a case of liability arising from the failure on the part of the city to enforce a police ordinance; but the case made by the petition and the contract entered into by the city is one for negligent breach of duty to require and prescribe safeguards to be employed in the doing of the work. That an action may be brought against the city which has let out work on its streets, for negligence, and that the ordinances of the city regulating such work are evidentiary, in support of such action, has been distinctly and positively enounced by this court in a recent opinion, with great clearness and force. According to the positive allegations of the petition under review, a cause of action is stated against the city for the negligent breach of its duty to require the work of sewer construction to be performed in strict accordance with its own ordinance safeguarding it. That ordinance, and the contract requiring its precautions to be observed, are set out in the petition in this case, and the charge is that the city negligently and knowingly failed to do its duty assumed by its

positive agreement. Now, in speaking of the force and admissibility of such a precautionary ordinance, this court said: "The ordinances themselves do not make a prima facie case, but may be considered with other facts in determining the question of negligence or no negligence upon the part of the city." *Ryan v. Kansas City*, 232 Mo. loc. cit. 485, 134 S. W. 570, 985. This differentiation between a cause of action originating from mere nonenforcement of a police ordinance and a cause of action based on negligence, in support of which such an ordinance is admissible, is clear and conclusive. Under the duty assumed by its contract in this case, the city was bound to require the observance of the safeguards prescribed by it, and which it covenanted to do in the very terms of the contract itself. Its negligence in failing to do this is the origin of one of the causes of action in the petition. Hence the ordinance in question is admissible in evidence as tending to prove that negligence, and for the added reason that the city contracted that it should be obeyed in this particular instance. For this reason we hold that the petition under review stated a cause of action entirely apart from any relationship, if such could have existed, which is denied, of employer and independent contractor on the part of the city and its codefendant.

Our conclusion is that the allegations in the petition in this case, fairly interpreted, state three causes of action: First, for negligence arising out of the employment of a contractor known to be incompetent and unskilful; second, for the negligent performance of work "attended with danger to others" by the contractor and its foreman and its blaster; third, for negligence and breach of duty on the part of the city in failing to require the observance of the safeguards against injury, which it contracted should be used. These conclusions put no obstacles whatever in the way of improvement and progress; for the defendant city has ample power, and is charged with the duty, under its own laws, to take bonds indemnifying it against any liability arising in the manner stated in this petition.

The general demurrer in this case should be overruled, and the city required to answer or make other defense to the causes of action stated in the petition.

Petition for rehearing denied March 1, 1912.
39 L.R.A. (N.S.)

WEST VIRGINIA SUPREME COURT OF APPEALS.

GUS SALINGER, Appt.,
v.

NORTH AMERICAN WOOLEN MILLS
et al.

(— W. Va. —, 73 S. E. 312.)

Evidence — written lease.

1. As a general rule a written lease of land becomes the repository of the contract, all preceding negotiations becoming consummated in it, and in the absence of fraud or mistake, it is the controlling evidence of the terms and conditions upon which the property was demised.

Landlord and tenant — outside walls — license.

2. The knowledge of a landlord, or of one of his tenants, and his or their acquiescence in the use by another tenant, without consideration, of the outside walls of a portion of the building not inclosing the part occupied by or leased to him, but leased to and occupied by another tenant, amounts simply to a revocable license, revocable at pleasure by the licensor, whether such licensor be the landlord or a tenant.

Same — right to outside walls.

3. The lessee of a storeroom, unless restrained by the terms of his lease, has the exclusive right to the use of the outside walls of that portion of the building covered by his lease, for advertising signs, to the exclusion of a lessee of another part of the same building, but he has no right to occupy with such signs, or for any purpose, the outside wall not inclosing his part of the leased premises.

License — revocability — lessee.

4. The rule giving right to the owner of a fee to revoke at pleasure a mere license to another to occupy his land, or any portion thereof, is equally applicable to his lessee, where such lessee is the licensor, unless the latter be restrained by the terms of his lease from granting such license.

Same — termination — method.

5. As a general rule a mere license is terminated by any act of the licensor which evinces an intention to revoke it, such as a conveyance or contract inconsistent with the continued enjoyment of the license.

(December 19, 1911.)

Headnotes by MILLER, J.

Note. — Right of tenants to use walls for advertising purposes.

As to the right of tenant to lease wall of building for advertising purposes, see note to *Louisville Gunning System v. Parks*, 13 L.R.A. (N.S.) 587; also *Forbes v. Gorman*, 25 L.R.A. (N.S.) 318.

As to the right to use a party wall for advertising purposes, see note to *Berry v. Godfrey*, 16 L.R.A. (N.S.) 434.

In the absence of express provision to

APPEAL by plaintiff from a decree of the Circuit Court for Wood County dissolving an injunction restraining defendants from interfering with advertising signs placed by plaintiff on the front outer walls of a store building occupied by him. Affirmed.

The facts are stated in the opinion.

Messrs. John F. Laird, D. C. Casto, and Dorr Casto, for appellant:

The lease of the tenant entitled him to so much of the premises as the landlord placed in his possession under the lease at the date of the lease in force, and Salinger's right and his possession under this lease must be determined by the practical construction of the lease, as interpreted by the acts of both the landlord and tenant in relation to the premises leased.

24 Cyc. 1044; 24 Cyc. 915, 916; Burwell v. Hobeon, 12 Gratt. 322, 65 Am. Dec. 247; Sanderlin v. Baxter, 76 Va. 299, 44 Am. Rep. 165; Scott v. Beutel, 23 Gratt. 1; Hardy v. McCullough, 23 Gratt. 251; Goddard, Easements, 120, 121; Elliott v. Rhett, 5 Rich. L. 405, 57 Am. Dec. 750; Washb. Easements, 85, 86; Scott v. Moore, 98 Va. 668, 81 Am. St. Rep. 749, 37 S. E. 342.

the contrary, a lease of a building or a part thereof for business purposes gives the lessee the exclusive right to the use of the outside walls of that portion of the building covered by his lease, for advertising purposes. Lowell v. Strahan, 145 Mass. 1, 1 Am. St. Rep. 422, 12 N. E. 401; Fuller v. Rose, 110 Mo. App. 344, 85 S. W. 931 (*obiter*); Riddle v. Littlefield, 53 N. H. 503, 16 Am. Rep. 388; Baldwin v. Morgan, 43 Hun, 355; Law v. Haley, 9 Ohio Dec. Reprint, 785; Scott v. Fox Optical Co. 21 Pittsb. L. J. N. S. 368; Broads v. Mead, 159 Cal. 765, 116 Pac. 46; Carlisle Café Co. v. Muse Bros. & Co. 67 L. J. Ch. N. S. 53, 77 L. T. N. S. 515, 46 Week. Rep. 107. *Contra*, Hele v. Stewart, 19 W. N. C. 129.

The lease of a storeroom in a one-story building does not carry with it the right to control the space on the front of the building above the top of the ceiling joists, so as to preclude the lessor from leasing such space to another person for advertising purposes. Booth v. Gaither, 58 Ill. App. 263.

A lease of a part of a single-story building, specifically describing the premises as a store and basement, does not preclude the lessor from erecting a billboard on the roof for advertising purposes, which does not interfere with the lessee's occupancy, where the lease imposes upon the lessor the duty of making repairs, and prohibits the lessee from making any alterations without the lessor's consent. Macnair v. Ames, 29 R. I. 45, 68 Atl. 950, 16 Ann. Cas. 1208.

In Lowell v. Strahan, *supra*, it was held that a lease demising "the first floor" in a

When the sign space to which several tenants have the right for their business purposes is properly and reasonably used by some of them to the exclusion of the remainder, the former, having prior possession, will not be enjoined from such exclusive use at the suit of the latter.

Law v. Haley, 9 Ohio Dec. Reprint, 785; Garrett v. Mulligan, 10 Phila. 339; Snyder v. Hersberg, 11 Phila. 200.

The circumstances and acts of the parties show that the right of Salinger to paint signs on the front of the building was a collateral agreement or consideration or circumstance, offered by Strong as an inducement to secure Salinger as a tenant. It is a part of the consideration for his lease.

Crawford v. Morris, 5 Gratt. 90; Ratcliffe v. Allison, 3 Rand. (Va.) 537; Alexander v. Newton, 2 Gratt. 266; Vance v. Snyder, 6 W. Va. 24; Campbell v. Fetterman, 20 W. Va. 410; Wendlinger v. Smith, 75 Va. 309, 40 Am. Rep. 727; French v. Williams, 82 Va. 462, 4 S. E. 591; Colhoun v. Wilson, 27 Gratt. 639; Wilfong v. Johnson, 41 W. Va. 283, 23 S. E. 730; Thomas v. Linn, 40 W. Va. 122, 20 S. E. 878; Browne, Parol Ev. § 50; Johnson v.

building included the outside of the wall as a part of the premises demised. The court distinguished the term "floor" from "room," and it is said that the word "room" excludes the outside of lateral walls. The language of the court was as follows: "The words 'first floor' in the building are equivalent to 'first story' of the building, and naturally include the walls. The apparent intention is to separate a section of the building as a distinct tenement. The words 'first floor' define the lower and upper boundaries of this, but there is nothing to fix the lateral boundaries except the boundaries of the building. In this respect the words differ somewhat from the word 'room.' 'Floor' means a section of the building between horizontal planes; the words 'in building' show that the section is of the whole building, and not of a part of it. The word 'room' includes a description of the perpendicular as well as of the horizontal planes which bound the parcel of the house described by it, and excludes the outside of lateral walls, at least when they constitute the walls of another room, as clearly as the words 'first floor' exclude the flooring of the story above it."

In Scott v. Fox Optical Co. *supra*, it was said, *obiter*, that a lease of a part of a building for the purpose of a dwelling does not carry with it the right to use the outside walls for advertising purposes.

In Bennett v. Seligman, 32 Mich. 500, it was held that the right of owners of a common stairway between two adjoining buildings, to use the walls along the stairway for the placing of signs and advertisements,

Burns, 39 W. Va. 658, 20 S. E. 686; Rymer v. South Penn Oil Co. 54 W. Va. 537, 46 S. E. 559; Heatherly v. Bank, 31 W. Va. 77, 5 S. E. 754; Seraggs v. Hill, 37 W. Va. 714, 17 S. E. 185; Crislip v. Cain, 19 W. Va. 438; Uhl v. Ohio River R. Co. 51 W. Va. 107, 41 S. E. 340; South & W. R. Co. v. Mann, 108 Va. 557, 62 S. E. 354; Chesapeake & O. R. Co. v. Deepwater R. Co. 57 W. Va. 673, 50 S. E. 890.

The lease of a portion of a building for a store or other business purposes gives the lessee the exclusive right to the use of the outer walls of that portion of the building so leased by him, for the purpose of posting advertisement and notices thereon.

24 Cyc. 1047; Lowell v. Strahan, 145 Mass. 1, 1 Am. St. Rep. 422, 12 N. E. 401; Martyr v. Lawrence, 2 De G. J. & S. 261, 4 New Reports, 312, 10 L. T. N. S. 677, 12 Week. Rep. 1043; Doe ex dem. Smith v. Galloway, 5 Barn. & Ad. 43, 2 Nev. & M. 240, 2 L. J. K. B. N. S. 182, 14 Eng. Rul. Cas. 804.

Acquiescence and silence on the part of Kinney & Carroll as tenants of a part of the second floor, and of Strong as owner, would, by itself, mature and ripen the easement of Salinger for the use of the front for signs, and would estop Kinney

is limited to that which is customary and reasonable.

A lessee of a room in a building is not entitled to remove a "For Rent" sign placed on the outside of the window after he has given notice of intention to quit, but before the expiration of the term for which he has paid rent, at least where he violated his contract by failing to give the notice the specified time before the date fixed for leaving. Whipple v. Gorsuch, 82 Ark. 252, 10 L.R.A.(N.S.) 1133, 101 S. W. 735, 12 Ann. Cas. 38.

Where the lessees are, by the terms of the lease, restricted to the use of the windows for advertising purposes, the lessor may place advertising matter on the outside of his building, so long as it does not damage or tend to injure the business of the lessees. Fuller v. Rose, 110 Mo. App. 344, 85 S. W. 931.

Offended taste will not support a right of action in favor of the lessee in such a case, but damage of a more substantial nature must be involved. Ibid.

Under the provision of a lease that no signs should be placed upon the front of the demised premises by the lessee, "that shall be detrimental to the other tenants in the building," it was held, upon the complaint of a tenant that defendant's sign interfered with the light entering the windows of the rooms rented by complainant, that he was entitled to relief, even though the injuries suffered by him were slight, and that the court would order the removal of the sign upon defendant's refusal to ad-

& Carroll and their licensees from asserting any right to lease the front to others.

16 Cyc. 719; Fourth Nat. Bank v. Olney, 63 Mich. 58, 29 N. W. 513; Headley v. Hoopengartner, 60 W. Va. 639, 55 S. E. 744; Despard v. Despard, 53 W. Va. 443, 44 S. E. 448; Levy v. Louisville Gunning System, 121 Ky. 510, 1 L.R.A.(N.S.) 360, 89 S. W. 528; Tufts v. Copen, 37 W. Va. 623, 16 S. E. 793.

Messrs. Thomas Coleman and Merrick & Smith, for appellees:

The privilege enjoyed by the appellant in placing his advertising signs on the front of the premises of Kinney & Carroll is that of licensee.

Mumford v. Whitney, 15 Wend. 380, 30 Am. Dec. 68; Lowell v. Strahan, 145 Mass. 1, 1 Am. St. Rep. 422, 12 N. E. 401; Jones, Land. & T. § 40.

Kinney & Carroll had a right to revoke the license or privilege enjoyed by plaintiff at their pleasure.

2 Minor, Inst. 28; Jones, Land. & T. § 37; 18 Am. & Eng. Enc. Law, 1144, 1146; Notes to Hicks v. Swift Creek Mill Co. 91 Am. St. Rep. 45, Harris v. Brown, 90 Am. St. Rep. 612, and Lawrence v. Springer, 31 Am. St. Rep. 712.

The grant by Kinney & Carroll of the

just it so as not to interfere with light entering complainant's windows. Oehme v. Shotland, 99 App. Div. 173, 90 N. Y. Supp. 958.

Where one of two persons who desired to lease a building had voluntarily permitted the other to entertain the belief that, if their negotiations came to a successful termination, the latter was to be allowed to place his sign at a particular place on the building, he cannot subsequently enjoin the erection of the sign in the manner specified. Garrett v. Mulligan, 10 Phila. 339.

The lessor's interference with signs lawfully placed upon the building by the tenant will amount to an eviction. O'Neill v. Manget, 44 Mo. App. 279.

Accordingly, it was held that a ticket broker who leases a space which was a part of a hotel office, 4 feet in width by 10 feet in length, immediately adjoining a window, with the right to use the window and the first brick column to the east of it for the purpose of advertising his business to be carried on at that place, and afterwards, on removing his place of business to an adjoining building, put up a notice painted on white calico which covered the lower half of the window, stating that he had so removed, which the landlord tore down and refused to allow, may vacate the premises and refuse to pay rent on the ground of eviction, where there is no evidence that the notice materially interfered with the use of the other parts of the room, or shut out the light. Ibid.

A. L. R.

right to the use of their front for advertising purposes was a formal revocation of the license enjoyed by the plaintiff.

18 Am. & Eng. Enc. Law, 1141; Pifer v. Brown, 43 W. Va. 412, 49 L.R.A. 497, 27 S. E. 399; Wilson v. St. Paul, M. & M. R. Co. 41 Minn. 56, 4 L.R.A. 378, 42 N. W. 600; Hicks Bros. v. Swift Creek Mill Co. 133 Ala. 411, 57 L.R.A. 720, 91 Am. St. Rep. 38, 31 So. 947; Bass v. Roanoke Nav. & Water Power Co. 111 N. C. 439, 19 L.R.A. 247, 16 S. E. 402; Fluker v. Georgia R. & Bkg. Co. 81 Ga. 461, 2 L.R.A. 843, 12 Am. St. Rep. 328, 8 S. E. 529; Jones v. Stover, 131 Iowa, 119, 6 L.R.A. (N.S.) 154, 108 N. W. 112; Pitzman v. Boyce, 111 Mo. 387, 33 Am. St. Rep. 536, 19 S. W. 1104.

The injunction was properly dissolved.

Cox v. Douglass, 20 W. Va. 175; Schoonover v. Bright, 24 W. Va. 698; Kester v. Alexander, 47 W. Va. 329, 34 S. E. 819; Crossland v. Crossland, 53 W. Va. 114, 44 S. E. 424.

Miller, J., delivered the opinion of the court:

Plaintiff, on bill filed, obtained an injunction restraining defendants and all other persons, from "destroying, removing, painting over, interfering with, or in any wise molesting, defacing, or changing, the painted advertisement and signs" placed by him on the front outer walls of the upper stories of the store building occupied by him on Court square in the city of Parkersburg.

On bill, answers of defendants, and affidavits filed on behalf of plaintiff, the court in vacation, on motion of defendants, dissolved the injunction, and plaintiff has appealed.

Plaintiff is lessee under Strong, the owner of the building, of the storeroom occupied by him, while defendants, Kinney & Carroll, are lessees of the two upper stories of the same building. Plaintiff first entered in October, 1907, as assignee of Rauch, a prior lessee. Subsequently, on April 1, 1908, the date of the expiration of the Rauch lease, pursuant to agreement Salinger obtained from Strong a new lease for five years, on the terms of the old, with privilege of an additional term of five years. Following this new lease, Strong by agreement with plaintiff, built an addition in the rear, and on October 1, 1908, the prior lease of April 1 was surrendered, and a second lease, covering the new addition, on the terms of the first, except that the rent was increased from \$60 to \$100 per month, was executed.

The grounds of relief alleged are, not 39 L.R.A. (N.S.)

that plaintiff's lease, in terms, gave him any right to occupy the front walls of the upper stories of the building with his signs, but that, prior to purchasing the lease from Rauch, and as an inducement thereto, Strong agreed that he might paint signs on said walls; and that Kinney & Carroll, tenants of the upper stories, and who had been such tenants for many years prior to plaintiff's purchase of the Rauch lease, had also consented thereto; and that before occupying said storeroom with his stock of goods, he had actually painted said signs on said upper walls, as they were at the time of filing his bill, and that he was so occupying said walls with his signs to the knowledge and acquiescence of Strong, and the knowledge and acquiescence of Kinney & Carroll, when Strong executed to him the two leases of April 1, and October 1, 1908, and when in August, 1910, the North American Woolen Mills Company, or Boso, its manager, claiming the right by contract with said Kinney & Carroll, and with Strong, the landlord, undertook to enter and paint out said signs, and occupy said walls with signs advertising the business of said Woolen Mills Company, and for which he sought to enjoin them.

The answer of Strong denies the alleged agreement, and denies that the subject of so occupying said upper walls with signs was ever mentioned by plaintiff prior or subsequent to plaintiff's purchase of the Rauch lease. His only admission is that some time after he executed the lease of April 1, 1908, plaintiff said to him that he was going to paint the upper walls, but that no mention was then or at any time made about painting signs thereon. He admits knowledge that plaintiff had painted signs on these walls, but he disclaims the right, as against Kinney & Carroll, his upper tenants, to authorize plaintiff to so occupy said walls, and he denies that he ever undertook to do so. He says he had no objection, if Kinney & Carroll had none, to plaintiff's use of said walls; and the latter, while denying any agreement with plaintiff that he might so occupy said walls, say they were not disposed to annoy or interfere with plaintiff in such use, so long as they had no opportunity to otherwise occupy said walls; but that, having had opportunity in August, 1910, to lease said walls at a profit, they had executed the contract to Boso for his Woolen Mills Company, and they denied any right in plaintiff by contract, license, or otherwise to longer occupy said walls with his signs.

While admitting said signs may be of value to plaintiff, all the answers deny any

alleged intention to injure him or his business, in making the contract with Boso, or that depriving him of the use of said walls for his signs will have that effect.

No evidence was offered in support of the bill, except the *ex parte* affidavit of plaintiff himself, to the effect that on August 20, 1910, M. Carroll, of the firm of Kinney & Carroll, had said to him that his firm had been compelled to sign the contract with Boso, for fear that, if they did not do so, Strong, the landlord, would require them to vacate the building, and that he, Carroll, personally did not then or at any time lay claim to any right to use said front walls for display signs, or the right to lease the same to anybody else, and that he would not have signed the contract with Boso, except for the threat of Strong and Boso to cancel their lease, a lease from month to month.

On this state of the pleadings and proofs, was the injunction properly dissolved? That a moral wrong may possibly be inflicted on plaintiff may be admitted. But the rights of plaintiff to longer occupy said walls with his signs depend solely on the nature of that right.

It is conceded that his lease does not in terms give him such right, and we must say from the record that he had no contract resting in parol, either with Strong, the landlord, or with Kinney & Carroll, the upper tenants, to so occupy said upper walls with his signs, for the allegations of his bill as to any such contract or agreement are denied by the answers, and there is no proof thereof. The rights of the plaintiff therefore rest solely upon the fact that Strong and Kinney & Carroll knew of plaintiff's use of said walls, and for so long a time did not object thereto. We do not see how this knowledge of Strong at the time he executed the leases to plaintiff can in any way affect the rights of the American Woolen Mills Company or Boso, under their contract with Kinney & Carroll, the upper tenants. The written lease from Strong to Salinger became the repository of plaintiff's contract, and all preceding negotiations were consummated in it, and it furnishes the controlling evidence, in the absence of fraud or mistake, of the terms and conditions upon which the property was demised. Jones on Landlord and Tenant, § 132. This is an elementary principle of contracts.

It is contended by counsel for defendants that the acquiescence of Strong and of Kinney & Carroll, in the use of said walls by plaintiff, amounted to a mere license, revocable at pleasure, and not to an easement. This proposition seems well
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founded in law. 2 Minor, Inst. 22; Mumford v. Whitney, 15 Wend. 380, 30 Am. Dec. 68; Lowell v. Strahan, 145 Mass. 1, 1 Am. St. Rep. 422, 12 N. E. 401. The proposition is particularly applicable where the license appertains to the occupancy of outside walls for advertising signs. Jones, Land. & T. § 40.

The question then is, Who had the right to give such license? If Kinney & Carroll, the upper tenants, had the right to control the use of the outer walls of that portion of the building occupied by them, they alone had the right to give the privilege or license to plaintiff, and no act of Strong could bind them, unless they had knowledge thereof and approved or acquiesced therein. Their answer is a denial of any knowledge of Strong's action or contract with plaintiff, and asserts their right to the use of said outer walls, and their legal right to contract the use thereof to the Woolen Mills Company. It is well settled also that a lessee has the exclusive right to the use of the outside walls of the portion of the building covered by his lease, to the exclusion of a lessee of another part of the same building, and has no right to use for any purpose any portion of the outside walls not inclosing his part of the premises. 1. Underhill, Land. & T. § 277. And this rule applies to the use of such walls for signs. Jones, Land. & T. § 108; 24 Cyc. 1047; Riddle v. Littlefield, 53 N. H. 503, 16 Am. Rep. 388. Our conclusion, therefore, is that Kinney & Carroll, and not Strong, had the right to control the outer walls of the upper stories of the building occupied by plaintiff. They were tenants thereof when plaintiff obtained his lease; he was charged with notice of their rights. He does not claim to have had any contract with them, and, having undertaken to occupy these walls without agreement with them, he did so at his peril.

Was the license of Kinney & Carroll revocable by them? Mr. Minor, 2 Minor, Inst. 22, says: "A license is sometimes revocable; namely, where if it is countermanded, it leaves the party *in statu quo*." And Mr. Jones says: "A mere license, unaccompanied with any vested interest in the real estate created by deed or other writing, and independent of any title acquired by grant, prescription, or adverse possession and claim for a period of the statute of limitations, must be deemed to be, in its own nature, countermandable, and essentially revocable at the will of the owner of the fee." Jones, Land. & T. § 37. But when the owner of the fee is not the licensor, we think the rule is equally applicable to a tenant, unless restrained by the

terms of his lease from granting such license. This latter proposition, we think fully supported by *Riddle v. Littlefield* and *Lowell v. Strahan*, supra. The license of *Kinney & Carroll*, having been without consideration, they could revoke it at any time. *Harris v. Brown*, 202 Pa. 16, 90 Am. St. Rep. 612, 51 Atl. 586; *Lawrence v. Springer*, 49 N. J. Eq. 289, 31 Am. St. Rep. 713, 24 Atl. 933; *Pifer v. Brown*, 43 W. Va. 412, 49 L.R.A. 497, 27 S. E. 399.

The remaining question is, Did *Kinney & Carroll* revoke the license? The general rule is that a license is terminated by any act of the licensor which shows an intention to revoke it, such as a conveyance or contract inconsistent with the continued enjoyment of the license. 18 Am. & Eng. Enc. Law, 1141; note to *Pifer v. Brown*, 49 L.R.A. 497, supra, and cases cited. The agreement in writing of *Kinney & Carroll* with the defendant *Boso*, giving to him the privilege of using said walls, is sufficient evidence, according to these authorities, of their intention to revoke the license to plaintiff.

We are of opinion, therefore, that the injunction was properly dissolved. The material allegations of the bill having been fully, fairly, plainly, distinctly, and positively denied in the sworn answers, and not proven, it was the duty of the court, on motion of the defendants, to dissolve the injunction. *Cox v. Douglass*, 20 W. Va. 175; *Schoonover v. Bright*, 24 W. Va. 698; *Kester v. Alexander*, 47 W. Va. 329, 34 S. E. 819; *Crossland v. Crossland*, 53 W. Va. 114, 44 S. E. 424. The decree below must therefore be affirmed.

MISSISSIPPI SUPREME COURT.

J. S. THOMAS, Appt.,

v.

FIRST NATIONAL BANK OF GULF-
PORT.

(— Miss. —, 58 So. 478.)

Draft — forged indorsement — name of mistaken holder.

The indorsement of a draft in his own name by one into whose hands it falls by mistake, being payable to another person bearing the same name, is a forgery, and will not protect a bank which innocently

Note.—The question, Who must bear loss where check or draft is purchased or paid upon the spurious indorsement of one who bears the same name as the payee or indorsee, is covered by the note to *S. Weisberger Co. v. Barborton Sav. Bank Co.* 34 L.R.A.(N.S.) 1101.

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cashes it upon such indorsement against the claim of the true owner.

(Smith, J., dissents.)

(May 8, 1912.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Harrison County in defendant's favor in an action brought to hold defendant liable for the proceeds of a draft in plaintiff's favor which it had paid on a forged indorsement. Reversed.

The case was tried upon an agreed statement of facts which was as follows:

"It is agreed by and between the parties hereto: That on and previous to the 23d day of October, 1909, the plaintiff, who is a white man and a citizen of said Harrison county, and whose business was that of riding about buying cattle, had on deposit in the First National Bank of De Funiak Springs, Florida, a balance of account of \$211, and that the plaintiff (who was then, and for some time had been, living, and is now living, at a point between Gulfport and Lyman, in said Harrison county, but nearest to Lyman, the two points, Gulfport and Lyman, being 8 miles apart) wrote a letter to the said bank at De Funiak Springs, requesting said bank to send said sum of \$211 to him at Gulfport, by letter, care general delivery, Gulfport, Mississippi, and in accordance with said instructions of plaintiff, said bank at De Funiak Springs, made out its draft No. 12,699, for said sum of \$211, on the National City Bank of New York, payable to the order of J. S. Thomas, intending the plaintiff, and immediately mailed same in the United States postoffice at De Funiak Springs, Florida, addressed as follows: 'J. S. Thomas, Gulfport, Miss.' The plaintiff had theretofore been writing some of his letters from Lyman, Mississippi, and some from Gulfport, and had been getting his mail some at Lyman and some at Gulfport. However, the letter written by plaintiff to the said bank at De Funiak Springs was written by plaintiff from said Gulfport. There lived, and had for some years lived, in Gulfport, a certain negro named J. S. Thomas, who can and could read and write, and who had a bank account at the First National Bank of Gulfport, the defendant herein (an itemized statement of whose entire deposits in defendant's bank to the date hereof is attached hereto as 'Exhibit C,') and who received his mail at said Gulfport. The authorized signature of said negro was filed by him with the defendant bank on February 4, 1907, where it still remains. When, by due course of mail, the letter from said Florida bank containing said draft reached

the United States postoffice at Gulfport, about October 25, 1909, the said negro, J. S. Thomas, was the first of said two persons of said name to call at the general delivery for the mail of J. S. Thomas, and the postal authorities in charge delivered the said letter to him. The said negro opened said letter, and coming into possession of said draft, took it on, to wit, October 26, 1909, during regular banking hours, to defendant's bank, indorsed same, 'J. S. Thomas,' in his own proper signature and handwriting, falsely representing it to be his own, and that he was the true J. S. Thomas mentioned as payee therein, by so indorsing and presenting said draft, and requested defendant bank to cash the same. The said negro was known to the officer of said defendant bank who was acting as paying teller at the time, but was not the regular teller, as J. S. Thomas, a depositor thereof, and the said officer of said defendant bank, having compared the indorsement 'J. S. Thomas' on the back of said draft with the signature of said negro, J. S. Thomas, on file, as aforesaid, and finding them to correspond, but without further inquiry, thereupon paid the amount called for by said draft, to wit, \$211 in cash, to said negro, J. S. Thomas; but said paying officer of defendant took no other means to ascertain the identity of said payee, J. S. Thomas, in the draft, merely paying said money upon its presentation and comparison of signature, as aforesaid. The original of said draft is herewith annexed, marked 'Exhibit A,' and made a part of this agreed statement of facts.

"The said defendant bank, at the close of its business on said October 26, 1909, in making up its items of paper to be forwarded to New York for payment, discovered that the said draft, Exhibit A, was erroneously safeguarded, as now appears on its face, in this, to wit, that, while said draft was intended to be for the sum of \$211, it was stamped with a machine called a protectograph, which had been caused by said De Funiak Springs bank to be erroneously stamped thereon, 'Not over Five Dollars, \$5,' and thereupon, on said date, said defendant bank sent the said draft by mail to said De Funiak Springs bank, calling its attention to said error, and requesting said Florida bank to send another draft in its place and stead properly safeguarded, which letter reached said Florida bank on the next day, October 27, 1909, and said Florida bank on the same day took up and retained the said first draft, Exhibit A, and on the same day, in its place and stead and in lieu thereof, mailed to defendant bank a new draft, No. 12,716, for \$211, payable to said defendant bank, which is herewith annexed 39 L.R.A. (N.S.)

as 'Exhibit B,' and made a part of this agreed statement of facts, which said last draft was duly received by said defendant bank and by it at once forwarded to New York, where it was paid in full to defendant bank out of the funds of the said First National Bank of De Funiak Springs, Florida, by and in the said National City Bank of New York, as is the banking custom in such cases. The amount was charged by the said Florida bank against the account of plaintiff and balanced same. That the receipt and opening said letter containing said draft, and cashing of the same at the defendant bank, and the indorsement and presentation of the same by said negro, J. S. Thomas, were all and singular without the information, knowledge, or consent of the plaintiff, J. S. Thomas; and that, upon learning from said Florida bank, upon inquiry, that the said sum of money, to wit, \$211, the proceeds of said draft, had been paid to the defendant bank, he went on, to wit, November 5, 1909, to said defendant bank and claimed said draft and proceeds thereof, and demanded payment of the same by the defendant to the plaintiff, as the true owner of said draft, and then and there notified said defendant bank that said indorsement was a forgery, and that he had not indorsed the same. The defendant bank refused to pay said sum of \$211, or any part thereof, to the plaintiff, and still refuses, though often requested. Upon said demands being made, said defendant bank notified the United States postal authorities and the police authorities of the said city, and endeavored to have said negro, J. S. Thomas, arrested, and requested plaintiff to have him arrested, or ascertain his whereabouts, for such fraudulent conduct and acts; but said negro was not found after search by all said parties, and it is believed by the said parties that he left said community after having received said money on said draft as aforesaid.

"The plaintiff, J. S. Thomas, had also formerly been a depositor at the said defendant bank, but closed his account there September 14, 1908, and has done no business with said bank since said date. On the books of said defendant bank the address of said plaintiff, J. S. Thomas, is Lyman, Mississippi, and said defendant bank, while it was doing business with said plaintiff, sent his statements and other communications to him at Lyman. The said sum of \$211, or any part of it, was never placed to the credit of said plaintiff, and he has never received said money or any part thereof, from any source. The said plaintiff knew, when he wrote to the said Florida bank, that one (another) J. S. Thomas had been a depositor and customer of said de-

fendant bank, but did not know him, and had never seen him; but did know that such a person did live, or at least had lived, in Gulfport. That all the indorsements upon said draft, Exhibit A hereto, are now as each originally was after being returned to said Florida bank, but the statement of 'J. S. Thomas' on the back thereof is not the signature of the plaintiff, that is to say, not his handwriting, nor was it written there with the knowledge or consent of the plaintiff. The words 'Paid Oct. 27, with our draft No. 12,716 favor of First National Bank, Gulfport, Miss.,' were written on the back of Exhibit A by the De Funiak Springs bank upon issuing Exhibit B hereto. That the negro, J. S. Thomas, who unlawfully took said draft, Exhibit A, as aforesaid, never had any deposit or balance with the said De Funiak Springs bank, and the said draft was not intended for him, but for the plaintiff; but said defendant bank knew nothing of either of said parties named J. S. Thomas having or not having any deposit in said Florida bank, nor which of said parties it was intended to have said draft, and was wholly without knowledge in that regard, but defendant bank did know that the plaintiff had been a depositor in defendant bank, and that his signature was there on file. It is further agreed that said cause may be heard without further pleadings before the judge of the circuit court aforesaid, without a jury, and before the supreme court if an appeal is taken, upon the above statement of facts (and the law applicable thereto), which are all the facts in the case."

Mr. George P. Money, for appellant:

The bank is liable.

Farmer v. People's Bank, 100 Tenn. 187, 47 S. W. 234; Shaffer v. McKee, 19 Ohio St. 526; 1 Morse, Banks & Bkg. p. 248; Pickle v. Muse (Pickle v. People's Nat. Bank) 88 Tenn. 381, 7 L.R.A. 93, 17 Am. St. Rep. 900, 12 S. W. 919; Chism v. First Nat. Bank, 96 Tenn. 641, 32 L.R.A. 778, 54 Am. St. Rep. 863, 36 S. W. 387; Talbot v. Bank of Rochester, 1 Hill, 295; Buckley v. Second Nat. Bank, 35 N. J. L. 400, 10 Am. Rep. 249; Salomon v. State Bank, 28 Misc. 324, 59 N. Y. Supp. 407; Johnson v. First Nat. Bank, 6 Hun, 124; Bobbett v. Pinkett, L. R. 1 Exch. Div. 368, 45 L. J. Exch. N. S. 555, 34 L. T. N. S. 851, 24 Week. Rep. 711; Colson v. Arnot, 57 N. Y. 253, 15 Am. Rep. 496; Beattie v. National Bank, 174 Ill. 571, 43 L.R.A. 654, 66 Am. St. Rep. 318, 51 N. E. 602.

The decision is sustained by —

Gallo v. Brooklyn Sav. Bank, 199 N. Y. 222, 32 L.R.A. 66, 92 N. E. 633; Indiana 39 L.R.A. (N.S.)

Nat. Bank v. Holtsclaw, 98 Ind. 85; Bank of Commerce v. Ginocchio, 27 Mo. App. 661; Dodge v. National Exch. Bank, 20 Ohio St. 234, 5 Am. Rep. 648, 30 Ohio St. 1; Graves v. American Exch. Bank, 17 N. Y. 205.

Messrs. Bowers & Griffith, for appellee:

The drawer should suffer in case of error induced by his own act.

Morse, Banks & Bkg. pp. 851-853; Snodgrass v. Sweetser, 15 Ind. App. 682, 44 N. E. 648.

Mayes, Ch. J., delivered the opinion of the court:

By agreement a jury was waived, and this case was tried by the judge on an agreed statement of facts. It is therefore unnecessary for us to set out at length any statement of the facts. The suit was instituted by J. S. Thomas against the bank for the purpose of recovering \$211. The agreed facts show that on and prior to the 23d day of October, 1909, the appellant in this suit had on deposit in the First National Bank of De Funiak Springs, Florida, a credit balance of \$211. Appellant, being in Gulfport, wrote a letter from that point to the Florida bank requesting the bank to send the amount of his deposit to him at Gulfport, care of the general post-office delivery. In accordance with this instruction, the Florida bank sent a draft for the amount on a New York bank, payable to the order of appellant, J. S. Thomas; the Florida bank addressing the letter containing the draft to J. S. Thomas, Gulfport, Mississippi, care general delivery. The appellant was a white man, and there was living in Gulfport at that time a negro by the name of J. S. Thomas, and this negro also received his mail at Gulfport. When the letter containing the draft reached Gulfport, October 25, 1909, it seems that appellant was not then in Gulfport; but the negro J. S. Thomas called for his mail at the general delivery, and the postal authorities delivered the letter intended for appellant and containing the draft to the negro of the same name. The negro opened the letter, and, finding the draft in it, took it to the First National Bank of Gulfport and indorsed same "J. S. Thomas," representing that the check was his and that he was the true J. S. Thomas mentioned as payee. The negro was known to the officers of the Gulfport bank and was a depositor in same. When the draft was indorsed to the bank by the negro, the bank paid the money to the negro J. S. Thomas. Subsequently, the Gulfport bank discovered some little mistake in the protectograph stamping of the draft, which mistake was made

by the Florida bank when it issued the draft. The Gulfport bank returned the draft by mail to the Florida bank, calling their attention to the error, and requesting the Florida bank to send another draft in its place. The Florida bank merely retained the original draft, and in place of same sent another one for the same amount, but this time made it payable to the Gulfport bank; the former draft having been already indorsed to the Gulfport bank by the negro J. S. Thomas. The draft was finally paid to the Gulfport bank when it was presented for payment in New York. The Gulfport bank had no knowledge of the fact that the negro did not own this draft. Appellant, J. S. Thomas, the white man, subsequently learned from the Florida bank that the Gulfport bank had collected the \$211, and when he received this information he went to the Gulfport bank and claimed the draft and the proceeds thereof, demanding that the Gulfport bank pay the same. J. S. Thomas, the real owner of the draft, notified the Gulfport bank that the indorsement was a forgery. The Gulfport bank refused to reimburse the true owner. The negro J. S. Thomas in the meantime had left for parts unknown. In other words, the facts of this case conclusively show that the appellant was the owner of the draft, and that the negro who presented it had no interest in it, and had forged the indorsement of the true owner and collected the proceeds from same. Some other facts are agreed to, but we do not think they are important in the consideration of this case. The question in this case is simply this: Where there are two people of the same name, and a check, by accident, reaches the hands of the wrong person, and the person wrongfully obtaining the check indorses his name on same and receives the proceeds from an innocent third party, is such an indorsement a forgery, and is the innocent party protected as against the true owner? The trial court held that it was not such a forgery as would fasten any liability on the bank, and from this judgment this appeal is taken.

There seems to be little dissent in the authorities; almost, if not quite, all the authorities holding that under such circumstances the party paying the check to the one forging the indorsement is not protected. Under such circumstances, it is nothing but a forgery. The true owner of the check is not placed beyond the protection of the law because some unscrupulous person of the same name lives in the same town with him. The true owner has never parted with his title, and his property is not to be taken away from him without
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his consent merely because the check happens to fall into the hands of another of the same name. Banks taking checks must know the true parties claiming to own them,—in fact, who do own them,—and they act at their peril. Where there are two or more persons of the same name, it cannot be anticipated that one of them will commit a crime and forge the name of the other to an instrument which may have accidentally come into his hands. The true owner of the check was guilty of no sort of neglect which would operate as an estoppel on him. He had a right to have his mail sent to him at the general delivery at Gulfport.

In the case of *Beattie v. National Bank*, 174 Ill. 571, 43 L.R.A. 654, 66 Am. St. Rep. 318, 51 N. E. 602, the court holds that "where a bill is payable to the order of a person, and another person of the same name of the payee gets hold of it and indorses it to a party who takes it in good faith and for value, such party acquires no title to the bill. . . . If the indorsement, so made by a person who is not the real payee, but has the same name as the real payee, is made by such person with full knowledge that he is not the real payee, and with intent to perpetrate a fraud, his indorsement cannot be regarded otherwise than as a forgery." To the same effect are many cases cited in the opinion in the above case.

It is true that Mr. Morse, in his work on *Banks and Banking*, vol. 2, at page 852, states in his text that under such circumstances he does not think that the rule announced above is correct; but he admits in this same text that, "though the propriety of the ruling may be criticized, it must be admitted that it lays down the only adjudicated law in the premises, except a remark made in an old case in New Hampshire;" and he further says: "The only English authority is to the same effect." Mr. Morse's view is that "the technical rule of law declaring the indorsement [under such circumstances] a forgery is too strong for the principles of justice;" but he is much alone in this view. We prefer to follow what seems to be the settled authority upon this subject, not only because the authorities are that way, but because we differ from Mr. Morse, and believe that the principles of justice announced by the decisions are more in accord with true principles of right than the view stated by Mr. Morse. It is difficult for us to understand by what principle of right a man should have his money or valuables taken from him because he has the misfortune, through no fault of his own, to have the same name

as some other person in the same town. It is difficult for us to understand how the true owner of a draft may lose his property rights in same by reason of the fact that it has fallen into the hands of another person of the same name, and that other person has forged an indorsement of his name to the instrument and obtained money for it, when the true owner knew nothing about it.

In the Beattie Case, *supra*, the court held that the true owner of a draft could recover its value where the person receiving it had the same name, but not the same middle initial. In other words, in the Beattie Case, the draft sued upon was made payable to the order of one George A. Bent, when in truth it was intended for George P. Bent. The draft was mailed to George A. Bent, and George A. Bent received it and indorsed upon it his own name and sold it to a purchaser in good faith; but the court held, notwithstanding this, that the purchaser got no title, saying: "It is true that the real and intended payee of the draft was named George P. Bent; but the fact that the name of the real owner and the name of the fraudulent possessor of the draft differ so far as the middle letter of the name is concerned, does not make the case other than a case where the name of the real payee and the name of the assumed payee are the same. This is so because the law does not regard the middle initial letter as a part of a person's name, but only recognizes one Christian name of a party."

It is readily seen that the above case is a stronger case than this one, because there was a difference in the name; that is, a difference in the initial. But in this case there was not such a difference, but the name was identical.

The case is reversed, and judgment here for appellant.

McLean, J., specially concurring:

Whenever a bank pays a check drawn upon it, or upon any other bank, it does so at its peril; it is the duty of the bank to know that it is paying the money to the right party, and if the party presenting the check for payment is not the party, he is necessarily guilty of forgery in presenting the check with the name of the wrong party having been indorsed thereon by him. The fact that both parties have the same name does not, and cannot, in the very nature of things, alter the question. The fact that one writes his own name across the check, and knowing that the check is payable to another party, makes him as guilty of forgery as if he had personated another

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person, and had forged the name of the other person,—in truth and in fact, when he does this, he is personating another person. The bank must look alone to the party presenting the check for a good title. Any other doctrine would result in a party losing his property without any fault on his part. The rule is well settled that an indorser guarantees the genuineness of all prior indorsements.

It is an elementary principle that, when one or two equally innocent persons must suffer, he by whose fault or neglect the loss is caused must bear the burden. Suppose the check in this case had been made payable to Bill Smith, and that the negro named Thomas had written the name Bill Smith in blank across the back of the check, and presented the check for payment, at the same time stating to the appellee that Smith had indorsed the check, could not in that case Bill Smith, the true owner of the check, have recovered his money? We see no difference in principle between such a case and the instant one. The difficulty with appellee is in confusion the real owner of the check with a party who bears the name of the real owner,—it fails to distinguish between a name and the person.

Smith, J., dissenting:

I regret that I am unable to concur in the conclusion reached by my brethren. My views will be found expressed in 2 Morse, Banks & Bkg. 4th ed. p. 851, better than I can do so myself.

Suggestion of error overruled June 4, 1912.

NEW JERSEY COURT OF ERRORS AND APPEALS.

CHANCELLOR OF NEW JERSEY, Respt.,
v.

JOSEPH TOWELL et al.
and

PHILEMON WOODRUFF et al, Exrs., etc.,
of Absalom B. Woodruff, Deceased,
Appts.

(— N. J. —, 82 Atl. 861.)

Mortgage — vendee — assumption of debt.

1. Where a purchaser of a part of mortgaged premises assumes the payment of all

Headnotes by VREDENBURGH, J.

Note. — Rule as to inverse order of alienation as affected by assumption of mortgage debt.

The decision in CHANCELLOR v. TOWELL, to the effect that the rule of inverse order

of the mortgage on the whole of such premises, the land so purchased is liable for the mortgage debt before the portion of the mortgaged premises remaining unconveyed by the mortgagor or his estate can be sold in satisfaction of the mortgage debt.

Same—conveyance—rule in equity.

2. In such cases, the rule in equity that the aliened portions shall be sold in the inverse order of their alienation does not apply.

Equity—circuity of action.

3. One of the cogent reasons for denying the application of this rule in such cases, beyond that of enforcement of the performance of the contract of assumption, is the anxiety of a court of equity to avoid the circuity of action which would necessarily result from the sale on foreclosure of the mortgage, of the mortgagor's remaining

of alienation in applying parts of mortgaged property conveyed at different times does not apply where a grantee of a part which would not ordinarily be primarily liable assumes the payment of the mortgage debt, is in accord with a well-recognized exception to the application of the inverse order of alienation rule.

The reason for this exception is that, to hold the so-called rule of inverse order of alienation applicable in such a case would produce a result not in accord with the principles of equity, and since the rule itself is of equitable origin, it will not be applied where the equitable reasons upon which it rests cease to exist, and are entirely wanting.

As between mortgagor and his grantee or privies.

The exception to the general rule just referred to was given effect in the following cases arising between mortgagors and their grantees, with the result that the portion of the land conveyed was held primarily liable;

—where the grantees of part of the mortgaged premises, in the conveyance to them, assumed the payment of the mortgage debt. *State v. Ripley*, 32 Conn. 150; *Burger v. Greif*, 55 Md. 518; *Jager v. Vollinger*, 174 Mass. 521, 55 N. E. 458; *Cooper v. Bigly*, 13 Mich. 463; *Mowry v. Mowry*, 137 Mich. 277, 100 N. W. 388; *Burbank v. Babcock*, 3 N. Y. S. R. 458; *Russell v. Pistor*, 7 N. Y. 171, 57 Am. Dec. 509; *Bowne v. Lynde*, 91 N. Y. 92;

—where the grantee of part of mortgaged premises assumed the payment of all of the mortgage notes. *Mead v. Peabody*, 183 Ill. 126, 55 N. E. 719;

—where an amount equal to the mortgage debt was deducted from the purchase price, and title given subject to the mortgage. *Wood v. Harper*, 9 App. Div. 229, 41 N. Y. Supp. 242.

And one who purchases a part of mortgaged premises from a grantee of such part, who undertook as a part of the purchase price to pay the entire mortgage debt, takes 39 L.R.A. (N.S.)

lands before those of the defaulting purchaser have been applied toward the satisfaction of the mortgage debt.

Mortgage—assumption—estoppel.

4. The fact that the defendant Towell became an alienee of the second and third tracts, conveyed to him expressly subject to the mortgage which he had previously covenanted to pay, must be regarded as decisive against him of the question of his equity, which he has raised upon this appeal.

(March 5, 1912.)

A PPEAL by defendants executors of Ab-salom B. Woodruff, deceased, from the portion of the decree of the Court of Chancery, directing the order in which the sev-

them subject to their primary liability for the payment of the mortgage debt, where he had knowledge of his grantor's undertaking. *Chapman v. Beardsley*, 31 Conn. 115; *Engle v. Haines*, 5 N. J. Eq. 186, 43 Am. Dec. 624; *Ross v. Haines*, 5 N. J. Eq. 632.

And where a grantee of part of mortgaged premises assumes the mortgage and executes a mortgage to secure the purchase price to his grantor, this part of the premises is primarily liable, although the last mortgage referred to was assigned to a third person. *Clark v. Benthem*, 4 Ohio Dec. Reprint, 498.

And where a grantee of part of mortgaged premises assumes the mortgage debt, one who purchases on foreclosure of a mortgage executed by such grantee to his grantor takes the premises subject to their primary liability for the payment of the original mortgage. *Russell v. Pistor*, 7 N. Y. 171, 57 Am. Dec. 509.

And in *Re Wisner*, 20 Mich. 442, it was held that, as between the estate of a deceased husband and his widow, the homestead conveyed by him to her subject to the amount unpaid on a mortgage thereon was primarily liable for the payment of the mortgage debt.

See also *Thompson v. Bird*, set out by the court in *CHANCELLOR v. TOWELL*.

As between grantees of part of mortgaged premises or their privies.

The exception holding that the rule as to inverse order of alienation does not apply where the mortgage debt is assumed by a grantee of a part of the encumbered premises is recognized as well between the several grantees of the mortgagor and their privies, as between the grantor and his grantees.

Thus, the rule was given effect in the following cases arising between the mortgagor's grantees, holding that the part of the premises first conveyed was primarily liable:

—where the grantee of such part assumed the payment of the mortgage debt.

eral parcels of mortgaged premises should be sold under foreclosure. Reversed.

The facts are stated in the opinion.

Mr. William I. Lewis, for appellants:

Inasmuch as Towell is the principal debtor, and A. B. Woodruff and his representatives are but sureties for the payment of the mortgage debt of \$13,000, all the property of Towell which is subject to the mortgage must be sold to satisfy it, before such property of his surety as is subject to such mortgage.

Woodside v. Adams, 40 N. J. L. 417; Wikoff v. Davis, 4 N. J. Eq. 227; Crowell v. Hospital of St. Barnabas, 27 N. J. Eq. 652; Klapworth v. Dressler, 13 N. J. Eq. 62, 78 Am. Dec. 69; Cumberland Trust Co. v. Padgett, 70 N. J. Eq. 353, 61 Atl.

837; Huyler v. Atwood, 26 N. J. Eq. 506; DeGrauw v. Mechan, 48 N. J. Eq. 227, 21 Atl. 193; Weatherby v. Slack, 16 N. J. Eq. 493; Irick v. Black, 17 N. J. Eq. 189; Delaware, L. & W. R. Co. v. Oxford Iron Co. 38 N. J. Eq. 151; Philadelphia & R. R. Co. v. Little, 41 N. J. Eq. 528, 7 Atl. 350; Cubberly v. Yager, 42 N. J. Eq. 289, 11 Atl. 113; Rue v. Meirs, 43 N. J. Eq. 377, 12 Atl. 369; Kidd v. Hurley, 54 N. J. Eq. 177, 33 Atl. 1057; Holcombe v. Fetter, 70 N. J. Eq. 300, 67 Atl. 1078.

The decree is plainly erroneous in not directing that any deficiency arising upon the sales of parcels 1 and 2 should be borne by parcels 3, 4, and 5, in proportion to their relative value.

Hoy v. Bramhall, 19 N. J. Eq. 563, 97

Iowa Loan & T. Co. v. Mowery, 67 Iowa, 113, 24 N. W. 747; Windsor v. Evans, 72 Iowa, 692, 34 N. W. 481; Jager v. Vollinger, 174 Mass. 521, 55 N. E. 458; Caruthers v. Hall, 10 Mich. 40; Mason v. Payne, Walk. Ch. (Mich.) 459; Black v. Morse, 7 N. J. Eq. 509; Wikoff v. Davis, 4 N. J. Eq. 224; Wood v. Harper, 9 App. Div. 229, 41 N. Y. Supp. 242; Russell v. Pistor, 7 N. Y. 171, 57 Am. Dec. 509; Wilcox v. Campbell, 106 N. Y. 325, 12 N. E. 823; Coles v. Appleby, 87 N. Y. 114; Baring v. Moore, 4 Paige, 166;

—where the grantee of a portion of the mortgaged premises, which was of sufficient value to pay the mortgage debt, assumed the whole debt. Welch v. Beers, 8 Allen, 151.

In Skinner v. Harker, 23 Colo. 333, 48 Pac. 648, where the grantees of a portion of mortgaged premises agreed as part of the consideration to pay the entire mortgage indebtedness, and the mesne grantees made the same agreement, with the exception of the last, who undertook only to pay a proportionate part of the indebtedness, it was held, as between such grantees and a subsequent grantee who purchased of the mortgagor with the understanding that the debt was to be paid by the grantees of the part first conveyed, that that part was the primary fund out of which the whole mortgage indebtedness should be paid.

And in Pool v. Marshall, 48 Ill. 440, it was held that a grantee of a part of mortgaged premises, who retained part of the purchase price and paid the mortgage debt, could not enforce contribution against a grantee who purchased another part of the encumbered premises after the first conveyance was made.

And in Wright v. Briggs, 99 Ind. 563, where the purchaser of part of mortgaged premises undertook to pay the mortgage debt, and stated to a purchaser of the remainder that he was bound to pay such debt, it was held that the grantee of the last purchaser, who relied upon the first purchaser's agreement, might recover from the latter the amount paid to discharge the mortgage debt, and might maintain

foreclosure proceedings against the portion of the premises first conveyed.

In Bowne v. Lynde, 91 N. Y. 92, where a mortgagor purchased land from one who took as part payment the bond and mortgage of a person to whom the mortgagor had conveyed a part of land owned by him under an agreement by which his grantee assumed the payment of the mortgage debt, it was held, it appearing that the mortgagor's grantor had knowledge of these facts, that the part of the mortgaged premises referred to was primarily liable for the payment of the mortgage debt.

And in Cooley v. Murray, 11 Colo. App. 241, 52 Pac. 1108, a grantee of part of mortgaged premises who assumed and agreed to pay the mortgage debt was held liable to a subsequent grantee of another portion of the encumbered premises, for the amount left due after the first grantee's part of the premises had been sold.

But where the mortgagor releases the grantees of a part of mortgaged premises from their assumption of the mortgage debt, such part of the premises is, as against subsequent grantees of the remainder of the mortgaged property, relieved from its primary liability. Judson v. Dada, 79 N. Y. 373.

Where conveyance is made subject to mortgage.

Where a conveyance of part of mortgaged premises is made subject to the mortgage, it is also held that such portion of the premises is primarily liable. Moore v. Shurtleff, 128 Ill. 370, 21 N. E. 775; Boone v. Clark, 129 Ill. 466, 5 L.R.A. 276, 21 N. E. 850; Monarch Coal & Min. Co. v. Hand, 197 Ill. 288, 64 N. E. 381; Brown v. South Boston Bank, 148 Mass. 300, 19 N. E. 382; Hoy v. Bramhall, 19 N. J. Eq. 74; Hill v. McCarter, 27 N. J. Eq. 41; New England Loan & T. Co. v. Stephens, 16 Utah, 385, 52 Pac. 624.

The court in Moore v. Shurtleff, supra, said: "The general rule of inverse order above stated is never applied where the parties, by an agreement in their deed, have

Am. Dec. 687; *Stillman v. Stillman*, 21 N. J. Eq. 129; *Hill v. McCarter*, 27 N. J. Eq. 41; *Harrison v. Guerin*, 27 N. J. Eq. 219.

Mr. George S. Hilton, for respondent.

Where a part of granted premises has been aliened by the grantor, and a part retained by him, the part retained, as between the grantor and his alienee, is primarily chargeable with the mortgage debt.

Hoy v. Bramhall, 19 N. J. Eq. 563, 97 Am. Dec. 687; *Stillman v. Stillman*, 21 N. J. Eq. 126; *Hill v. McCarter*, 27 N. J. Eq. 41; *Harrison v. Guerin*, 27 N. J. Eq. 219.

Vredenburg, J., delivered the opinion of the court:

This controversy concerns the order of sale of parcels of mortgaged premises under foreclosure, and involves the correctness of the decree below in directing certain of the parcels which remain unconveyed by the mortgagor and his executors, to be sold before resort be had to certain previously conveyed parcels, called in the decree the "Second and Third Tracts."

In December, 1870, Absalom B. Woodruff, being seised of a tract of land in Paterson, New Jersey, became indebted to the chancellor of New Jersey in the sum of \$13,000,

charged a mortgage upon land in a different manner, 'as where, by the terms of sale of a part of the premises, the mortgage is made a common charge, or that part conveyed is subjected to a proportionate part of the encumbrance. In such cases, if there be no specific agreement as to the proportion which each part is to bear, contribution must be made according to the relative value of each part.' 2 Jones, *Mortg.* § 1625. . . . It is clear, therefore, that, notwithstanding lot 5 was conveyed before lot 4, under the agreement between the parties, it was not relieved from the lien of said trust deed, but remained primarily liable, so far as made so by the terms of said agreement."

And in *Briscoe v. Power*, 47 Ill. 447, it was held that where the first grantee of part of mortgaged premises expressly takes subject to the mortgage, his portion of such premises is liable to a *pro rata* share of the encumbrance equally with that of a subsequent grantee who also took subject to such mortgage.

And in *Hanes v. Denby*, — N. J. Eq. —, 28 Atl. 798, where a part of mortgaged premises were conveyed by a deed of warranty expressly excepting the mortgage, and the balance of the property was later conveyed, it was held that the part first conveyed was chargeable with a proportionate part of the mortgage debt.

But it has been held that the mere recital in a conveyance of part of mortgaged premises that it was subject to the mortgage is not sufficient to constitute such land a primary fund out of which the debt

and gave his bond for double that sum in the usual form to the chancellor, conditioned to be void if he (*Woodruff*) should pay that sum, with interest, upon the happening of the deaths of two named persons (then living, but who have since died), and to secure such payment executed, at the same time, a deed of mortgage covering his said land, containing the same conditions as the bond.

Woodruff died October 11, 1886, but before that event conveyed, by deed of warranty, two separate parcels of the land embraced in the mortgage on the dates following: First, on July 5, 1882, a parcel described in the master's report as the "First Tract," containing 4 acres, to the defendant *Joseph Towell*; second, on March 5, 1885, another parcel in lots numbered on a map as lots 142, 144 (part of lot 146), 171, 173, and part of lot No. 175, described in the master's report as the "Second Tract," to the said *Joseph Towell*. After *Woodruff's* death, his executors, by an executors' deed drawn in the usual form and without covenants of warranty, thirdly, conveyed on February 16, 1887, another parcel of said mortgaged land, described in the master's report as the "Third Tract," being com-

is to be satisfied. *Slater v. Breese*, 36 Mich. 77; *Hall v. Morgan*, 79 Mo. 47.

Effect upon mortgagee's rights.

In *Palmer v. Snell*, 111 Ill. 161, it was held that the mortgagee could not be compelled to resort to his personal remedy against a grantee of part of the mortgaged premises who assumed the mortgage debt, before resorting to another part of the land subsequently conveyed. The court said: "But even had *James T. Snell* assumed the payment of the mortgage debt, so as to have given a right of resort to him personally, to the mortgagee for the mortgage debt, the rule here invoked, which compels a first resort to a particular one of two funds for a creditor's benefit who can reach but one of them, would not be applied in such a case as this, so as to require, first, the exhaustion of the personal remedy against *Snell*. This rule will not be enforced whenever it will trench upon the rights or operate to the prejudice, of the party entitled to the double fund. *Sweet v. Redhead*, 76 Ill. 374. The mortgagee's right to a prompt foreclosure of his mortgage is not to be impeded by compelling a first resort to any personal remedy the mortgagee may have."

And in *Waters v. Hubbard*, 44 Conn. 340, it was held that where the mortgagee was entitled to all of the mortgaged property in case the debt was not paid, a decree should not be made first requiring the appropriation of a part of the property conveyed to a grantee who had assumed the payment of the mortgage debt, before taking the remainder of the property. J. T. W.

posed of lots Nos. 140 and 169, in block A, as laid down on a map, to the said Joseph Towell. There was then left unconveyed in the estate of Woodruff lots 139, 141, 143, 145, 149, 151, and part of 153, on the west side of Lilly street, as indicated on said map.

The appellants urge that the above-designated second and third tracts should have been decreed to be sold next after the sale of the said first tract, to pay any deficiency (there being no dispute as to its priority of liability) of the proceeds of sale necessary to satisfy the mortgage debt remaining after the sale of the said first tract, and before resort be had to the said unconveyed lots still owned by the appellants. The decree complained of, on the contrary, orders these unconveyed lots to be sold before the said second and third tracts are exposed to sale; and hence the dispute which is the subject of the present appeal.

In the sale from Woodruff to Joseph Towell, dated July 5, 1882, the latter, in consideration of that conveyance to him, entered into an absolute agreement and covenant, therein set forth next to the description of the parcels conveyed by it, as follows, *viz.*: "And which is hereby sold subject to a mortgage executed by the said Woodruff to the chancellor of New Jersey, to secure the payment of \$13,000 to the said chancellor, with interest, as in said mortgage stated, which mortgage was dated December 16th, 1870, or about that time, and the payment of which said sum of \$13,000, with interest, as in said mortgage stated, the said Joseph Towell hereby assumes and covenants for himself, his heirs, executors, and administrators, to and with the said Absalom Woodruff, his executors, administrators, and assigns, to pay off and discharge according to the terms and conditions in said mortgage mentioned, including the buildings, plants, trees, and flowers thereon."

On the same date (July 5, 1882), said Towell, with his wife, executed an indemnifying mortgage to said Woodruff covering the same land and premises conveyed to Towell by the last-mentioned deed, stating in said mortgage "that the premises thereby mortgaged were the same conveyed by said Woodruff to said Towell by said deed subject to said \$13,000, and the payment of which said sum of \$13,000 secured by said mortgage of \$13,000, with interest, was by said Towell assumed; provided always, and said mortgage from said Towell to said Woodruff was therein declared to be, upon the express condition, that if the said Towell, his executors or administrators, did and should well and truly pay or cause to be

paid to the chancellor the sum of money and interest secured by said \$13,000 mortgage to said chancellor, and indemnify and save harmless the said Woodruff from any payment thereon, according to the condition of a certain bond bearing even date with said mortgage to said Woodruff, executed by said Towell to said Woodruff, then said bond and mortgage of said Towell should be void."

The explicit terms of this mortgage from Towell to Woodruff make assurance doubly sure that the intent of the respective parties executing and accepting these sealed instruments was that Towell assumed thereby, as a part consideration for the land conveyed to him, to pay and discharge all of Woodruff's said mortgage debt to the chancellor, and indemnify Woodruff against its payment.

Incontestably, the consequence, in equity, of such an assumption was that Towell became thereafter, as between himself and his vendor, the principal debtor, and the liability of the vendor, Woodruff, in respect to the mortgage debt, was that of surety. This relationship, established by the covenant of Towell in the deed, was reinforced by the terms of his bond and mortgage, just quoted. By the acceptance of this title, the clause of assumption by Towell in the deed to him became his covenant, and he thereby became bound in law to his grantor to pay the mortgage (*Finley v. Simpson*, 22 N. J. L. 311, 53 Am. Dec. 252), and liable to him for any deficiency which might exist upon a sale of the mortgaged premises.

In *Weatherby v. Slack*, 16 N. J. Eq. 493, Chancellor Green said: "The real question in such cases must always be, Who in equity is bound to pay the debt? The debt is due from the mortgagor to the encumbrancers, and his [the mortgagor's] portion of the mortgaged premises must primarily bear the burden, unless it be shown that it has, by some means, been shifted upon the portion of the alienees."

As soon as the debt in question became payable, Woodruff, the surety, had the right to file a bill to compel payment by Towell, the principal debtor, in order that he (the surety) might be relieved from responsibility; and the court will interfere "to compel payment by the principal rather than the surety, in order to enforce the performance of the obvious duty of the principal to protect the surety from a needless burden, and to prevent circuity of action." *Irick v. Black*, 17 N. J. Eq. 189-197. "The court will interfere, though the principal is perfectly able to respond in damages, and there is no danger of eventual loss." 17 N. J. Eq. 197. In *Shannon v. Marselis*, 1

N. J. Eq. at page 424, Chancellor Vroom said: "It is the policy and duty of this court to settle and adjust all claims between the parties in one suit, if possible, . . . There can be no good reason assigned why there should be this circuity of action, but a very good one why there should not, which is that the money might be lost to Carrick altogether."

The rule in equity that, where mortgaged premises are sold in separate parcels successively to different purchasers, with covenants against encumbrances, the parcels are liable to sale to satisfy the mortgage, in the inverse order of their sale, "will not be applied in any case where its application would work injustice." *Hill v. McCarter*, 27 N. J. Eq. 41; *Hoy v. Bramhall*, 19 N. J. Eq. 563, 97 Am. Dec. 687; *Hanes v. Denby*, — N. J. Eq. —, 28 Atl. 798.

Prof. Pomeroy, in his *Equity Jurisprudence*, at page 215, ¶ 1224, of volume 3, states the general rule in equity in this form: "Whenever the mortgagor has conveyed separate parcels of the mortgaged premises by warranty deed to successive grantees, and there was no special provisions in any of their deeds, and no other dealings between themselves or with the mortgagor which disturb the equities otherwise existing, a priority results, depending upon the order of conveyance." But in his next paragraph (1225) he proceeds to consider the dealings between the grantee and the mortgagor which "disturb" those equities and defeat the rule, and says: The doctrine stated in the foregoing paragraph is one of purely equitable origin, and is not an absolute rule of law; and if the peculiar equitable reasons upon which it rests are wanting, it ceases to operate. . . . The equities among successive grantees, as determined by the general doctrine of the preceding paragraph, will therefore be disturbed in the following instances: (1) Whenever a grantee of any parcel either expressly assumes the payment of the mortgage, or his deed is of such a form that he takes the parcel conveyed to himself subject to the mortgage, as a part of the consideration; then, as has already been shown, the parcel thus purchased becomes, in the hands of himself and of those holding under him, primarily chargeable with the mortgage debt as against the mortgagor grantor, and consequently as against all subsequent grantees or other parcels from the mortgagor. By such an express or implied assumption, the doctrine of liability, in the inverse order of alienation, and all of its consequences, are defeated with respect to the mortgagor and the subsequent grantees. (2) In like manner, when the

deeds to the successive grantees are not warranty or equivalent thereto, but simply purport to convey the mortgagors right, title, and interest in the parcels, the intention is clear that the grantees respectively assume their portions of the burdens. Their several parcels are all liable ratably, and not in the inverse order."

The record brought up on this appeal shows that in the said deed of March 5, 1886, from Woodruff to Towell, conveying the second tract, there is a clause reading "subject, however, to a mortgage of \$13,000 to the chancellor by said Woodruff, on or about December 19, 1870, which said Towell has heretofore assumed and agreed to pay, and that the said Woodruff will warrant, secure, and forever defend the said land and premises unto the said Joseph Towell (except the said mortgage) and his heirs and assigns forever;" and that in the said deed of February 16, 1887, from the executors of Woodruff to Towell, conveying the third tract, there is a clause reciting the terms of a lease given by Woodruff to Towell, and reading in the deed as follows: "Free from all encumbrance except a mortgage of \$13,000, given by said Woodruff to the chancellor of New Jersey, and which said mortgage said Towell has already assumed and agreed to pay."

But quite irrespective of the form of these admissions of Towell, in these deeds to him, of his assumption of the mortgage, his obligation to pay the \$13,000 mortgage debt already existed and could not thereby be enlarged; and when these second and third tracts were conveyed to him subject to the mortgage, the rule as to sale in the inverse order of alienation ceased, as we have seen by the authorities, to be applicable. The fact that Towell himself became an alienee of the second and third tracts, conveyed to him expressly subject to the mortgage which he had covenanted to pay, is decisive against him upon this question. The holders of the subsequent mortgages from Towell (\$5,000 to the chancellor, dated August 29, 1896, and \$2,000 to Zabriskie, dated January 31, 1900) can stand certainly in no better position than Towell; when they took their mortgages, the public records then showed them that the lands included in their mortgages were subject to the \$13,000 mortgage, and they thus had full notice that those lands must bear the same equitable proportion of the mortgage burden upon the whole tract which Towell was bound to bear.

The decision in the case of *Thompson v. Bird*, 57 N. J. Eq. 175, 40 Atl. 857, is pointed authority in this state in support of the position that the rule as to sale in the inverse order of alienation is inap-

plicable to cases like the present. It was there held, as to the mortgagor's lands remaining in him after his conveyance of a part, that, "where a purchaser of a part of mortgaged premises assumes the payment of all or a portion of the mortgage on the whole of such premises, the land so purchased is liable for the mortgage debt, or such portion of it assumed by the purchaser, before the remaining portion of the mortgaged premises held by the mortgagor, or by subsequent purchasers from the mortgagor, can be sold in satisfaction of the mortgage debt."

Justice Reed, sitting as vice chancellor in that case, thus defines (57 N. J. Eq. at page 177) the true rule and its reason in characteristically clear language, as follows: "But if any purchaser of a part of mortgaged premises, instead of bargaining for a clear title, chooses to assume the payment of all or a part of an encumbrance upon the whole of such premises, such purchaser cannot equitably ask that the remaining portion shall be first sold to answer the mortgage debt, for it is apparent that after such person gets the land from a mortgagor at a less price on account of the encumbrances, the payment of which he assumes, he cannot ask that the land of the mortgagor shall be sold to relieve his own land of the debt which he has promised to pay as a part of the consideration for his purchase." The decree there was that the mortgagor's remaining land should be sold last. The cases cited (57 N. J. Eq. on page 178) in the opinion fully sustain its conclusions. Among them are the very early decisions in this state of *Engle v. Haines*, 5 N. J. Eq. 186, 43 Am. Dec. 624; *Wikoff v. Davis*, 4 N. J. Eq. 224, and others which have been followed to the present time as leading authorities upon the subject.

Both reason and authority lead us, therefore, to hold that, the defendant Towell having agreed as part consideration for the purchase of the first tract, to relieve Woodruff from liability to pay either the whole or any part of the mortgage debt himself, Woodruff's estate is entitled to compel him to perform that contract. It is plain that if it should in the future be necessary to sell that part of the mortgaged premises still remaining in the Woodruff estate, for the purpose of satisfying any part of the mortgage debt, that estate would be entitled to call upon Towell to make good the loss which would have fallen upon it by reason of his breach of his contract of assumption. Towell has therefore no right to have any part of the Woodruff lands sold to satisfy the \$13,000 mortgage; and consequently all the property which he holds by 39 L.R.A. (N.S.)

conveyance from Woodruff or from Woodruff's estate, which is subject to the mortgage, should be first exhausted for the purpose of satisfying the mortgage debt. This course would avoid circuity of action, and this the court, for obvious reasons, regards as a duty which it is always anxious to accomplish.

The decree below should be reversed to the extent required to conform to these views.

White, J., concurring:

The equitable doctrine of "inverse order of alienation," as applied to the order of sale of several parcels of a tract of land covered by a foreclosing encumbrance, is, as I view it, depending upon the payment of the considerations for the parcels conveyed, and arises because it would be inequitable for the mortgagor grantor, who had already received the full consideration for the parcel conveyed, to call upon such parcel to contribute towards the payment of his mortgaged debt until his remaining mortgaged land had been first exhausted. Of course, there may be other reasons than nonpayment of consideration for the express assumption by the conveyed parcel of a part or all of the mortgage debt; but, in the absence of such express assumption, the payment or nonpayment of the consideration furnishes, in my judgment, the real, underlying, and substantial bases for the application, or nonapplication of this equity, rather than the presence or absence of a covenant warranting title. Of course, a warranty of title against the mortgage will give rise to the application of the equity; but obviously there would be no warranty of title if a part of the consideration was to be the payment by the conveyed parcels of the mortgage debt; and, on the other hand, the mere absence of an express warranty of title against the mortgage encumbrance, if there had in fact been a payment of the full consideration for the conveyed parcel, would not defeat the real reason for the equity, and consequently, as it seems to me, would not defeat the application of the equitable doctrine under consideration. In other words, if the grantee of the conveyed parcel expressly assumes the payment of the mortgage debt, such assumption obviously enters into the consideration for the conveying, and defeats the application of the rule or equity of inverse order of alienation. So, if it appears in any other way that the consideration, in whole or in part, was not paid because of the parcel being conveyed subject to the lien of the mortgage debt, the rule is also defeated to the extent of such nonpayment of con-

sideration. But, if it appears that the full consideration for the conveyed parcel was actually paid to the mortgagor grantor, the grantee is entitled to call upon the remaining mortgaged land owned by the mortgagor grantor, to pay the mortgage debt before the conveyed parcel shall be attacked, and this quite irrespective of the nonexistence of any express covenant of warranty of title. This is my understanding of the doctrine laid down by Pomeroy (§§ 1224 and 1225) and by Mr. Justice Reed in *Thompson v. Bird*, 57 N. J. Eq. 175, 40 Atl. 857.

Assuming that the language of these conveyances sufficiently establishes the payment of the full consideration, this view would lead, it seems to me, to an affirmance of the vice chancellor's decision, if there were no express assumption of the mortgage debt in the conveyances of tracts second and third in this case, because I cannot see how the doctrine of "avoidance of circuity of action" could have the effect against the second mortgagee of interposing before his lien the personal obligation of Towell upon the collateral bond which the latter gave when he purchased tract first. As was said by Mr. Justice Garrison in *Marsden v. White*, 71 N. J. Eq. 224-229, 65 Atl. 181, 183, quoting from *Atlantic Coast Brewing Co. v. Clement*, 59 N. J. L. 48, 35 Atl. 647: "Avoidance of circuity of action is at best a doctrine of convenience,—a secondary equity, so to speak,—and not to be resorted to in the face of either legal rule or substantial right."

If, therefore, the case were bare of other circumstance than the fact that Towell is the same person who assumed the payment of the mortgage debt as part of the consideration for the first tract conveyed to him, and gave a personal collateral bond conditioned upon his paying such debt, I should think the payment by him to the mortgagor grantor of the full consideration for the second and third tracts would entitle his second mortgagee to require the sale of the mortgagor grantor's remaining land before said tracts were called upon.

There was, however, another important circumstance connected with the conveyances of these two tracts. They were not only conveyed subject to the lien of the mortgage, but it was expressly stated in the conveyances that this was done purposely, because the grantee, Towell, had already assumed the payment of the mortgage debt. This statement, it seems to me, in view of the fact that the mortgage was a lien upon the tracts, constituted an express extension of the previous assumption upon the first tract to the second and third

tracts. It was in effect an assertion by the mortgagor grantor, "I will not remove the lien of the mortgage debt from these two tracts, as my acceptance of the full consideration would otherwise oblige me to do, because the burden is upon you to do so as a result of our previous transactions," and it was an agreement by the grantee that the mortgagor grantor should not be called upon to so remove it; but, on the contrary, he (the grantee) should be subject to the burden of either doing so, or holding these two tracts, also, in addition to the first tract, subject to the burden of the whole mortgage debt. This being so, of course, the second mortgagee took with full notice, and can no more invoke an equity expressly bargained away than his mortgagor, who bargained it away, could invoke it.

I concur in the reversal, therefore, but for the reasons above stated.

Garrison, J., concurring:

My vote to reverse is based solely upon the equitable rule stated by Prof. Pomeroy in the concluding paragraph of § 1225 of his work on Equity Jurisprudence, and quoted at length by Judge Vredenburg in his opinion.

The deeds on record at the time the second mortgage was taken gave notice, by their terms, of the equities subsisting between the mortgagor and his grantee, by which the direct, and not the inverse, order of alienation obtained. This was notice that the second mortgagee would have no right to marshal securities as against the land not included in his mortgage. The decree, giving such right to the second mortgagee, who was also the holder of the first mortgage, was therefore erroneous.

PENNSYLVANIA SUPREME COURT.

VITTI MARCELLO FOR USE OF SOUTH
SIDE TRUST COMPANY

v.

CONCORDIA FIRE INSURANCE COM-
PANY, Appt.

(234 Pa. 31, 82 Atl. 1080.)

**Insurance — change of possession —
receiver in bankruptcy.**

No change in the interest, title, or pos-

Note. — As to the effect of bankruptcy or insolvency proceedings, or assignment for the benefit of creditors, on fire insurance, see note to *Gordon v. Mechanics' & T. Ins. Co.* 15 L.R.A. (N.S.) 827.

See also, as to the effect of the appointment of receiver for insured on fire insurance, note to *Bronson v. New York F. Ins. Co.* 10 L.R.A. (N.S.) 643,

session of insured property is effected within the meaning of a provision on the policy avoiding it in case of such change, by the appointment of a receiver in bankruptcy proceedings, who, without dispossessing the owner, places a watchman upon the property, effects insurance thereon, and advertises the personal property for sale.

(January 2, 1912.)

APPEAL by defendant from a judgment of the Court of Common Pleas Number 4, for Allegheny County, in plaintiff's favor in an action brought to recover the amount alleged to be due on a fire insurance policy. **Affirmed.**

The facts are stated in the opinion of Carnahan, J., in the trial court as follows:

The plaintiff, Marcello, was the owner in 1908 of a lot of ground near Bridgeville, Allegheny county, having thereon a two-story frame, slate-roof building, occupied by him as a storeroom and dwelling, and a three-story frame, slate-roof building, with addition; also occupied as a storeroom and dwelling.

On June, 2, 1908, the defendant company, in consideration of a premium paid, issued to him its policy of fire insurance for \$1,500 on the three-story building "while occupied as a private dwelling house and storeroom," and on August 29, 1908, the same company, in consideration of a premium paid, issued to him its policy of fire insurance for \$1,000 on the two-story building "while occupied as a grocery and dwelling house." Each of these policies was for a period of one year from its date; and in each other insurance was permitted.

The buildings were destroyed by fire on December 25, 1908. Proofs of loss were duly furnished, payment was refused, and an action of assumpsit was brought to recover on the policies. An affidavit of defense was filed, and a rule was taken for judgment for want of a sufficient defense, which rule was duly heard and discharged. The parties now submit a case stated.

Each of the policies provided, *inter alia* that it should be null and void, and of no effect, "if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale of any property covered by this insurance by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured or otherwise, or if this policy be

assigned before a loss, or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein." No waiver or modification of any of the above provisions and conditions was ever made.

On December 9, 1908, an involuntary petition in bankruptcy was filed by creditors of Marcello against him in the United States court for the western district of Pennsylvania. On December 12, 1908, Marcello, in writing, waived service of a subpoena in bankruptcy. On December 17, 1908, a petition for the appointment of a receiver of the property of Marcello was filed, and, as respects said petition, there was a second written waiver by Marcello of the service of a subpoena or notice upon him. On December 17, 1908, the South Side Trust Company was appointed "receiver of all the assets and property, of every kind and character, belonging to said bankrupt." On December 18, 1908, the receiver gave bond, which was duly approved and filed on the same day, and thereupon, December 18, 1908, the receiver took possession of the property covered by these two policies of insurance, and placed a watchman upon it. On December 19, 1908, the receiver took out policies of fire insurance issued by various companies to the amount of \$9,000 upon the same property covered by these two policies. Marcello, before the filing of the petition in bankruptcy, had, in addition to the two policies in suit, taken out other policies of several companies on said property; his entire insurance on the same being \$9,000. On December 21, 23, and 24, 1908, the receiver advertised the personal property of Marcello for sale on December 31, 1908. On December 25, 1908, the buildings and their contents were destroyed by fire. The receiver's watchman was on the property at the time of the fire, and Marcello was living in one of the dwellings, not having been dispossessed by the receiver. Marcello's policies, including the two in suit, had not been canceled. On December 29, 1908, Marcello was adjudged a bankrupt. No notice of the bankruptcy proceedings, nor of the appointment of a receiver, was given to the defendant company; nor did it ever consent to the "changed conditions," as set forth in the case stated.

The sole question in the case is whether there was such a change in the interest, title, or possession of the subject of insurance as to terminate the policies. It does not appear among the facts submitted and expressly agreed to that the change was "a change of occupants without increase of hazard," or otherwise; nor does

it appear that the receiver had no such title as to enable it to take out new policies of insurance; nor that it was not empowered to sell and dispose of the personal property, as it had announced its intention by advertisement to do.

The bankruptcy act of July 1, 1898, chap. 541, 30 Stat. at L. 544, U. S. Comp. Stat. 1901, p. 3418, authorizes the appointment "of receivers, or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates to take charge of the property of bankrupts, after the filing of the petition, and until it is dismissed, or the trustee is qualified." The title to the property of the alleged bankrupt remains in him until adjudication, subject to the control of the court, to be exercised either by a receiver, or the marshal, if otherwise the interests of the creditors are not sufficiently protected. *Re Laplume Condensed Milk Co.* (D. C.) 145 Fed. 1013.

The duty required and the power conferred clearly are that the receiver, or the marshal, should take possession of property that would otherwise go to waste, and hold it and preserve it, so that it might come to the trustee, when selected, without needless injury. *Boonville Nat. Bank v. Blakey*, 47 C. C. A. 43, 107 Fed. 891.

As a general rule, no order of sale should be made until after adjudication, unless the property is of such a nature that a sale is necessary to preserve its value. *Re T. L. Kelly Dry-Goods Co.* (D. C.) 102 Fed. 747; *Re Garner* (D. C.) 153 Fed. 914; *Re Harris* (D. C.) 155 Fed. 216.

A receiver in bankruptcy is a mere custodian, and has no title to the property of the bankrupt. 2 Foster, Fed. Pr. 4th ed. 1815.

"In general, the receiver in a bankrupt proceeding is a caretaker and custodian of the property of the bankrupt, and is not a trustee for the creditors. . . . In an involuntary proceeding, the duty of the receiver, who conducts the business of the bankrupt, is to maintain, as far as possible, the continuity of his affairs, so that, if no adjudication is made, his property and business may be returned to him with the least possible damage." Alderson, *Receivers*, 361.

From the above-recited authorities, it appears that, while the receiver might be justified in advertising for sale and selling the personal property, and doubtless would be, if so authorized and directed by order of the court, it would have no authority to sell the real estate; and that, as respects title to the real estate, it was in the bank-

rupt at the time of the destruction of the buildings by fire, and until adjudication. Whether or not the receiver had such insurable interest in the buildings as to enable it to take out new policies of insurance on them, as it did, is not a question which calls for decision in this case.

Had the fire occurred after the adjudication of Marcello as a bankrupt, and especially after the appointment of a trustee for the benefit of creditors, qualification of the trustee, and that taking of actual possession by the trustee, the question here presented could not have arisen. But, under the circumstances, it cannot be said that it is one which involves mere technicality. It comes naturally from the contracts of insurance and the facts agreed upon; and the insurance company is entitled to have it fully considered and passed upon by the courts.

The receiver did take possession of the premises. It placed a watchman upon them. The watchman was there, in personal charge of the property, both real estate and personalty, at the time of the fire. The receiver did not lease them to a tenant; it did not dispossess the bankrupt, who was living upon them. He was allowed to remain; and he was there at the time of the fire. As a further act of possession, it reinsured the property in its own name for creditors; and, as a further act of possession, it advertised the personal property for sale. Its possession was complete in the sense that it had absolute charge of the property, and actually occupied it, without notice to or knowledge of this defendant.

The safety of the insurer is dependent much upon the character of the assured, not alone upon his integrity and good faith, but upon his habits of carefulness, of prudence, and vigilance. It is obvious that the danger of fire may be much less when the assured is a man watchful and provident than where he is heedless and negligent, as well as dishonest. The provision, therefore, which requires assignment of a policy to be made with the consent of the insurers, and to be approved by them, is not unmeaning. Nor is its purpose to stipulate for a new contract with the assignee. It is designed rather to afford substantial protection to the underwriters, by enabling them to preserve, during the continuance of the risk, the safeguards which existed at its origin, those found in the honesty and watchfulness of the assured. It was for this reason that it was early laid down that a fire policy could not be assigned, pending the risk, so as to give the assignee any interest in it whatsoever, either legal or equitable. Lord Chancellor

King, Lynch v. Dalzell, 4 Bro. P. C. 431. Such a policy has indeed, in some of the later cases, been held assignable in equity, with the subject itself, when it contained no provision to the contrary; and it is on that account that the prohibition to assign has been generally introduced. State Mut. F. Ins. Co. v. Roberts, 31 Pa. 438.

It was not contemplated by the parties to the contracts that mere change of occupancy should vitiate them, because change "in the interest, title, or possession" is expected in case of "death of an insured," and likewise "change of occupants without increase of hazard." The word "possession," as used in the policies, seems to have a broader significance than any that could be gathered from the words "occupant," "occupancy," or "occupation." Such is the view taken by the superior court in a case involving the consideration of a policy of insurance which contained this provision: "This entire policy . . . shall be void . . . if any change, other than by the death of the insured, takes place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured or otherwise." The court says, *inter alia*: "We are not aware that the precise question here involved has been decided in this state. But there is a decision in Rumsey v. Phoenix Ins. Co. (C. C.) 17 Blatchf. 527, 1 Fed. 396, by the United States circuit court of appeals for the northern district of New York, opinion by Judge Wallace, which seems to decide this question. In that case, the policy provided that it should be void 'if the property be sold or transferred, or any change take place in the title or possession, whether by legal process, judicial decree, voluntary transfer, or conveyance.' The court said in that case: 'The fact that Zimmer moved out of the dwelling house and let it to tenants is not a defense, within the conditions that avoid the policy "if any change takes place in title or possession." The change of possession contemplated is something more than a change of occupation; it is a change effected "by legal process, judicial decree, voluntary transfer, or conveyance;" one which refers to his possessory right, and not to the occupancy of the insured. The possession of Zimmer's tenants was his possession, within the meaning of the policy.' In our opinion, the proper legal, as well as reasonable, construction of the word reasonable, construction of the word 'possession,' as used in the policy in the present case, limits it to legal possession, or possessory right. . . .

33 L.R.A. (N.S.)

'Where the terms of a policy are susceptible, without violence, of two interpretations, that construction which is most favorable to the insured, in order to indemnify him against loss sustained, should be adopted.' Humphreys v. National Ben. Asso. 139 Pa. 264, 11 L.R.A. 564, 20 Atl. 1047. In the present policy, the word 'occupation' seems to be used to indicate actual possession or occupancy, and the word 'possession,' as used with the words 'interest' and 'title' in the clause in question, seems to mean legal possession, or possessory right, and, in accordance with the doctrine above quoted, these words should be so construed as to indemnify the insured against the loss sustained. . . . We do not find that there was any change in the possession, except the physical occupancy of the premises, which is not forbidden by the term of the policy of insurance." McGinnis v. St. Paul F. & M. Ins. Co. 38 Pa. Super. Ct. 390.

We regard the above-quoted authority as decisive of the question now submitted; and therefore, the receiver having no possessory right, but being merely a caretaker, pending adjudication in bankruptcy, the plaintiff is entitled to judgment. The bankruptcy proceeding was involuntary on his part; and it is not material that he had knowledge of it, or that he waived the service of notices connected with its progress.

The decision here reached can hardly be said to work a hardship upon the defendant company. It is not deprived of any right or privileges contemplated at the time the policies were issued. It is not claimed that the hazard was increased. On the contrary, it seems to have been lessened, or at least the tendency was to lessen it. The occupancy of the insured was not disturbed, and both he and the receiver's watchman were on the premises at the time of the fire. What was said in this respect in Fuller v. New York F. Ins. Co. 184 Mass. 12, 67 N. E. 879, namely, "The rights and obligations of the receiver tended to add to, and not diminish, the care and oversight of the insured property, and could in no way increase the risk, or alter it to the detriment of the insurer," is quite applicable here, although in that case the assured had been adjudged a bankrupt, and a receiver, who had been designated, had not qualified; nor had he taken actual possession. Later he did qualify, and still later a trustee was appointed.

In further support of the views here entertained are the cases of Fuller v. New York F. Ins. Co. *supra*, and Fuller v. Jameson, 98 App. Div. 53, 90 N. Y. Supp.

456. As against them, the defendant cites and confidently relies upon a case entitled *Re Hamilton*, decided by the United States district court in Arkansas, and reported in 102 Fed. 683. The policy of insurance there considered contained provisions respecting a change in the "interest, title, or possession" of the subject of insurance, similar to the provisions of these policies; and in the opinion of the court are certain *dicta* in which are expressed substantially the view taken by defendant here; namely, that possession of the receiver before adjudication in bankruptcy was such a change of possession as brought about a cancelation of the policy. But the policy, which was a renewal, was assigned by the assured to the receiver, with the written consent of the insurance company; and the question before the court was whether a bank, which had received the original policy as a pledge for the payment of a debt by the assured, was entitled to claim the renewal as a continuation of the pledge under the terms of the original agreement with the assured. The point decided was that "the assignment of the policy to the receiver, with the consent of the company, operated as a new and substantive contract by which the rights of the bank, as pledgee, were terminated."

We do not regard this case as an authority upon the question presented here; but, if we are mistaken in this respect, it need only be said that the decisions of our own state are binding upon us.

Messrs. William A. Jordan and W. S. Maxey for appellant.

Mr. E. Y. Breck, for appellee:

The title to the property remained in the bankrupt until its destruction by fire, when a right of action vested in the bankrupt.

Fuller v. New York F. Ins. Co. 184 Mass. 12, 67 N. E. 879; *Fuller v. Jameson*, 98 App. Div. 53, 90 N. Y. Supp. 456; *Keeney v. Home Ins. Co.* 71 N. Y. 39, 27 Am. Rep. 60; *Thompson v. Phoenix Ins. Co.* 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019; *Hill v. Cumberland Valley Mut. Protection Co.* 59 Pa. 474; *Commonwealth Ins. Co. v. Berger*, 42 Pa. 285, 82 Am. Dec. 504; *Collins v. London Assur. Corp.* 165 Pa. 298, 30 Atl. 924; *McGinnis v. St. Paul F. & M. Ins. Co.* 38 Pa. Super. Ct. 390.

A receiver in bankruptcy is a mere custodian, and has no title to the property of the bankrupt.

2 Foster, Fed. Pr. 4th ed. 1815; *Re T. L. Kelly Dry-Goods Co.* 102 Fed. 747; *Boonville Nat. Bank v. Blakey*, 47 C. C. A. 43, 107 Fed. 891; *Re J. C. Winship Co.* 56 C. 39 L.R.A. (N.S.)

C. A. 45, 120 Fed. 93; *Re Kolin*, 67 C. C. A. 481, 134 Fed. 557; *Re Benedict*, 140 Fed. 55; *Alderson, Receivers*, § 281, p. 361; *Re Richards*, 127 Fed. 772.

Per Curiam:

The facts and the law applicable thereto in each of these cases are the same. The judgment in each is affirmed for the reasons stated in the opinion of Judge Carnahan.

KENTUCKY COURT OF APPEALS.

MARTHA J. GREEN

v.

NANCY K. GREEN, Appt.

(147 Ky. 608, 144 S. W. 1073.)

Insurance — benefit — effect of divorce.

1. A woman who divorces her husband, who has named her as beneficiary in a mutual benefit certificate, forfeits her rights thereunder where the statute provides that payment of such certificate shall be only to families, heirs, blood relatives, affianced husband, or affianced wife, or to persons dependent on the member.

Same — affianced wife — redesignation.

2. Designation of a divorced wife who has promised to remarry a holder of a mutual benefit certificate, as beneficiary, is necessary to give her the right to the proceeds as an affianced wife, where the designation in her favor as wife was annulled by the divorce.

(March 16, 1912.)

A PPEAL by defendant from a judgment of the Circuit Court for Grayson County in plaintiff's favor in an action brought

Note. — Effect of divorce on rights of beneficiary under insurance policy or benefit certificate.

The earlier cases upon this question are collated in the note to *Wallace v. Mutual Ben. L. Ins. Co.* 3 L.R.A. (N.S.) 478, the present note merely being supplementary thereto.

As is indicated in the earlier note, the general rule is that a wife's interest as beneficiary in an ordinary life insurance policy is not affected by a divorce. This rule was adhered to in *Begley v. Miller*, 137 Ill. App. 278, wherein it was said that "the decree of divorce in no way affected the rights of the divorced wife in the policy as the beneficiary named in it, or her authority to demand and receive the amount payable in virtue of its terms." And *Blum v. New York L. Ins. Co.* 197 Mo. 513, 8 L.R.A. (N.S.) 923, 95 S. W. 317, 7 Ann. Cas. 1021, is to the same effect.

In some jurisdictions, however, it has been provided by statute that insurance pol-

to recover the amount of a mutual benefit certificate. Affirmed.

The facts are stated in the opinion.

Messrs. J. C. Graham, Charles V. Higdon, and O'Doherty & Yontz for appellant.

Messrs. Charles P. Johnson and J. M. Campbell for appellee.

Clay, C., delivered the opinion of the court:

Joseph T. Green was a member in good standing of the Modern Woodmen of America, a fraternal insurance society. On August 8, 1908, the society issued to him a benefit certificate for \$1,000, wherein appellant, Nancy K. Green, then his wife, was named as beneficiary. In January, 1910,

appellant, Nancy K. Green, obtained a divorce from Joseph T. Green. On August 30, 1910, Joseph T. Green died. The Modern Woodmen of America is a corporation organized and existing under the laws of the state of Illinois, with power to conduct a fraternal life insurance business. It is under the supervision of a grand or supreme body, and procures members through the lodge system exclusively. It pays no commissions and employs no agents, except in the organization of the local or subordinate lodges or council.

The laws of Illinois, under which the society was incorporated, provide as follows:

"Payment of death benefits shall only be paid to the families, heirs, blood relations, affianced husband or affianced wife

held for the benefit of the insured's wife shall inure to her separate benefit, provided that in case of her death or divorcement the insured shall have the right to designate another beneficiary. Under a statute such as this it was held in *Haven v. Home Ins. Co.* 149 Mo. App. 291, 130 S. W. 73, that the wife could not prevent the insured's changing the beneficiary after a divorce, even though obtained by her for his fault. But the enactment of such a statute does not impair vested rights of a married woman in a paid-up insurance policy in her favor on her husband's life. *Blum v. New York L. Ins. Co.* supra.

As regards mutual benefit certificates, the general rule is that where the statutes or the laws of the organization require the beneficiary to be, at the time of maturity of the certificate, either the wife or a member of the assured's family or dependent upon him, a divorce terminates the wife's rights. See cases in earlier note and *Green v. Knights & Ladies of Security*, — Ky. —, 144 S. W. 1076, which follows *GREEN v. GREEN*; and *Dahlin v. Knights of Modern Maccabees*, 151 Mich. 644, 115 N. W. 975, holding a divorced wife not to be a "widow."

But where the restriction to a class is construed to mean that a proper relationship must exist at the time of selection, divorce does not terminate the wife's rights, especially where the assured has a right to but does not change the beneficiary. *Schmidt v. Hauer*, 139 Iowa, 531, 111 N. W. 966. See also *Snyder v. Supreme Ruler*, F. M. C. 122 Tenn. 248, — L.R.A.(N.S.) —, 122 S. W. 981.

And where there is nothing in the contract of insurance, by-laws, or regulations which requires the beneficiary to belong to a special class or disqualifies a wife as a beneficiary in the event of her divorcement, she is not thereby rendered ineligible to receive the death benefit. Thus in *Farra v. Brame*, 171 Ind. 520, 86 N. E. 843 (but see decision in appellate court, as reported in 82 N. E. 926, on rehearing 84 N. E. 155), where the rules of the society did not require that the beneficiary be confined to the relatives or family of the assured, it was 30 L.R.A.(N.S.)

held that a decree of divorce in his favor did not of itself deprive the wife of her rights as his beneficiary. In arriving at this conclusion the court said: "It may be conceded that by the divorce in question the relation of husband and wife was terminated, and the wife was no longer a relative or dependent of her former husband, and in the event of his death could not in any sense be regarded as his heir; but it does not follow that from the mere fact of the divorce alone she was thereby disqualified as a beneficiary and deprived of the benefits provided for by the insurance certificate. Of course, the relief department [assurance society] might have provided, either in the contract of insurance or in its by-laws, rules, and regulations, that in the event the wife of the insured, whom he had designated as his beneficiary, should be divorced from him, such divorce should terminate her rights as a beneficiary and deprive her of the death benefits. This, however, was not done, for we discover no provision to that effect, either in the application, certificate, by-laws, or regulations of the department. Under the circumstances, there is nothing which will require a court to read such a condition or provision into the contract of insurance here involved. In view of the by-laws, rules, and regulations, it certainly is not tenable to argue that no one but relatives of the assured, members of his family, or dependents can be lawfully designated by him as . . . it may be asserted that neither the rules of the relief department nor the provisions of the insurance contract in question limit or confine the appointment of a beneficiary by an applicant to members of his family or his relatives, or to others who are dependent upon him for support."

For a treatment of the general question as to who takes under designation of "husband," "wife," or "widow," see the note to *Meeker v. Draffen*, 33 L.R.A.(N.S.) 825.

As to the effect in general of statute permitting change of beneficiary as affecting rights of beneficiary under policy previously issued, see note to *Blum v. New York L. Ins. Co.* 8 L.R.A.(N.S.) 923. G. J. C.

of or to persons dependent upon the member." Hurd's Rev. Stat. 1909, chap. 73, § 258.

The by-laws of the society contain the following provisions:

"Sec. 45. Benefit certificates shall be made payable only to the wife, surviving children, or some other person or persons specifically named in said benefit certificate as beneficiary, who are related to the member as heir, blood relative, or person dependent upon him or member of his family whom the applicant shall designate in his application. No payment shall be made upon any benefit certificate to any person who does not bear such relationship as wife, surviving child, heir, blood relative, or person dependent upon or member of the family of the member at the time of his death.

Sec. 46. If the death of a beneficiary of any member heretofore or hereafter adopted shall occur prior to the death of such member, or in the event of the disqualification of the beneficiary under the provisions of § 45 hereof, and if such member has failed to have another beneficiary named as provided in § 47 hereof, then the amount to be paid under the benefit certificate shall be payable to the surviving beneficiaries, if any there be, or if no beneficiaries survive him, then to the widow; if no widow, to his children, including his legally adopted children, and in case there are deceased children or child, the children or child of such shall take the share of such deceased parent; if no children or child of the deceased children or child, to the mother; if no mother, to the father; if no father, to the brothers and sisters, share and share alike, and in case there are deceased brothers or sisters, then to the children or child of such, who shall take the share of such deceased parent; if no brothers or sisters or children or child of any deceased brother or sister, then to the next of kin, who would be the distributees of the personal estate of the member upon his death intestate according to the laws of the state wherein said member resided at the time of his death."

"Sec. 49. The contract for beneficial membership between the society and its beneficial members shall include the application for beneficial membership, the medical examination furnished by the applicant, the benefit certificate issued thereupon, and the by-laws of the society as they exist at the time of the issuance of the certificate, or as they may be thereafter amended, modified, or changed; all with the same force and effect as written into the face of the benefit certificate. This

provision shall be construed not only to govern the rights and conduct of the member, but also to determine the financial liability of the member to the society, and of the society to the member and his beneficiary or beneficiaries."

This action was instituted by Martha J. Green, the mother of the decedent member, against the Modern Woodmen of America and Nancy K. Green, for the purpose of recovering the proceeds of the benefit certificate. In addition to setting forth the above facts, the petition charged that Nancy K. Green and James T. Green were divorced, and that they entered into a written contract by which James T. Green transferred to Nancy K. Green certain property, money, etc., which she agreed to and did accept in full satisfaction of all claims she then had or might have to any part of his property. The petition further alleged that the decedent had no children, or child or descendant of any child, at the time of his death; that his father was dead at the time; that he had not adopted any child; and that appellee, as his mother, was entitled to the proceeds of the benefit certificate. The Modern Woodmen of America paid the proceeds of the certificate into court to abide the result of the suit. Appellant, Nancy K. Green, filed an answer in two paragraphs. In the first paragraph she denied that appellee, Martha J. Green, was entitled to the proceeds of the certificate, and in the second paragraph she alleged, in substance, that under the terms of the decedent's contract with the Modern Woodmen of America he had the right expressly reserved to him to change the beneficiary in the certificate, and to name another and different beneficiary, but that he declined and refused to do so, and elected to keep the certificate in force for appellant's benefit. She further alleged that, while she had instituted an action for and obtained a divorce from James T. Green, she had done so only after he had persevered in a course of misconduct towards her, and after he had failed to discharge any of the duties incumbent upon him as a husband, and he well understood that the proceedings were only had as the last resort; that she did not in fact desire any separation; that after the divorce was granted he changed his course of conduct and living, and there came into existence between them a tacit agreement to the effect that, as soon as he showed that he intended in good faith to reform his course of living, they would be reunited in the bonds of matrimony; and that such an agreement was in force at and for a long time prior to his death. Appellant also

fled a demurrer to the petition, and moved to strike out the allegations in reference to the settlement between her and her husband. Thereafter, appellant amended her answer and counterclaim, and alleged, in substance, that at and a long time prior to the death of James T. Green, she was the affianced wife of James T. Green, and that he had expressly desired that the proceeds of said policy should come to her, and he meant and intended said policy should be for her benefit, and frequently so declared in the presence of divers persons, and designated and intended the same to be a legacy to her, and with this purpose and view elected not to change the beneficiary named in the policy, and allowed same to remain payable to appellant, and that the agreement was well understood between them at and when the divorce was granted, and was continued thereafter up to and until his death. Appellant's demurrer to the petition and motion to strike were overruled. Appellee's demurrers to the second paragraph of appellant's original answer and to the second paragraph of her amended answer were sustained, and, appellant having declined to plead further, judgment was entered in favor of appellee, Martha J. Green. From that judgment this appeal is prosecuted.

For appellant, it is insisted that, as the law of the state of Illinois provides that death benefit may be made to the affianced wife of a member, the allegations of the second paragraph of her amended answer are sufficient to show her right of recovery. In the case of mutual benefit societies it is the rule that, when the classes of persons to whom benefits may be paid are prescribed by statute or by the society's charter of incorporation, neither the society nor the member, nor both combined, can divert the funds. 29 Cyc. 108; Kentucky Masonic Mut. L. Ins. Co. v. Miller, 13 Bush. 489. In the case of old line insurance companies, a number of courts hold that, unless the contract provides to the contrary, the designation of a beneficiary, valid in its inception, remains so, although the insurable interest or relationship of the beneficiary has ceased; consequently it is held that the wife's interest in an ordinary policy of insurance payable to her is not affected by a divorce. Phoenix Mut. L. Ins. Co. v. Dunham, 46 Conn. 79, 33 Am. Rep. 14; McKee v. Phoenix Ins. Co. 28 Mo. 383, 75 Am. Dec. 129; Overhiser v. Overhiser, 63 Ohio St. 77, 50 L.R.A. 552, 81 Am. St. Rep. 612, 57 N. E. 965; Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251. In the last-mentioned case the parties were divorced and each re-

married. Upon the death of the husband, the court carried the doctrine to the extent of holding that the divorced wife, who was named as beneficiary in the policy, was entitled to the proceeds of the policy in preference to the lawful widow, because she had an insurable interest when the policy was taken out. Other courts, failing to notice the distinction between ordinary insurance companies and fraternal societies, have applied the same rule in the case of the mutual benefit insurance, and have based their opinions upon the authority of the rule laid down in cases where only ordinary insurance policies were involved. *Courtois v. Grand Lodge*, A. O. U. W. 135 Cal. 557, 87 Am. St. Rep. 137, 67 Pac. 970; *Wist v. Grand Lodge*, A. O. U. W. 22 Or. 271, 29 Am. St. Rep. 603, 29 Pac. 610; *Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; *White v. Brotherhood of American Yeoman*, 124 Iowa, 293, 66 L.R.A. 164, 104 Am. St. Rep. 323, 99 N. W. 1071, 2 Ann. Cas. 350.

On the other hand, a number of the courts make a distinction between policies in an ordinary insurance company and certificates in a mutual benefit society, and hold in the case of the latter that, if the insured designates as beneficiary a member of his family, the subsequent separation of the family relationship, before the insured's death, defeats the beneficiary's right to the fund, and that, where the wife is named as a beneficiary, her right to the benefit is defeated by an absolute divorce. *Knights of Columbus v. Rowe*, 70 Conn. 545, 40 Atl. 451; *Larkin v. Knights of Columbus*, 188 Mass. 22, 73 N. E. 850; 1 Bacon, Ben. Soc. 3d ed. § 243; *Kirkpatrick v. Modern Woodmen*, 103 Ill. App. 468; *Tyler v. Odd Fellows' Mut. Relief Asso.* 145 Mass. 134, 13 N. E. 360; *Williams's Appeal*, 92 Pa. 69; *Schonfield v. Turner*, 75 Tex. 324, 7 L.R.A. 189, 12 S. W. 626; *Norwegian Old People's Home Soc. v. Wilson*, 176 Ill. 94, 52 N. E. 41. And it is also held that if a member names his fiancée as beneficiary, the breaking off of the engagement defeats the interest of the beneficiary. *Grand Lodge, A. O. U. W. v. Child*, 70 Mich. 163, 38 N. W. 1.

Without approving of the rule applied by some courts in the case of ordinary life insurance companies, we are of the opinion that there is every reason why a different rule should prevail in the case of mutual benefit societies. The latter are organized for the benefit of the members, their families, and those dependent upon them. To permit the benefits to be paid to those who at one time sustained such relation, but did not sustain that relation at the time

of the member's death, would be to frustrate the purpose of the society. In other words, to entitle one to receive the proceeds of a certificate in a fraternal society, he must, unless the contract or charter and by-laws provide otherwise, bear the required relation at the time of the member's death. That being true, we are of the opinion that the divorce operated to revoke the designation of appellant as the beneficiary in the certificate in question, and to substitute decedent's mother in her place.

If the insured thereafter desired that appellant, as his affianced wife, should become the beneficiary of the certificate, it was necessary for him to do some affirmative act, by which she, as his affianced wife, was designated as the beneficiary. Her appointment as beneficiary having been revoked by the divorce, a subsequent agreement between her and her divorced husband to marry again did not have the effect of reinstating the appointment. In such a case there must be not only a promise to marry, but a new designation of the affianced wife as the beneficiary of the policy. As the allegations of appellant's answer and amended answer do not bring her case within the rule above announced, it follows that the demurrers thereto were properly sustained.

Judgment affirmed.

NEW HAMPSHIRE SUPREME COURT.

JOHN J. MCGREENERY et al.

v.

WILLIAM H. MURPHY

and

CHARLES H. TENNEY, Trustee.

(76 N. H. 338, 82 Atl. 720.)

Bulk sale — following profits — right.

Creditors of one who sells a stock of merchandise in bulk for an adequate consideration, without complying with the pro-

visions of the bulk sales law, cannot hold the vendee liable for the value of the property, as trustee, although the statute provides that such sale shall be fraudulent and void as against creditors.

(March 5, 1912.)

EXCEPTIONS by the defendant trustee to a judgment of the Superior Court for Merrimack County charging him for the value of a stock of goods sold by the principal defendant to him, for which he paid an adequate consideration. Sustained.

Defendant Murphy kept a pool room in Concord in which he had a stock of goods. The defendant trustee purchased them in bulk, paying therefor \$136.12. He afterwards disposed of them in the regular course of trade. At the time of the sale defendants did not know of the bulk sales law and did not comply with its provisions. The trustee was held chargeable by the court for \$136.12, and he excepted.

Messrs. Martin & Howe and Joseph A. Donigan, for defendant trustee:

The trustee should be discharged.

Smith v. Foster, 41 N. H. 215; Wilson v. Harris, 21 Mont. 374, 54 Pac. 46; Missouri Nat. Bank v. Staley, 9 Mo. App. 146; Harvey v. Mix, 24 Conn. 406; Chatroop v. Borgard, 40 Ill. App. 279; Stevens v. Kirk, 37 Vt. 204, 207; Baxter v. Currier, 13 Vt. 615; Hutchins v. Hawley, 9 Vt. 295; Barker v. Esty, 19 Vt. 132.

The statute relating to sales of merchandise in bulk is unconstitutional and void.

Sol Block & Griff v. Schwartz, 27 Utah, 388, 65 L.R.A. 308, 101 Am. St. Rep. 971, 76 Pac. 22, 1 Ann. Cas. 550; Wright v. Hart, 182 N. Y. 330, 2 L.R.A.(N.S.) 338, 75 N. E. 404, 3 Ann. Cas. 263; McKinster v. Sager, 163 Ind. 671, 68 L.R.A. 273, 106 Am. St. Rep. 268, 72 N. E. 854; Miller v. Crawford, 70 Ohio St. 207, 71 N. E. 631, 1 Ann. Cas. 558; Charles J. Off & Co. v. Morehead, 235 Ill. 40, 20 L.R.A.(N.S.) 167, 126 Am. St. Rep. 184, 85 N. E. 264, 14 Ann. Cas. 434; Neas v. Borches, 109 Tenn. 406, 97 Am. St. Rep. 851, 71 S. W. 50.

Note. — *Remedy of creditors where sale is made in violation of bulk sales law.*

This note, as indicated by the title, is confined to cases expressly considering or necessarily involving and passing upon the question as to the form of remedy available to the creditors of one who has sold goods in violation of the bulk sales law.

For a brief history of bulk sales legislation, and a full consideration of the earlier authorities as to the validity and construction, in general, of bulk sales statutes, including a few earlier cases on procedure, see note to Everett Produce Co. v. Smith, 2 39 L.R.A.(N.S.)

L.R.A.(N.S.) 331; and for later cases as to the constitutionality of this legislation, see note to Young v. Lemieux, 20 L.R.A.(N.S.) 160.

As to what kind or classes of property are within the operation of bulk sales statutes, see note to Cooney E. & Co. v. Sweat, 25 L.R.A.(N.S.) 758; and as to what are "fixtures" within the meaning of bulk sales laws, see note to Bowen v. Quigley, 34 L.R.A.(N.S.) 218.

As to the applicability of statutes relating to sales of stocks of goods in bulk to a transfer in payment of a creditor, see note to Compton v. Dietlein, 12 L.R.A.(N.S.) 174; and as to whether a chattel mortgage

Messrs. Starr & Flynn and Remick & Hollis, for plaintiff:

Trustee process is the proper procedure. Gutterson v. Morse, 58 N. H. 529; Green v. Doughty, 6 N. H. 572; Proctor v. Lane, 62 N. H. 457; Burlingame v. Bell, 16 Mass. 318; Hastings v. Baldwin, 17 Mass. 552; Hawes v. Mooney, 39 Conn. 37; Joseph v. People's Sav. Bank, 132 Ind. 39, 31 N. E. 524; 2 Wade, Attachm. § 327; Wapples, Attachm. & Garnishment, §§ 425, 426; 20 Cyc. 663, 993; Jaques & T. Co. v. Carstarphen Warehouse Co. 131 Ga. 1, 62 S. E. 82; Kohn v. Fishbach, 36 Wash. 69, 104 Am. St. Rep. 941, 78 Pac. 199.

The statute is constitutional.

State v. White, 64 N. H. 50, 5 Atl. 828; Morey v. Brown, 42 N. H. 373; State v.

Campbell, 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585; State v. Marshall, 64 N. H. 549, 1 L.R.A. 51, 15 Atl. 210; State v. Forcier, 65 N. H. 42, 17 Atl. 577; State v. Pennoyer, 65 N. H. 113, 5 L.R.A. 709, 18 Atl. 878; State v. Griffin, 69 N. H. 1, 41 L.R.A. 177, 76 Am. St. Rep. 139, 39 Atl. 260; State v. Ball, 70 N. H. 40, 46 Atl. 50; Horan v. Byrnes, 72 N. H. 93, 62 L.R.A. 602, 101 Am. St. Rep. 670, 54 Atl. 945; State v. Cohen, 73 N. H. 543, 63 Atl. 928; State v. Roberts, 74 N. H. 476, 16 L.R.A. (N.S.) 1115, 69 Atl. 722; John P. Squire & Co. v. Tellier, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; McDaniels v. J. J. Connelly Shoe Co. 30 Wash. 549, 60 L.R.A. 947, 94 Am. St. Rep. 889, 71 Pac. 37; Walp v. Moorar, 76 Conn. 515, 57 Atl. 277; Re T. &

is within the meaning of bulk sales laws, see note to Hanna & Hogg v. Richter Brewing Co. 12 L.R.A. (N.S.) 178.

"The courts look with favor upon the rights of creditors and will afford them every remedy and facility to detect and defeat any effort to defraud them of their just rights. And courts of law and courts of equity generally have concurrent jurisdiction in the matter of affording relief against fraudulent conveyances by debtors." 20 Cyc. 655.

Remedy at law.

Where a sale of goods has been made without compliance with the provisions of a bulk sales statute making such sale void or voidable as to creditors of the seller, it seems clear that a creditor of the seller may pursue any legal process against the property in the hands of the purchaser or transferee, as if no sale or transfer had been made; and it has been held that any single creditor of one who has sold a stock of merchandise in violation of the bulk sales law may, without the co-operation of other creditors, attack the sale by procuring a levy upon the goods sold, as the property of the vendor, of an execution issued upon a judgment in his favor and against the vendor, his debtor. Wilson v. Edwards, 32 Pa. Super. Ct. 295.

And the levy, on behalf of a creditor, of an execution issued upon a judgment against one who has sold a stock of merchandise in violation of the bulk sales law, upon the goods sold, as the property of the vendor, is an appropriate proceeding to invalidate the sale, within the meaning of a provision of the bulk sales statute that proceedings at law or equity must be brought against the purchaser to invalidate the sale within ninety days from the consummation thereof. Dickinson v. Harbison, 78 N. J. L. 97, 72 Atl. 941; Wilson v. Edwards, supra.

So, also, a creditor of one who has sold a stock of goods in violation of a bulk sales statute which declares such a sale to be fraudulent against the creditors of the vendor may proceed by attachment against the

vendor as a fraudulent debtor (Knight v. Stephen Putney Shoe Co. 137 Ga. 493, 73 S. E. 740); and no title having passed to the vendee as against the creditor, the goods which were the subject-matter of such sale are subject to attachment at the suit of the creditor as the property of the vendor (W. B. Parham & Co. v. Potts-Thompson Liquor Co. 127 Ga. 303, 56 S. E. 460).

And this remedy by attachment against the debtor affords the creditor an adequate legal remedy, where the sale is conclusively presumed to be fraudulent, and is therefore inoperative and void as to creditors of the vendor, upon the grounds of fraud. Carstarphen Warehouse Co. v. Fried, 124 Ga. 544, 52 S. E. 598.

Likewise, a creditor of one who has sold his stock of goods in violation of a bulk sales act which makes such a sale void as against the creditors of the seller is entitled to maintain garnishment proceedings against the purchaser for the enforcement of the law. Musselman Grocer Co. v. Kidd, D. & P. Co. 161 Mich. 478, 115 N. W. 409; Marquette County Sav. Bank v. Koivisto, 162 Mich. 554, 127 N. W. 680.

But in Schmucker v. Lawler, 38 Pa. Super. Ct. 578, it was held that, under a bulk sales statute providing that a sale of goods in bulk in violation thereof shall be deemed fraudulent and voidable as against the creditors of the seller, while the goods sold are liable to execution in favor of any creditor of the seller, as if no sale had taken place, a creditor has no remedy against the purchaser, as garnishee, in a statutory "attachment execution" intended to reach debts due from a third person to a judgment debtor, and property of the latter held by a third person for him and as his property, as the purchaser cannot be considered a debtor of the seller, and as between them the property is the former's absolutely, so that he does not hold it for, or as the property of, the latter.

And in Bewley v. Sims, — Tex. Civ. App. —, 145 S. W. 1076, it was held that the purchaser of a stock of goods in violation of the bulk sales law, who has resold the

J. Farrell Co. 9 Am. Bankr. Rep. 341; Neas v. Borches, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50; Re Paulis, 144 Fed. 472; Thorp v. Pennock Mercantile Co. 99 Minn. 22, 108 N. W. 940, 9 Ann. Cas. 229; Williams v. Fourth Nat. Bank, 15 Okla. 477, 2 L.R.A.(N.S.) 334, 82 Pac. 496, 6 Ann. Cas. 970; Musselman Grocer Co. v. Kidd D. & P. Co. 151 Mich. 478, 115 N. W. 409; Jaques & T. Co. v. Carstarphen Warehouse Co. 131 Ga. 1, 62 S. E. 82; Young v. Lemieux, 79 Conn. 434, 20 L.R.A.(N.S.) 160, 129 Am. St. Rep. 193, 65 Atl. 436, 600, 8 Ann. Cas. 452.

Mr. Robert Jackson also for plaintiff.

Walker, J., delivered the opinion of the court:

The plaintiffs seek to charge the trustee for the value of the stock of goods sold by the principal defendant to the trustee, for which the latter paid an adequate consideration, and which he has since disposed of in the regular course of business. It is conceded that, in the absence of the statute upon which the plaintiffs rely (Laws 1909, chap. 69, § 1), the sale would be deemed valid, and the trustee would be discharged. The statute referred to is as follows: "The sale in bulk of any part or the

whole of a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be fraudulent and void as against the creditors of the seller, unless the purchaser demands and receives from the seller a written list of names and addresses of creditors of the seller, and certified by the seller, under oath, to be, to the best of his knowledge and belief, a full, accurate, and complete list of his creditors; and unless the purchaser shall, at least five days before taking possession and becoming the owner of such merchandise, or paying therefor, notify personally, or by registered mail, every creditor whose name and address are stated in said list, of the proposed sale and of the terms and conditions thereof."

The plaintiffs' position is that under this statute the sale in question was fraudulent and void as against them, creditors of the vendor, and that they are entitled to recover their debt by trustee process of the vendee. If it is assumed that the statute gave them the right to secure their claim by an attachment of the stock of goods in the possession of the vendee, it does not follow that they charge him as a trustee of the vendor for the value of the goods. The statute pur-

goods to another, is not personally liable at the suit of a creditor of the fraudulent seller, who has not, by attachment, garnishee proceedings, or otherwise, acquired a lien on the goods sold, although the statute provides that a sale in violation thereof shall be void as against creditors of the seller or transferrer. The court said: "It is true the act declares void any sale such as here alleged; but no trust relation, and no lien upon or right in the property so unlawfully purchased, is specifically conferred upon the vendor's creditors, as would have been so easy, had such been the legislative purpose. Nor do we think such lien or right is to be implied" etc.

On the other hand, in *Fitz Henry v. Munter*, 33 Wash. 629, 74 Pac. 1003, where creditors of one who had sold a stock of goods in violation of a bulk sales law providing that such a sale should be void as to creditors of the seller, were allowed to intervene in an action for the purchase price of the goods, and secure a distribution of the proceeds of the sale *pro rata* to all of the creditors who were parties to the suit, such proceeds being less than the total amount of their claims against the vendor, the court said: "We also think that the object of this law was to hold the goods of debtors under such circumstances as a trust fund for the benefit of all the creditors, and to hold the purchaser in possession as a trustee for such creditors."

And in *Kohn v. Fishbach*, 36 Wash. 69, 104 Am. St. Rep. 941, 78 Pac. 199, it was held that a creditor of one who has sold 39 L.R.A.(N.S.)

a stock of goods in violation of the bulk sales law may recover the amount of his debt, if not more than the value of the goods sold, by a garnishment proceeding against the purchaser, although the latter, at the time of the service of the writ of garnishment, is not indebted to the seller and has disposed of the goods, the court saying: "It is true, the garnishee answered, and probably in accordance with the facts, that he did not at that time have any of the property of the defendant in his possession, and that he was not indebted to him. But, in contemplation of law, he had the property of the defendant in his hands, because, having purchased the property in fraud of law, without complying with the provisions of the law in relation to sales of property in bulk, he stood in the position of a trustee of the property, responsible to the *cestui que trust*, or the creditors, for the disposition of such property."

And likewise, in Georgia, where a sale of a stock of goods in violation of the bulk sales law is conclusively presumed to be fraudulent as to creditors of the vendor, a creditor of one who has made such a sale can hold the vendee liable in a garnishment suit for the value of the goods, if not more than the amount of the indebtedness sought to be collected in the suit, although the vendee bought the goods in part payment of a debt then due to him from the vendor, and although the vendee has sold the goods prior to the service of the summons and garnishment. In this case, the court said: "We are of opinion that the purpose of the stat-

ports to make such a sale void as against creditors of the seller, although the parties acted with the utmost good faith, and entertained no purpose to defraud or to embarrass the seller's creditors in the collection of their claims. The sale, which was otherwise valid as against everybody, is made invalid as against creditors as a matter of law. It is declared fraudulent when no fraud was intended by the parties. As was said by the court in *Thompson v. Esty*, 69 N. H. 55, 63, 45 Atl. 566, 567, in regard to the effect of the retention of the possession by the vendor of the chattels sold: "Though it is found or admitted that the vendee paid to the vendor the full value of the property, that no actual fraud was intended or committed, and that no creditor was misled, deceived, or injured in any respect by the transaction, the law pronounces it fraudulent and void." After showing that in many, if not in a majority, of the cases where this rule has been implied, it has resulted in evident injustice, it was held that the rule should be confined within the limits of the cases to which it had been applied, and not be extended to cases where its application was not necessarily required by the authorities; that not one but a creditor of the vendor who had attached the property could have the

sale set aside on account of the constructive fraud; and that an assignee in insolvency, though representing all the creditors, did not have that right. An attaching creditor who has obtained judgment for his debt is alone entitled to appropriate the property so held, as against the innocent vendee who has paid the vendor a full consideration for it. In the course of the discussion, the court refer to the opinion in *Boardman v. Cushing*, 12 N. H. 105, and say: "This is an unequivocal recognition of the rights of creditors to set aside a presumptively fraudulent conveyance upon an attachment of the property, but the opinion also contains the equally emphatic assertion that the enforcement of such rights, without regard to the actual intention of the parties or the resulting injury, is not to be extended to cases requiring the application of equitable principles. To charge a trustee in foreign attachment on account of a fraudulent sale of property, fraud must be proved as a fact from all the relevant circumstances of the case, and not declared as a matter of law from a few circumstances which as evidence might indicate a fraudulent purpose." The phrase, "fraudulent and void as to creditors," relates to attaching creditors who seek to set aside the vendee's title, which,

ute regulating sales of stocks of goods, wares, and merchandise in bulk was to constitute such goods, etc., sold in bulk without complying with the provisions of the statute, trust property in the hands of the purchaser for the benefit of the creditors of the seller. . . . And if a purchaser under such circumstances sells the goods, he is liable, if the statute be constitutional, under a subsequent garnishment proceeding, for their value at the time he sells them, provided the value is not more than the amount of the garnisher's debt against the principal defendant." *Jaques & T. Co. v. Carstarphen Warehouse Co.* 131 Ga. 1, 62 S. E. 82.

In equity.

As to conditions precedent to equitable remedies of creditors, in general, see note to *Ziska v. Ziska*, 23 L.R.A. (N.S.) 1.

Upon the question of priority as to proceeds of creditors' bills, see note to *Russell v. Chicago Trust & Sav. Bank*, 17 L.R.A. 345.

And as to the effect of a creditors' bill or supplementary proceedings as against bankrupt proceedings, see subdivision of note to *State ex rel. Strohl v. Superior Court*, 45 L.R.A. at page 193.

Under a bulk sales statute providing that proceedings to set aside a sale made in violation thereof must be taken within ninety days after the consummation of the sale, where it is practically impossible for a general creditor within that time to bring action and obtain judgment in order to

avoid the sale by issuing an execution against the property sold, and where an attachment does not lie, because the fraud requisite therefor, under the local statute, must be actual, and not merely constructive, any creditor is entitled to sue, by creditors' bill, on behalf of himself and others, to set aside the sale. *Guaranty Title & T. Co. v. Pearlman*, 144 Fed. 550.

But where a creditor of one who has sold a stock of goods in violation of the bulk sales law has a complete statutory remedy by attachment, he is not entitled to the extraordinary remedies of injunction and receiver. *Carstarphen Warehouse Co. v. Fried*, 124 Ga. 544, 52 S. E. 598.

In *Bixler v. Fry*, 157 Mich. 314, 122 N. W. 119, the opinion of the judge below was affirmed by an equally divided court, that a general creditor of one who has sold his stock of merchandise in violation of a bulk sales statute making such a sale void as against the creditors of the vendor cannot, without first having secured a judgment in an action at law against the vendor, his debtor, maintain a bill in equity against the vendee for the appointment of a receiver, an accounting, and a sale of the property conveyed.

And in *Rubinsky v. Spiro*, 60 Misc. 582, 113 N. Y. Supp. 852, it was held that a general creditor of one who has sold merchandise in bulk in violation of the bulk sales law cannot maintain a suit in equity to set aside the transfer until after recovery of judgment against the debtor and return of execution unsatisfied. A. C. W.

until set aside, is a valid title. As between the parties to the sale, the title passed to the vendee, and it remains in him until it is vacated by a creditor of the vendor upon proceedings instituted for that purpose, or until the vendee disposes of the property. Though the word "void" is used in the statute, in legal effect it means voidable at the instance of an attaching creditor. But, as above suggested, a creditor who resorts to trustee process against the vendee is not an attaching creditor. He does not attach the property and seek to defeat the vendee's title. He acquires no lien upon the property. *Corning v. Records*, 69 N. H. 390, 398, 76 Am. St. Rep. 178, 46 Atl. 462. It may not be inaccurate to say that he affirms the sale, but seeks to charge the trustee for its value upon some equitable ground. "That trustee process is an equitable proceeding in which the rights of the parties are determined upon equitable principles, and that, in the absence of fraud in the intent, the trustee cannot be charged for chattels in his possession unless he has in his hands property belonging to the defendant which the defendant has the legal right to take and carry away, are propositions for which in this state the citation of authority seems superfluous." *Corning v. Records*, supra, 396. See also authorities there cited. This general principle is recognized and applied in *Dole v. Farwell*, 72 N. H. 183, 55 Atl. 553, where it was held that, as against the trustee, a plaintiff in foreign attachment cannot raise the question whether an assignment of future earnings by the defendant is fraudulent as matter of law. In *Gutterson v. Morse*, 58 N. H. 529, cited by the plaintiffs, the trustee was charged for the value of property fraudulently conveyed to him without consideration, which he had sold, because it was equitable and just that he should be so charged, and not upon the ground of setting aside the trustee's title to the property. Having fraudulently received the defendant's property and sold it, equity required that he should account for its value to the defendant's creditor. The case is not an authority for the proposition that one sued as a trustee may be charged for the value of property sold to him by the defendant, when there was no fraud in fact connected with the sale, and when he had paid the defendant a full and fair consideration for it. Equity does not require or authorize such a holding. *Pittsfield Bank v. Clough*, 43 N. H. 178, 187. In view of the settled law of this state upon this subject, apparently contrary holdings elsewhere (*Jacques & T. Co. v. Carstarphen Warehouse Co.* 131 Ga. 1, 62 S. E. 82; *Kohn v.* 39 L.R.A.(N.S.)

Fishback, 36 Wash. 69, 104 Am. St. Rep. 941, 78 Pac. 199) need not be considered.

In the enactment of the statute in question the legislature of 1909 furnished no evidence of an intention to establish a new rule for the collection of debts in cases of conveyances of property by debtors, which are merely fraudulent in law, but not in fact; nor to extend the equitable process of foreign attachment to such cases. The intention was to apply the doctrine of constructive fraud to sales of personal property under certain circumstances which before had been regarded as valid sales. The statute was designed to extend the doctrine, but not to affect or increase the remedies, that have been applied in cases of constructive fraud, as contrasted with cases of actual fraud. It furnished, therefore, no justification for charging the trustee in this proceeding.

This result renders it unnecessary to consider the question raised and argued by counsel, of the constitutionality of the statute.

Exception sustained.

All concur.

KANSAS SUPREME COURT.

MILTON E. BAILEY et al., Appts.,
v.
JOHN KELLY.

(86 Kan. 911, 122 Pac. 1027.)

Landlord and tenant — lease with existing nuisance — liability to licensee.

1. Where a nuisance dangerous to life is created by the owner on his premises, or through his gross negligence is suffered to remain there, he cannot, by leasing the prop-

Headnotes by PORTER, J.

Note. — When a court assumes to remove the ancient landmarks and to unsettle law which has been settled for centuries, it owes the duty to the profession and its constituents to give a valid reason for its act, and when it fails to do so the only excuse for preserving the decision is to restore the guide posts. The above decision is without precedent except in the *Willcox Cases*, decided by the supreme court of Tennessee and referred to in the above opinion. The note to the first of those cases, in 34 L.R.A. 824, shows that the decision is unsupported by principle or precedent, and the note in 34 L.R.A.(N.S.) 799, shows that they have been repudiated by the courts before which the question has come since their decision. It is too well settled to admit of controversy that a property owner is not bound to keep it safe for persons who

erty to another, avoid his own liability to any person who is rightfully upon the premises, and who, without any fault, is injured by reason of such nuisance; and this liability extends to a servant of the tenant, notwithstanding the tenant, by reason of his own fault or neglect or knowledge of the danger, could not have maintained an action against the owner for any injury suffered by himself.

Trial — jury — knowledge of landlord.

2. In such a case, it is for the jury to determine whether or not the owner knew of the dangerous condition of the premises at the time of the letting, or in time to have abated the nuisance before the injury occurred, or should have known it by the exercise of ordinary care.

(April 6, 1912.)

APPEAL by plaintiffs from a judgment of the District Court for Cloud County in defendant's favor in an action brought to recover damages for the death of plaintiffs' intestate, which was alleged to have been due to the defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Charles L. Hunt, Park B. Pulsifer, A. M. French, and A. L. Wilmoth, for appellants:

Plaintiffs should recover.

Copley v. Balle, 9 Kan. App. 465, 80 Pac. 656; Thomp. Neg. § 1173; Kinchlow v. Midland Elevator Co. 57 Kan. 374, 46 Pac. 703;

come upon it without his invitation or permission. 26 L.R.A. 686, note. Furthermore, when he lets it to another with the dangerous condition plainly visible, the lessee takes all the risk of injury from it. After it goes into possession of the lessee, he alone is responsible for injury to persons who come upon it by his permission or invitation, since there is no privity between them and the property owner. As shown in *BAILEY v. KELLY*, the landlord has been held liable where he let the premises with a nuisance on them dangerous to the public, and the court states that "no reason is apparent why the same rule should not apply to a case where the dangerous nuisance exists upon private property, and a third person who is lawfully upon the premises, and who is without default or negligence, is injured thereby." But this is the exact point where the line of cleavage has been made by the courts throughout the history of the question. The courts hold that the property owner owes a duty to the public which he cannot evade by leasing the property, but that he owes no duty to his lessee or persons who come upon the property by the lessee's invitation, except in cases where there was a concealed danger, in which cases the owner has been held liable upon the theory of fraud. But it does not appear that the danger was concealed in *BAILEY v.* 39 L.R.A. (N.S.)

De Tarr v. Ferd. Heim Brewing Co. 62 Kan. 188, 61 Pac. 689; *Cristadoro v. Von Behren*, 119 La. 1025, 17 L.R.A. (N.S.) 1161, 44 So. 852; *Monahan v. National Realty Co.* 4 Ga. App. 680, 62 S. E. 127; *Texas & P. R. Co. v. Moore*, 8 Tex. Civ. App. 289, 27 S. W. 962; *Steinberg v. Willcox*, 96 Tenn. 163, 34 L.R.A. 615, 33 S. W. 917; *Herd v. Koenig*, 137 Mo. App. 589, 119 S. W. 56; *Reichenbacher v. Fahmeyer*, 8 Ill. App. 217; *McLaughlin v. Kelly*, 230 Pa. 251, 79 Atl. 552; *Ross v. Jackson*, 123 Ga. 657, 51 S. E. 578; *Bailey v. Dunaway*, 8 Ga. App. 713, 70 S. E. 141; *Patterson v. Jos. Schlitz Brewing Co.* 16 S. D. 33, 91 N. W. 336; *Grant v. Tomlinson*, 138 Mo. App. 222, 119 S. W. 1079; *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. 421.

Messrs. F. W. Sturges, Fred W. Sturges, Jr., and Theo Laing, for appellee:

Appellee leased the premises without fraud or concealment, without promise or agreement to change or repair, to a tenant who had opportunity to know and knew the condition thereof. He was therefore not liable.

Perez v. Rabaud, 76 Tex. 191, 7 L.R.A. 620, 13 S. W. 177; *Scott v. Simons*, 54 N. H. 431; *Brewster v. De Fremery*, 33 Cal. 341; *O'Brien v. Capwell*, 59 Barb. 497; *Edwards v. New York & H. R. Co.* 98 N. Y. 245, 50 Am. Rep. 659; *Moore v. Parker*, 63 Kan. 52, 53 L.R.A. 778, 64 Pac. 975; *Walsh v. Schmidt*, 206 Mass. 405, 34 L.R.A. (N.S.) 798, 92 N. E. 496.

KELLY. This distinction appears to be sound. There is no liability for negligence unless there is a duty, and the property owner owes no duty to persons who come upon the land without his invitation or license, nor to persons who, because of contract, assume the risk, as in case of the lessee. Furthermore, there appears to be no ground upon which the lessee can give invitations or licenses which will impose liability upon the property owner. Attention is called to the fact that *Edwards v. New York & H. R. Co.* 98 N. Y. 245, 50 Am. Rep. 659, upon which the court so largely relies to support its ruling, involves the fall of a gallery in a public place of entertainment known as Gilmore's Garden, in New York city, which is within the exceptions of the general rule, but even in that case a judgment of nonsuit was affirmed. Also in *Todd v. Flight*, 9 C. B. N. S. 377, 30 L. J. C. P. N. S. 21, 7 Jur. N. S. 291, 3 L. T. N. S. 925, 9 Week. Rep. 145, 15 Eng. Rul. Cas. 329, the injury was caused by the fall of a chimney over the line onto the property of an adjoining landowner, which is manifestly a different case from *BAILEY v. KELLY*. The court in *BAILEY v. KELLY* appears to have sufficiently pointed out the distinction between the facts before it and those involved in the other cases cited by it to make further comment unnecessary. H. P. F.

Porter, J., delivered the opinion of the court:

On October 4, 1909, the daughter of the plaintiffs, a girl of sixteen years, was drowned in a cistern on premises belonging to the defendant. At the time of the accident she was a servant in the employ of persons who occupied the premises as tenants of the defendant. The parents sued the owner of the property to recover damages upon the ground that he was negligent in permitting the cistern to be and to remain with a dangerous and insecure covering. The court sustained a demurrer to the evidence, and the plaintiffs appeal.

In the rear of the premises there was a large shed in which there was a cistern 20 feet deep and 8 feet in diameter. The water in the cistern was 12 feet deep. The wooden platform over the cistern was raised a few inches above the level of the ground, there being no floor in the shed. Some time prior to the fall of 1907, an opening had been cut in the platform. The cover to the opening consisted of a window sash which was about 2 feet wide and 2 feet 8 inches long, from which the glass had been removed and upon one side of which sheet iron was nailed. The cover was but little larger than the opening, and there was no way of fastening it to the platform. It lay loosely over the opening, and was easily slipped off or to one side. Water was drawn from the cistern by lowering a bucket through the opening. In December, 1907, the defendant leased the premises to Watson for the purpose of being used as a restaurant. The cover of the cistern remained in the same condition from the time of the letting until the accident, after which hinges and clasps were put on, by which it could be fastened in place. The shed in the rear of the restaurant was used by the tenants for the purpose of storing supplies and for doing laundry work; water from the cistern being used for laundry purposes. The plaintiffs' daughter, who had been in the employ of the tenant about four weeks, went from the kitchen to the shed to get supplies for the restaurant. In doing so she stepped upon the insecure cover, which tilted, and threw her into the cistern, and she was drowned. The trial court sustained the demurrer on the sole ground that the action could not be maintained, because the daughter, if she had survived, could not have recovered from the landlord for injuries received while a servant of the tenant, caused by the defective condition of the premises or the failure of the landlord to repair. From the evidence it appears that the defendant purchased the property in January, 1906. The cistern was made by a former

owner in 1895. In 1907 a tenant who occupied a part of the premises, and who had been using the cistern in connection with a barber shop, pulled up the pump, and abandoned the use of the cistern. He left the platform as it had been up to that time, with a small opening just large enough for a four-inch pipe. The evidence does not show who caused the larger opening to be made, or who provided the defective cover, but the platform, the opening, and the cover were in the same condition when the premises were leased to Watson in December, 1907, as they were when the accident occurred. In order to show that the defendant knew of the condition of the cistern, the tenant, Watson, was called as a witness. He testified that, at the time he went into possession, the defendant did some painting about the house, and was there when the witness was using the cistern to get water to wash the floors and windows. He also testified that he examined the premises himself at the time he leased the place, and that, from about the time he took possession, he knew the condition of the cistern, and that there was nothing about it that led him to believe it to be dangerous; that on the day of the accident he was helping his wife with the laundry work, and had been drawing water from the cistern for washing, and that, so far as he knew, Jennie Bailey, the girl who was drowned, never drew any water from the cistern. There was no evidence to show that she knew of the dangerous condition of the cover except that she had been employed there for four weeks before the accident, and that she and the other employees went in and out and had opportunity to see the premises.

As between landlord and tenant, where there is no fraud or false representations or deceit, and in the absence of an express warranty or covenant to repair, the law has always been that there is no implied contract that the premises are suitable or fit for occupation, or for the particular use intended, or that they are safe for use. *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471; *O'Brien v. Capwell*, 59 Barb. 497; *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438; *Eakin v. Brown*, 1 E. D. Smith, 36; *Moore v. Parker*, 63 Kan. 52, 53 L.R.A. 778, 64 Pac. 975; *Taylor, Land. & T.* 9th ed. § 175a. The rule generally is that the occupant, and not the owner, is responsible to third persons for injuries caused by the failure to keep in repair. 1 *Thomp. Neg.* § 1155; 1 *Pingrey, Real Prop.* pp. 617, 618, 623. There are certain exceptions to the rules exempting the landlord from liability for injuries to third persons caused by defective conditions in leased premises. One of them,

relied upon by the appellant, is where the premises are let with a nuisance upon them, which is the cause of the injury complained of. A nuisance may result from nonfeasance or negligence as well as from misfeasance or malfeasance. Wood, Nuisances, 3d ed. chap. 1. If there is a dangerous nuisance on the premises, the owner cannot avoid liability to a third person for damages resulting from a continuance of the nuisance, which it was his duty to abate. 1 Thomp. Neg. § 1158; Knauss v. Brua, 107 Pa. 85; Irvine v. Wood, 51 N. Y. 224, 10 Am. Rep. 603; Waggoner v. Jermaine, 3 Denio, 306, 45 Am. Dec. 474; Fish v. Dodge, 4 Denio, 311, 47 Am. Dec. 254; Rosewell v. Prior (Eng.) 2 Salk. 459; Clark v. Fry, 8 Ohio St. 358, 72 Am. Dec. 590; Stephani v. Brown, 40 Ill. 428; Peoria v. Simpson, 110 Ill. 294, 51 Am. Rep. 683. The rule is well settled, however, that when the property does not constitute a nuisance when demised, but becomes so only by the act of the tenant, the owner will not be held liable. Joyce v. Martin, 15 R. I. 558, 10 Atl. 620; Rankin v. Ingwersen, 49 N. J. L. 481, 10 Atl. 545; Kalis v. Shattuck, 69 Cal. 593, 58 Am. Rep. 568, 11 Pac. 346; Shearm. & Redf. Neg. 5th ed. § 120. The doctrine of *caveat emptor* does not apply where there is any dangerous defect in the demised premises not easily discoverable, and, if the landlord knows of such defect, the duty rests upon him to notify the lessee. Moore v. Parker, 63 Kan. 52, 53 L.R.A. 778, 64 Pac. 975; Meyers v. Russell, 124 Mo. App. 317, 101 S. W. 606; Sunasack v. Morey, 196 Ill. 569, 63 N. E. 1039; Morgan v. Sheppard, 156 Ala. 403, 47 So. 147; Cate v. Blodgett, 70 N. H. 316, 48 Atl. 281. A distinction, of course, is made between cases where the construction of the premises is such that they cannot be used at all for the purpose intended by the tenant without creating a nuisance, and those where the nuisance arises from an improper use of the premises by the tenant. 1 Thomp. Neg. § 1158; Pickard v. Collins, 23 Barb. 444. In most of the cases holding the landlord liable because of leasing the premises with an existing nuisance which has caused the injury, it will be found that the defective or dangerous condition created what is usually termed a public nuisance, such as an unguarded excavation on a public street, or so near thereto as to become dangerous to the public. Such are the following cases: Stephani v. Brown, 40 Ill. 428; Hart v. Albany, 9 Wend. 570, 571, 24 Am. Dec. 165; Peoria v. Simpson, 110 Ill. 294, 51 Am. Rep. 683; Owings v. Jones, 9 Md. 108; Dalay v. Savage, 145 Mass. 38, 1 Am. St. Rep. 429, 12 N. E. 841. Others proceed

upon the proposition that the premises were leased with the expectation that they would be used and frequented by the public, such as a wharf or pier or place of amusement. Albert v. State, 66 Md. 325, 59 Am. Rep. 159, 7 Atl. 697. In *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295, a leading case very frequently cited, the action was against the landlord, who leased a pier when it was defective, and it was held that he was liable to a third person who entered upon it and was injured by its defective condition. Clancy v. Byrne, 56 N. Y. 129, 15 Am. Rep. 391, was a case where plaintiff's horse fell through a defective pier. The action was against the lessee, who had covenanted with his landlord to make all ordinary repairs, and had then sublet the pier. He was held liable because he owned or had rights in the premises, and leased them with the nuisance upon them. No reason is apparent why the same rule should not apply to a case where the dangerous nuisance exists upon private property, and a third person who is lawfully upon the premises, and who is without default or negligence, is injured thereby. In *Edwards v. New York & H. R. Co.* 98 N. Y. 245, 248, 249, 50 Am. Rep. 659, which is often referred to in opinions by other courts and by text writers as a leading case, this language is used (the italics are ours): "If a landlord lets premises and agrees to keep them in repair, and he fails to do so, in consequence of which any one lawfully upon the premises suffers injury, he is responsible for his own negligence to the party injured. If he demises premises knowing that they are dangerous and unfit for the use for which they are hired, and fails to disclose their condition, he is guilty of negligence which will in many cases impose responsibility upon him. If he creates a nuisance upon his premises, and then demises them, he remains liable for the consequences of the nuisance as the creator thereof, and his tenant is also liable for the continuance of the same nuisance. But where the landlord has created no nuisance, and is guilty of no wilful wrong or fraud or culpable negligence, no case can be found imposing any liability upon him for any injury suffered by any person occupying or going upon the premises during the term of the demise; and there is no distinction stated in any authority between cases of a demise of dwelling houses, and of buildings to be used for public purposes. The responsibility of the landlord is the same in all cases. If guilty of negligence or other delictum which leads directly to the accident and wrong complained of, he is liable; if not so guilty, no liability attaches to him."

"The foundation of the liability in these cases, when there is no warranty and no misrepresentation, is negligence." *Bowe v. Hunking*, 135 Mass. 380, 384, 46 Am. Rep. 471, citing *George v. Skivington*, L. R. 5 Exch. 1.

Where the nuisance arises from the improper use of the premises, the tenant, and not the landlord, will be liable; but where the nuisance existed at the time the premises were leased, the action may be maintained against either lessor or lessee or both. *Stephani v. Brown*, 40 Ill. 428. By receiving the rent the landlord profits by the continuance of the nuisance, and is held liable after he has parted with the possession. Besides, he may, notwithstanding the lease, enter for the purpose of abating a nuisance. *Rosewell v. Prior*, 2 Salk. 459. It appears to be sound doctrine and good sense that he whose duty it is to abate a nuisance should answer for the consequences resulting from its continuance. In *Brown v. Cayuga & S. R. Co.* 12 N. Y. 486, Denio, J., in a separate opinion, speaking for himself, said: "Everyone is bound so to use his own property that it shall not be the means of injury to his neighbors, and I think the proprietor should himself look to it, and that he cannot safely wait to be admonished before reforming what may be dangerous to others." Page 494.

The main contention of the appellee is that the demurrer was rightly sustained because of the principle thus stated in 24 Cyc. 1119: "The general rule is that a subtenant, guest, or servant of the tenant is regarded as so far identified with the tenant that his right to recover against the landlord is the same as the tenant's right would be, had the accident happened to him; but he can have no greater claim against the landlord than the tenant himself would have under like circumstances." To the same effect is 1 Thomp. Neg. § 1133. It must be conceded that authority from able text writers and decisions by courts of the highest standing will be found which seem to support the contention. These authorities put the servant in the shoes of the tenant for all purposes. They divide strangers and all third persons into two classes with respect to the landlord's liability for injuries caused by defects in the premises. Into the first class they place all persons who are strangers to both landlord and tenant, such as the owners of adjoining premises, travelers upon highways adjoining the leased premises, and all persons who sustain no contractual relations with either party to the lease. In the second class they place servants, employees, licensees, guests, customers, etc., of the tenant; and 39 L.R.A. (N.S.)

these being upon the premises by his invitation, express or implied, are said to stand in his shoes. The rule declared is that, as between the landlord and them, the duty to keep the premises in safe condition is in all respects the same as that which the landlord owes to the tenant. The doctrine of *caveat emptor* is strictly applied; and, if the tenant cannot recover, this class of strangers cannot. *Whitmore v. Orono Pulp & Paper Co.* 91 Me. 297, 40 L.R.A. 377, 64 Am. St. Rep. 229, 39 Atl. 1032; *O'Brien v. Capwell*, 59 Barb. 497; *Perez v. Rabaud*, 76 Tex. 191, 7 L.R.A. 620, 13 S. W. 177; *Anderson v. Hayes*, 101 Wis. 538, 70 Am. St. Rep. 930, 77 N. W. 891; *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767. And see extended note in 92 Am. St. Rep. 499, and cases cited at page 509. A leading case is *O'Brien v. Capwell*, supra, which was an action by a washerwoman in the employ of the tenant against the landlord, for injuries caused by the railing on a back porch giving way on account of its defective condition and lack of repair. Some reliance was placed upon the promise of the landlord to repair, made when his attention was called to the defect. The court held the negligence of the landlord to be one of omission of duty; and in the opinion it was said: "In such case, where no affirmative fault, misfeasance, or affirmative wrong was committed by the defendant or was imputed to him, it is essential, to sustain a recovery, to establish that the defendant owed some clear, specific, legal duty to the party injured, which was violated." 59 Barb. 504. The tenant was aware of the defective condition when the premises were leased, and the court held that, because the landlord owed him no duty which would have entitled the tenant to recover in case he had been injured, the servant could not recover; that the rule of *caveat emptor* always applies to contracts of letting, "with one or two recognized exceptions" (p. 504), which, it was said, had no application to that case. The opinion cites, among other authorities, *McGlashan v. Tallmadge*, 37 Barb. 313, 315. We have examined the cited case, which holds that, where the landlord was guilty of fraud or where a nuisance was created by his wrongful act, the rule of *caveat emptor* does not apply. The case of *O'Brien v. Capwell*, 59 Barb. 497, which defendant cites, is not squarely in point, nor is the reasoning upon which it rests satisfactory. In the present case the dangerous nuisance was not the result of the failure to repair. It was as much a death trap and a nuisance when the opening was made and the defective cover placed there as it was when the accident

occurred. Another case cited by appellee is *Perez v. Rabaud*, 76 Tex. 191, 7 L.R.A. 620, 13 S. W. 177, which squarely denied the right of a servant of the tenant to recover against the landlord for injuries caused by the defective and dangerous cistern, and the decision is placed upon the ground that the servant cannot be classed as a stranger, but can recover only where the tenant could have recovered if the latter had been injured. It should be noted that the defective condition of the cistern was alleged to have resulted "from age and natural decay," and that the petition set up a promise of the landlord to repair. The decision follows, and is based upon the cases of *O'Brien v. Capwell*, supra, and *Jaffe v. Harteau*, 66 N. Y. 398, 15 Am. Rep. 438. In the *Jaffe* Case, which is frequently referred to as a leading case, the wife of the tenant was denied the right to recover. Of course, that case cannot be recognized as an authority here, because it is directly opposed to *Moore v. Parker*, 63 Kan. 52, 53 L.R.A. 778, 64 Pac. 975, where it was held that the wife of the tenant could maintain the action. The opinion also relies to a great extent upon the general rule stated in 1 *Thompson on Negligence*, 1st ed. p. 323, and 2d ed. §§ 1130-1133, to the effect that, in the absence of fraud or deceit, there is no implied agreement that the premises are fit for occupation, and that the rule extends to servants of the tenant. The Texas case may have been decided correctly upon the facts. It is distinguishable from the present case by the fact that there is here no reliance upon a promise to repair, or, in fact, upon the breach of any covenant, express or implied, under the law of landlord and tenant. The liability of the appellee as it appeared at the close of appellant's evidence does not rest upon any contractual relation of landlord and tenant. If liable at all, his liability springs from his negligent act in creating a dangerous nuisance upon his premises, and which he is held, with his tenant, to have maintained jointly, because he received the rent for the premises with the nuisance existing thereon. *Rosewell v. Prior*, 2 Salk. 459. "It is also, no doubt, true that in the leasing of premises there is no implied warranty that they are fit for a particular use, and that liability, if any, in this class of cases, does not spring from contract, but must be predicated upon the negligent act or omission of the landlord, the same being the proximate cause of the injury, in reference to a matter where it was his duty to use ordinary care out of respect to the rights of others liable to be thereby directly involved; and for an injury 39 L.R.A. (N.S.)

thus arising a recovery may be had where there is no such contributory negligence on the part of the plaintiff as would bar the remedy in other actions for negligence." *Reichenbacher v. Pahmeyer*, 8 Ill. App. 217, 218.

A case frequently cited in connection with the nuisance doctrine is *Godley v. Hagerty*, 20 Pa. 387, 397, 69 Am. Dec. 731, where the owner erected a building for rent in so imperfect a manner that it was incapable of supporting the burden imposed upon it, and it fell, injuring an employee of the tenant. The owner was held liable for the injury. It was said in the opinion: "When a man erects a building to rent, the law requires a reasonable share of that regard for human life which he is sure to manifest when he builds for his own inhabitation. If he will build, as is charged and found in the case, 'loosely, carelessly, unskilfully, and negligently,' and with 'insufficient and improper materials,' whereby the innocent and unsuspecting are injured, let him respond in damages." *Coke v. Gutkese*, 80 Ky. 598, 44 Am. Rep. 499, was an action by the daughter of the tenant for injuries she received by falling through a defective flooring into a privy vault. The action was brought against the owner, alleging that he knew the dangerous condition of the floor and concealed the fact from the lessee, and that neither the plaintiff nor her father, by the exercise of ordinary care, could have discovered it. The Kentucky court held the petition good as against a demurrer.

Of course, in the present case, the tenant himself could not recover for any injury he sustained as a result of the nuisance which he participated in maintaining, and the existence and danger of which were not concealed from him by the owner. The appellants, however, might have joined him as a defendant in the present action or have sued him separately. What reason can be suggested for denying to a person injured by the gross neglect of both landlord and tenant the right to recover of the landlord merely because the tenant in a like case could not maintain an action against the landlord? The tenant knew of the dangerous trap, the servant, so far as the evidence discloses, was ignorant of the peril, and, without fault or culpable negligence on her part, came to an untimely death.

We have purposely omitted citations to cases where the landlord retained control over the premises or some portion of them, such as cases involving tenement buildings and rooming houses, and cases of injuries caused by unguarded elevator shafts, where the landlord controlled the operation of the elevator. In such cases the owner's liabil-

ity arises from the neglect of a duty which he manifestly owes to all persons lawfully upon the premises. *Kinchlow v. Midland Elevator Co.* 57 Kan. 374, 46 Pac. 703, is cited and relied upon by the appellant. In that case the landowner, who was in possession and control of the premises, maintained thereon a dangerous nuisance by which a boy in the employ of a licensee of the landowner was injured. The court applied the maxim, *Sic utere tuo ut alienum non laedas*, and held the owner liable because he had maintained upon his premises a trap or pitfall unguarded and liable to cause injury to others; but the case is not directly in point for the reason that the owner was in possession and control of the premises.

A case which fully recognizes the principle running through the cited cases is *Moore v. Parker*, 63 Kan. 52, 53 L.R.A. 778, 64 Pac. 975. The trial court sustained a demurrer to the petition, and the judgment was reversed. The wife of the tenant of a farm was injured by the giving way of a platform over a well intended for domestic use. The petition alleged that the owner of the premises constructed the platform of defective materials, and that, at the time the premises were leased, he knew it was in a dangerous condition, and that he negligently and fraudulently concealed the fact, and failed to disclose to plaintiff or her husband the defects, which were not obvious, and could not be discovered by the exercise of ordinary care. It was ruled in the syllabus: "A landlord is not an insurer or a warrantor, nor is he compelled to exercise constant care and inspection; but if he knows that the premises which he is about to let are defective and in a dangerous condition, especially if such dangerous or defective place is not obvious or discoverable to the tenant by the exercise of ordinary care, and he does not inform the latter of such defective or dangerous place, and injury is occasioned thereby to the tenant or a member of his family, who is not aware of such defective or dangerous place, while in the exercise of ordinary care, the landlord is liable in damages. The law requires good faith on the part of the landlord toward his tenant." It will be observed that the petition alleged the landlord's knowledge of the nuisance, his concealment of the fact from the tenant, and that it was unknown to plaintiff or to the tenant, and could not be discovered by the exercise of ordinary care. The demurrer admitted these averments. In the present case the appellee contends that the evidence fails to show that he knew of the dangerous condition of the cistern, and that he concealed it from the tenant; and, further, that it conclusively appears that what

ever defect existed was obvious and discoverable by the tenant. In fact, the tenant admitted in his testimony that he knew the conditions from the time he went into possession, although he says there was nothing which induced him to believe them to be dangerous.

The courts are at variance upon the question whether or not it is necessary to show actual notice of the dangerous condition to the owner in order to establish his liability to persons injured thereby. The numerical weight of authority would seem to require proof of actual notice. However, in *Hines v. Willcox*, 96 Tenn. 148, 160, 34 L.R.A. 824, 832, 54 Am. St. Rep. 823, 33 S. W. 914, 916, the landlord was held liable to a tenant for injuries caused by a defect in the premises which the landlord concealed from the tenant when the lease was made, and which defect was known to the landlord or might have been known by him in the exercise of reasonable care. In the opinion it was said: "We think the great weight of authority is that if a landlord lease premises which are, at the time, in an unsafe and dangerous condition, he will be liable to his tenant for damages that may result, if he knows the fact and conceals it, or if, by reasonable care and diligence, he could have known of such dangerous and unsafe condition, provided reasonable care and diligence is exercised by the tenant on his part." The case has been criticized by other courts for extending the rule, and holding the landlord liable for defects of which he has only constructive notice, that is, making him liable not only for failure to disclose defects of which he knows, but also for failure to make known defects which he could have discovered by reasonable diligence. See *O'Malley v. Twenty-Five Associates*, 178 Mass. 555, 60 N. E. 387, and critical note in 34 L.R.A.(N.S.) 799-802. But in *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603, a case cited and approved in numerous decisions, the same rule of constructive notice was applied and the owner was held liable, as well as the tenant, for damages to one passing along a public street, who stepped upon the iron cover of a coal hole which turned and caused him to fall through it. In *Moore v. Parker*, 63 Kan. 52, 53 L.R.A. 778, 64 Pac. 975, the case of *Hines v. Willcox* is approved, and an excerpt quoted stating the doctrine that constructive notice is sufficient. The question, however, was not decided, for the reason that the petition to which the demurrer was erroneously sustained in that case alleged that the landlord had actual notice. In *Timlin v. Standard Oil Co.* 126 N. Y. 514, 22 Am. St. Rep. 845, 27 N. E. 786, the court cites with ap-

proval the case of *Todd v. Flight*, 9 C. B. N. S. 377, 30 L. J. C. P. N. S. 21, 7 Jur. N. S. 291, 3 L. T. N. S. 325, 9 Week. Rep. 145, 15 Eng. Rul. Cas. 329, where it was said that an action will lie against an owner who, with knowledge, leased his premises in a dangerous condition,—that is, in such a condition as to be a nuisance,—where damage was caused to a third party after the leasing. In the opinion in the principal case, *Peckham, J.*, used this language: "I think that even if he do not create it, yet if, to his knowledge, it exist on his premises at the time of the demise, and is of a character dangerous to the public or an adjoining owner, or if he were in truth ignorant, and yet by the exercise of reasonable care and diligence he would have known of its existence, there is no principle which can exempt him from responsibility any more than if he created the nuisance himself." 126 N. Y. 525.

There was some evidence tending to show that the opening in the platform was made, and the insufficient cover attached, some time in 1907 previous to the letting. Whether the owner created the nuisance himself, or whether it was done by some tenant then in the occupancy of the premises, does not appear, and is not controlling. Ever since *Rosewell v. Prior*, 2 Salk. 459, it has been held that if the nuisance is created by a tenant, and thereafter the landlord takes possession and relets the premises to another with the nuisance remaining thereon, he is liable the same as though he created it in the first instance. For the reasons stated, we are of the opinion that it was for the jury to determine whether or not the appellee knew of the dangerous condition of the premises at the time of the letting, or in time to have abated the nuisance before the injury occurred, or should have known of it by the exercise of ordinary care, and that, in cases where a nuisance dangerous to life is created by the owner on his premises, or through his gross negligence is suffered to remain there, he cannot, by leasing the property to another, avoid his own liability to any person who is rightfully upon the premises, and who, without fault, is injured by reason of such nuisance. And this liability extends to a servant of the tenant, notwithstanding the tenant, by reason of his own fault or neglect or knowledge of the danger, could not have maintained an action against the owner for any injury suffered by himself.

It was error to sustain the demurrer, and the judgment is reversed, and a new trial ordered.

Petition for rehearing denied.

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UNITED STATES CIRCUIT COURT
OF APPEALS, FOURTH CIRCUIT.

SIDNA ALLEN, Plff. in Err.,
v.
UNITED STATES.

(— C. C. A. —, 194 Fed. 664.)

Perjury — securing acquittal — double jeopardy.

1. Placing one on trial for perjury which secured his acquittal of another offense is not placing him twice in jeopardy for the same offense.

Evidence — perjury — sufficiency.

2. To sustain a conviction of perjury for giving evidence which secured the acquittal of accused upon another charge, the falsity of the oath must be proved by positive and direct testimony, circumstantial evidence alone not being sufficient.

(February 27, 1912.)

Note. — Acquittal of crime as a bar to a subsequent prosecution of defendant for perjury committed on the former trial.

It is a general rule that the acquittal of a defendant on a criminal prosecution in which he testified, does not bar a subsequent prosecution against him for perjury committed upon the former trial. Where the issues in both trials were practically the same, however, it has been held that the decision in the first prosecution was *res judicata*.

The general rule just stated was applied in *People v. Sculley*, 3 N. Y. Crim. Rep. 244, where it was held that an acquittal upon a trial for robbery was not a bar to a prosecution for perjury committed by the accused in the former trial, in stating that he did not aid or assist in the robbery, and knew nothing about it. The court said: "The objection was suggested to my mind when the jury was impaneled, as to whether the case did not involve such a re-examination of the preceding case as to preclude the prosecution of the offense by way of indictment for perjury committed upon that trial. Of course, such a case could not have arisen before the act was passed allowing the defendant to be a witness in his own behalf, and that statute is of recent date; and there is no case that I am aware of where this precise point has arisen, as to whether or not a person may be indicted for perjury for giving testimony falsely upon a trial of himself which may have resulted in his acquittal. But the preceding rule of the common law was that a judgment received by a person in his favor could not be admitted in his favor. It was a record upon which he could stand as a legal estoppel, but, it was a matter open for re-examination; and if it was obtained by perjury on the part of the person in whose favor it might be rendered, there was a good reason for holding that though the perjury had been success-

ERROR to the District Court of the United States for the Western District of North Carolina to review a judgment convicting defendant of perjury. Reversed.

The facts are stated in the opinion.

Argued before Pritchard, Circuit Judge, and Dayton and Rose, District Judges.

Messrs. Walter S. Tipton and Watson, Buxton, & Watson, for plaintiff in error:

Where the evidence in the criminal and perjury cases is the same, the perjury case will not lie.

United States v. Butler, 38 Fed. 498; Cooper v. Com. 106 Ky. 909, 45 L.R.A. 216, 90 Am. St. Rep. 275, 51 S. W. 789, 59 S. W. 524, 11 Am. Crim. Rep. 625; United States v. McKee, 4 Dill. 128, Fed. Cas. No. 15,688; Coffey v. United States, 118 U. S.

ful, it would not exonerate him from criminal prosecution. The statute allowing witnesses to take the stand in their own behalf, and subjecting them to the same consequences as other witnesses, has exposed the accused, where he gives false testimony knowingly, to prosecution by way of indictment afterwards, although his testimony may have resulted in his favor. If that should not be the rule, then in all cases a very strong inducement would be held out to the accused to swear falsely, if he could swear falsely with the assurance in his own mind that he would be under no criminal accountability whatever, and that he could not be indicted the same as any other witness might be. That was not any part of the purpose of the law allowing the accused to be a witness in his own behalf on the trial. One of the objects was to subject him to all the restraints and obligations that other witnesses were subjected to, in order to insure, so far as possible, a truthful statement from him when he was placed as witness upon the stand. It is more important that these restraints should be imposed upon a person swearing in his own behalf in a civil or criminal case, than upon other persons, for the purpose of securing, as far as possible, truthful testimony in courts of justice. If they are not to be imposed then the criminal goes upon the stand with the knowledge that he may swear falsely, and is in no manner responsible for the crime, and thus destroy one of the great safeguards that might be expected to accrue. I think the law is not designed to uphold any such inconsistency."

And, in State v. Williams, 60 Kan. 838, 58 Pac. 476, affirmed on rehearing on other grounds in 61 Kan. 739, 60 Pac. 1050, it was held that an acquittal of the defendant in a prosecution for assault and battery was not an adjudication of the truthfulness of the defendant's testimony, and not such an adjudication as barred a prosecution for perjury in testifying that he did not strike the one upon whom the assault was alleged to have been committed, with a pistol, or have a pistol in his possession.

And this case was followed in State v. 39 L.R.A. (N.S.)

436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437; Petit v. Com. 22 Ky. L. Rep. 262, 57 S. W. 14.

Before the jury can convict of perjury, the falsity of the oath must be proven by two credible witnesses, or by one such witness and corroborative circumstances sufficient to turn the scales against the defendant's oath.

United States v. Wood, 14 Pet. 430, 10 L. ed. 527; State v. Miller, 24 W. Va. 807; State v. Hawkins, 115 N. C. 712, 20 S. E. 623; State v. Massey, 97 N. C. 465, 2 S. E. 445; Schwartz v. Com. 27 Gratt. 1025, 21 Am. Rep. 365, 2 Am. Crim. Rep. 410; United States v. Hall, 10 L.R.A. 324, 44 Fed. 864; Peterson v. State, 74 Ala. 34; McClerkin v. State, 20 Fla. 879; People v.

Bevill, 79 Kan. 524, 131 Am. St. Rep. 345, 100 Pac. 476, 17 Ann. Cas. 753, holding that an acquittal in a prosecution charging illegal fishing was not a bar to a prosecution against the defendant for perjury committed on the former trial, in testifying that he did not set certain nets or take fish therefrom.

And in State v. Cary, 159 Ind. 504, 65 N. E. 527, it was held that an acquittal of the defendant in a prosecution for criminal assault did not establish the fact that testimony which he gave in his behalf, denying the commission of the assault, was true, or bar a prosecution against him for perjury.

So, in State v. Caywood, 96 Iowa, 372, 65 N. W. 385, it was held that an acquittal for larceny was not *res judicata* in a prosecution against the defendant for perjury committed in the former trial.

And in State v. Vandemark, 77 Conn. 201, 58 Atl. 715, 1 Ann. Cas. 161, it was held that an acquittal in a prosecution for criminal conspiracy to commit an assault was not a bar to a prosecution for perjury committed by the defendant on the former trial, in stating that he was not at certain places at given times, and did not commit the assault, and had no knowledge of it; since the offenses were wholly distinct, and it was impossible that evidence sufficient to prove the former could be sufficient to prove the latter.

And in Dickerson v. State, 18 Wyo. 440, 111 Pac. 857, 116 Pac. 448, where a plea in bar tendered the issue of former acquittal, it was held that such a plea in a prosecution for perjury, setting up the defendant's acquittal of the crime of rape on the trial in which the perjury was alleged to have been committed, was insufficient.

So, in People v. Albers, 137 Mich. 678, 100 N. W. 908, it was held that the defendant's acquittal of the crime of bribery was not a bar to a prosecution for perjury committed in the former trial, by stating that he had been sent to offer the bribe by a certain person.

After referring to United States v. Butler; Cooper v. Com.; and Petit v. Com. infra, the court in this case said: "These

Wells, 103 Cal. 631, 37 Pac. 529; Haines v. State, 109 Ga. 526, 35 S. E. 141; State v. Waddle, 100 Iowa, 57, 69 N. W. 279; Wadlington v. Com. 22 Ky. L. Rep. 1108, 59 S. W. 851; State v. Jean, 42 La. Ann. 946, 8 So. 480; Com. v. Pollard, 12 Met. 225; Com. v. Butland, 119 Mass. 317; Vance v. State, 62 Miss. 137; Whittle v. State, 79 Miss. 327, 30 So. 722, 15 Am. Crim. Rep. 574; State v. Blize, 111 Mo. 464, 20 S. W. 210; State v. Gibbs, 10 Mont. 213, 10 L.R.A. 749, 25 Pac. 289; Gandy v. State, 23 Neb. 436, 36 N. W. 817; Crusen v. State, 10 Ohio St. 258; Williams v. Com. 91 Pa. 493; State v. Buie, 43 Tex. 532; Grandison v. State, 29 Tex. App. 186; Galloway v. State, 29 Ind. 442.

cases are authority for the proposition that an acquittal of a certain charge is a complete defense to a subsequent prosecution for perjury; which is based upon the assumption that respondent was guilty of that charge. If this proposition be sound, and it has been denied . . . it has no application to this case. It is true that the perjured testimony under consideration was material, because it strengthened respondent's claim that he was not acting corruptly. But its falsity is not, legally speaking, inconsistent with respondent's innocence of the crime of bribery. Because respondent was innocent of that crime, it does not follow that all testimony tending to prove his innocence was true, and that all testimony tending to prove his guilt was false. It is not even certain that the jury who acquitted respondent of the charge of bribery found that De Vries did not send him to Renihan. From the nature of the case this is a fact extremely difficult, if not impossible, to be proved. But if we assume that they did so find, as alleged in respondent's plea, it by no means follows that such finding is *res judicata* in this suit. The foregoing authorities certainly do not so hold. Because the people may not prosecute one for perjury upon the basis that he was guilty of the crime for which he has been acquitted, it by no means follows that they cannot prosecute him for perjury simply because the jury credited his perjured testimony, and particularly when the prosecution for the crime of perjury does not proceed upon grounds inconsistent with his innocence of the first charge. The verdict of the jury in the first case adjudged respondent innocent of the crime of bribery. By what reasoning can it be contended that it also adjudged him innocent of the crime of perjury in giving his testimony therein? He was not then tried for that charge, and he could not have been convicted of it. If a prosecution on that charge had been at once instituted, the pendency of the first prosecution could not have been pleaded in abatement of the second; and it has been held that the judgment in the suit in which perjury is alleged to have been committed is inadmissible evidence 39 L.R.A. (N.S.)

Messrs. A. E. Holton and A. L. Coble, for defendant in error:

The acquittal of a defendant charged with crime is no bar to his prosecution for perjury in having testified falsely on the first prosecution.

State v. Vandemark, 77 Conn. 201, 58 Atl. 715, 1 Ann. Cas. 161; United States v. Houston, 4 Cranch, C. C. 266, Fed. Cas. No. 15,398; United States v. Randenbush, 8 Pet. 288, 8 L. ed. 948; State v. Morgan, 95 N. C. 641; Coffey v. United States, 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437; State v. Beville, 79 Kan. 524, 131 Am. St. Rep. 345, 100 Pac. 476, 17 Ann. Cas. 753; 30 Cyc. 1422; State v. Cary, 159 Ind. 504, 65 N. E. 527; State v. Williams, 60 Kan.

on the question of guilt or innocence in the prosecution for perjury. . . . The general proposition that one can escape punishment for perjury, because he succeeded in inducing a jury to credit his false testimony, is supported neither by authority nor by reason. If he could, then it is true, as stated by counsel for the people, that the law encourages parties, particularly respondents in criminal cases, to perjure themselves. We must declare that the law is guilty of no such folly. Is the rule changed by the fact that the suit in which credit was given to the perjured testimony was another suit between the same parties? We think not. "The former verdict is conclusive only as to facts directly and distinctly put in issue, and the finding of which is necessary to uphold the judgment. The doctrine of estoppel [that is, the conclusiveness of a former judgment] is restricted to facts directly in issue, and does not extend to facts which rest in evidence, and are merely collateral. "A fact or matter in issue is that upon which plaintiff proceeds by his action, and which the defendant controverts in his pleadings, while collateral facts are such as are offered in evidence to establish the matters or facts in issue." "

In State v. Smith, — Minn. —, 137 N. W. 295, it was held that unless the conviction on the charge of perjury necessarily imported a contradiction of the jury's verdict of not guilty in the former trial for arson, the prosecution for perjury was not barred; and it was held that the jury's verdict of not guilty in the arson case in question, in which evidence was given of the defendant's admissions of being at the place where the arson was alleged to have been committed and of setting the fire in question, did not bar a prosecution for perjury based upon the defendant's denials of such admissions on the trial for arson.

Where the issues in both trials were practically the same, it has been held however, that the decision in the first prosecution was *res judicata* in the subsequent prosecution for perjury.

Thus, in United States v. Butler. 38 Fed. 498, the defendant had been acquitted upon

837, 58 Pac. 476; *Hutcherson v. State*, 33 Tex. Crim. Rep. 67, 24 S. W. 908.

Circumstantial evidence is sufficient to convict of perjury.

United States v. Wood, 14 Pet. 430, 10 L. ed. 527; 1 Greenl. Ev. ¶ 258; *People v. Doody*, 172 N. Y. 165, 64 N. E. 807, 15 Am. Crim. Rep. 576, affirming 72 App. Div. 372, 76 N. Y. Supp. 606; 30 Cyc. 1453; *Beach v. State*, 32 Tex. Crim. Rep. 240, 22 S. W. 976; *State v. Journigan*, 120 N. C. 568, 26 S. E. 696; *State v. Knox*, 61 N. C. (Phill. L.) 313.

Rose, District Judge, delivered the opinion of the court:

The plaintiff in error was the defendant below. He will be called the defendant. The defendant in error will be referred to as the government. The circumstances are peculiar. A year before the present indictment was returned, the defendant and one Dickins had been jointly indicted in the court below for (1) making counterfeit \$20 gold pieces; (2) having such coins in their possession with intent to defraud; and (3) passing or attempting to pass some of such coins on particular individuals. To such indictment Dickins pleaded guilty. The defendant stood his trial. It was proved that the defendant and Dickins lived close together in Carroll county, Virginia. They had been for some time closely associated. The defendant had in writing ordered machinery which could be used to make counterfeit coins. He had paid for this machin-

ery by his personal check. Dickins had invented a wagon brake. The defendant had a half interest in the patent therefor. In February, 1910, they came together to Winston-Salem, North Carolina. Their avowed purpose was to sell rights under the brake patent. While in Winston-Salem, Dickins passed or attempted to pass two of the counterfeit coins, one upon a prostitute, and the other upon a hack driver. As a result of his offering one of the coins to the latter, he was arrested. At the time he attempted to pass these coins, and when he was arrested, the defendant was waiting for him at a railroad station in Winston-Salem. There were many other facts and circumstances offered in evidence. Some of these tended to show that the defendant and Dickins were acting in concert. There was testimony that some man who answered more or less closely to the description of the defendant had, after the arrest of Dickins, made an unsuccessful attempt to recover from the prostitute the coin which had been passed upon her. The defendant took the stand in his own behalf. He admitted everything to which those government witnesses, who had positively identified him, had sworn. He gave an explanation of all such circumstances consistent with his lack of any knowledge of or participation in any illegal act of Dickins. He denied that he had ever visited the prostitute in question, or had ever had any communication of any kind with her. He was acquitted.

an indictment for unlawfully selling liquor, and it was held in a subsequent prosecution for perjury in stating that he did not sell it, as charged, that a plea of prior acquittal was bad, since the indictments were not for the same transaction nor sustained by the same evidence, but it was held that such acquittal was a conclusive adjudication in defendant's favor in the prosecution for perjury. The court said: "It certainly strikes one as an anomaly that, after an acquittal for a criminal offense, a party may be put upon trial for perjury, in swearing that he was not guilty of that offense; but I do not think a plea of former acquittal is the proper way to take advantage of it. To make such a plea effective it must appear that the same evidence will sustain both indictments, and that they relate to the same transaction. Thus, if a person be acquitted of robbery, he cannot be convicted of larceny of the same property; nor, after conviction for arson, can a prisoner be tried for murder committed in burning the building, although it has been held that a trial and conviction for an assault and battery is no bar to a subsequent indictment for manslaughter. *Burns v. People*, 1 Park. Crim. Rep. 182. But the offense of perjury is a totally distinct and separate thing from 39 L.R.A. (N.S.)

selling liquor, and was committed at a different time, although it related to the same transaction, and the evidence that will sustain one will only partly sustain the other. If defendant's contention were sound it would follow as a matter of course that if he had been convicted upon the first indictment for selling liquor, he could have pleaded a prior conviction to the indictment for perjury, a point I should be quite unwilling to concede. But I am clearly of the opinion that upon the trial of this case the defendant would be entitled to show that he had been acquitted of the offense concerning which he is charged to have committed perjury, and that such acquittal would be conclusive. Whenever the same fact has been put in issue between the same parties, the verdict of the jury upon such issue is a complete estoppel. This case contains all the elements of a plea of *res judicata*: the parties are the same; the point in issue, viz., whether he did in fact sell liquor, is the same, and the quantum of proof requisite in both cases is also the same. Had he sworn before the commissioner that he had paid his tax, and had been acquitted by the jury upon the ground that he did not sell liquor, the issue would have been different, and perhaps such difference might have been

About twelve months afterwards, the indictment now before us was found. By it he is charged with perjury in having sworn at his trial for counterfeiting that he was not guilty of the counterfeiting charge; that he did not have the counterfeit coins in his possession, nor did he attempt to pass them; that he had nothing to do with the counterfeit money that Dickens made and passed; that he did not know that Dickens had in his possession in Winston-Salem a counterfeit coin; that he did not make or aid and abet Dickens in the manufacture of counterfeit coins; and that he was in Winston-Salem on February 10, 1910, only for the purpose of selling a patent wagon brake. At the trial of the defendant for perjury, the testimony on both sides was in all substantial respects the same as that which had been given when he was called upon to answer the indictment for counterfeiting. It is true that the government did prove two additional attempts of Dickens to pass the counterfeit coins. When making one of these attempts, it was shown that Dickens had a companion. Such companion did not look unlike the defendant, but the witness would not swear that it was in fact the defendant. The defendant was convicted.

A number of assignments of error are made. The most important are intended to raise the questions (1) whether such a prosecution can be maintained at all; and (2) whether the defendant can be properly convicted when no witness has testified that

what the defendant had sworn in the first trial was false, and when it is not shown that the defendant has ever, in writing or otherwise, made any representations necessarily inconsistent with the truthfulness of the evidence for the giving of which he was put upon his trial.

The defendant says that he has been twice put in jeopardy for the same offense. With this contention we cannot agree. Passing or trying to pass in February counterfeit coins upon various residents of Winston-Salem is not the same offense as fore-swearing one's self in June in the United States district court at Greensboro. *State v. Vandemark*, 77 Conn. 201, 58 Atl. 715, 1 Ann. Cas. 161; *State v. Williams*, 60 Kan. 838, 58 Pac. 476; *Hutcherson v. State*, 33 Tex. Crim. Rep. 67, 24 S. W. 908; *State v. Beville*, 79 Kan. 524, 131 Am. St. Rep. 345, 100 Pac. 476, 17 Ann. Cas. 753; *State v. Cary*, 159 Ind. 504, 65 N. E. 527; *People v. Albers*, 137 Mich. 679, 100 N. W. 908; *State v. Caywood*, 96 Iowa, 372, 65 N. W. 385. In every one of these cases, the defendant was held properly convicted of perjury while testifying in his own behalf when under prosecution for an offense of which he was acquitted. It is true that the right to convict for perjury committed under such circumstances has been denied. *United States v. Butler* (D. C.) 38 Fed. 498; *Cooper v. Com.* 106 Ky. 909, 45 L.R.A. 216, 90 Am. St. Rep. 275, 51 S. W. 789, 59 S. W. 524; *Petit v. Com.* 22 Ky. L. Rep. 262, 57 S. W. 14.

But in none of those cases was it held

shown by parol, but in this case the two issues were identically the same."

And in *Cooper v. Com.* 106 Ky. 909, 45 L.R.A. 216, 90 Am. St. Rep. 275, 51 S. W. 789, 59 S. W. 524, it was held that an acquittal on a charge of adultery was a bar to a prosecution of the accused for perjury in swearing that he did not commit the offense. The court said: "Appellant in this case had already been tried and acquitted of the offense of having had carnal sexual intercourse with Libbie Purvis, and the judgment in that case is *res judicata* against the Commonwealth, and he cannot again be put on trial, where the truth or falsity of the charge in that indictment is the gist of the question under investigation."

And this case was followed in *Petit v. Com.* 22 Ky. L. Rep. 262, 57 S. W. 14, where it was held that an acquittal on a prosecution for carrying a deadly weapon was a bar to a prosecution against the defendant for false swearing as to whether or not he was carrying such weapon.

Referring to the *Butler* Case supra, the court, in *State v. Williams*, 60 Kan. 838, 58 Pac. 476, said: "In that case the defendant, who had been acquitted upon a charge of selling liquor without the payment of the special tax required by law, was prosecuted 39 L.R.A. (N.S.)

for perjury for swearing that he did not sell the liquor; and it was held that his acquittal of selling liquor was an adjudication in his favor on the subsequent trial for perjury, and that the government could not show that his sworn statement was false. It will be observed, however, that the issues there were more nearly identical than in the present case. The defendant swore that he did not sell liquor, and the finding of the jury was that he did not sell it. So, it was held that a person could not be convicted of perjury in swearing to a state of facts which a jury in another case against him had found to be true. Even in that case it was said that if the defendant had sworn that he had paid his tax, and had been acquitted by the jury upon the ground that he did not sell the liquor, the issue would have been different. So, here the defendant may have had a pistol in his hand or on his person at the time of the alleged assault, without being guilty of the offense charged against him in the police court; and he may even have struck Stevens with the pistol, and still have been acquitted on the ground that it was necessary for his own defense; and therefore there is not the identity of issues that there was in the *Butler* Case." J. T. W.

that the prosecution for perjury put the defendant a second time in jeopardy for the same offense. Indeed, Judge, afterwards Mr. Justice Brown, who decided *United States v. Butler*, supra, pointed out that it was impossible to hold that the defendant was being tried twice for the same crime. If that were true, a defendant testifying in his own behalf in a criminal trial could safely swear to anything he pleased. He could never be punished for perjury so committed. Autre fois convict is as conclusive a plea as autre fois acquit. But the learned judge was of opinion that, wherever the nature of the perjury alleged was such that the real issue of fact to be passed upon by the jury sworn in the perjury case was necessarily the same which had been already decided by the jury in the first case adversely to the contention upon which the government must stand in the perjury prosecution, the matter was *res judicata*. In spite of the great weight which the sound learning and broad wisdom of Mr. Justice Brown give to any of his judicial deliverances, his reasoning in this case has failed to secure general acceptance. The highest courts of Connecticut, Indiana, Michigan, Iowa, and Kansas have expressly declined to follow it. It has been adopted by the court of appeals of Kentucky. The reasons why a verdict of acquittal in a criminal case should not necessarily bar a subsequent prosecution of the defendant for perjury committed by him when testifying as a witness in his own behalf are forcibly stated by the supreme court of Michigan in *People v. Albers*, 137 Mich. 679, 100 N. W. 908. As there argued, public policy may require the recognition of the right sometimes to institute such prosecution. If so much be granted, it may be neither easy nor safe to lay down a fixed and unvarying rule of law defining the circumstances under which such prosecutions may or may not be undertaken. For the purposes of this case, it is enough to say that it is very hard to imagine any state of things which would justify an indictment for perjury of an acquitted defendant against whom the government offers no other substantial evidence than that which had been before the jury which had found him not guilty. The government and its prosecuting officers should not discredit the verdicts and judgments of its own courts by seeking to induce one jury to find that another gave a wrong verdict upon what is in all material respects the same testimony. The record in the case at bar suggests that the able and experienced attorney for the United States, when he began the prosecution for perjury, had some reason to think that one of the new wit-

nesses to the passing by Dickins of counterfeit coins would be able to identify the defendant as the person who was with him when such attempt was made. After it was found that such identification could not be had, it would have been better to have gone no further with the case. It is unnecessary for us to decide whether upon this record as it stands and as a matter of law we would, upon this ground, be justified in reversing the judgment of the court below. It will have to be set aside for reasons which, unless other evidence shall be forthcoming, will preclude a verdict for the government in any new trial which may be had.

As already stated, no witness testified to anything which was absolutely inconsistent with the defendant's innocence. No admission of his which showed him to be guilty was offered in evidence against him. The defendant prayed the court to instruct the jury that, in order to convict him, the falsity of his oath must be proved by two credible witnesses, or by one such witness and corroborative circumstances sufficient to turn the scale against the defendant's oath. The learned judge declined to give this instruction or others of similar import. He told the jury that such had been the rule of the common law, but that it did not apply in a case like the present. He added: "This case depends largely upon circumstantial evidence. . . . The law of circumstantial evidence is not supplanted by the rule of the common law which I have stated; but in an indictment for perjury, if the prosecution has introduced testimony showing circumstances which are well connected, strong, cogent, and convincing, which irresistibly lead the minds of the jury to the conclusion beyond a reasonable doubt that the defendant swore falsely as charged in the indictment, that he swore contrary to what he necessarily knew to be the truth, not only is the jury warranted in returning a verdict of guilty under such circumstances, but it would be their duty to do so."

To the refusal of the instructions asked for by him and to the portion of the charge of the learned judge above referred, the defendant duly excepted and has assigned error. Such assignments must be sustained. In trials for treason and perjury almost alone are now to be found any survival of the practice of arbitrarily measuring the probative value of evidence by the number of witnesses. It is true that in perjury the requirements of the rule are not now what they once were. There is no question that there are cases in which neither the two witnesses of the earlier

law, nor the one witness with strong corroboration of the later, are required to support a conviction. The court and the text-writers have said that the oath of a living witness to the falsity of the statement in question is not indispensable. "First, where the falsehood of the matter sworn by the prisoner is directly proved by documentary or written evidence springing from himself with circumstances showing the corrupt intent; secondly, in cases where the matter so sworn is contradicted by a public record, proved to have been well known by the prisoner when he took the oath, the oath only being proved to have been taken; and thirdly, in cases where the party is charged with taking an oath contrary to what he must necessarily have known to be true, the falsehood being shown by his own letters relating to the fact sworn to, or by any other written testimony existing and being found in his possession and which has been treated by him as containing the evidence of the fact recited in it. *United States v. Wood*, 14 Pet. 440, 441, 10 L. ed. 527, 533; 1 Greenl. Ev. § 258.

It may well be that a conviction might be sustained under still other circumstances, although the living witness was not forthcoming. If so, the evidence that the defendant had in fact forsworn himself must be direct and positive. If true, it must demonstrate the defendant's guilt. Such was the testimony held sufficient in *People v. Doody*, 172 N. Y. 165, 64 N. E. 807, 15 Am. Crim. Rep. 576. We have examined the other authorities relied on by the government. None of them sustain its contention. We have already quoted from *Greenleaf on Evidence*. 30 Cyc. 1452, in so many words declares: "Positive and direct evidence is absolutely necessary in a perjury case. Circumstantial evidence standing alone is never sufficient."

In *Beach v. State*, 32 Tex. Crim. Rep. 240, 22 S. W. 976, the acts proved were absolutely inconsistent with the innocence of the accused. The court there, it is true, says that two witnesses need not swear directly adversely to the fact sworn by the defendant. It is sufficient when the facts conclusively demonstrate his guilt. It, however, shows the sense in which it intends its words to be understood, by citing as its authority for them *United States v. Wood*, supra. The most recent text-writers recognize that to convict of perjury the government must produce testimony of a more direct and positive character than is required to justify a verdict of guilty of other offenses. There is no suggestion that the rule as laid down in *Greenleaf* and in *United States v. Wood*, supra, is not in sub-

stance still binding on the courts. 3 Wigmore, Ev. § 2040; 2 Chamberlayne, Ev. § 989.

In this case no witness directly swore to the falsity of any of the testimony for the giving of which the defendant was indicted. Nor is there any direct written evidence springing from himself which proves any of that testimony to be untrue. No admission or action of his established by the evidence is logically inconsistent with his innocence. Under such circumstances the refusal of the instructions asked for by him and the giving of the portion of the charge above quoted constituted prejudicial error.

The judgment of the lower court will have to be reversed.

UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

JOHN P. REYNOLDS, Trustee in Bankruptcy, Appt.,

v.

NEW YORK TRUST COMPANY.

(110 C. C. A. 409, 188 Fed. 611.)

Trover — right to waive tort — consumption of property.

1. The right to waive the tort, and sue in contract for conversion of property, does not fail because the property is consumed rather than converted into money.

Courts — Federal — effect of state decisions.

2. A Federal bankruptcy court is not bound by the decisions of the courts of the state in which it is sitting, as to the right of one whose property has been converted and consumed, to waive the tort and sue in contract for its value.

Note. — Bankruptcy: double proof of claim against estate of firm and individual partner.

This note does not include the cases on the right to prove a debt against the respective estates of two partnerships composed in whole or in part of the same members. Nor does it include cases like *Re Knight*, 2 Biss. 518, Fed. Cas. No. 7,880, 8 Nat. Bankr. Rep. 436, holding that where there are partnership and individual debts, and there are no partnership assets and no solvent partner, the debts of the firm and of the individual member may be proved against the individual estate, which is to be distributed *pari passu* among the creditors.

Generally, as to provability and discharge of partnership debts in individual proceedings, see the note in 69 L.R.A. 772.

As to the effect of an adjudication of bankruptcy of a member of the firm upon the rights of the firm creditors against the firm property, see the note in 30 L.R.A. (N.S.) 787.

Bankruptcy — quasi contracts — conversion — waiver of tort.

3. A contract, express or implied, for which claims may be filed under the bankruptcy act, includes quasi contracts to pay for property converted and consumed by the debtor.

Same — partnership — proof against firm and individual.

4. One whose bonds have been converted and consumed by a brokerage firm cannot, upon the theory that the tort is both joint and several, so as to permit him to proceed in contract, prove his claim in bankruptcy proceedings both against the estate of the firm and that of an individual partner who is not shown to have participated in the conversion or benefited thereby.

(June 22, 1911.)

As to the effect of an adjudication of bankruptcy of the partnership, to subject the separate estates of the partners to administration in bankruptcy, see the note in 5 L.R.A. (N.S.) 654.

As to the application of partnership assets, with the consent of all partners, to the payment of an individual debt of a partner, as a voidable preference under the bankruptcy act, see the note in 17 L.R.A. (N.S.) 1040.

As to whether the individual partner, as well as the firm, must be insolvent in order to render the firm bankrupt, or to avoid a payment of a firm debt as a preference, see the note in 21 L.R.A. (N.S.) 960.

As to whether a preference of a firm creditor by a partner, out of his own property, is an act of bankruptcy by the firm, see the note in 16 L.R.A. (N.S.) 656.

Pertinent to the matters discussed in *REYNOLDS v. NEW YORK TRUST CO.* is the question whether an unliquidated claim for tort may be proved in bankruptcy. This question was discussed in the note in 8 L.R.A. (N.S.) 961, which shows that it has been very generally held not only under the present bankruptcy law, but under the preceding bankruptcy laws, that unliquidated claims for damages arising *ex delicto* are not provable in bankruptcy, the only exception being such actions for tort as may be waived, and an action *ex contractu* maintained.

Generally, as to election between tort and assumpsit, see the note in 17 L.R.A. (N.S.) 280.

English rule.

With respect to the question herein considered the rule was established in England, at an early date, that joint and several creditors could not resort to both estates. This rule is said, in *Emery v. Canal Nat. Bank*, 3 Cliff. 507, Fed. Cas. No. 4,446, 7 Nat. Bankr. Reg. 217, to have been first promulgated in *Ex parte Rowlandson* (1735), 3 P. Wms. 405, in which the obligee in a joint and several bond proved his debt under three separate commissions,—that of the partnership and those of each part-

A PPEAL by the trustee in bankruptcy from an order of the District Court for the District of Massachusetts allowing a claim of the New York Trust Company for a certain amount against the individual estate of E. H. Gay, bankrupt. Reversed.

The facts are stated in the opinion.

Argued before Colt, Circuit Judge, and Aldrich and Brown, District Judges.

Messrs. Tyler & Young and Woodman & Whitehouse for appellant.

Mr. Charles P. Howland for appellee.

Brown, District Judge, delivered the opinion of the court:

This is an appeal by the trustee in bankruptcy of E. H. Gay, from an order

ner,—and after receiving a dividend under the joint commission, applied for a dividend under each separate commission. The chancellor was at first inclined to think that the petitioner, being a joint and several creditor, ought to be at liberty to come in under each of the commissions provided that he received but a single satisfaction, but afterwards held that since, if a person to whom others are jointly and severally bound sues the obligors severally, he cannot thereafter sue them jointly, the petitioner should be put to his election as to which commission in bankruptcy he would claim under. It was argued in behalf of the petitioner that the reason for the rule preventing both joint and several suits upon a joint and several obligation was based upon the want of necessity therefor, in that, if the obligee should sue the obligors jointly and recover judgment, he would be entitled to resort to both the joint and separate estates in execution, and that it would therefore be fruitless and vexatious to bring separate actions to accomplish what could be done by one; and that the bankruptcy of the debtor ought not to deprive the creditor of this advantage given him by law, so long as he did not receive a double satisfaction. In support of this position, a case decided three years earlier, but apparently unreported, was cited, in which a joint and several creditor was entitled to realize under both commissions. But the chancellor distinguished this case upon the ground that there the creditor had not only a debt against the partnership, but had the individual bond of the bankrupt partner for the same debt. While the *Rowlandson* Case has been cited as negating the right to make double proof, the exact holding would seem to be that, while a joint and several creditor may prove his debt against both estates, he cannot, so long as each estate is insufficient to meet the debts for which it is primarily liable, claim dividends from both estates, at least if he does not hold the separate and independent obligation of the bankrupt partner for the same debt.

So, also, subsequent cases adopted the rule that the obligee in a bond to whom the

of the district court for the district of Massachusetts, allowing a claim of the New York Trust Company for the sum of \$14,875, against the individual estate of E. H. Gay. A claim of like amount was allowed against the copartnership estate of E. H. Gay & Company, bankrupt. From the allowance of the claim against the copartnership estate, there is no appeal.

The question before us is whether the trust company has the right to make double proof, and to have its claim allowed both against the copartnership estate and against the individual estate of one of the copartners.

By stipulation the parties have agreed upon the following facts:

(1) E. H. Gay was the managing partner

bankrupts were jointly and severally bound must make his election come upon the joint or separate estates, and, having chosen to come upon one, he could not come upon the other for the deficiency until the creditors of such other were first served. *Ex parte Banks* (1740) 1 Atk. 106; *Ex parte Bond* (1745) 1 Atk. 99. The *Banks* Case, like the *Rowlandson* Case, *supra*, based its conclusion upon the ground that, although the bond creditors might have brought separate actions and had separate execution, they could not have levied their debt upon both estates at the same time. In the *Bond* Case, it was reasoned that to permit a joint and several creditor to resort to both estates would prejudice the joint creditors, who were said to have an equal right with the former to resort to the residue of the individual estate after the payment of the individual creditors.

What was said in the discussion of *Ex parte Rowlandson*, *supra*, with respect to the distinction between proving the debt and the allowance of dividends, is borne out by the statement in *Ex parte Bentley* (1790), 2 Cox, Ch. Cas. 288, 2 Revised Rep. 36, that it had been the constant practice for a joint and several creditor under such circumstances to be admitted to prove under both a joint and separate estate, so long as he made his election before a dividend.

In *Ex parte Bevan* (1804) 10 Ves. Jr. 107, Lord Eldon said that he had never been able to understand why a creditor having a joint and several security should not go against both estates, but that it was settled otherwise upon reasons not very intelligible; and held, in conformity with the established rule, that the advantage of a joint and several creditor was no more than that he could elect whether he would in the first instance be a joint or several creditor, and that if he elected the former, he was entitled to no preference out of the surplus of the separate estate, but that the other joint creditors came in on an equal footing with him in resorting to that estate. This case was followed in *Ex parte Hay* (1808) 15 Ves. Jr. 4.

In another case the commissioners allowed 39 L.R.A. (N.S.)

of E. H. Gay & Company. The New York Trust Company, owner of twenty-five \$500 first-mortgage 6 per cent bonds of the Manistee, Filer City, & East Lake Street Railway Company, lodged them with E. H. Gay & Company on March 14, 1905, together with \$3,125 in cash, under a deposit agreement by which E. H. Gay & Company were to deliver to the New York Trust Company at par value \$15,625 bonds of a corporation to be organized in the course of the reorganization of the railway company.

(2) In pursuance of this agreement, the Manistee Light & Traction Company was incorporated. Its bonds were issued and delivered to E. H. Gay & Company, who received and held 15 $\frac{625}{630}$ of them for the

double proof, but the court of review, upon appeal to it, was evenly divided as to the propriety of the rule (*Ex parte Moulton, Montagu, Bankr. Cas.* 321), but upon appeal to the chancellor he affirmed the judgment of the two judges who were against double proof, placing his decision upon the ground of authority. (1832) 2 Deacon & C. 419.

There were other early English cases upon this question, but they will not be here treated. A few of the cases have been set out for the purpose of showing the early adoption of the rule and the subsequent inclination to regret its adoption, preceding the enactment of a bankruptcy law treating that precise question.

The provision of the English statute that if a debtor is liable in respect of distinct contracts as a sole contractor, and also as a member of a firm, the circumstance that the sole contractor is also one of the joint contractors shall not prevent proof in respect of the contracts against the properties respectively liable on the contract,—was held in *Re Parker* (1887) L. R. 19 Q. B. Div. 84, 56 L. J. Q. B. N. S. 338, 57 L. T. N. S. 198, 35 Week. Rep. 566, to authorize double proof where trust money is misappropriated by a firm of which one of the partners is one of the trustees of the estate. The court pointed out that there was a joint liability on the part of the partners to restore the money, and a separate and distinct individual liability of the individual partner, founded upon his duty as trustee. This case was followed in *Re Macfadyen* [1908] 2 K. B. 817, 77 L. J. K. B. N. S. 1027, 52 Sol. Jo. 727.

American cases—early bankruptcy acts.

In 1843 the Federal district court for Massachusetts expressly repudiated the English rule, in *Re Farnum*, Fed. Cas. No. 4,674, the court saying that in this country a creditor holding two valid obligations was entitled to the benefit of both. The court, although referring to the distinction made in *Re Rowlandson* between the joint and several bond involved in that case, and the situation in the case therein distinguished,

New York Trust Company under the deposit agreement. These 15 $62\frac{1}{2}\%$ bonds were pledged by E. H. Gay & Company, without authority from or knowledge of the New York Trust Company, as security for loans negotiated in the course of the firm business of E. H. Gay & Company for their own benefit. No notice was ever sent to the New York Trust Company that the Manistee Light & Traction Company bonds had been received by E. H. Gay & Company for the benefit of the New York Trust Company, and the trust company had no knowledge that E. H. Gay & Company had the bonds.

(3) No attempt is made by the New York Trust Company to show that the unau-

thorized pledge of the bonds was the individual act of E. H. Gay.

(4) It is hereby stipulated by parties that the market value of bonds of the Manistee Light & Traction Company at the time of conversion herein was \$950 for each bond of \$1,000 face value, and, if said claim of the petitioner is allowed as a claim against the individual estate of E. H. Gay, it is agreed that such allowance may be in the sum of \$14,875.

The claim filed against the copartnership estate made no allegation of a conversion either by the copartnership or by E. H. Gay, but alleged merely the receipt by E. H. Gay & Company of bonds, for delivery to the trust company, and the nondelivery to the trust company.

which involved a separate and distinct obligation of the individual partner, nevertheless repudiated the English rule in its entirety, so far as it prevented double proof of a joint and several obligation, notwithstanding that distinction could have been invoked to differentiate the Farnum Case, since in that case the claimant was the holder of a bill of exchange drawn by the partnership and indorsed by the individual partner, thus presenting two separate and distinct obligations within the meaning of the distinction.

It is to be observed that the Farnum Case was decided under the bankruptcy act of 1841, § 14 of which provided, among other things, that the creditors of the company and the separate creditors of each partner should be allowed to prove their respective debts, and that "the net proceeds of the joint stock shall be appropriated to pay the creditors of the company, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate estate of any partner after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there shall be any balance of the joint stock after the payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners, according to their respective rights and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts; . . . and in all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone." 5 Stat. at L. 448, chap. 9.

In *Mead v. National Bank*, (1868) 6 Blatchf. 180, Fed. Cas. No. 9,366, decided under the bankruptcy act of 1867, § 36 of which is substantially the same as § 14 of the act of 1841, the court intimated its inclination to indorse the position taken by 39 L.R.A. (N.S.)

Judge Sprague in the Farnum Case. Although the Mead Case has been cited as expressly taking the same position, the court essentially declared that it did not decide the question, and held merely that a creditor of a partnership who took the separate and respective obligations of the firm and of the individual partners, the aggregate amount of all those obligations being equal to the partnership debt, was entitled to prove the obligations respectively against the estate of each maker.

While double proof was not attempted in *Re Bigelow*, 3 Ben. 146, Fed. Cas. No. 1,397, 2 Nat. Bankr. Reg. 371, involving a bond executed by persons composing a firm, by which they expressly bound themselves jointly and severally, the court declared it to be the American rule that double proof is allowable in such cases, although the actual decision was that the debt was provable against the several estates of the individual bankrupts, as against the objection that it should have been proved against the firm.

Where the claimant has the joint obligation of the partnership and a separate and distinct obligation of an individual partner, for the same debt, he may prove against, and claim a dividend from, both estates. *Emery v. Canal Nat. Bank*, 3 Cliff. 507, Fed. Cas. No. 4,446, 7 Nat. Bankr. Reg. 217. This case, like the Farnum Case, involved commercial paper signed by the firm and indorsed by an individual member of the firm, thus involving two separate and distinct obligations. The various assignees in bankruptcy, seeking to compel the creditors to elect between the estates, contended that the individual partner was not a "sole trader" within the meaning of § 21 of the bankruptcy act of 1867, providing that if any bankrupt shall, at the time of the adjudication, be liable upon any bill of exchange, promissory note, or other obligation in respect of distinct contracts, "as a sole trader and also as a member of a firm," the circumstance that the sole contractor is also one of the joint contractors shall not prevent proof and receipt of dividends in respect of such distinct contracts against the estates respectively liable upon such con-

The learned district judge was of the opinion that the claim allowed against the firm estate was neither presented nor allowed as a claim based on a liability in tort, and that, as against the firm, no liability in tort had been waived in order to rest the claim on an implied promise arising upon the waiver of tort; but that failure to comply with the firm's express promise was the sole basis of proof against the firm.

The claim against the individual estate of E. H. Gay is based solely upon the theory of an implied contract or quasi contract, arising from the conversion of the bonds by E. H. Gay & Company in the course of the firm business.

By its terms the claim against E. H. Gay

tract. The court, however, held that, especially in view of the closing words of the provision, the words "sole trader" meant simply "sole contractor," and cited *Ex parte Hinton*, De G. Bankr. Cas. 550, as authority for this construction of a similar provision in one of the earlier English bankruptcy acts, and as also going further and declaring that the enactment was intended to include a joint and several promissory note, and that it ought not to be confined to cases where the parties had executed separate instruments.

So, essentially involving distinctive obligations, the case of *Re Baxter*, Fed. Cas. No. 1,119, 18 Nat. Bankr. Reg. 62, which follows *Emery v. Canal Nat. Bank*, holds that a corporation could prove a claim against a partnership which was its general business agent, and also against the estate of one of the partners, who was the treasurer of the corporation, where the treasurer, as such, collected certain stock subscriptions, and, without the knowledge or assent of the corporation, paid them over to the firm, which received them in violation of the express terms of their agency, the instrument creating the agency providing that the firm should receive and disburse all moneys of the corporation "except subscriptions to its capital stock."

Where a partnership enters into a composition with creditors in a bankruptcy proceeding to which one of the partners is not a party, the firm creditors are not, upon the bankruptcy of such individual partner, entitled, as against the individual creditors, to resort to the individual estate, except in the case of holders of notes signed by the firm, and indorsed by the individual partner, who may share with the individual creditors in the distribution of the partner's estate, notwithstanding they entered into the composition. *Re Adams*, 29 Fed. 843.

At least where there are no assets in the individual estate, the fact that proof has been made against the estate in bankruptcy of an executor, for funds misappropriated by him, does not prevent proof of the claim against the estate in bankruptcy of the partnership of which he was a member, the 30 L.R.A. (N.S.)

individually alleged a conversion of the bonds by E. H. Gay. This allegation, however, becomes immaterial since the stipulation provides that no attempt is made to show that the unauthorized pledge was the individual act of E. H. Gay; and since it does not appear that E. H. Gay individually received benefit therefrom.

The trust company contends that the conversion was in course of the firm business, and that thereby the partners became jointly and severally liable in tort for the conversion; that upon the waiver of tort there arise implied contracts or quasi-contracts both of the firm and of the individual partners, to pay the value of the bonds converted to the use of the firm.

Where there are separate and distinct

funds having been applied to the partnership business with the knowledge and consent of the other partners. *Re Tesson*, Fed. Cas. No. 13,844, 9 Nat. Bankr. Reg. 378. In this case the court stated that if there had been a separate estate applicable to the payment of this demand, more doubt might arise as to the propriety of proving against the partnership estate.

And it was held in *Re Jordan*, 2 Fed. 319, that the claim for funds misappropriated by an executor and applied to the use of a partnership of which he was a member, with the knowledge and consent of the other partners, was provable against his individual estate and the joint estate of the partners.

The doctrine of these cases was recognized in *Re Thomas*, 8 Biss. 139, Fed. Cas. No. 13,886, involving the question whether a creditor of the partnership, holding as security property of an individual partner, was bound to surrender the security before claiming recognition as a partnership creditor. In discussing the question the court said: "There is a class of cases in which it has been held that where a creditor holds notes signed by a firm, and signed or indorsed also by an individual member of the firm, he may prove against both estates, and receive dividends from both. *Re Farnum*, Fed. Cas. No. 4,674; *Mead v. National Bank*, 6 Blatchf. 180, Fed. Cas. No. 9,366; *Emery v. Canal Nat. Bank*, 3 Cliff. 507, Fed. Cas. No. 4,446. These cases established a rule opposed to the old rule on the subject in England, and the principle thus settled seems to reach out to the question involved in the case at bar. The scope of these decisions is that, when an individual member of a firm, as such, becomes surety upon or indorses an obligation of the firm, he thereby gives what is in the nature of security upon his separate estate to the firm creditor; and by reason of the individual liability, superadded to the joint obligation, he places the firm creditor in a position where he can go against the individual as well as the joint estate. Thus, it results that, without the indorsement or individual signature of one of the firm, the firm creditor would have

express contracts of the firm and of a co-partner to pay a debt contracted by the firm, the right to prove against both estates may be conceded. If one dealing with a firm procures also the individual undertaking of a partner to answer for the firm debt, there are substantial reasons for permitting him to resort to both estates. *Re McCoy*, 80 C. C. A. 60, 150 Fed. 106; *Chapman v. Bowen*, 207 U. S. 89, 52 L. ed. 116, 28 Sup. Ct. Rep. 32.

The additional several contract of a partner is not implied from the firm transaction, but must be created by a distinct act of the copartner.

As the conversion in the present case was by the firm, in the course of firm business; as the actual participation of E. H. Gay is

not proved; as there is no evidence that his individual estate benefited by the firm conversion,—there is difficulty in finding any substantial ground upon which to imply from the circumstances a separate contract of E. H. Gay, which corresponds to an express individual contract to answer for a firm debt.

While the partnership relation exposes one partner to liability for firm debts contracted by another partner without his consent, one partner has no authority to make an individual contract for another partner.

In the present case it is contended that because, under the partnership relation, partners, through firm dealings, may be made jointly and severally liable in tort, there arise quasi *ex contractu* on waiver of

no right to claim against the individual assets until individual creditors had been first satisfied. But holding the individual indorsement or signature, the firm creditor may, in the first instance, prove against the separate as well as the joint estate."

And it was held that although there could be no contribution between the joint and the separate estates unless there should be a surplus of the one or the other, yet when the property of one was pledged for the debt of the other, a court of equity would apply the right of subrogation precisely as it would if the contracting parties were not partners, and thus do justice to the different sets of creditors. *Ex parte Massachusetts Hospital L. Ins. Co.* Fed. Cas. No. 9,327, 17 Nat. Bankr. Reg. 192. This case involved a note signed by the partnership and by one of the partners individually, who also executed a mortgage upon his individual property to secure the note; and the court held that the holder of the note not only might prove, but was bound to prove, at the request of the separate creditors, his whole debt without deduction, against the joint assets; and that, as against the separate assets of the individual partner, he could prove only for the deficiency after disposing of the security.

In addition to the early Federal cases already cited, holding that the holder of commercial paper in which a firm is bound as maker, and one or more of its partners as indorser or indorsers, may prove the debt against and receive dividend from, both the joint and separate estate, reference may be had to *Re Bradley*, 2 Biss. 515, Fed. Cas. No. 1,772.

So, also, where the note of a third person bears the separate indorsement of a firm and an individual partner. *Re Howard*, Fed. Cas. No. 6,750, 4 Nat. Bankr. Reg. 571.

—act of 1898.

Subdivision f of § 5 of the bankruptcy act of 1898 provides as follows: "The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the 39 L.R.A. (N.S.)

individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets, and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership." 30 Stat. at L. 548, chap. 541, U. S. Comp. Stat. 1901, p. 3424.

One of the early cases decided under this act, although not involving the matter of double proof, may be cited as perhaps affording a foretaste of subsequent decisions on double proof. This case, *Lamoille County Nat. Bank v. Stevens*, 107 Fed. 245, 6 Am. Bankr. Rep. 164, holds that a firm note given for a firm debt, and bearing the indorsement of a member of the partnership, is a partnership obligation, irrespective of whether the partner's liability, as indorser has become fixed, and that it cannot therefore be proved against the individual estate. The court pointed out that § 5f makes a sharp distinction between partnership debts and individual debts in respect of participation in partnership and individual assets, and declared that the question in the case was whether the debts were, at the time of the adjudication, as between the individual and the firm, the separate debts of the individual or the joint debts of the firm, and not whether the individual was anyhow liable for the debts.

But it was held in *Buckingham v. First Nat. Bank*, 65 C. C. A. 498, 131 Fed. 192, 12 Am. Bankr. Rep. 465, that a note signed by a firm and indorsed by a member thereof was a claim against the individual estate of the indorser, and that the holder of the note could claim payment thereof out of the individual estate in preference to the claims of the firm creditors.

In *Re Mosier*, 112 Fed. 138, 7 Am. Bankr. Rep. 268, the court briefly declares that joint and several notes given by partners for partnership liabilities are none the less

tort, not only a joint contract, but also several contracts of each partner to pay the amount of the firm debt. This contention seems also to involve the proposition that upon a conversion of bonds or stock by a partnership, there arise a number of debts; as many individual debts as there are partners, and also a firm debt.

The breach of an express contract to deliver the bonds of the trust company creates only a partnership debt, for payment of which resort must be had to the proceeds of the partnership property. Bankruptcy Act July 1, 1898, chap. 541, § 5f, 30 Stat. at L. 547, U. S. Comp. Stat. 1901, p. 3424. Upon a suit for such a breach of contract, only a single judgment could be had, a

judgment against the firm, upon which resort would be had to the firm assets.

The claim against E. H. Gay is based entirely upon the fact, stated in the stipulation, though not in the claim, that the copartnership converted the bonds. Viewing both estates, we have asserted against E. H. Gay, as a joint debtor, either a breach of express contract of an implied contract to pay for value received; as an individual debtor, the conversion of the bonds, a tort, with a waiver of the remedy in tort. We now reach the important question, whether the fact that there was a conversion by the firm is in itself a sufficient basis for an implied or quasi contract of E. H. Gay individually.

As was said in the opinion of this court

partnership debts because the partners are also individually liable, and that since, by the terms of § 5f of the bankruptcy act, no part of the separate property is to go for partnership debts till the separate creditors are fully paid, there can be no individual assets of the partner in which such partnership creditors can participate. Doubtless the notes involved in this case contain the name of the firm and also of the individual partners as makers, instead of bearing the signature of a partner as indorser, as in *Buckingham v. First Nat. Bank*, supra, and this difference between the two cases leaves room to distinguish them by invoking the distinction alluded to in the *Rowlandson Case*, between the case of a mere joint and several obligation, and the situation where the creditor's claim against the individual is based upon the latter's independent undertaking.

Re *McCoy*, 80 C. C. A. 60, 150 Fed. 106, 17 Am. Bankr. Rep. 760, quoting with approval from *Re Thomas*, supra, and declaring that the rule as so declared under the act of 1867 was not modified by § 5f of the act of 1898, holds that the holder of a note signed in the name of the firm and by the individual partners, and given for money used in the partnership business, could, after proof of the claim against, and receipt of a dividend from, the firm estate, prove his claim for the balance against the individual estate.

The case of *Re Coe*, 106 C. C. A. 181, 183 Fed. 745, affirming 169 Fed. 1002, which is criticized in *REYNOLDS v. NEW YORK TRUST CO.*, really does not conflict with that case. In the *Coe Case* it appeared that the bankrupts were importers, and that an arrangement was entered into by them with the claimant bank whereby imported goods were consigned to the bank, which accepted drafts upon it for the purchase price, and upon the delivery of the goods, the bank paid the drafts and drew bills for an equivalent amount upon the bankrupts, to whom were delivered the imported property for sale upon the condition that the bankrupts collect the proceeds and pay them over to the bank. The bankrupt firm sold the

goods, collected the money, but misappropriated it, and subsequently the firm and the partners were declared bankrupt, and, under a composition agreement between the creditors on one hand and the bankrupt firm and one of the partners on the other, the claimant filed a claim against the in- upon the amount owing to it. Thereafter the claimant filed a claim against the individual estate of the partner who did not enter into the composition agreement, for the balance of the advance less the dividend received, a wilful conversion being alleged. The referee held that the acceptance of the dividend from the partnership precluded the assertion of the claim against the individual partner, but this decision was reversed by the district court (169 Fed. 1002), which declared that the acceptance of the dividend could not be regarded as an election to treat the indebtedness as a simple contract indebtedness of the firm, since the bank could have originally put in a double proof against the firm assets and against the assets of the individual partners; and also pointed out that the composition in terms did not propose to make any arrangement for the settlement of the individual indebtedness of the one partner, and that therefore no occasion arose for the exercise of an election, even if the doctrine of election applied at all. It was also pointed out that counsel for the trustee in bankruptcy urged that the receipt by the claimant of the dividend under the composition was an admission that the claim made was a simple contract claim against the firm upon the acceptances. In reply, the court said that the stipulation made did not take any position as to the grounds of the claim, but that it simply fixed the amount of the claim, and expressly reserved the rights of the bank, and since the composition did not purport to settle any questions of the individual liability of the one partner, whatever rights the bank had against the individual estate remained unaffected. The circuit court of appeals (106 C. C. A. 181, 183 Fed. 745) stated that the referee regarded the acceptance of the composition as a bar to any

in *Clarke v. Rogers*, 106 C. C. A. 64, 183 Fed. 518: "A claim based on a tort as known at common law is undoubtedly provable whenever it may be resolved into an implied contract. For example, it is a settled rule that where a tortfeasor, by conversion of personal property, has sold the property converted, and received cash therefor, the true owner may sue him for money had and received as on an implied contract."

The trustee, appellant, claims that it is a well-established law that "Unless there has been a sale of the property and a receipt of the proceeds of the same in money, the tort cannot be waived, and an action or claim will not lie as for money had and received upon an implied promise or quasi contract,"—citing *Jones v. Hoar*, 5 Pick. 285; *Ladd v. Rogers*, 11 Allen, 209; *Allen v. Ford*, 19 Pick. 217; *Berkshire Glass Co. v. Wolcott*, 2 Allen, 227, 79 Am. Dec. 781; *Brown v. Holbrook*, 4 Gray, 102; *Hagar v. Norton*, 188 Mass. 50, 73 N. E. 1073; *Newmarket Mfg. Co. v. Coon*, 150 Mass. 566, 23 N. E. 380; *Cooper v. Cooper*, 147 Mass. 373, 9 Am. St. Rep. 721, 17 N. E. 892.

While some of these cases might be distinguished on the ground that they relate merely to the scope of the special action for

money had and received, yet it must be conceded that upon the whole they may be regarded as giving a somewhat narrow limitation to the doctrine of quasi contract. We should be reluctant, however, to rule that the claim should be disallowed on so limited a view of the scope of the law of quasi contracts.

It is difficult to find any substantial ground upon which the judicial conscience which admits the use of fiction to sustain an action of assumpsit for money had and received should refuse to adopt a similar fiction upon an action in assumpsit for goods sold and delivered. Where a person has converted personal property to his own use by keeping, concealing, or consuming it, there is every reason for requiring him to pay its value, and for giving the owner an option to sue upon contract. To hold him upon an implied contract if he has sold the goods for money and used the proceeds, but to refuse to hold him upon an implied contract for the value of goods consumed, but not sold, is to limit the doctrine of quasi contracts by an arbitrary distinction, which disregards the substantial similarity of the two cases.

If the plaintiff's goods are taken, his right to waive the tort and to sue in contract should be the same whether the de-

claim against the individual estate, and that it would have been so if the liability asserted against his estate had been for his contractual liability on the acceptances, as to which the partners were jointly liable; but that such was not the case since the individual's liability was predicated of his conversion of the proceeds of the goods, instead of paying them over to the claimants, to whom they belonged. It is at this point that the language quoted in *REYNOLDS v. NEW YORK TRUST CO.* is used, but it should be noted that the court immediately thereafter used the following language: "The bank could prove two claims, one against the firm," i. e., the partners jointly on the acceptances, "and the other against the partners jointly and severally upon an implied contract (the tort being waived) to repay moneys of the bank wrongfully converted by them. The doctrine of election between inconsistent remedies on the same claim has no application." Really the *Coe* Case actually holds only that resorting to the partnership estate upon the basis of the debt as evidenced by the acceptances did not preclude the creditor from resorting to the estate of the individual upon the basis of the implied contract arising from his wrongful misappropriation. Of course, it is true that so far as the language just quoted seems to recognize the right to prove "against the partners jointly and severally upon an implied contract (the tort being waived)," it is in conflict with the *REYNOLDS CASE*. But 30 L.R.A. (N.S.)

the fact remains that the creditor in the *Coe Case* may be said to have elected to prove upon the implied contract against the partner individually; and therefore the language referred to was unnecessary to the decision of the case, for it is to be observed that, since the *Coe Case* involved distinctive obligations,—that is the joint liability of the firm upon the acceptances, and the individual liability of the partner upon the implied contract arising from the misappropriation,—the court in that case was not called upon to discuss the nice question involved in the *REYNOLDS CASE*, as to whether the obligation of the implied contract was "joint and several" or "joint or several."

In conclusion it may be said that while the American cases cannot be said to deny the right to make double proof of a mere joint and several obligation, they have not allowed recourse to both estates except where the double claim was based upon the joint obligation of the firm, and also an independent obligation or undertaking of the individual partner. This is true not only where the obligations were strictly contractual, but also where claim was made for wrongful misappropriation; for it will be noted that in the decisions involving misappropriation (with the exception of the *REYNOLDS CASE*), the partner as trustee, executor, etc., stood individually in a fiduciary relation with the claimant.

L. A. W.

fendant has sold the goods or has consumed them.

While the authorities in America are divided (Keener, *Quasi Contr.* 193 et seq.), there seems little doubt of the soundness of Mr. Keener's conclusion that "the two cases involve a common element which is universally recognized in the one case, and should be in the other, as furnishing a ground for recovery, namely, that the defendant has that for which in conscience he should give the plaintiff an equivalent in money." Keener, *Quasi Contr.* 195.

In *Crawford v. Burke*, 195 U. S. 176-194, 49 L. ed. 147-154, 25 Sup. Ct. Rep. 9, 13, where the defendants sold stocks and thereby converted them to their own use, the court said: "It is evident that the plaintiff might have sued them in an action on contract, charging them with the money advanced and with the value of the stock."

The trustee contends that upon the question whether there arises, from a mere conversion without a sale, an implied contract or a quasi contract to pay the value of the goods converted, we should be governed by the Massachusetts decisions, citing *Fleitas v. Richardson*, 147 U. S. 550, 37 L. ed. 276, 13 Sup. Ct. Rep. 495; *Humphrey v. Tatman*, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; *Re Chantler Cloak & Suit Co. (C. C.)* 151 Fed. 952; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306. These cases, however, are too restricted in scope to support the trustee's contention.

In the exercise of the jurisdiction in bankruptcy conferred under the Constitution, the courts of the United States have the right to resort to the principles of the common law, and therefrom to determine whether or not an obligation of a contractual character arises upon the conversion of goods, and is available to the owner upon waiver of his right to pursue his remedy for tort. See the learned opinion of Shiras, J., in *Murray v. Chicago & N. W. R. Co. (C. C.)* 62 Fed. 24, cited with approval in *Western U. Teleg. Co. v. Call Pub. Co.* 181 U. S. 92-103, 45 L. ed. 765-771, 21 Sup. Ct. Rep. 561.

The decisions of a state court, so far as they relate to the scope of particular forms of action, and as to the adoption or nonadoption of particular modes of procedure involving the use of ancient fictions, can hardly be regarded as conclusive upon the broader question of the existence of an obligation of a contractual character.

In *Clarke v. Rogers*, 106 C. C. A. 64, 183 Fed. 518-524, Judge Putnam clearly recognizes the distinction between the question of the existence of a contractual obli-

gation and the question of the mode of recovery, in the following language: "Independently of the bond, we believe there is an obligation resting on a defaulting testamentary trustee to restore the value of the assets embezzled, which is of a contractual character. The method of recovering upon this would be so far purely incidental that the legislature might at any time provide for an action at common law in behalf of the successor as trustee, whatever might at any time be the preceding remedies, either by a suit in equity, or by a suit on the bond, or by a summary order of the court having jurisdiction in reference thereto."

As the bankruptcy statute suspends the special remedies under state laws, and substitutes its own procedure, it is important that the meaning of § 63, which defines debts which may be proved, should not be narrowed nor confused by reading into it local decisions denying a right of recovery under particular modes of procedure. Uniformity of construction is desirable, and we think the courts of bankruptcy are at liberty to give to the words "upon a contract express or implied," in § 63a4, a breadth of meaning which will include quasi contracts, in which the real ground of liability is that, for value received in money or in goods, a defendant should pay.

Assuming, therefore, that by the conversion there was created a contractual obligation, we have next to inquire what is its nature.

It is argued that as tortfeasors are jointly and severally liable, so the implied contract is both joint and several. The proposition that joint tortfeasors are "jointly and severally liable" requires careful consideration, however, since there is ground for thinking that the fundamental error in the trust company's argument arises from the inaccuracy of this expression.

The liability of one of the several tortfeasors is not both joint and several, but is joint or several at the election of the plaintiff. The plaintiff may have judgment against one or more, but he may not have two judgments against the same person on the same transaction.

If a tort is committed by several, it may be treated as joint or several at the election of the aggrieved party. *Gould*, Pl. chap. 4, § 66; *Sessions v. Johnson*, 95 U. S. 348, 24 L. ed. 596; *Atlantic & P. R. Co. v. Laird*, 164 U. S. 393, 41 L. ed. 485, 17 Sup. Ct. Rep. 120; *Chicago, B. & Q. R. Co. v. Willard* (1911) 220 U. S. 413, 55 L. ed. 521, 31 Sup. Ct. Rep. 460.

A joint judgment is a bar to a several action, and a several judgment to a joint

action. At law, therefore, one whose goods were converted by partners could not have both a joint and several judgment, but could have either at his election. The present claims, therefore, if reduced to judgment in tort, would not be two, but one judgment only, joint or several, at the plaintiff's election. It seems impossible that the trust company should have greater rights before judgment than if it had proceeded to judgment.

In *Bighy v. United States*, 188 U. S. 400-409, 47 L. ed. 519-525, 23 Sup. Ct. Rep. 468, 472, it was said: "A party may in some cases waive a tort, that is, he may forbear to sue in tort, and sue in contract, where the matter out of which his claim arises has in it the elements both of contract and tort. But it has been well said that 'a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them upon which assumpsit can be maintained.'"

The individual tort imputed to E. H. Gay being waived, what elements remain to support an individual contract? That a partnership of which he is a member has had the bonds.

In *Keener on Quasi Contracts* it is said (page 160): "Assuming a defendant to be a tortfeasor, in order that the doctrine of waiver or tort may apply, the defendant must have unjustly enriched himself thereby," etc. If the right to recover on quasi contract upon a waiver of tort rests upon the doctrine of unjust enrichment, the difference between enrichment by money and by stocks or bonds of known market value, would be unsubstantial. To limit the right to recover on quasi contract, to cases where money had been received, would be arbitrary and hardly defensible in reason.

As there is no individual act of E. H. Gay, or benefit to his estate, which is separable from the act and benefit of the firm, what is there except the fact that the creditor once had a right to sue him individually as a tortfeasor, to support the theory of an individual promise or an individual quasi contract?

The trust company contends that both the claim against the firm and the claim against the individual were proved, on the theory of implied contract based on the conversion of the bonds, and that the proof against the firm was not an express contract. *Chicago & N. W. R. Co. v. DeClow*, 61 C. C. A. 34, 124 Fed. 142-148, is cited to sustain the proposition that there has been no election to proceed for breach of express contract, and thereby to waive any action on implied contract.

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Assuming for the purposes of the case, however, that the trust company bases both claims upon the contractual obligations arising upon a waiver of the joint tort, we do not escape the fundamental difficulty in the case. If there is an implied contract of the firm, of E. H. Gay jointly with the other partners, growing out of the fact that the firm pledged the bonds as security for loans negotiated in the course of the firm business, and for the firm benefit, can it be said with consistency that E. H. Gay is also liable because he individually had the bonds or their proceeds?

It is apparent that in the decision of this case we can derive no assistance from those cases in which it appeared that a partner, or one of several joint tortfeasors, had individually converted property or funds and wrongfully appropriated them to the uses of a firm. The opinion of the district court correctly distinguishes between cases of that character and the present case. In such cases the individual, as well as the firm, has had the property,—the individual by using it as his contribution to the firm, and the firm by using it in the firm business. Both were under an obligation because both had received a benefit. Here are two distinct causes of action.

It is apparent that the present claim was allowed solely upon the authority of decisions in the second circuit. *Re Coe* (D. C.) 169 Fed. 1002, *Re Coe*, 106 C. C. A. 181, 183 Fed. 745. In the opinion of the district court (169 Fed. 1002) it was said that the members of a firm were jointly and severally liable upon a claim either in tort or upon quasi contract, at the creditor's election, for misappropriation, and that upon their bankruptcy the plaintiff could file double proof both against the partnership assets and against the individual assets of each partner, citing *Re Baxter*, Fed. Cas. No. 1,119; *Re Jordan* (D. C.) 2 Fed. 319; *Re Blackford*, 35 App. Div. 330, 54 N. Y. Supp. 972; *Lindley*, Partn. 5th ed. 703; *Loveland Bankr.* 315, and cases cited; *Re Parkers*, L. R. 19 Q. B. Div. 84, 56 L. J. Q. B. N. S. 338, 57 L. T. N. S. 198, 35 Week. Rep. 566.

In the circuit court of appeals (106 C. C. A. 181, 183 Fed. 745) it was said: "It makes no difference that the partners acted without evil intent, nor that the firm got the benefit of what they did. It remains a wrongful conversion for which all the partners are liable, not jointly as partners, but jointly and severally as tortfeasors, whether they each actively participated in it or not; the acts of every one being imputed to every other."

The only additional authority cited by the circuit court of appeals was *Blyth v. Fladgate*, [1891] 1 Ch. 337, 60 L. J. Ch. N. S. 66, 63 L. T. N. S. 546, 39 Week. Rep. 422.

With the greatest respect for the opinions of the learned judges in both the district court and the circuit court of appeals, we are unable to accept the proposition that joint tortfeasors are jointly and severally liable, if by that is meant subject to both joint and several judgments. As we have said, a plaintiff is not entitled to two judgments against a tortfeasor, but is put to his election. He is permitted to deal with each of the tortfeasors as if he were the sole cause of the tort; but he may not subject a single defendant to two judgments, joint and several.

Had this creditor proceeded to reduce its tort claim to judgment before bankruptcy, and to prove on the judgment in tort under § 63a (1), he could have had but one judgment against E. H. Gay; at the creditor's election an individual judgment, or a judgment against E. H. Gay with others. In other words, he would have been compelled to elect between a joint and a several liability.

It is true that upon the joint judgment in tort he might have had execution against the individual estate, but this is equally true of a joint judgment on contract.

The bankruptcy statute intervenes to destroy the ordinary rights under execution, by § 5g, which divides the assets into partnership estate and individual estate, and gives priority of rights in the assets to creditors according to whether the debts are partnership or individual.

The brief of the trust company states, correctly we think, that "this is a question concerning the nature of legal rights." The creditor's legal right was to make his claim joint or several; he could not make it both, and must elect. The creditor's rights were in the alternative, and not cumulative; he is forced to an election,—not according to the early English rule that an election must be made even where there are distinct contract rights against both the firm and the individual, but on the ground that at law his right is to have his cause of action joint or several, but not both.

If it be granted for the purposes of the case that, upon a waiver of tort, there arise contractual obligations which correspond to the tort obligations, then it follows not that there are two contracts, one joint and one several, but one contract which is joint, or in the alternative a number of contracts which are several. But, as

we have seen, the proposition that, upon a waiver of tort, there arise contractual obligations corresponding to liabilities in tort, is itself most doubtful.

If on principle the doctrine of quasi contracts is broader in scope than the action for money had and received, and should be extended to all cases in which a defendant has had that for which in conscience he should give the plaintiff an equivalent in money (*Keener, Quasi Contr.* 195), yet in the present case this reason applies only to the firm, and not to the individual who was not an actual participant, or beneficiary.

Under such conditions the rule that forbids contribution between wrongdoers abates, and the right arises to recover from the actual wrongdoer the damage imposed upon one who is not in fact a participant; the ultimate responsibility being cast upon the actual wrongdoers. *Union Stock Yards Co. v. Chicago, B. & Q. R. Co.* 196 U. S. 217, 224, et seq., 49 L. ed. 453, 445, 25 Sup. Ct. Rep. 226, 2 Ann. Cas. 525.

Whether in any event the right to contribution would not cast this claim ultimately upon the partnership estate, under chapter 3, § 5g, through a claim of the individual estate, is a query which we need not solve, but simply refer to as a possible complication that might result from implying a contract against one who is held liable as a tortfeasor without actual participation or moral responsibility.

Furthermore, the fiction of a promise should not be extended beyond its legitimate purpose, and especially should it not be permitted to affect injuriously the rights of third persons.

There is an inconsistency between the requirement that a plaintiff should waive the tort and take his place with the other creditors, and a contention that, by virtue of the tort alone, he should have implied contracts which put him in a better position than other creditors, who have express contracts.

The bankruptcy act requires a distinction between firm and individual debts. The test of whether the debt is firm or individual is the character of the transaction from which it arises. Here there was no transaction other than a firm transaction; and a fiction of law which raises a promise based solely upon tort liability, and not upon an obligation to pay for value received by an individual, cannot be allowed without an infringement of the rights of the individual creditors, and of bankruptcy rules of equality.

Upon a review of the cases cited we find no sufficient authority for the allowance of

double proof in a case like the present. Without questioning the correctness of the decisions in the cases in the second circuit, or considering the differences in facts, we nevertheless do not feel constrained to accept the proposition that, upon a waiver of tort, there arise contractual obligations corresponding to tort obligations, or the further proposition that, upon waiver of a joint tort, there arise both joint and several obligations *ex contractu*. The contractual obligation arises only when value has been received for which in good conscience a defendant should pay.

We are of the opinion that the claim against the individual estate of E. H. Gay should be disallowed on the ground that upon this record only a firm contract exists after the waiver of tort.

The judgment of the District Court is reversed, and the case remanded to that court with direction to disallow the claim of the New York Trust Company for the sum of \$14,875 against the individual estate of E. H. Gay, and the appellant recovers costs in this court.

ARKANSAS SUPREME COURT.

SOUTHERN TELEPHONE COMPANY,
Appt.,
v.
J. E. KING.

(— Ark. —, 146 S. W. 489.)

Damages — negligence of telephone company — knowledge of consequences.

1. A telephone subscriber cannot hold the company, which fails to answer his call, liable for injury caused by going to the central office in a sick and weakened condition to obtain medical aid for a member of his family, where it had no notice that such injury was likely to result from its negligence.

Note. — Liability of telephone company for failure to make connections for subscriber.

The earlier cases on this subject are collected in the notes to *Lebanon, L. & L. Teleph. Co. v. Lanham Lumber Co.* 21 L.R.A.(N.S.) 115, and *Volquardsen v. Iowa Teleph. Co.* 28 L.R.A.(N.S.) 554.

As to the right of withdrawing telephone service because of the abuse of the privilege by subscribers, see note to *Huffman v. Marcy Mut. Teleph. Co.* 23 L.R.A.(N.S.) 1010.

As to right to refuse telephone service to coerce payment of bill, see note to *Danaher v. Southwestern Teleg. & Teleph. Co.* 30 L.R.A.(N.S.) 1027.
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Telephones — statutory liability — telegraph.

2. A statute rendering telegraph companies liable for mental suffering due to negligence in receiving, transmitting, and delivering messages does not apply in case of the negligence of telephone companies.

Damages — punitive — negligence of telephone company.

3. Punitive damages cannot be assessed against a telephone company for mere neglect to answer the call of the subscriber, in the absence of anything to show intentional wrong or wilfulness, or conscious indifference to consequences, from which malice may be inferred.

(April 8, 1912.)

A PPEAL by defendant from a judgment of the Circuit Court for Drew County in plaintiff's favor in an action brought to recover damages for injuries alleged to have been suffered by plaintiff because of defendant's failure to comply with its contract to furnish him telephone service. Reversed.

The facts are stated in the opinion.

Messrs. Williamson & Williamson, for appellant:

The verdict as to punitive damages is erroneous.

Western U. Teleg. Co. v. Hogue, 79 Ark. 36, 94 S. W. 924; *Chicago, R. I. & P. R. Co. v. Whitten*, 90 Ark. 467, 119 S. W. 835, 21 Ann. Cas. 726; 13 Cyc. 113-F. & notes 98, 99; *Spellman v. Richmond & D. R. Co.* 28 Am. St. Rep. 874, note; *Anson, Contr.* 311.

There is wholly lacking that element of brutal indifference and maliciousness that seems to be essential in praying penal vengeance.

Chicago, R. I. & P. R. Co. v. Whitten, 90 Ark. 468, 119 S. W. 835, 21 Ann. Cas. 726; 2 *Sutherland, Damages*, 1101; *St. Louis, I. M. & S. R. Co. v. Hall*, 53 Ark. 7, 13 S. W. 138, 13 Cyc. 108, 109, and note 81, 13 Cyc. 110, and note 88; *Spell-*

As to right of addressee to recover damages for failure to summon him to receive a long-distance telephone message, see note to *McLeod v. Pacific States Teleph. & Teleg. Co.* 15 L.R.A.(N.S.) 810.

As to the measure of damages for removal of telephone, see note to *Carmichael v. Bell Teleph. Co.* — L.R.A.(N.S.) —.

Telephone companies are under the duty of furnishing to their subscribers reasonably prompt and efficient service in the way of giving them connection with other subscribers. *Glawson v. Southern Bell Teleph. & Teleg. Co.* 9 Ga. App. 450, 71 S. E. 747.

In considering the actual quantum of diligence required, it has been said that "the delicacy of the instrumentalities involved and the difficulty of keeping them

man v. Richmond & D. R. Co. 28 Am. St. Rep. 878, note.

No recovery can be had for mental anguish where there is no physical injury.

St. Louis, I. M. & S. R. Co. v. Taylor, 84 Ark. 42, 13 L.R.A.(N.S.) 159, 104 S. W. 551; Pierce v. St. Louis, I. M. & S. R. Co. 94 Ark. 489, 127 S. W. 707; Peay v. Western U. Teleg. Co. 64 Ark. 538, 39 L.R.A. 463, 43 S. W. 965; St. Louis, I. M. & S. R. Co. v. Groce, 99 Ark. 420, 138 S. W. 879; Texarkana & Ft. S. R. Co. v. Anderson, 67 Ark. 123, 53 S. W. 673; St. Louis, I. M. & S. R. Co. v. Bragg, 69 Ark. 402, 86 Am. St. Rep. 206, 64 S. W. 226; St. Louis, I. M. & S. R. Co. v. Wilson, 70 Ark. 136, 91 Am. St. Rep. 74, 66 S. W. 661.

Plaintiff had no right to sustain an action for his distress of mind on account of his wife's suffering.

Hyatt v. Adams, 16 Mich. 180; Bube v. Birmingham R. Light & P. Co. 140 Ala. 276, 103 Am. St. Rep. 33, 37 So. 285; Western U. Teleg. Co. v. Reid, 120 Ky. 231, 70 L.R.A. 289, 85 S. W. 1171; 37 Cyc. 1781-1784; 13 Cyc. 196, 197; Western U. Teleg. Co. v. Hogue, 79 Ark. 33, 94 S. W. 924; St. Louis, I. M. & S. R. Co. v. Taylor, 84 Ark. 47, 13 L.R.A.(N.S.) 159, 104 S. W. 551; Woodstock Iron Works v. Stockdale, 143 Ala. 550, 39 So. 335, 5 Ann. Cas. 578; Chicago, R. I. & P. R. Co. v. Whitten, 90 Ark. 462, 119 S. W. 835, 21 Ann. Cas. 726; Chicago, R. I. &

in repair and in perfect working order must be considered;" and that "it may be said that a telephone company is held to only ordinary diligence in keeping its plants, instruments, etc., in working order for the purpose of facilitating conversations between its subscribers." Ibid.

Accordingly it was held that where the line is in order, the telephone company may be liable for the death of a member of a subscriber's family due to the inability to get the necessary medical or surgical attention, because of the negligence of the exchange operator. Ibid.

In answer to the objection that damages which result through the failure to get a physician so that the progress of a malady can be checked, or the effect of a wound can be allayed, and the injurious results prevented, are speculative and remote in character, the court pointed out that there was considerable conflict among the authorities on that question; that while there are some diseases, as to which the court might say as a matter of law (basing its conclusion upon the state of common knowledge) that the chances of recovery were always speculative and doubtful; that there were other diseases which perhaps the court might say as a matter of law, that they would yield to proper treatment; and that between these two classes exist a wide class as to which common knowledge is not so well established, and in these cases the question as to whether the results of a physician's or surgeon's services would or would not be doubtful or uncertain, is a question of fact and is for the jury. Ibid.

So in Southwestern Teleg. & Teleph. Co. v. Allen, — Tex. Civ. App. —, 146 S. W. 1066, it was said that it cannot be said as a matter of law that the loss of a physician's services could not be considered as a reasonable and probable consequence likely to result from wrongfully disconnecting the telephone of a subscriber who resided in the country about 9 miles from the nearest physician, when the company had notice of the illness in the subscriber's family and that the attendance of a physician would probably be required.

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In the last cited case it was held that the wrongful refusal to receive further calls from a subscriber rendered the telephone company liable for such general damages which might reasonably be expected to follow as the natural and probable consequences of the act, and for such special damages as were the natural and probable result of the special conditions of which the company had notice.

Accordingly it was held that a subscriber who has informed the manager of the telephone company of the necessity for good service because of the illness of his wife is entitled to recover for mental anguish which he sustained by reason of witnessing the suffering of his wife occasioned by the failure to secure the attendance of a physician because of his inability to get telephone connections with the central office. Ibid.

But in Glawson v. Southern Bell Teleph. & Teleg. Co. supra, it was held that no recovery can be had for mental suffering in an action by a husband for the death of the wife, under a statutory provision that the measure of damages shall be the "full value of the life of the deceased, as shown by the evidence."

A telephone company under contract to furnish the subscribers of another company with telephonic connections with various independent lines including the members of an unincorporated association, with the right to refuse further service in case a subscriber should be in default in payment of charges due, and under a contract with the unincorporated association which provided in effect that the primary obligation to pay exchange charges was upon the association, and not upon the members, cannot refuse telephonic connections to a subscriber who desires to communicate with a member of the association, upon the ground that the latter was in arrears for certain long-distance charges, without subjecting itself to liability for penalties imposed under a general statute for refusing to render the service. Osborne v. Reading Cent. Teleph. Co. 163 Mich. 545, 128 N. W. 745.

A. L. R.

P. R. Co. v. Moss, 89 Ark. 187, 116 S. W. 192.

The statute does not apply to telephone companies.

Wisconsin Teleph. Co. v. Oshkosh, 62 Wis. 32, 21 N. W. 828; Arkansas & L. R. Co. v. Stroude, 77 Ark. 114, 113 Am. St. Rep. 130, 91 S. W. 18; Western U. Teleg. Co. v. Crenshaw, 93 Ark. 419, 125 S. W. 420, 37 Cyc. 1704; Western U. Teleg. Co. v. State, 82 Ark. 318, 101 S. W. 748, 12 Ann. Cas. 82; Arkansas & L. R. Co. v. Lee, 79 Ark. 451, 96 S. W. 148.

To recover more than nominal damages, actual damages must be shown.

Emerson v. Turner, 95 Ark. 598, 130 S. W. 538.

The damages in the present case are all entirely too remote, too extraordinary, too speculative, and too contingent to enter as elements of damage based on the negligence complained of.

Woodstock Iron Works v. Stockdale, 143 Ala. 550, 39 So. 335, 5 Ann. Cas. 578, 37 Cyc. 1750-B, 1754-B; Kelly v. Altemus, 34 Ark. 184, 36 Am. Rep. 6; St. Louis, I. M. & S. R. Co. v. Bragg, 69 Ark. 402, 86 Am. St. Rep. 206, 64 S. W. 226; St. Louis, I. M. & S. R. Co. v. Harrison, 76 Ark. 434, 89 S. W. 53; Rodgers v. Choctaw, O. & G. R. Co. 76 Ark. 521, 1 L.R.A.(N.S.) 1145, 113 Am. St. Rep. 102, 89 S. W. 468.

Mr. Patrick Henry for appellee.

McCulloch, Ch. J., delivered the opinion of the court:

Appellee instituted this action below against appellant (a corporation operating a telephone system in the town of Monticello and vicinity) to recover damages alleged to have been sustained by reason of negligence in failing to furnish telephone service. He alleged in his complaint the following state of facts, which the testimony established, viewed in its most favorable light: Appellee resided at Monticello, and was one of appellant's subscribers, having a telephone in his residence. His wife and son were both sick, and he was convalescent. About 3 o'clock in the morning his son grew worse, and needed immediate attention of a physician, and he attempted to call by telephone Dr. Kimbro, his family physician, who lived in another part of town. He got connection with Dr. Kimbro's residence, but the latter's wife informed him that the doctor had gone to the country to make a call, and could be reached by telephoning him at the Agricultural School. He then endeavored for a considerable time to get connection with the Agricultural School, but could not get a response to his call for the telephone

central office. He walked uptown and tried to call from a telephone at a livery barn, and again failed to get a response from central. He went to the central office, and, finding it closed, knocked at the door. The operator answered, and, after giving his name, appellee told the operator that he had a sick child and wanted to telephone the doctor, and the latter replied: "We are closed until 6 o'clock. I am sorry, but can't do anything for you until 6 o'clock." He returned home and again telephoned Dr. Kimbro's residence, and finally secured the latter's attendance about 8 o'clock, after he returned from the country. The evidence tends to show that a telephone message to the Agricultural School would have been sent over by special messenger to Dr. Kimbro, at the residence of his patron in the neighborhood. Appellee alleged in his complaint that, "by reason of the excitement, exposure, and effort in coming to the office of defendant, his recovery was retarded, and that he was prevented for the period of one week from resuming his work, during which time he suffered physical pain," and he claimed damages in the sum of \$25 for loss of a week's time, \$25 for physical pain, and \$15 for costs of additional medical attention. He alleged that he suffered great mental pain and anguish by reason of his inability to procure medical aid for his child, and claimed damages therefor in the sum of \$250. He also prayed for punitive damages in the sum of \$1,000. The jury returned a verdict for appellee and assessed damages as follows: "For actual damages, as alleged, \$50; for mental pain and anguish on account of himself, wife, and child, as alleged, \$100; for punitive or exemplary damages, as alleged, \$200."

We are of the opinion that the testimony does not warrant a recovery of more than nominal damages. Even if the negligence of the operator in failing to respond to appellee's call could be said to have been the proximate cause of his injury, resulting from exertion and exposure in walking uptown to the central office, appellant is not liable, for the reason that it had no notice of the special circumstances out of which the damages might arise. Western U. Teleg. Co. v. Raines, 78 Ark. 545, 94 S. W. 700; Western U. Teleg. Co. v. Hogue, 79 Ark. 33, 94 S. W. 924. It is not claimed that the operator was informed until appellee reached the central office that he desired to get connection with the Agricultural School for the purpose of communicating with his physician. Whatever physical injury appellee sustained by reason of his trip uptown had then accrued, and notice to the operator at that time would not render ap-

pellant liable for the damages already sustained. *Crutcher v. Choctaw, O. & G. R. Co.* 74 Ark. 358, 85 S. W. 770.

No damages resulted from any act or omission of the operator after appellant notified her of his desire to communicate with the physician, except the mental pain and anguish which he suffered by reason of his inability to secure the attendance of his physician. This court has steadily adhered to the rule that "mental suffering alone, unaccompanied by physical injury or any other element of recoverable damages, cannot be made the subject of an independent action for damages . . . and that such suffering does not of itself constitute a cause of action." *St. Louis, I. M. & S. R. Co. v. Taylor*, 84 Ark. 42, 13 L.R.A.(N.S.) 159, 104 S. W. 551; *Peay v. Western U. Teleg. Co.* 64 Ark. 538, 39 L.R.A. 463, 43 S. W. 965; *Chicago, R. I. & P. R. Co. v. Minn.* 334, 79 N. W. 315. But 192; *Chicago, R. I. & P. R. Co. v. Whitten*, 90 Ark. 462, 119 S. W. 835, 21 Ann. Cas. 726; *St. Louis, I. M. & S. R. Co. v. Groce*, 99 Ark. 420, 138 S. W. 879. After the decision of this court in the Peay Case, the legislature changed the rule as to telegraph companies negligently failing to receive, transmit, or deliver telegraphic messages (*Kirby's Dig.* § 7947); but the statute only applies to companies doing a telegraph business, and not to telephones. While the telephone occupies to some extent the same field as the telegraph, and it is in some respects an improvement on the latter method of long-distance communication, still the former does not fall within the definition laid down by the lawmakers in providing that telegraph companies shall be liable for mental anguish. There are authorities which hold that, in the construction of statutes, the word "telegraph" embraces "telephone," and that statutes concerning telegraph companies include telephone companies as well. *Northwestern Teleph. Exch. Co. v. Chicago, M. & St. P. R. Co.* 76 Minn. 334, 79 N. W. 315. But the method of carrying on the business of telephoning is dissimilar in many respects from the telegraph business, particularly in the method of transmission. *Jones, Teleg. & Teleph. Companies*, §§ 3 et seq. The statute declares that telegraph companies shall be liable for mental anguish or suffering on account of negligence "in receiving, transmitting, or delivering messages." Now, by a very strained construction of that language, it may be reasoned that a telephone company, in its method of furnishing an apparatus for transmitting sound, "receives, transmits and delivers messages;" but that construction is decidedly strained, for it is evident that if the lawmakers had had in mind a telephone company, with its methods of doing business, it would have used altogether different language. A telephone company does not receive a message, nor does it transmit and deliver it in the ordinary acceptation of those words. It merely furnishes to the patron facilities for carrying on a conversation at long distance. The choice of phraseology shows very plainly that, while it is possible to give the other construction to the language, the legislature would have chosen more appropriate words if that construction had been intended. It is not the business of the courts to legislate; and, if a change in the law in this respect is desired, the general assembly is the branch of government whence the change must come.

The facts of the case do not disclose any element of exemplary damages. At most, only negligence is proved; and that, however gross, is not sufficient to justify an award of damages by way of punishment, without any element of intentional wrong or wilfulness or conscious indifference to consequences, from which malice may be inferred. *St. Louis, I. M. & S. R. Co. v. Dysart*, 89 Ark. 261, 116 S. W. 224.

The judgment is reversed, and judgment will be entered here in appellee's favor for nominal damages and costs in the lower court.

CONNECTICUT SUPREME COURT OF ERRORS.

THOMAS DYER, Appt.,
v.

CITY OF DANBURY et al.

(85 Conn. 128, 81 Atl. 958.)

Highway — defect — limb falling from tree.

1. Statutes making a municipality liable for injuries caused by defective highways do not apply to those caused by the fall of limbs from trees in the street.

Municipal corporation — failure to remove nuisance — liability.

2. A municipal corporation is not liable

Note. — Liability of municipality for personal injuries by trees.

Generally as to the liability of municipal corporation for defects or obstructions in streets, see *Elam v. Mt. Sterling*, 20 L.R.A.(N.S.) 512.

Falling tree or limb.

A city is liable in damages to one injured by the falling of a tree standing with-

for injury to a traveler by its failure to remove a nuisance consisting of a dangerous limb on a tree in the street, since the duty to remove it is a governmental one.

Same — acceptance of charter — contract duty.

3. The acceptance by a municipality of a charter imposing upon it the duty of removing nuisances does not create a contract between it and the state that it will do so, a breach of which gives a right of action to one injured by its failure.

Same — attempted regulation of trees — effect.

4. Charter authority to regulate the planting and removal of trees, and an ordinance providing that no person shall remove or plant a tree in the street without a permit, do not impose upon the municipality the duty of removing dead limbs

from trees, so as to render it liable for injury caused by its failure to do so, if under statutory authority a tree warden has been elected who is given the care and control of the public shade trees in the town.

Same — charter — construction — removing dead limbs.

5. Forbidding the removal of trees standing in the street without a permit does not prevent the owner of the tree from removing branches therefrom which have become dangerous to persons using the street.

(October Term, 1911.)

A PPEAL by plaintiff from a judgment of the Superior Court for Fairfield County sustaining demurrers to the complaint in an action brought to recover damages for

in the limits of the street or highway, where it knew, or might have known by the exercise of reasonable diligence, of its dangerous condition, and took no steps to remove the same or guard passers-by against it. 28 Cyc. 1378.

Thus, in *Henderson v. Schlamp*, 14 Ky. L. Rep. 575, where a city, by use of reasonable diligence, could have detected the decayed condition of a tree, it was held liable for injury caused by it falling upon a pedestrian.

So, in *Chase v. Lowell*, 149 Mass. 85, 21 N. E. 233, where a decayed shade tree standing in the street was blown down, striking and injuring a pedestrian, the conclusion was reached, after a review of all previous statutes, that a surveyor in a city or town had no power summarily to remove a shade tree standing in the highway, but that the question whether such tree incommoded or endangered travelers and ought to be removed should be determined by the adjudication of a tribunal designated by the statute for that purpose. The same case was again before the court in 151 Mass. 422, 24 N. E. 212, where the duty of a highway surveyor as to a dangerous shade tree in a public way, to apply to the authorities for an adjudication, was emphasized; and the municipality was held liable for injury to a traveler, if after notice of such dangerous tree the highway surveyor took no action. The court said: "The cases do not go upon the ground that notice to one or more than one of the inhabitants of a town constitutes notice to the town, but that such a state of facts may be shown as will warrant an inference that the authorities either knew, or by the exercise of reasonable diligence might have known, of the defect. "While the authorities are not to be held responsible for the neglect of citizens to inform them of the existence of a defect, the fact that it was generally talked about in the community is a circumstance which may properly be considered. In such a case, notoriety derives its force as evidence not merely from its suggestion that the defect was of such a kind that the authorities would have been

likely to discover it, in the first instance, with their own eyes, but quite as much from the probability that their attention may have been brought by others to a matter which was generally talked about and in which they were interested. . . . In the performance of their duty to discover and repair defects, officers of cities and towns should avail themselves of all the means of information conveniently to be had. Among these is the general knowledge which the people are likely to have of what affects the common interest. It would be unjust to persons injured by defects, if cities and towns were held responsible only for such defects as the officers, regardless of information, should have first discovered with their own eyes." It was also said: "The decayed roots were visible to persons on the sidewalk opposite, and the evidence tended to show that large numbers saw them. All this was competent evidence of the notoriety of the defect, and was not objected to. The acts of persons in looking at the roots were an important part of the evidence. From this it might be inferred that they noticed the decayed condition of the roots, and so that knowledge of the defect became general. But that evidence might properly be strengthened by introducing as a part of the *res gestæ*, the declarations which accompanied the acts, and which characterized them as acts, and communicated intelligence of the condition of the tree to those who looked. The remarks made at the time rendered it certain that the view of the roots gave notice of the defect, to those who then saw them. If the fact that these persons looked at the decayed roots was competent as tending to show the notoriety of the defect, then clearly the accompanying declarations, which tended to show the nature of the act of looking, were also competent."

And in *Morris v. Salt Lake City*, 35 Utah, 474, 101 Pac. 313, although not an action for personal injuries, where a tree whose roots had been cut by an independent contractor employed by the city to lay a sidewalk was blown down, injuring the dwelling of an abutting owner, the city was

injuries caused by a limb falling from a dead tree. Affirmed.

The facts are stated in the opinion.

Mr. Charles M. Murphy for appellant.
Messrs. J. Moss Ives and Thomas A. Keating for appellee city.

Thayer, J., delivered the opinion of the court:

This action was brought against the city and town of Danbury. A separate demurrer was filed by each of the defendants, and each demurrer was sustained. The correctness of the judgment in favor of the city only is questioned by this appeal.

According to the allegations of the complaint, the plaintiff while passing along the sidewalk was hit upon the head and injured

by a falling limb which had "become dislodged from," or was "broken off by the wind from," a dead tree which stood within the limits of the street, and overhung the sidewalk. The street was a public highway of the city, and it was the duty of the city to keep it in repair and in safe condition for public travel. The tree had existed in its dangerous condition for more than a year, and constituted a nuisance upon the highway. The city charter provides that the common council shall have power "to regulate the planting and removal, and provide for the protection, care, and preservation of trees in the public streets and parks." The common council has passed an ordinance which provides that "no person shall cut down any trees standing upon any

held liable whether the independent contractor negligently cut the roots, or necessarily did so in the construction of the walk. The court said that the contractor would be liable because he caused the tree to become a menace and a danger, and for permitting it to remain in that condition, and the city is liable for failing to discharge its duty in not removing the tree from a public street, when deprived of its support, and in permitting it to remain in that condition so that it might be blown over at any time by an ordinary wind.

Where a tree standing beside a public highway, by reason of excavation near it done by order or permission of a municipality, had been a dangerous nuisance of which the municipality had notice sufficiently long to have removed it, the municipality in *Steves v. South Vancouver*, 6 B. C. 17, was held liable for the death of a person lawfully using the highway, caused by the tree being blown down upon him during a violent wind storm.

But it is held in *East St. Louis v. Giblin*, 3 Ill. App. 219, that, although a city is liable for a person's death caused by the negligence of its employees in felling a tree, it is not liable where the death was the result of the negligence of the assistants of an independent contractor employed by the city for a stipulated sum to cut down the tree.

So, in *Watkins v. County Court*, 30 W. Va. 657, 5 S. E. 654, it was held that a county court, a municipal corporation, is not responsible in an action brought by an individual for damages for an injury sustained by him in consequence of the county court, or any officer or agent of it, failing to perform any duty imposed upon it, except when by statute it is expressly or by necessary implication rendered liable to such action. Consequently where a dead tree standing within 5 feet of the edge of the public road fell upon and injured a passer-by as a result of the wilful neglect of duty by the surveyor of the road, it was held that such court could not be sued by the individual for injuries sustained, there being no statute providing, expressly or by 39 L.R.A. (N.S.)

necessary implication, that a county court should be responsible at the suit of an individual for neglect of duty to have such trees cut down.

In *Colorado Springs v. May*, 20 Colo. App. 204, 77 Pac. 1093, where a city was held liable for injuries to one driving along an avenue, caused by its employee felling a tree which struck and frightened plaintiff's horse, overturning the buggy, it was held to be the city's duty, in felling such tree, to use reasonable and ordinary care to avoid injury to those traveling the avenue; and if such duty was observed there was no liability; if not, there was,—unless defeated by the alleged contributory negligence of the plaintiff.

Where a decayed tree, being struck by a heavy truck, fell upon and injured plaintiff, it was held in *Gubasko v. New York*, 14 Daly, 559, 1 N. Y. Supp. 215, affirming a judgment for defendant, that if the tree was dangerous, but appeared safe to outward observance, the defendant was not bound to examine a hole which had existed on one side of the tree, although by so doing it would have discovered the decay.

But in *Vosper v. New York*, 17 Jones & S. 296, an action for death of plaintiff's intestate, caused by the falling of a tree growing on the sidewalk, it appeared that the tree was rotten from the roots up to a dangerous degree. There was a conflict of evidence as to whether there was any exterior sign of the rottenness when the tree was standing. In affirming a judgment for the plaintiff, the court held that it was incumbent upon the city to use ordinary caution to anticipate the danger that could come into existence without manifesting itself to ordinary observers. "If the contingency of the facts," said the court, "were that a secret cause of danger might grow and increase, and yet be hidden, it could not be assumed that, as matter of law, the city was not bound to do anything except use ordinary means to ascertain when danger was imminent and imperiled the safety of passers-by. It would be a question for the jury as to whether the defendant should do or not do

street or highway in the city, nor set out any trees between the curb and sidewalk, without a permit from the superintendent of public works," and that any person who shall violate these provisions shall pay a fine. The town of Danbury has elected a tree warden, and has assumed the exclusive control, care, and protection of all the trees upon the streets in the town and city. These are the essential facts alleged in the complaint.

The overhanging limb did not constitute a defect in the highway. It did not obstruct travel thereon, and the city was not bound to remove it as a part of its duty "to build and repair" the highways within its limits. *Hewison v. New Haven*, 34 Conn. 136, 143, 144, 91 Am. Dec. 718. The com-

plaint therefore does not state a cause of action under § 2020 of the General Statutes, which provides that any person injured by a defective road or bridge may recover damages from the party bound to keep it in repair.

If the overhanging limb by reason of its liability to fall upon the traveled part of the highway constituted a nuisance, as alleged, it ought to have been removed. If it endangered travel upon the highway, it was a public nuisance, and the city could and should have caused its removal. But this duty of the city was a public governmental one, for the neglect of which no liability at common law ensued to the city, and no statute imposes any. *Hewison v. New Haven*, 37 Conn. 475, 483, 9 Am. Rep. 342.

something, even to cutting down the tree, to prevent the danger. . . . The city would be bound to act upon their knowledge or obligation to gain knowledge, as to the intrinsic qualities of the tree and the soil, although these were not manifested in the outward appearances of the tree."

The injury complained of in the *Hewison* Case, relied upon in *DYER v. DANBURY*, was not by trees, but by an iron weight insecurely attached to a flag suspended over the street, falling upon a passer-by. When this case was before the court in 34 Conn. 140, 91 Am. Dec. 718, an attempt was made to maintain an action for the injury, grounded on a breach of an imposed statutory duty to keep the highway free from defects, but the court was satisfied that the suspended flag and weight which produced the injury did not constitute a defect in the highway within the meaning of the statute. The cause of action for the same injury alleged in 37 Conn. 475, 9 Am. Rep. 342, was a breach of duty which it was claimed grew out of the acceptance by the city of a charter from the state, by force of which it agreed to keep highways from being rendered unsafe by nuisances; and the suspension of a flag and weight over the way upon which the injury occurred constituted a nuisance. It was held that the duty to remove such nuisance was a governmental duty, for the nonperformance or negligent performance of which the city was not liable. In distinguishing *Jones v. New Haven*, 34 Conn. 1, where the city under its charter, giving it exclusive control of the public parks, was held liable for a personal injury caused by the falling of a decayed limb from a tree in a public park, the court in the *Hewison* Case, 37 Conn. 483, said: "In that case the duty which the city had contracted with the state to perform was a strictly private duty. The city asked of the general assembly and received power to control the trees of the city, standing on its streets and squares, and assumed the entire and exclusive control of them. The owners of trees standing on the highway are liable at common law for injuries occurring in

consequence of their neglect to trim and keep them safe; and the city, assuming the exclusive control and forbidding the owners to cut and therefore to trim them, assumed the duty and liability which would otherwise have rested on the owners. It was a private duty so far as the city owned the trees, and equally a private duty if they assumed it in exclusion of the owners; and being a private duty and unperformed, they were undoubtedly liable for the injury which resulted from their neglect."

A city was held liable in *Wright v. Chelsea*, 207 Mass. 460, 93 N. E. 840, for injuries to travelers by falling of a limb of a shade tree which stood within the limits of a public way, where the evidence showed that plaintiffs were in the exercise of due care, that the limb had been so dangerous by reason of decay and consequent liability to be blown down by ordinary winds as to attract attention for more than a year, and the officer whose duty it was to report any such danger to the proper authorities testified that he had never done so.

In *McGarey v. New York*, 89 App. Div. 500, 85 N. Y. Supp. 861, a city was held liable for injury to a person by being struck by a falling limb of a tree while walking along a public street, there being evidence to support the finding of the jury that notice of the rotten and dangerous condition of the limb would have been communicated to defendant had proper inspection or examination been made. The court said it was the duty of the municipality to inspect trees in public places to ascertain their true condition.

But in *Miller v. Detroit*, 156 Mich. 630, 132 Am. St. Rep. 537, 121 N. W. 490, 16 Ann. Cas. 832, it is held that a municipal corporation is not, under a statute requiring it to keep its highways, streets, and sidewalks in reasonable repair, liable for injuries to a pedestrian caused by the falling of a dead limb from a tree growing between the sidewalk and the curb, since the statute mentioned refers only to the traveled way, and imposed no obligation upon the city to trim trees growing between

The complaint therefore states no cause of action arising from the city's failure to abate the nuisance. For the nonperformance or misperformance of a merely governmental duty imposed upon a city or town it is not liable in damages, unless a right of action against it is given by statute. *Jones v. New Haven*, 34 Conn. 1, 13; *Greenwood v. Westport*, 63 Conn. 587, 60 Fed. 560; *Platt Bros. & Co. v. Waterbury*, 72 Conn. 531, 48 L.R.A. 691, 77 Am. St. Rep. 335, 45 Atl. 154.

The acceptance of a charter imposing such a duty upon a city does not create a contract between it and the state, rendering it liable in damages at common law for a neglect to perform or a negligent performance of the duty. *Hewison v. New Haven*,

37 Conn. 475, 482, 9 Am. Rep. 342. Where, however, some special power or privilege out of which grow public duties primarily for the benefit of its own citizens is granted to a municipality at its request, or where with its consent some special duty, not belonging to it under the general laws, is imposed upon it, the case is different. In such cases the municipality is in a sense performing a private duty, and, although no liability for damages is imposed by statute for negligence in the performance of such duties, the municipality is nevertheless liable for it. *Jones v. New Haven*, 34 Conn. 14; *Hewison v. New Haven*, 37 Conn. 483, 9 Am. Rep. 342; *Hourigan v. Norwich*, 77 Conn. 358, 365, 59 Atl. 487.

In the *Jones Case*, above cited, as in the

the sidewalk and the curb in a city street. The court in distinguishing *McGarey v. New York*, supra, calls attention to the fact that New York state, where the decision in that case was made, recognized a common-law right of recovery of private damages whenever a duty was imposed upon a municipal corporation, a rule which does not obtain in Michigan.

So, where plaintiff was passing along when a limb fell from a tree standing on the edge of the sidewalk, injuring him, the city in *Jones v. Greensboro*, 124 N. C. 310, 32 S. E. 675, was held not liable; in the absence of evidence that the limb was materially decayed, or that anyone had seen it, or that any city officer knew of it, or could by reasonable diligence have discovered its condition before the accident. The court said: "No more than reasonable care to discover the defects will be required of the corporation, and notice will not be inferred from the notoriety of the defect open to reasonable discovery; but if it be concealed or obscured in any way so as to escape attentive observance on the part of the defendant, notice will not be attributed to it. The burden of showing the defect and notice rests upon the plaintiff."

The law of Missouri imposes upon cities the duty to keep their streets in a reasonably safe condition for travelers passing over them; and a city is held liable for an injury resulting from a defect in a street of which it had notice, or which it could have discovered by the exercise of reasonable care, not that it had become notoriously defective so as to impart notice to the general traveling public. Thus in *Lundy v. Sedalia*, — Mo. App. —, 144 S. W. 889, a city was held liable for injury to a person passing along the sidewalk by the falling of a dead limb of a tree growing between the sidewalk and the curb, where it had long been in a rotten condition, and the defect was one which could have been discovered by reasonable care. The court said if the city, in the exercise of reasonable diligence, could have made the discovery and removed the limb before plaintiff's injury, it was liable for its want of 39 L.R.A. (N.S.)

proper diligence. Whatever may be the law as interpreted by the courts of other states, the courts of this state adhere to the doctrine that a city must exercise proper care to keep its streets reasonably safe for travel from sources of danger overhead as well as on the surface. The fact that passers-by failed to notice the condition of the limb does not preclude the conclusion that defendant's street commissioner should not have made the discovery while in the performance of his duty as such. He was not required to make a particular examination of each tree to see if there was a rotten limb, but it was expected that he would observe defects in the trees or overhead dangers which the ordinary passer-by perhaps would fail to notice, because he has the right to assume that everything is reasonably safe, and therefore does not bestow the same attention that the law imposes upon the city's officials.

Projecting limb.

In *Embler v. Wallkill*, 132 N. Y. 222, 30 N. E. 404 affirming 57 Hun, 384, 10 N. Y. Supp. 797, a town was held liable where a traveler on a highway was swept off from a load of hay by an overhanging limb of a tree growing at the side of the road, the commissioners of highways in such a case being liable for not knowing of an obstruction which had existed so long that a vigilant officer should have known of its existence, and the fact that thousands passed there without injury being of no consequence. In determining whether there was sufficient evidence to charge the commissioners with notice of the alleged defect, the court said that the jury had the right to consider the circumstance that people driving on loads of hay had passed under this tree without difficulty, and also the circumstance that no complaint was made to the commissioners.

So in *Ferguson v. Southwold*, 27 Ont. Rep. 66, a municipality, under its duty to keep the highway in repair, was held liable for injuries sustained by a person by being brushed off a load of hay by a branch

present case, a dead limb fell from a tree upon the plaintiff, and caused the injury complained of. The declaration in that case alleged that the city charter provided that the defendants, through their common council, might make such by-laws as they saw fit in relation to the cutting, breaking, or injury to trees, and the protection and preservation of trees in the streets, highways, and public squares of the city; that by their common council they had passed a by-law by which it was provided that no person should, without the approbation in writing of the mayor and aldermen first obtained, cut, bruise, destroy, or aid in the cutting, bruising, or destroying or injuring any tree which had been or should be planted, set out, or standing for shade, ornament, or use in any of the public streets or highways; that the defendants had assumed upon themselves the task of superintending, regulating, and putting in proper condition trees so situated, and had agreed that they would so superintend, regulate, and put in proper condition such trees; that it thereby became and was the duty of the defendants to take proper care of such trees, and to use due care and diligence in and about superintending and regulating them, and particularly to remove all dead, decayed, and broken limbs remaining upon said trees; and that the defendants neglected this duty, and through such negligence

the plaintiff received her injury. In that case we held that the declaration stated a good cause of action, upon the ground that it therein appeared that the state had authorized the city as a special privilege to assume control of the "protection and preservation" of the trees, of which the pruning and removal of the dead limbs was a part, and that the city had assumed the exclusive control of the trees and the duty of protecting them for the special benefit of its own inhabitants, and that the duty was a private as distinguished from a governmental one. It is claimed that the allegations of the complaint now in question bring the present case within the principle upon which the Jones Case was decided.

The complaint contains no allegation of a duty on the part of the city to care for the trees, and none that it had undertaken or assumed the care and control of them. On the contrary, it is alleged that the tree warden of the town of Danbury had assumed the exclusive control, care, and protection of all the trees upon the street. Gen. Stat. § 4443, as amended by chapter 83, Pub. Acts 1903, p. 54, and chapter 114, Pub. Acts 1905, p. 325, provides for the election of such a tree warden by the towns, and provides that such wardens shall have the care and control of all public shade trees in the town except those in public parks and open places (and of these under

of a tree which, to defendant's knowledge, extended over the line of travel at a height of about 11 feet.

So, in *Louisville v. Michels*, 114 Ky. 551, 71 S. W. 511, a city, under its duty to keep its streets clear of obstructions, is held liable where one driving a patrol wagon was, without contributory negligence upon his part, thrown therefrom by coming in contact with a limb of a tree projecting dangerously low. The court approved of an instruction that, "unless you shall believe from the evidence that the limb of the tree in question was a dangerous obstruction to the use of the street by persons in vehicles, or that the city did not know of the obstruction, and could not have discovered it by the exercise of ordinary care, then the law is for the defendant, and you should so find, unless you shall believe that the limb had existed in its dangerous condition for such a length of time that the city or its officers knew or could have ascertained the dangerous condition of the limb with reference to people using the highway, by the exercise of ordinary care."

Miscellaneous.

It is held in *Nestor v. Fall River*, 183 Mass. 265, 67 N. E. 248, that the loose and rotten roots of a tree which had stood in the sidewalk for over sixty years is a defect in the highway, and a city is liable by 39 L.R.A. (N.S.)

statute for injury to a pedestrian caused by tripping over such root. Under the statute, however, giving damages for personal injuries caused by defects in highways, it is held that compensation can be recovered only for injuries to the person, and not for expense of medical attendance made necessary by the accident.

And in *Lamb v. Cedar Rapids*, 108 Iowa, 629, 79 N. W. 366, a city was held liable to a person injured while attempting to remove a piano from a dray, by falling over a stump in the space along the road; since a city is bound to keep its streets, which have been opened to public use, free from defects and obstructions, although that duty extends only to so much of each street as is customarily used by the public.

But in *Washburn v. Easton*, 172 Mass. 525, 52 N. E. 1070, it was held that a town was not liable under a statute authorizing the commissioners to plant shade trees whenever it will not interfere with the public travel or private rights, where one traveling along a highway with his team was injured by colliding with shade trees; no contention being made that the accident was due to any defect in the trees themselves, there being nothing to show that there had been any change since the road commissioner located the trees, and the law declaring that such trees did not incommode or endanger public travel. J. D. C.

certain circumstances), and that they shall enforce all provisions of law for the preservation of such trees, provided such provisions do not conflict with any city or borough ordinance. This act does not apply to towns which have within their limits a city whose boundaries are identical with those of the town. The act is applicable to Danbury, which is not such a town. There is no conflict between this general law for the care and custody of the trees upon the highways, and the ordinances of the city of Danbury, recited in the complaint. The section of the charter quoted in the complaint gives to the city permission "to regulate the planting and removal, and provide for the protection, care, and preservation of trees in the public streets and parks." The ordinances provide only that no person shall cut down any tree standing in any street or highway, nor set out any trees between the curb and sidewalk without a permit from a city officer. Here is no attempt to provide for the protection, care, and preservation of the trees. It is simply an attempt "to regulate the planting and removal" of trees in the city highways. After they are planted, and while they remain upon the street, the care and control of them is, under the allegations of the complaint, left to the town tree warden, who is charged with that duty, and who, according to the allegations of the complaint, has assumed the exclusive control of them. There is nothing in the ordinance or regulation which would prevent the tree warden or the owner of the tree in question from removing the dead branch which overhung the sidewalk and constituted the nuisance complained of as causing the plaintiff's injury. The complaint does not specifically charge a duty upon the defendant to remove this limb, and it states no facts which raise such a duty. It therefore fails to state a cause of action, and the demurrer to it was properly sustained.

There is no error.

The other Judges concur.

KENTUCKY COURT OF APPEALS.

CITY OF LUDLOW, Appt.,
v.

COMMONWEALTH OF KENTUCKY.

(147 Ky. 706, 145 S. W. 406.)

Municipal corporations — nuisance in highway — criminal liability.

1. A city is criminally liable if its officers permit one of its streets, which it is required by statute to maintain, to become

so out of repair that it constitutes a public nuisance.

Trial — instruction — liability for nuisance — definition of offense.

2. The court need not make use of the word "nuisance" in instructing the jury as to what will render a city liable for permitting one of its streets to become so out of repair as to constitute a public nuisance, but it is sufficient if it tells the jury that the city may be found guilty if it finds certain facts with respect to the condition of the street.

(April 12, 1912.)

APPEAL by defendant from a judgment of the Circuit Court for Kenton County convicting it of maintaining a public nuisance. Affirmed.

The facts are stated in the opinion.

Messrs. Jackson & Woodward, for appellant:

The city council, and not the city itself, should have been indicted, because the council had exclusive jurisdiction to repair the streets.

Georgetown v. Com. 115 Ky. 382, 61 L.R.A. 673, 73 S. W. 1011, 1 Ann. Cas. 961; Hammar v. Covington, 3 Met. (Ky.) 494.

The court should have given all the law of the case to the jury.

Buckles v. Com. 113 Ky. 795, 68 S. W. 1084.

Note. — Criminal responsibility of municipality for maintaining or permitting a nuisance.

A municipal corporation is liable to indictment for malfeasance as well as nonfeasance with respect to duties which it owes the public. 28 Cyc. 1775, 4 Dill. Mun. Corp. § 1597. This rule applies with reference to nuisances.

Thus in *Paris v. Com.* 4 Ky. L. Rep. 597, a case relating to nuisance resulting from obstruction of streets by boisterous crowds, the rule is stated that a municipal corporation may be indicted for a nonfeasance in not carrying out the powers of its charter, and for such misfeasance as are either treasonable, felonious, or attended with violence; but in order that the municipality be indictable for a nonfeasance, it must have the power to do the act omitted, and for a misfeasance the act done must come within the scope of its corporate duty. Only an abstract of *Com. v. Paducah*, 6 Ky. L. Rep. 292, is reported, but from this it appears that the municipality is not liable for nonfeasance unless, in addition to having the power to abate the nuisance, it is its duty to do so through its ministerial officers. This latter view, that it must be the duty of the municipality to abate the nuisance, is taken in *State v. Portland*, 74 Me. 271, 43 Am. Rep. 586; but in the latter case it is held that where the power is ex-

Messrs. James Garnett, Attorney General, and M. M. Logan, Assistant Attorney General, for the Commonwealth:

A city may be indicted and punished for maintaining and continuing a public nuisance by failure to keep its streets in repair.

Georgetown v. Com. 115 Ky. 382, 61 L.R.A. 673, 73 S. W. 1011, 1 Ann. Cas. 961; *Hammar v. Covington*, 3 Met. (Ky.) 494; *Com. v. Somerset*, 14 Ky. L. Rep. 238.

Mr. R. G. Williams also for the Commonwealth.

Hobson, Ch. J., delivered the opinion of the court:

The city of Ludlow was indicted by the grand jury of Kenton county for main-

taining a common nuisance, in failing to keep in a safe condition for the use of the traveling public one of the city highways. On a trial of the case it was fined \$200, and appeals.

Ludlow is a city of the fourth class. It has no board of public works, and under the statute the duties imposed upon the board are performed by the council. By § 3583, Ky. Stat. "the board of public works shall have the exclusive power and control over the construction, . . . repairing, . . . and improving of all streets." The chief point made on appeal is that the city cannot be indicted for the failure of the council to repair the streets, but that the council must be indicted. In support of this contention we are referred to the case

pressly conferred upon a public corporation in a matter such as sewers, it carries with it by implication the powers necessary for its proper performance, and also the corresponding duty and obligation which grow out of the exercise of the power. So it was held in *People v. Albany*, 11 Wend. 539, 27 Am. Dec. 95, and *State v. Shelbyville*, 4 Sneed, 176, that the municipality is bound to exercise its powers in this regard when demanded by the public interests.

But the remedy by indictment is not available where the duty is imposed not by charter, but by a general law of the state, if such general law does not expressly provide for the remedy by indictment. *State v. Burlington*, 36 Vt. 521. This point was not expressly noted in *State v. Portland*, 74 Me. 268, 43 Am. Rep. 586, although the power to abate the nuisance was conferred by statute in that case. So, in *Saukville v. State*, 69 Wis. 178, 33 N. W. 88 (not treated as a nuisance) where the duty to repair a bridge was one imposed by statute, the town was held criminally liable. In neither of the last two-named cases does it appear as to whether or not the law expressly provided for the remedy by indictment.

In *State v. Portland*, supra, a municipality was held criminally liable for a permissive nuisance arising from sewage matter deposited in tide water, although there was no allegation in the indictment of defect in the plan of the sewer (and all the difficulty there was arose from the plan), in adopting which the city exercised its best judgment as to the proper location of the outflows of the sewers, and had been guilty of no negligence, having constructed the sewers upon a system as good as anyone knew how to build at the time of their construction.

In *People v. Albany*, supra, a municipality, which had power to remove nuisances, was held criminally liable for failure to exercise the same in removing a nuisance caused by permitting the basin in a river at the termination of a canal to be filled with dirt and filth so as to become offensive.

And in *Com. v. Gloucester*, 110 Mass. 491, 39 L.R.A. (N.S.)

a town was held criminally liable for constructing a dam and dike across a cove, whereby navigation to and from the open sea was greatly obstructed and confined. A statute in this case, supplemental to one authorizing the county to construct a highway over the cove, authorized the town to erect certain convenient and suitable sluice ways or water courses through said highway, and flood gates suitable for admitting and stopping the tide waters, for the purpose of creating mill privileges. The case was heard on demurrer, and so far as it appears there had been no highway constructed by county, nor no authority given town to obstruct navigation. It is further stated that whether or not the structure actually erected was within the authorization was a question of fact, which could not be passed upon in the case, but at any event if it should appear to have been beyond the authorization, the town would be liable.

So, in *Com. v. Bredin*, 165 Pa. 224, 30 Atl. 921, the burgess and councilmen of a borough in their corporate capacity were held indictable for maintaining a common nuisance consisting of a sewer, partly covered and partly open, into which was dumped a drain and sewage from a large area. In this case the defendants had power to prohibit and remove any nuisance or offensive matter, and also to make such other regulations as might be necessary for the health and cleanliness of the borough, but it did not appear that any such regulations had been made.

Where a borough, which is not bound to construct a sewer system, determines in the exercise of its discretion upon the construction of such a system, it must so complete the work as not to create a public nuisance; and it is no defense to its liability for such a nuisance that it is without means to complete the system so as to obviate the nuisance. Neither is it a defense that others maintain a nuisance which in a measure contributes to the nuisance created by the sewer system. *Com. v. Wilkinsburg*, 37 Pa. Super. Ct. 160.

Neither is it a defense to an indictment for maintaining a sewer whereby the waters

of *Georgetown v. Com.* 115 Ky. 382, 61 L.R.A. 673, 73 S. W. 1011, 1 Ann. Cas. 961. In that case the city allowed an open drain between the gas plant and the Big Spring branch to become filled with filth and to be a nuisance. But the city did not own the gas plant. The nuisance, while within the city, was not on the property of the city, or created by it. The city had passed ordinances punishing the creating of such a nuisance, but it had failed to enforce its ordinances. It was held in that case that in enforcing its ordinances the city acts in a governmental capacity, and that it may not be indicted for suffering a common nuisance because it failed to enforce its criminal or penal laws. But in the opinion the distinction between that case and such

of a stream are polluted that the waters of the stream were not shown to have been used by the lower riparian owners for "drinking or domestic purposes." *Com. v. Ashley*, 37 Pa. Super. Ct. 254.

In *Paris v. Com.* 29 Ky. L. Rep. 483, 93 S. W. 907, a municipality was held criminally liable for permitting blasting on a lot owned by the city in a residence district, notwithstanding the city claimed that the blasting was done by one who was its tenant, but it did not show that the lot had passed beyond its control.

It is no defense to a liability under an indictment for suffering and permitting a city employee and garbage contractor to put the garbage on a city lot, that there was an ordinance providing punishment for maintaining a nuisance in the city. *Newport v. State*, 108 Ky. 151, 55 S. W. 914.

Where the indictment charges the suffering of assemblages and boisterous crowds upon the streets so as to obstruct the same, the city is not liable where it has provided the necessary ministerial officers for the abatement and prevention of the nuisance, and such officers have in good faith attempted to do so. *Paris v. Com.* 4 Ky. L. Rep. 597.

But this rule yields to public necessity; and the municipality is not liable for burning the bedding, bedsteads, and clothing that has been used in and about a smallpox hospital that had been established by the municipality during a smallpox epidemic, where it is shown that such burning was the best means known of preventing the spread of infection, and that it was the uniform practice in hospitals where such diseases were being treated, and was the recognized and accredited mode recommended and indorsed by the medical profession; and where such burning was done in good faith. The court states that the temporary inconvenience which resulted to parties near by could not be considered, but the rights of such parties must yield in a matter such as this where public necessity demands the action. *State v. Knoxville*, 12 Lea, 146, 47 Am. Rep. 331.

Neither is a municipality liable for fail-
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a case as we have here is expressly pointed out. In *Davis v. Bangor*, 42 Me. 522, it was held that, in all cases where the municipality may be held for damages for a defective highway in a suit by the person sustaining special damages thereby, the municipality may be indicted for a common nuisance, if its acts amount to a common nuisance. It seems to us that this is a sound principle. We have held in a number of cases that the title to a city street is in the city, and that the city is liable to persons injured by reason of its negligence in failing to keep its streets in a reasonably safe condition. This ruling necessarily rests upon the ground that the city is liable for the negligence of its officers in failing to keep the streets in repair; and if the failure

ure to abate a nuisance resulting from drainage and sewage being conducted into a ditch by the side of the road, where the duty so to do is imposed not by a charter, but by a general law of the state, and the remedy by indictment is not expressly made applicable by the statute itself. A further fact relieving the municipality from liability in this case was that the state imposed the duty of the removal or abatement of the nuisance erected or created by private persons, upon the selectmen, conditioned upon the exercise of their judgment and discretion, and imposed no liability upon the municipality. *State v. Burlington*, 36 Vt. 521.

In *People v. Albany*, 11 Wend. 539, 27 Am. Dec. 95, there was held to be no criminal liability for failure to abate a nuisance if, in order to do so, it was necessary to cut down and remove a bulkhead which had been erected under legislative authority and consented to by municipality, as there was no duty or power created by charter to do this.

See *Com. v. Bredin*, supra, where the power to abate the nuisance was conferred by a general borough act.

Where the nuisance is the result of conditions created by private parties on private ground.

In *State v. Shelbyville*, 4 Sneed, 176, the mayor and alderman of a municipality were held criminally liable for a nuisance in permitting a slaughterhouse to be kept by certain citizens within the town, upon a lot owned by them, where the defendants had power to abate the nuisance. The indictment in this case was treated as one against the municipality.

In *Com. v. Paducah*, 6 Ky. L. Rep. 292, the liability of a municipality for such nuisances is recognized, but it is held that there is no liability for permitting a nuisance in that it did not prevent a "bawdy-house" from being kept, and punish the keeper and those who assembled there, as it was not the duty of the municipality to abate nuisances except such as were defined

to keep the streets in repair is a wrongful act of the city, we cannot see upon what principle it can be maintained that the city may not be prosecuted for maintaining a common nuisance, when its acts in the matter amount to creating a nuisance. That the rule that the city may be indicted has been held in Maine, Massachusetts, New Hampshire, Pennsylvania, Tennessee, and Canada. *State v. Madison*, 63 Me. 546; *Com. v. Boston*, 16 Pick. 442; *Com. v. New Bedford Bridge*, 2 Gray, 339; *State v. Dover*, 46 N. H. 452; *Com. v. Bredin*, 165 Pa. 224, 30 Atl. 921; *Chattanooga v. State*, 5 Sneed, 578; *Reg. v. London*, 32 Ont. Rep. 326; *Dill. Mun. Corp.* last ed. §§ 1597, 1598; 1 *Smith, Modern Law of Mun. Corp.* § 823; *Elliott, Roads & Streets*, § 662, and cases cited.

In *Saukville v. State*, 69 Wis. 178, 33 N. W. 88, a conviction was sustained against a city for failing to repair a bridge, which was a public highway within the city limits. In *State v. Portland*, 74 Me. 268, 43 Am. Rep. 586, the city was indicted for creating a common nuisance by allowing a sewer to overflow. It seems to us that these cases rest upon a sound principle, and that, as the city is liable to a person injured by reason of its negligence in the care of its sewers, bridges, or highways, it may be indicted by the state if it thus creates a common nuisance. The rule declared by the English courts is that, where the town may be indicted for a nuisance, an action for

redress may be maintained by the person injured. *Henly v. Lyme*, 5 Bing. 91, 6 L. J. C. P. 222, 30 Revised Rep. 542. The city officers may be fined and imprisoned if they create or maintain a nuisance. *Com. v. Hopkinsville*, 7 B. Mon. 38. But the city whom they represent may at the election of the state be indicted, as the duty is by the statute imposed on the city. Section 3560, Ky. Stat. provides: "Public ways, as used in this act, shall mean all public streets, alleys, sidewalks, roads, lanes, avenues, highways, and thoroughfares, and the same shall be under the exclusive management and control of the city, with powers to improve them by original construction, or to reconstruct them, as may be prescribed by ordinance."

It is true that the county may not be indicted for a common nuisance for failing to keep its highways safe; but a county is only a political subdivision of the state. The title to the highway is not in the county, and the county is not answerable in damages to a person who is injured by reason of a defect in the highway. In such cases the county authorities who are negligent must be indicted for creating the nuisance. The distinction is an old one, and comes to us with the common law from England. It appears to rest on this ground: The counties in England are merely political subdivisions, created for convenience for governmental purposes. On the other hand, city charters in England are

by it, and it did not appear that the acts permitted had been defined by it to be a nuisance.

In *Georgetown v. Com.* 115 Ky. 382, 61 L.R.A. 673, 73 S. W. 1011, 1 Ann. Cas. 961, the liability of a municipality for permitting the pollution of a drain on private property within the municipal limits was denied, notwithstanding it had passed ordinances making it an offense to cause, maintain, or permit noxious or unhealthy matter in such a drain within the city. The liability in this case is distinctly denied on the theory that the abatement of the nuisance was a matter which concerned the public or governmental function of the municipality. In the course of the opinion, the court refers to *State v. Shelbyville*, and *Com. v. Paducah*, and disapproves of the holding in these cases in so far as they recognize the abatement of nuisances to be a matter belonging to the municipality in its private or corporate capacity. In the course of the opinion the court states that nuisances are an offense at common law, and the person creating or permitting them are liable to indictment wherever committed, and when the state grants to a city the power to abate or pass ordinances to punish persons guilty of such offenses, this right

is exercised only in aid of sovereignty in the enforcement of its laws for the comfort, safety, and health of the public. A city in such a case becomes a part of the sovereignty, and therefore is not liable to indictment.

The case of *Paris v. Com.* supra, agrees with this case in holding that there can be no indictment of a municipality for matters which concern its public or governmental functions; the difference arises as to whether or not a nuisance is concerned with such public or governmental function. In so far as *Paris v. Com.* supra, holds that it is not, it is overruled by *Georgetown v. Com.* although it should be noted that *Paris v. Com.* is a case which concerns a nuisance upon the streets, a distinction that was not discussed by the court.

In *Frankfort v. Com.* 25 Ky. L. Rep. 311, 75 S. W. 217, the indictment, while against the board of councilmen, was treated as an indictment against the municipality, and there was held to be no criminal liability for permitting a nuisance to exist on private property.

Nonrepair of streets.

In some cases the nonrepair of streets has

royal grants, and confer privileges upon the citizens of the city not possessed by the people of England at large. Thus the charter of the city of London confers upon the people of London many exclusive privileges, and the same is true of the charters of the other English cities, especially those that are very old. So it was that the cities of these favored communities, possessing peculiar privileges under royal grants, were held to a different responsibility from that imposed upon mere political subdivisions. Our ancestors brought the common law with them to this country, and originally all cities were incorporated by a special act of the general assembly, conferring privileges more or less valuable; and so a common-law distinction between these municipalities and the counties has been steadily maintained in this country, although under recent legislation much of the reason upon which the rule rested has been abolished. Still the rule has yet some foundation in the greater density of population, and the fact that under our general laws the cities still enjoy some special privileges.

It is also insisted that the court misinstructed the jury, in that it did not tell the jury that the city was accused of maintaining a common nuisance. The instructions of the court are as follows:

"(1) If you believe from the evidence beyond a reasonable doubt that defendant, in this county and state, and on the ———

day of June, and for many weeks prior thereto, and within one year previous to the finding of the indictment herein, did unreasonably and unnecessarily, and for an unreasonable and unnecessary length of time, suffer and permit deep holes or depressions to be and remain in the street or highway described in the proof, or did suffer and permit said street to be so worn as to cause the street car rails to project above the surface of said street or highway; and you further believe that said street or highway was thereby rendered dangerous, unsuitable, or unsafe to the public traveling, passing, and repassing thereon, and having the right then and there to travel, pass, and repass thereon,—you will find defendant guilty, and fix its punishment at a fine in any amount in your discretion, governed by the proof.

"(2) Unless you believe from the evidence beyond a reasonable doubt that defendant has been proven guilty, you must acquit it."

The instruction follows the indictment, which aptly informed the defendant of the offense it was charged with. It was not necessary that the court should use in the instruction the words "common nuisance." It submitted to the jury the facts which make out a case of nuisance, and when the jury found these facts to exist the legal conclusion followed.

Judgment affirmed.

been treated as constituting a nuisance, and the municipality liable therefor.

Thus in *State v. Murfreesboro*, 11 Humph. 217, a municipality was held liable for failing to keep one of the public streets in repair.

It is no defense to an indictment for suffering one of the public streets of a municipality to remain out of repair, that the street was in a remote and sparsely inhabited part of the town, that it had been very little used, and that its use was not essential to the public convenience; that it had never been opened or worked by the corporation, and to open and put it in order would be attended by an expense beyond the means of the corporation.

So, in *Byron v. State*, 35 Wis. 313, the municipality was held liable for neglecting to keep a public highway in proper repair, but this case turned on other points.

So, in *Reg. v. London*, 32 Ont. Rep. 326, the liability of a municipality for neglect in repairing and keeping in repair one of its public streets is recognized.

In *State v. Canterbury*, 28 N. H. 195, a municipality was held liable for failure to build a bridge over a river and connecting the parts of a highway.

In *State v. Boscawen*, 32 N. H. 331, the 39 L.R.A. (N.S.)

municipality was held liable notwithstanding such highway may not have been regularly laid out, but existed under such circumstances as to create an estoppel.

So, a municipality has been held criminally liable for failure to repair highways or bridges in cases in which such failure does not appear to have been treated as a nuisance.—Highways: *State v. Dover*, 46 N. H. 452; *State v. Barksdale*, 5 Humph. 154;—Bridges: *State v. Gorham*, 37 Me. 451; *State v. Madison*, 63 Me. 546; *State v. Whittingham*, 7 Vt. 390; *Saukville v. State*, 69 Wis. 178, 33 N. W. 88.

In *Com. v. Boston*, 16 Pick. 442, a municipality which had annexed outlying territory, and had, by its proper officers, power to lay out streets therein, but was not obliged to complete such streets sooner than might be deemed expedient so to do, is criminally liable for failure to prepare and fit out such street for public use, within a reasonable time after having declared it expedient so to complete it.

Cases, however, in which municipalities have been held criminally liable for failure to comply with their duty to keep streets and bridges in repair, irrespective of the question of nuisance, have, in general, been excluded from the note.

W. A. E.

MARYLAND COURT OF APPEALS.

FRANCIS J. SCHAUB, Appt.,

v.

JOHN P. O'FERRALL et al.

(116 Md. 131, 81 Atl. 789.)

Conspiracy — to defeat action by perjury — liability.

1. An attorney to whom his client has assigned an interest in the property for which the suit is brought cannot maintain an action against defendants and the witness for conspiring to defeat the claim by perjured testimony, which is successful, although he is thereby deprived of the interest assigned to him.

Witness — perjury — civil liability.

2. A witness is not liable in a civil action for giving perjured testimony in pursuance of a conspiracy which deprives one of property and injures him in his business.

(October 25, 1911.)

APPEAL by plaintiff from a judgment of the Superior Court of Baltimore City sustaining a demurrer to a declaration filed to recover the loss alleged to have been sustained by plaintiff in his failure to recover for his client from the defendant in a former suit and one of the defendants in this case the alleged money or property of his client, in which he alleges an interest by assignment from her. Affirmed.

The facts are stated in the opinion.

Mr. James Fluegel for appellant.

Mr. John P. O'Ferrall for appellees.

Pattison, J., delivered the opinion of the court:

The question presented by this appeal is one of pleading, and involves only the sufficiency of the averments of the third amended declaration. To this declaration the defendants demurred, and the court below sustained the demurrer and entered judgment for the defendants for costs, from which judgment this appeal was taken.

As we are to determine whether the ruling of the lower court was correct in sustaining the demurrer to the declaration, it will be well for us to set forth the declaration, which is as follows: "For that this plaintiff (Schaub) was in the month of September, 1909, and had been for many years prior thereto, a practising attorney at law in Maryland and particularly in Baltimore city, where he enjoyed a lucrative practice as a lawyer. That he had been retained by one Margaret A. Boland in the year 1909 to represent her profes-

sionally as her lawyer in a pending divorce case between her and her husband, the defendant John H. Boland, and to recover for her a large sum of money and considerable personal property which her husband had covenanted to give her, irrespective of the said divorce case, and which said claim for money and personal property due to the said Margaret A. Boland had been by her in part assigned to this plaintiff for a valuable consideration. That in a cause then pending in the circuit court No. 2 of Baltimore city, the said Margaret A. Boland had obtained a divorce from the defendant, John H. Boland, on the ground of his adultery, but had not as yet received from him the moneys and property so due to her as aforesaid, in which this plaintiff had an interest. That to recover the same the said Margaret A. Boland filed a petition in said court to require the said John H. Boland to pay the same to her. That the payment of the same to her had also been guaranteed to her by the joint obligation of the defendant John H. Boland and that of the defendant Edward L. Kaufman, who was then his copartner in the glass and paint business in Baltimore city. That the defendants Boland and Kaufman had failed and refused to pay the said moneys or deliver the said chattels to the said Margaret A. Boland, or to this plaintiff as her solicitor and lawyer, as demanded by him. That the said defendants were represented by a lawyer, who is the defendant John P. O'Ferrall. That the defendant John H. Boland became acquainted and socially intimate with the defendant Pearl R. Ohle, a lewd woman and a prostitute, in the fall of the year 1909, and introduced her to the defendants Kaufman and O'Ferrall. That the said John H. Boland did thereupon, after unlawfully, wilfully, corruptly, and wickedly conspiring with the other defendants in this case to ruin, injure, and defame this plaintiff in his profession as a lawyer, and particularly as the attorney for the said Margaret A. Boland, threaten him that, if he persisted in pressing her claim as aforesaid against him, the defendants would injure and ruin the plaintiff in his profession, and would have the said prostitute, Pearl R. Ohle, falsely testify in the said pending case of Margaret A. Boland versus John H. Boland in the circuit court No. 2 of Baltimore city, that she had seen the plaintiff in the home of his said client in Baltimore city in her bedroom. That the plaintiff and his said client appeared to be affectionate toward each other, and that in the month of September, 1909, the plaintiff and his said client had occupied a bedroom together in a hotel in New

Note. — For perjury or subornation of perjury as ground of civil actions. see note to *Godette v. Gaskill*, 24 L.R.A. (N.S.) 265. 39 L.R.A. (N.S.)

York city, while being registered under the name of Tremane, and while the said divorce suit as afore stated was then pending in said court." That the plaintiff, well knowing that such testimony on the part of the said Ohle would be rank perjury, refused to be swerved from his duty as the attorney for the said Margaret A. Boland, and proceeded in the circuit court No. 2 in the case then pending, to press her said claim as aforementioned. That the defendant Pearl R. Ohle did thereupon, in pursuance of the said unlawful, wicked, malicious, and corrupt conspiracy and combination with the other defendants herein named, and after she had received various sums of money and presents from the said John H. Boland, falsely testify to the said matters and things aforementioned, in accordance with the threat so made to this plaintiff by the said John H. Boland (and which matters and things all the defendants knew to be false and unfounded in fact), in the said cause then pending for the recovery of the moneys and property so due to the plaintiff's client, in which he had an interest in the circuit court No. 2 of Baltimore city. That, as a result of the said perjury of the said Ohle in pursuance of said conspiracy, the course of justice was perverted in said cause, and the said avowed and corrupt object of the said conspiracy was accomplished by the plaintiff being thus injured in his good name, fame, and reputation as a practising lawyer and as the attorney for the said Margaret A. Boland; and he and the said Margaret A. Boland were thereby deprived of the moneys and chattels which, but for said foul, corrupt, unlawful, and wilful conspiracy they would, in the cause then pending in the circuit court No. 2, have obtained. "That, in consequence of the said perjury by the said defendant Ohle, the decree for an absolute divorce that was obtained by the said Margaret A. Boland against the defendant John H. Boland therefore, and in which divorce case this plaintiff had acted as her lawyer and solicitor, was set aside, and her bill of complaint was dismissed; and this plaintiff says that thereby he was unjustly caused to suffer in his reputation as a practising attorney in said cause, and in his profession as a lawyer, and other wrongs, financial losses, and damages did he thereby sustain."

The lower court in sustaining the demurrer held that the facts alleged in the declaration, if true, do not constitute a valid cause of action. The record, however, does not disclose the grounds upon which the trial judge based his decision. It will be seen that the declaration, consisting only of one count, avers that the plaintiff "had

been retained by one Margaret A. Boland . . . to represent her professionally as her lawyer in a pending divorce case between her and her husband, the defendant John H. Boland, and to recover for her a large sum of money and considerable personal property which her husband had covenanted to give her, . . . and which said claim for money and personal property due to the said Margaret A. Boland had been by her in part assigned to this plaintiff for a valuable consideration. . . . That to recover the same the said Margaret A. Boland filed a petition in said court (in the divorce proceeding aforesaid) to require the said John H. Boland to pay the same to her. . . . That the defendant Pearl R. Ohle did thereupon, in pursuance of said unlawful, wicked, malicious, and corrupt conspiracy and combination (such conspiracy and combination being set out in the declaration), with the other defendants herein named, falsely testify to said matters and things aforementioned . . . in said cause then pending for the recovery of the money and property so due to the plaintiff's client, in which he had an interest in the circuit court No. 2 of Baltimore city. That, as a result of the said perjury of said Ohle in pursuance of said conspiracy, the course of justice was perverted in said cause, . . . and he and the said Margaret A. Boland were thereby deprived of the money and chattels, which, but for said false, corrupt, unlawful, and wilful conspiracy, they would, in the cause then pending in the circuit court No. 2, have obtained."

1. The plaintiff, as shown by that part of the declaration immediately above quoted, seeks to recover in this suit, by reason of said alleged perjury, the loss alleged to have been sustained by him in his failure to recover for his client from the defendant in that case, and one of the defendants in this case, the alleged money or property of his client, in which, as the declaration herein alleges, he had an interest by assignment from her. All the authorities we have found are against his right to recover in this suit for such alleged loss. There does not appear to be any conflict of authority on this point. This court said in the recent case of Roschen v. Packard, — Md. —, 81 Atl. 174, and others, decided at the April term, 1911, and not yet reported: "The allegations that the appellees made false statements in their answer to the petition for mandamus, and that certain of them committed perjury at the trial of that case, do not state a cause of action. The controverted questions of fact which were in issue in the mandamus case and

which were disposed of there cannot be again retried. Upon all the questions involved in that case the judgment therein rendered is conclusive upon the plaintiff, and the findings of the jury in that case cannot be reviewed or inquired into in this suit." *Smith v. Lewis*, 3 Johns. 157, 3 Am. Dec. 469; *Homer v. Fish*, 1 Pick. 441, 11 Am. Dec. 218; *Dunlap v. Glidden*, 31 Me. 436, 52 Am. Dec. 625. In the case of *Smith v. Lewis* the declaration sets forth a suit brought by Lewis against Smith and others, in Connecticut, in which Lewis obtained a judgment. It is then alleged therein that Lewis, in order to prove the matters necessary to maintain his suit, unlawfully and corruptly, and with the view and design to deceive the court and jury and to injure the plaintiff, procured one Stephen Burritt to commit wilful and corrupt perjury by making a deposition altogether false, and known to be so by the defendant, and which was given in evidence in the trial, on which evidence, and no other, the plaintiff in the former suit prevailed. Chief Justice Kent, in passing upon the rulings of the court below in sustaining the demurrer to the declaration in that case, said: "This suit is an attempt to overhaul the merits of the verdict and recovery in Connecticut. . . . If this be not an effort to try over again the merits of the former recovery, I must be greatly mistaken in my view of the case. . . . It would be against public policy and convenience, it would be productive of endless litigation, and it would be contrary to established precedent to allow the losing party to try the cause over again in a counter suit, because he was not prepared to meet his adversary at the trial of the first suit." As was said in the case of *Dunlap v. Glidden*: "If the judgment was obtained, as is contended, by fraud and perjury, the plaintiff has ample remedy by law. The court which rendered the judgment, upon proof of these allegations, would be bound to grant a new trial so that upon a further investigation justice might be done. The witnesses, if guilty, might be indicted for perjury, and so might all those be indicted who have unlawfully conspired together to deprive the plaintiff of his rights, and their conviction would afford the most convincing evidence that a review of the action should take place." The plaintiff in this suit, it is true, was not the plaintiff in the former suit, but the alleged loss sustained by him, as stated in this declaration, resulted from his failure to recover for his client the property and money sued for in such former suit, and in which property and money he had, as he alleges, an interest by assignment from her.

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The recovery by Schaub in the former suit was dependent upon the recovery by his client, the plaintiff, in such suit. Thus the plaintiff here is governed and controlled by the principles of law stated in the above-mentioned authorities, and his right to recover in this suit for such alleged loss is thereby prevented.

2. Moreover, whatever may be the liability, if any, of the other defendants in this case for procuring the said Pearl R. Ohle to testify falsely, as it is alleged, to the defamatory words concerning the plaintiff in this case set forth in the declaration, it is clear from all the authorities that no action would lie against the witness, Pearl R. Ohle, even though such testimony was in pursuance of the conspiracy charged against the defendants, including the witness, in this suit. This court in the case of *Hunkel v. Voneiff*, 69 Md. 188, 9 Am. St. Rep. 413, 14 Atl. 501, quotes approvingly from *Starkie on Slander*, in which that author said: "Witnesses, like jurors, appear in court in obedience to the authority of the law, and therefore may be considered, as well as jurors, to be acting in the discharge of a public duty; and, though convenience requires that they should be liable to a prosecution for perjury committed in the course of their evidence, or for conspiracy in case of a combination of two or more to give false evidence, they are not responsible in a civil action for any reflections thrown out in delivering their testimony." In the same opinion the court also quoted from the opinion of the court in *Dawkins v. Rokeby*, L. R. 8 Q. B. 255, in which the court there said: "A long series of decisions has settled that no action will lie against a witness for what he says or writes in giving evidence before a court of justice. This does not proceed on the ground that the occasion rebuts the *prima facie* presumption that words disparaging to another are maliciously spoken or written. If that were all, evidence of express malice would remove this ground. But the principle we apprehend is that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action on an allegation, whether true or false, that they acted from malice." After *Dawkins v. Rokeby* came the case of *Seaman v. Netherclift*, which is also cited by this court in the case last referred to, and which was tried before Coleridge, Ch. J., at nisi prius and afterwards decided by him and Brett, J., in L. R. 1 C. P. Div. 540, and subsequently by the court of appeals in L. R. 2 C. P. Div. 53. The judges who heard the case on appeal said: "If there is anything as to which the authority is overwhelming,

it is that a witness is privileged to the extent of what he says in course of his examination. Neither is that privilege affected by the relevancy or irrelevancy of what he says; for then he would be obliged to judge of what is relevant or irrelevant, and questions might be, and are, constantly asked which are not strictly relevant to the issue." This court in *Hunkel v. Voneiff*, after citing other English authorities in which the same principle is laid down, said: "A different view as to the extent of the privilege has been taken by the courts of many of the states, and it may be conceded that the weight of authority in this country is in favor of a much greater restriction upon the privilege than is sanctioned by the English decisions. But we are not controlled by any decision of our own courts, and are at liberty to settle the law for this state according to our best judgment. After a most careful consideration of the subject, we are convinced that the privilege of a witness should be as absolute as it has been decided to be by the English authorities we have cited; and we accordingly adopt the law on this subject as they have laid it down." And in the case of *Kimball v. Harman*, 34 Md. 410, 6 Am. Rep. 340, this court said: "It is clear, therefore, as well upon the authority of other cases as that of *Saville v. Roberts*, 1 Ld. Raym. 374, that an act which, if done by one alone, constitutes no ground of an action on the case, cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several." From what we have said it is clear that no action lies against the defendant *Ohle*. The defects that we have pointed out are sufficient, in our opinion, to render the declaration bad. We will therefore affirm the judgment of the court below in sustaining the demurrer to the declaration.

Judgment affirmed, as per *Per Curiam* heretofore filed, with costs to the appellees.

MASSACHUSETTS SUPREME JUDICIAL COURT.

EVA HOTENBRINK

v.

BOSTON ELEVATED RAILWAY COMPANY.

(211 Mass. 77, 97 N. E. 624.)

Carrier — tobacco juice on step — injury — liability.

A street car company is not liable for injury to a passenger who falls from the step of a car which is slippery because of tobacco

juice which has been expectorated there, if there is nothing to show that it had been there any length of time, and the conductor is not shown to have been negligent in failing to discover it before the accident happened.

(February 27, 1912.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for personal injuries due to a fall from defendant's car which was alleged to have been caused by defendant's negligence. Overruled.

The facts are stated in the opinion.

Messrs. W. P. Murray and E. F. Hodgdon, for plaintiff:

It was the duty of the conductor to look for, see, and take proper precautions to prevent injuries from this danger.

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The question of his negligence was indicated in the declaration, and should have been submitted to the jury.

Joslyn v. Milford, H. & F. Street R. Co. 184 Mass. 65, 67 N. E. 866.

The company had, by its practice and rules, made it the duty of the conductor to put sand, provided for that and other purposes, on any slippery substances on the step of the car. The breach of this duty is negligence.

Foster v. Old Colony Street R. Co. 182 Mass. 380, 65 N. E. 795; *Anjou v. Boston*

Note. — Duty of carrier of passengers to keep steps of car free from slippery substances other than snow and ice.

As to duty of carrier of passengers to keep steps of cars free from snow and ice, see note to *Riley v. Rhode Island Co.* 15 L.R.A. (N.S.) 523, and the supplemental note thereto which is appended to *Murphy v. North Jersey Street R. Co.* 35 L.R.A. (N.S.) 592.

A carrier owes the duty to its passengers of exercising as high degree of care to keep the steps provided for passengers to alight from its coaches in a reasonably safe condition to so alight as would be exercised by every prudent person under the same circumstances. *St. Louis Southwestern R. Co. v. Gresham*, — Tex. Civ. App. —, 140 S. W. 483.

And while it is the duty of a railroad company to inspect its trains, it is not bound to keep up a continuous inspection, or to know at each moment the condition of every part of the train. *Proud v. Philadelphia & R. R. Co.* 64 N. J. L. 702, 50 L.R.A. 469, 46 Atl. 710, wherein it was held that the failure of a railroad company to discover filth on the steps of a passenger car in the nighttime, within half an hour after the car had been inspected and found to

which were disposed of there cannot be again retried. Upon all the questions involved in that case the judgment therein rendered is conclusive upon the plaintiff, and the findings of the jury in that case cannot be reviewed or inquired into in this suit." *Smith v. Lewis*, 3 Johns. 157, 3 Am. Dec. 469; *Homer v. Fish*, 1 Pick. 441, 11 Am. Dec. 218; *Dunlap v. Glidden*, 31 Me. 436, 52 Am. Dec. 625. In the case of *Smith v. Lewis* the declaration sets forth a suit brought by Lewis against Smith and others, in Connecticut, in which Lewis obtained a judgment. It is then alleged therein that Lewis, in order to prove the matters necessary to maintain his suit, unlawfully and corruptly, and with the view and design to deceive the court and jury and to injure the plaintiff, procured one Stephen Burrutt to commit wilful and corrupt perjury by making a deposition altogether false, and known to be so by the defendant, and which was given in evidence in the trial, on which evidence, and no other, the plaintiff in the former suit prevailed. Chief Justice Kent, in passing upon the rulings of the court below in sustaining the demurrer to the declaration in that case, said: "This suit is an attempt to overhaul the merits of the verdict and recovery in Connecticut. . . . If this be not an effort to try over again the merits of the former recovery, I must be greatly mistaken in my view of the case. . . . It would be against public policy and convenience, it would be productive of endless litigation, and it would be contrary to established precedent to allow the losing party to try the cause over again in a counter suit, because he was not prepared to meet his adversary at the trial of the first suit." As was said in the case of *Dunlap v. Glidden*: "If the judgment was obtained, as is contended, by fraud and perjury, the plaintiff has ample remedy by law. The court which rendered the judgment, upon proof of these allegations, would be bound to grant a new trial so that upon a further investigation justice might be done. The witnesses, if guilty, might be indicted for perjury, and so might all those be indicted who have unlawfully conspired together to deprive the plaintiff of his rights, and their conviction would afford the most convincing evidence that a review of the action should take place." The plaintiff in this suit, it is true, was not the plaintiff in the former suit, but the alleged loss sustained by him, as stated in this declaration, resulted from his failure to recover for his client the property and money sued for in such former suit, and in which property and money he had, as he alleges, an interest by assignment from her. 39 L.R.A. (N.S.)

The recovery by Schaub in the former suit was dependent upon the recovery by his client, the plaintiff, in such suit. Thus the plaintiff here is governed and controlled by the principles of law stated in the above-mentioned authorities, and his right to recover in this suit for such alleged loss is thereby prevented.

2. Moreover, whatever may be the liability, if any, of the other defendants in this case for procuring the said Pearl R. Ohle to testify falsely, as it is alleged, to the defamatory words concerning the plaintiff in this case set forth in the declaration, it is clear from all the authorities that no action would lie against the witness, Pearl R. Ohle, even though such testimony was in pursuance of the conspiracy charged against the defendants, including the witness, in this suit. This court in the case of *Hunckel v. Voneiff*, 69 Md. 188, 9 Am. St. Rep. 413, 14 Atl. 501, quotes approvingly from *Starkie on Slander*, in which that author said: "Witnesses, like jurors, appear in court in obedience to the authority of the law, and therefore may be considered, as well as jurors, to be acting in the discharge of a public duty; and, though convenience requires that they should be liable to a prosecution for perjury committed in the course of their evidence, or for conspiracy in case of a combination of two or more to give false evidence, they are not responsible in a civil action for any reflections thrown out in delivering their testimony." In the same opinion the court also quoted from the opinion of the court in *Dawkins v. Rokeby*, L. R. 8 Q. B. 255, in which the court there said: "A long series of decisions has settled that no action will lie against a witness for what he says or writes in giving evidence before a court of justice. This does not proceed on the ground that the occasion rebuts the *prima facie* presumption that words disparaging to another are maliciously spoken or written. If that were all, evidence of express malice would remove this ground. But the principle we apprehend is that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action on an allegation, whether true or false, that they acted from malice." After *Dawkins v. Rokeby* came the case of *Seaman v. Netherclift*, which is also cited by this court in the case last referred to, and which was tried before Coleridge, Ch. J., at *nisi prius* and afterwards decided by him and Brett, J., in L. R. 1 C. P. Div. 540, and subsequently by the court of appeals in L. R. 2 C. P. Div. 53. The judges who heard the case on appeal said: "If there is anything as to which the authority is overwhelming,

it is that a witness is privileged to the extent of what he says in course of his examination. Neither is that privilege affected by the relevancy or irrelevancy of what he says; for then he would be obliged to judge of what is relevant or irrelevant, and questions might be, and are, constantly asked which are not strictly relevant to the issue." This court in *Hunckel v. Voneiff*, after citing other English authorities in which the same principle is laid down, said: "A different view as to the extent of the privilege has been taken by the courts of many of the states, and it may be conceded that the weight of authority in this country is in favor of a much greater restriction upon the privilege than is sanctioned by the English decisions. But we are not controlled by any decision of our own courts, and are at liberty to settle the law for this state according to our best judgment. After a most careful consideration of the subject, we are convinced that the privilege of a witness should be as absolute as it has been decided to be by the English authorities we have cited; and we accordingly adopt the law on this subject as they have laid it down." And in the case of *Kimball v. Harman*, 34 Md. 410, 6 Am. Rep. 340, this court said: "It is clear, therefore, as well upon the authority of other cases as that of *Saville v. Roberts*, 1 Ld. Raym. 374, that an act which, if done by one alone, constitutes no ground of an action on the case, cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several." From what we have said it is clear that no action lies against the defendant *Ohle*. The defects that we have pointed out are sufficient, in our opinion, to render the declaration bad. We will therefore affirm the judgment of the court below in sustaining the demurrer to the declaration.

Judgment affirmed, as per Per Curiam heretofore filed, with costs to the appellees.

MASSACHUSETTS SUPREME JUDICIAL COURT.

EVA HOTENBRINK

v.

BOSTON ELEVATED RAILWAY COMPANY.

(211 Mass. 77, 97 N. E. 624.)

Carrier — tobacco juice on step — injury — liability.

A street car company is not liable for injury to a passenger who falls from the step of a car which is slippery because of tobacco

juice which has been expectorated there, if there is nothing to show that it had been there any length of time, and the conductor is not shown to have been negligent in failing to discover it before the accident happened.

(February 27, 1912.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for personal injuries due to a fall from defendant's car which was alleged to have been caused by defendant's negligence. Overruled.

The facts are stated in the opinion.

Messrs. W. P. Murray and E. F. Hodgdon, for plaintiff:

It was the duty of the conductor to look for, see, and take proper precautions to prevent injuries from this danger.

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The question of his negligence was indicated in the declaration, and should have been submitted to the jury.

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The company had, by its practice and rules, made it the duty of the conductor to put sand, provided for that and other purposes, on any slippery substances on the step of the car. The breach of this duty is negligence.

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A carrier owes the duty to its passengers of exercising as high degree of care to keep the steps provided for passengers to alight from its coaches in a reasonably safe condition to so alight as would be exercised by every prudent person under the same circumstances. *St. Louis Southwestern R. Co. v. Gresham*, — Tex. Civ. App. —, 140 S. W. 483.

And while it is the duty of a railroad company to inspect its trains, it is not bound to keep up a continuous inspection, or to know at each moment the condition of every part of the train. *Proud v. Philadelphia & R. R. Co.* 64 N. J. L. 702, 50 L.R.A. 469, 46 Atl. 710, wherein it was held that the failure of a railroad company to discover filth on the steps of a passenger car in the nighttime, within half an hour after the car had been inspected and found to

Elev. R. Co. 208 Mass. 273, 94 N. E. 386, 21 Ann. Cas. 1143; *Kingston v. Boston Elev. R. Co.* 207 Mass. 457, 93 N. E. 573.

Mr. Sheldon E. Wardwell, for defendant:

There was no evidence from which the jury could have found that the defendant was negligent.

Goddard v. Boston & M. R. Co. 179 Mass. 52, 60 N. E. 486; *Lyons v. Boston Elev. R. Co.* 204 Mass. 227, 90 N. E. 419; *Anjou v. Boston Elev. R. Co.* 208 Mass. 273, 94 N. E. 386, 21 Ann. Cas. 1143; *Toland v. Paine Furniture Co.* 175 Mass. 476, 56 N. E. 608; *Proud v. Philadelphia & R. R. Co.* 64 N. J. L. 702, 50 L.R.A. 468, 46 Atl. 710; *Jennings v. Tompkins*, 180 Mass. 302, 62 N. E. 265.

De Courcy, J., delivered the opinion of the court:

There was evidence for the jury of the plaintiff's due care, and we do not understand that the defendant contends to the contrary. The sole question here is that of the defendant's negligence; involved in the presence of some tobacco spit of the size of a silver dollar or half dollar on the rear step of the car.

Even if it be assumed that the presence of tobacco spit would produce a slippery

condition on the car step, the plaintiff was bound to show that the defendant's conductor knew it was there, or by the exercise of the care owed to the plaintiff would have seen and removed it.

There is no evidence that the conductor knew the saliva was there. No witness in the case, with the exception of the plaintiff and the child Clausina Bookhaut, testified that the alleged condition existed even at the time of the accident; and no witness testified to its existence before the plaintiff alighted. The momentary presence of such a substance on the step would not render the defendant liable. *Goddard v. Boston & M. R. Co.* 179 Mass. 52, 60 N. E. 486; *Lyons v. Boston Elev. R. Co.* 204 Mass. 227, 90 N. E. 419. There was nothing in its appearance from which the inference could be drawn that it had been upon the step for a considerable period of time. *Anjou v. Boston Elev. R. Co.* 208 Mass. 273, 94 N. E. 386, 21 Ann. Cas. 1143. The inference that it must have been there for two minutes, or since the preceding stop at H or I street, is merely conjectural, for it might have come from some passing teamster or pedestrian or otherwise.

And the evidence fails to show that the conductor was negligent in failing to see this substance on the step before the plain-

be in good condition, will not render the company liable to a passenger who is injured by slipping on the step, where the proof does not show that due care would have prevented the accident.

So, where a passenger is injured by slipping on the smooth edge of the step of a boat, and the stairs are finished in the same manner as upon the best river boats, he cannot recover for his injury, since no evidence of negligence appears. *Crocheron v. North Shore Staten Island Ferry Co.* 56 N. Y. 656, reversing 1 Thomp. & C. 446, wherein it appeared that the boat had been in use a year, and had carried, on an average, a thousand passengers a day, and no injury of the kind had occurred.

A carrier is not bound to anticipate unusual and unexpected causes of peril. Thus in *Pittsburgh, C. C. & St. L. R. Co. v. Rose*, 40 Ind. App. 240, 79 N. E. 1094, where the plaintiff was injured by slipping on a banana peel, which was lying on a step of a car, and the evidence showed that the plaintiff and others got aboard the train about four or five minutes before it left the station, without seeing the peel,—although two passengers embarking at the same station testified that they did see it,—and all the while the train was at the station the brakeman and conductor thereof were completely occupied by their duties in making up the train, helping the passengers on board, and taking up tickets, from the time the peel could have been dropped on the step until the plaintiff met with the acci-

dent, it was held that the plaintiff was not entitled to recover. It was said: "It was not a danger reasonably to be apprehended; not such a one as would require the unremitting vigilance of the carrier to guard his passengers against. Successfully to have guarded against an accident of this kind, the company would be compelled to keep a servant at the steps of every car during all the time it was receiving and discharging passengers. No such degree of vigilance is required of a carrier to guard against a peril of this character."

But where the rules of the carrier made it incumbent upon the conductor to clean the step of the car, and put sand on it provided for the purpose, whenever it was necessary to prevent passengers from slipping, it was held in *Kingston v. Boston Elev. R. Co.* 207 Mass. 457, 93 N. E. 573, that the carrier was liable for injuries to the plaintiff caused by slipping on the muddy step of the car; its conductor having been negligent in not cleaning it off, and notwithstanding the mud reached the step by the natural tracking thereon during the course of the journey.

And where one was injured by slipping from the steps of a car it has been held to be a question for the jury whether the carrier negligently permitted the steps to become slippery and muddy after a very recent rain during the course of the journey, or failed to equip the steps in a reasonably safe manner. *St. Louis Southwestern R. Co. v. Gresham*, supra.

E. M. S.

tiff fell. His position on the rear platform, to the left of the controller, would enable him to see only the outer edge of the step. It was not something to be anticipated, like the accumulation of mud and slime on rainy days (*Kingston v. Boston Elev. R. Co.* 207 Mass. 457, 93 N. E. 573), or of snow and ice during our winter season (*Foster v. Old Colony Street R. Co.* 182 Mass. 378, 65 N. E. 795). Nor did the testimony disclose any rule of the company imposing upon the conductor a special duty to examine the car steps for tobacco spit. *Kingston v. Boston Elev. R. Co. supra.*

On the evidence presented the plaintiff was not entitled to go to the jury on the issue of the defendant's negligence.

Exceptions overruled.

PENNSYLVANIA SUPREME COURT.

JOSEPH F. SULZNER

v.

CAPPEAU-LEMLEY & MILLER COMPANIES
NY, Appt.

(234 Pa. 162, 83 Atl. 103.)

Contracts — duress — threat of imprisonment.

A transfer of stock cannot be set aside for duress, because of a threat to imprison the son of the transferrer, who made the contract for the transfer, if it was not carried out.

(January 2, 1912.)

A PPEAL by defendant from a judgment of the Court of Common Pleas, Number 4, for Allegheny County in plaintiff's favor in an action brought to recover possession of a certificate of the stock of a mining company. Reversed.

The facts are stated in the opinion.

Mr. Charles A. O'Brien for appellant.
Messrs. Harvey A. Miller and U. G. Vogan for appellee.

Moschzisker, J., delivered the opinion of the court:

The plaintiff deposited a certificate for 2,500 shares of the stock of a mining company with the defendants for the purpose of sale. A few days later a meeting took place at the office of the defendants in relation to this sale, and certain other per-

sons appeared and claimed to be purchasers of portions of the stock through a son of the plaintiff and another man who they asserted acted as his agents. The plaintiff recognized these claims, accepted in cash what the alleged purchasers declared to be the unpaid balance due, signed a receipt for the purchase money, and executed appropriate papers to carry out a proper division and a transfer of the stock. Subsequently he instituted this action of replevin to recover the certificate for the stock in question. At the trial of the cause the plaintiff did not deny the identity of the papers executed by him, but asserted that they were obtained by duress. This issue was submitted to the jury, and they found a verdict in favor of the plaintiff for the value of the stock, judgment was entered thereon, and the defendant has appealed.

The appellant states the questions involved to be: (1) Was the charge of the court correct and adequate on the question of duress? (2) Was the plaintiff entitled to recover on the whole evidence in the case? We shall consider the latter question before passing upon the former.

There is no sufficient testimony to show that the plaintiff was either old or infirm at the time of the transaction complained of. The only evidence bearing upon that point was a statement by him that a few months previous thereto he had been in Texas for his health, "about my nervous system." The alleged coercion was thus described by the plaintiff: "Mr. Taylor says, 'Mr. Sulzner, are you aware that your son has sold 1,000 shares to Mr. Volquarts of this stock?' I says: 'No, sir; I don't know anything about it.' He says, 'He has;' and he says also: 'Mr. Kirker sold 1,000 shares to Mr. Cappeau-Lemley. George sold his at 19 cents, and Cappeau-Lemley for 26 cents.' I said, 'I won't stand for anything like that, because,' I said, 'they had no business.' I said: 'Why didn't you tell me all this before you got my stock here, because this wasn't the deal we were to get now? You were to give me my money for it.' And then Mr. Taylor says, 'Mr. Volquarts, tender \$125 to Mr. Sulzner, the balance of \$190 which George gave a check for \$65 on account.' 'Well, now,' I said, 'this is a snap judgment you are taking on me.' I says, 'I don't know anything about this.' He says, 'Well, here is the money.' And he says then, 'Mr. Lemley, you tender \$260;' and he says: 'I don't think I have that much in the office. I will go in and see.' And he went in the office and brought out \$260, and then laid that down to me. And Mr. Taylor says, 'Now, Mr. Sulzner, we have tendered you this money for 2,000 shares;'

Note.—The question involved in the above case, as to the validity of contracts procured by threats of prosecution of a relative, is covered in notes to the cases of *City Nat. Bank v. Kusworm*, 26 L.R.A. 48; *Williamson-Halsell Frazier Co. v. Ackerman*, 20 L.R.A. (N.S.) 484, and *Ball v. Ball*, 37 L.R.A. (N.S.) 539.
39 L.R.A. (N.S.)

and he says, 'Take that,' and he had a paper in his hand; and he says, 'We will put your son in the pen.' He says, 'It is either take that or take the consequences.' Then I broke down and started to cry. I got so bewildered. . . . After that they had me so confused I didn't know what I was doing. I wanted to go home, and I picked up the money, and I says to George, I says: 'George, you are getting me into all kinds of trouble. You had no business doing this.' And I took the money up and went home." The plaintiff further said that he took the money and signed the papers "to save my son from being arrested." The son described the incident practically as his father, adding: "Mr. Taylor was walking around there flashing the paper, going to send me to prison, send me to the penitentiary, . . . and father got all bewildered and broke down, did not know what to do, and he said, 'You've got me into this, and I have got to pay or you will go to prison.' I said, 'There is nothing to it at all.'"

Under both the civil and common law, threats, in order to constitute duress, had to be of "such a character as to induce a well-grounded fear in the mind of a firm and courageous man;" but "the doctrine which is now approved by the judicial mind, both of this country and of England, is that any contract produced by actual intimidation ought to be held void, whether as arising from a result of merely personal infirmity or from circumstances which might produce a like effect upon persons of ordinary firmness." *Jordan v. Elliott*, 12 W. N. C. 56, 59.

A person is supposed to possess ordinary firmness unless it is shown that by reason of age or other sufficient cause he is weak or infirm. *Union Nat. Bank v. Dersham*, 15 W. N. C. 541. "The constraint that takes away free agency and destroys the power of withholding assent to a contract must be one that is imminent and without immediate means of protection, and such as would operate upon the mind of a person of reasonable firmness." *Motz v. Mitchell*, 91 Pa. 114, 117.

Ordinarily, when no proceedings have been commenced, threats of arrest, prosecution or imprisonment do not constitute legal duress to avoid a contract. The threats must be made under such circumstances that they excite the fear of imminent and immediate imprisonment. *Moyer v. Dodson*, 212 Pa. 344, 61 Atl. 937; *Harmon v. Harmon*, 61 Me. 227, 14 Am. Rep. 556; *Higgins v. Brown*, 78 Me. 473, 5 Atl. 269; *Hilborn v. Bucknam*, 78 Me. 482, 57 Am. Rep. 816, 7 Atl. 272; *Sieber v. Weiden*, 39 L.R.A.(N.S.)

17 Neb. 582, 24 N. W. 215; *Wilkerson v. Hood*, 65 Mo. App. 491; *Russell v. McCarty*, 45 Ga. 197. The decision in *Jordan v. Elliott*, 12 W. N. C. 56, cited by the appellant, does not control the present case. There the plaintiff, who was an infirm widow, seventy-seven years of age, knew of the defendant, as a man of violent disposition. His threat was to put her son in jail before night, and at the time of the execution of the papers she was laboring under great agitation. This court in its opinion states: "The circumstances which surrounded the old lady, and which induced, or rather compelled her, to execute the paper in controversy, were of an extraordinarily rough, impudent, and fraudulent character;" and, further, that she had a "conviction that she was dealing with a dangerous man whose will it would not be safe to resist." Although the English case of *Williams v. Bayley*, L. R. 1 H. L. 200, 6 Eng. Rul. Cas. 455, is referred to, the law of that case was not adopted as necessary to the decision of *Jordan v. Elliott*. After citing it, we expressly stated: "How aptly these authorities bear on the case in hand. I need not say, for anyone who reads the evidence will at once see that Mrs. Elliott was so thoroughly overcome by fear, produced by the conduct of the plaintiff, that in the execution of the note in suit she was anything but a free and voluntary agent."

The plaintiff had been president of the mining company whose stock was in controversy, and so far as the evidence shows he was a man of ordinary firmness. He himself was not threatened with arrest at any time, and, upon the occasion when he signed the contract which he is endeavoring to avoid, both the plaintiff and his son were at liberty to come and go as they chose, and had ample time to consult an attorney, had they so desired. The evidence as presented was not sufficient to sustain a finding that the plaintiff's signature had been obtained by duress, and, had the defendant requested binding instructions, he would have been entitled thereto, but the record shows no such request or no question of law reserved.

Under these circumstances, the defendant was not within the act of April 22, 1905 (P. L. 286), and had no right to judgment *non obstante veredicto* upon the whole record; and, since there is no assignment of error complaining of the judgment for the plaintiff, we will not enter a final judgment the other way. However, the charge of the trial judge was inadequate, in that it did not sufficiently define the applicable rules of law as we have stated them.

The last two assignments of error, which

complain of the refusal to enter judgment *non obstante veredicto*, are overruled. The first two, which go to the charge, are sustained. The judgment is reversed, with a *venire facias de novo*.

OHIO SUPREME COURT.

JOHN HORTON, Plff. in Err.,

v.

STATE OF OHIO.

(85 Ohio St. 13, 96 N. E. 797.)

Indictment — false pretense — certainty.

1. An indictment under § 7076, Revised Statutes, for obtaining money by false pretenses, must set forth the alleged false pretenses with such certainty and precision as will reasonably appraise the defendant of what he will be required to answer, and so that the court may determine what evidence is admissible, and must allege that the pretenses were in fact false and made with intent to defraud.

False pretense — defense — unlawful transaction.

2. It is no defense to an indictment for obtaining money by false pretenses that the

Headnotes by the COURT.

Note. — Illegal intent of prosecutor as affecting guilt in obtaining property by false pretense or confidence game.

This note is supplemental to the note to *People v. Turpin*, 17 L.R.A. (N.S.) 276, where the earlier cases are collected.

The decision in *Horton v. State*, to the effect that the wrongful purpose of the prosecutor is no defense to the action, is in accordance with the weight of authority shown by the previous note.

In *State v. Martin*, 226 Mo. 538, 126 S. W. 442, where a conviction was affirmed for obtaining money from one Bull by false and fraudulent representations, which were chiefly in falsely personating the owner of land on which Bull had cut timber without leave; and there was evidence that the inducement to the prosecutor was, at least in part, the escape from criminal prosecution, the court, in holding that such purpose of the prosecutor was immaterial, said: "Concede that Bull and his neighbors had been trespassing upon the lands of Wilcox and cutting the timber thereon without authority, and that they might have been prosecuted criminally therefor, how does it lessen the offense of these defendants, who were not the owners of the land and timber, that, seizing upon their knowledge of the illegal taking of the timber, they concocted the scheme of extorting money from Bull and his neighbors by representing Denton to be Wilcox, and causing him to make a demand for payment for the timber, which neither he nor

transaction in which the money was so obtained was unlawful.

(Davis, J., dissents from proposition 2.)

(October 31, 1911.)

ERROR to the Circuit Court for Mercer County to review a judgment affirming a judgment of the Court of Common Pleas convicting defendant of obtaining money by false pretenses. Reversed.

Statement by Johnson, J.:

John Horton was indicted for obtaining money under false pretenses. At the October term, 1909, of the court of common pleas of Mercer county, the grand jury returned an indictment against John Horton for obtaining money under false pretenses from one Frank Linneman. Omitting formal parts, the indictment is as follows: "That John Horton unlawfully did falsely pretend, with intent to defraud one Frank Linneman, that he was selling counterfeit money, by which said false pretenses the said John Horton then and there unlawfully did obtain from said Frank Linneman \$65 in money, of the value of \$65 of the personal property of said Frank Linneman; whereas in truth and in fact said John Horton was not selling, and

they were entitled to. We think the court properly brushed aside this instruction. Whatever offense Bull was guilty of, it formed no justification for the criminal conduct of these defendants in extorting money from him by means of the false and fraudulent representations and fraudulent simulation of Mr. Wilcox."

In *Foster v. State*, 8 Ga. App. 119, 68 S. E. 739, where the prosecutrix went to Florida at the instigation of the defendant, and there paid him \$100, for which he was to get her \$500 in counterfeit money, and she also paid certain expenses both within and without the state of Georgia, the court stated that what had happened without the county could not be considered except as giving point to what occurred within the county, and held that "a person may be guilty of cheating and swindling in a transaction in which both parties know that they are violating or about to violate the law, provided that the one therein cheats and swindles the other out of something of value. But neither counterfeit money itself, nor the possession thereof, is a thing of value; and therefore one person cannot cheat and swindle the other by representing to him that if he will go to certain expense he can procure at a certain time and place a designated amount of counterfeit money, though the latter fails to get the expected spurious currency." The court said: "Was Mrs. Robertson deceived in Hall county? Yes; she was deceived into believing that if she would go to Jacksonville, Florida, she could get

had no intention at said time to sell and deliver, any counterfeit money; and said Horton at the time he so falsely pretended as aforesaid well knew the said false pretenses to be false." A motion to quash and a demurrer were filed to this indictment, and were overruled. On the trial at the close of the state's case, the defendant interposed a demurrer to the evidence, and moved the court to instruct the jury to return a verdict for defendant. This was also overruled. The defendant was convicted and sentenced. On error to the circuit court this judgment was affirmed, and error is prosecuted here to reverse the judgments of the courts below.

Messrs. John E. Egan, George W. Mannix, Jr., and Robert R. Nevin for plaintiff in error.

Mr. John G. Romer for the State.

Johnson, J., delivered the opinion of the court:

Defendant contends that the indictment is defective, in that it is indefinite, and does not sufficiently set forth the alleged false pretenses, and does not allege that the pretenses were in fact false, and, further, that the indictment does not charge a crime under the law.

This court has many times declared that

\$500 in spurious currency in return for \$100. She makes no complaint of not getting all she expected to get out of the trip and in return for the money she expended in connection therewith, except that she did not get the counterfeit money. The transaction in Jacksonville, whereby she was induced to turn the \$100 over to Foster, must be eliminated; for that occurred in Florida.

We are not to be understood as holding that cheating and swindling cannot be predicated of an unlawful transaction. There are many transactions for which the state can prosecute, where the parties, by reason of the uncleanness of their hands, would not be allowed to maintain a civil action. Thus, although the sale of liquor is a crime in this state, yet if the keeper of a 'blind tiger' should represent to a prospective purchaser that a bottle contained corn whisky, and should sell it as a bottle of corn whisky, receiving therefor the purchaser's money, when in fact it contained water only, he could be held for cheating and swindling. Or, if in a similar case the prospective purchaser should palm off on the keeper of a 'blind tiger,' in the nighttime, a worthless slip of paper as a dollar bill, and receive in exchange therefor a quart of whisky, the person so deceiving the seller of the liquor could be convicted of cheating and swindling. However, it must be noticed in each of these illustrations that the person deceived parts with something of value. It is true that in this state

a criminal offense must be charged with reasonable certainty in the indictment so as to apprise the defendant of that which he may expect to meet and be required to answer; so that the court and jury may know what they are to try, and the court may determine without unreasonable difficulty what evidence is admissible. And an indictment for obtaining money or property by false pretenses must aver all of the material facts necessary to be proven in order to convict, and that the false pretenses were false in fact and induced the owner to part with his property. *Dillingham v. State*, 5 Ohio St. 280; *Schleisinger v. State*, 11 Ohio St. 669; *Du Brul v. State*, 80 Ohio St. 52, 87 N. E. 837; *People v. Behee*, 90 Mich. 356, 51 N. W. 515.

First. It will be noted that this indictment contains no averment that there was any attempt by Horton to induce Linneman to purchase any counterfeit money, or that Linneman did purchase any such money. There is no allegation that Horton sold or agreed to sell or deliver any counterfeit money or any other thing to Linneman by which Linneman was induced to and did pay him the \$65. In *Schleisinger v. State*, 11 Ohio St. 669, the court say at page 673: "There is, however, no colloquium set forth in the indictment, showing a negotiation between the parties, and that the repre-

liquor cannot be said to have any marked value in the full sense of the words; yet it is a thing of value. *Mance v. State*, 5 Ga. App. 229, 62 S. E. 1053. But in no sense is counterfeit money a thing of value. The very possession of it is criminal. It is a violation of law to make it, to own it, or use it. It is utterly without value. Suppose that the defendant had said to the prosecutrix, 'Your sworn enemy is in Jacksonville; if you will go there with me and pay me \$100, I will show that enemy to you that you may poison him.' Suppose the defendants statement were a lie, could the transaction be treated as cheating and swindling? The privilege of poisoning one's enemy is not a thing of value."

(It may be noted in view of the recommendations of the New York courts; mentioned in the former note, that the legislature relieve them from their doctrine that the illegal intent of the prosecutor is a defense, that the following provision has been placed in the statute: "Hereafter it shall not be a defense to a prosecution for larceny, or for an attempt or for conspiracy to commit the same, or for being accessory thereto, that the purpose for which the owner was induced, by color or aid of fraudulent or false representation or pretense, or of any false token or writing, to part with his property or the possession thereof, was illegal, immoral, or unworthy." N. Y. Penal Law, § 1290.)

B. B. B.

sentations and pretenses were made with the intent to thereby obtain from said Woods and Pew any goods of any kind whatsoever."

The important matter is that there is no allegation of any transaction, contract, or negotiation in which, by reason of the false pretenses referred to, Horton obtained the money from Linneman. On the trial the prosecuting witness described the transaction in question, and testified that defendant told him he was selling counterfeit money three for one, and that he (Linneman) gave defendant \$65, for which defendant promised to give him \$300 counterfeit money in eight days. As pointed out already, the indictment charges only that defendant falsely pretended that he was selling counterfeit money. It is not alleged that he pretended to have counterfeit money, or that he was delivering it. But, according to the testimony of the prosecuting witness, that pretense was not a false pretense, because he was then selling and did sell to him counterfeit money to be delivered at a future time. The promise to deliver the counterfeit money at a future time could not be made the basis of a conviction for crime. *Dillingham v. State*, 5 Ohio St. 280; *State v. Petty*, 119 Mo. 425, 24 S. W. 1010; *Com. v. Drew*, 19 Pick. 179; *People v. Miller*, 169 N. Y. 339, 88 Am. St. Rep. 546, 62 N. E. 418.

Plaintiff in error challenges the indictment on two other grounds: (1) That the false representations averred in the indictment were such as no man had the right to rely on, and that, in the absence of any alleged disability on the part of the prosecutor, they are not sufficient to sustain a conviction. (2) That there was a common criminal design between the parties.

Many decisions are cited by the parties in support of their respective views of these questions, and they disclose much conflict of authority.

As to the first proposition, there are cases which hold that where the pretense is absurd or irrational, and the prosecutor had at the time the means of detection, such pretense is not within the law of crimes. It would not be profitable here to discuss these cases in detail. We agree with the view that many of such holdings have gone too far. The weak and feeble have equal rights with the strong. The careless or unwary are entitled to the protection of these false pretense statutes as well as of all other statutes. Most people think the fanciful story of a confidence man who sells a gold brick is absurd, and should

carry its own refutation; but many inexperienced, unwary, but honest, men, have been caught by it, and no one would think the offense was not an indictable one.

The second of the above contentions presents a different question, and one as to which there is a diversity of decisions. Can there be a conviction for obtaining money by false pretenses when the transaction, on the part of the person from whom the money is obtained, would have been unlawful if the representations of the defendant had been true; or if one pretends to be engaged in the commission of a particular crime, when, in fact, he is not so engaged, can he be convicted for obtaining money by false pretense from one who desired to participate in the same crime, and who parted with his money in that behalf?

In *McCord v. People*, 46 N. Y. 470, the accused falsely pretended to be an officer with a warrant to arrest the prosecuting witness, and he thereby induced the witness to deliver to him certain property. The court held that the prosecutor parted with his property as an inducement to a supposed officer to violate the law and his duty, and that the indictment could not be sustained. The court say at page 472 of 46 N. Y.: "Neither the law or public policy designs the protection of rogues in their dealings with each other, or to insure fair dealing and truthfulness as between each other in their dishonest practices. The design of the law is to protect those who for some honest purpose are induced, upon false and fraudulent representations, to give credit or part with their property to another, and not to protect those who for unworthy or illegal purposes part with their goods." This case has been followed in a number of New York cases and in some other jurisdictions. *People v. Klock*, 55 Misc. 48, 106 N. Y. Supp. 267; *People v. Stetson*, 4 Barb. 152; *People v. Tompkins*, 186 N. Y. 413, 12 L.R.A.(N.S.) 1081, 79 N. E. 326; *State v. Crowley*, 41 Wis. 272, 22 Am. Rep. 719, 2 Am. Crim. Rep. 33; *Foster v. State*, 8 Ga. App. 119, 68 S. E. 739. *State v. Crowley* and *Foster v. State* were cases in which the false representations were made in transactions for the sale of counterfeit money. The court in *Foster v. State* say: "This case is also to be distinguished from those cases in which the defendant, by imposing on the credulity or weakmindedness of the prosecutor, has caused him to pay money for something which could not be of value, but which the prosecutor was led to believe was in fact so. In such cases a prosecution for

cheating and swindling may lie. But in this case the prosecutrix acted with her eyes open. She admitted that she knew that the money she was to get would not be good money."

A different rule has been adopted in a number of states. Generally stated, the rule in those states is that it is no defense to an indictment for obtaining money under false pretenses that the transaction in which the money was paid was illegal. *Com. v. O'Brien*, 172 Mass. 248, 52 N. E. 77; *People v. Martin*, 102 Cal. 558, 36 Pac. 952; *People v. Watson*, 75 Mich. 582, 42 N. W. 1005; *Lovell v. State*, 48 Tex. Crim. Rep. 85, 86 S. W. 758, 13 Ann. Cas. 561; *Re Cummins*, 16 Colo. 451, 13 L.R.A. 752, 25 Am. St. Rep. 291, 27 Pac. 887; *Com. v. Henry*, 22 Pa. 253; 2 Bishop, Crim. Law, § 469.

In *Com. v. O'Brien*, 172 Mass. 248, 52 N. E. 77, after a discussion of the different views taken of the question, the court says: "With the greatest respect for the New York and Wisconsin courts, we think this end is more effectually reached if we do not read into the absolute words of the statute . . . an implied exception, which allows a knave to cheat anyone out of his money, if the knave can succeed in persuading his victim into a scheme, which has any technical element of illegality on the victim's side. The question of allowing the latter a personal remedy is entirely different." In *People v. Tompkins*, 186 N. Y. 413, 12 L.R.A. (N.S.) 1081, 79 N. E. 326, defendant induced one Felix to part with a large sum of money on the false representation that defendant, as an employee of the Western Union Telegraph Company, had means of obtaining advance information as to results of horse races, which were being betted on in a certain pool room. Felix went to the pool room and made a bet on a certain horse falsely named as winner. The court, while yielding to the authority of *McCord v. People* and of what it states to be a firmly established rule in that state, yet questions the soundness of the rule, and in its syllabus suggests the "alteration of the rule to the legislature." In the opinion it is stated that the rule is at variance with a more reasonable view and the decisions in at least twelve states.

The primary object sought to be accomplished in prosecutions for crime is the suppression of crime. The effort is one to protect the public and prevent wrongdoing. If it were a civil proceeding of course where the injured person is a party

to the unlawful enterprise, he would not be heard to complain, and the law would leave the parties where it finds them. There is a natural feeling that, where two persons are co-offenders, it is unjust that one should be punished and the other not; especially that one should be permitted to invoke the aid of the courts to punish his confederate, while he escapes himself.

But the dissatisfaction should be not that one is punished, but rather that the other is not. It is no argument in favor of either that the other equally deserves conviction. The statute of Ohio (§ 7076, Revised Statutes), which denounces obtaining money or property by false pretenses, is broad and complete,—“Whoever, by any false pretense, with intent to defraud, obtains from any person, anything of value.”

Shall we read into this criminal statute the principle of civil jurisprudence which requires the complaining party to come into court with clean hands, and thus deny to the state (in the effort to prevent wrongdoing) the equally sound principle of criminal law that the guilt of one man shall not be received as an excuse for that of another? We think to so hold would in some degree throw around crime the protection of the law. If a sharper working a confidence game or a scheme to obtain money by false pretenses could weave into his tricky negotiation some element which is unlawful and criminal, he could hold it over the head of his victim, and could call it to his aid in escaping prosecution.

However, for the reasons already given in this opinion, we feel forced to the conclusion that the indictment in this case does not state the accusation against defendant in such a manner as to directly and specifically advise him of what he must prepare to meet, and that it does not meet the requirements of well-settled rules so as to secure to him the constitutional safeguard of the right to demand the nature and cause of the charge against him, and therefore the motion to quash and the demurrer should have been sustained.

For error in overruling, the judgments of the courts below are reversed.

Judgments reversed and judgment for plaintiff in error.

Spear, Ch. J., and *Davis*, *Shauck*, *Price*, and *Donahue*, JJ., concur in the judgment.

Davis, J., dissents to second proposition of syllabus.

OHIO SUPREME COURT.

TALYOR, Admr., etc., of Nancy M. Taylor,
Deceased, Plff. in Err.,
v.

PROTESTANT HOSPITAL ASSOCIATION.

(85 Ohio St. 90, 96 N. E. 1089.)

Charity — hospital — receiving pay.

1. The fact that a public charitable hospital receives pay from a patient for lodging and care does not affect its character as a "charitable institution," nor its rights or liabilities as such in relation to such a patient.

Same — liability for negligence.

2. A public charitable hospital, organized as such and open to all persons, although conducted under private management, is not liable for injuries to a patient of the hospital, resulting from the negligence of a nurse employed by it.

(November 21, 1911.)

ERROR to the Circuit Court for Franklin County to review a judgment affirming a judgment of a Court of Common Pleas in defendant's favor in an action brought to recover damages for the death of plaintiff's intestate, which was alleged to have been caused by the negligence of defendant's servant. Affirmed.

Statement by Johnson, J.:

Plaintiff in error brought suit in the common pleas court of Franklin county. His petition alleges, in substance, his appointment and qualification as administrator, the incorporation of defendant under the laws of Ohio, and that it maintains and operates a hospital at the city of Columbus, Ohio, for hire and reward. That defendant received said Nancy M. Taylor at its hospital as a pay patient, and agreed, for a valuable consideration, to furnish her with board, lodging, and nursing, provide an operating room and table, and assist in and about an operation to be performed on her by a certain named surgeon. That defendant provided for said operation certain gauze sponges necessary to be used in said operation, which consisted of two abdominal incisions, and that defendant provided one of its employees to assist in said opera-

tion, to wit, a nurse, whose duty it was to keep account of the sponges so provided for use of the surgeon. That the nurse negligently failed to keep a proper count of the sponges which had been used in the operation, and that by reason of her negligence one of the sponges which had been used was left in the body of the decedent and caused her death, to the damage of plaintiff and the next of kin of decedent, for which judgment is prayed. The first defense of the answer of defendant admits appointment of plaintiff as administrator; the incorporation of defendant; that deceased was received at the hospital as a pay patient, and that defendant agreed, for \$10 a week, to furnish her with board, lodging, and nursing; that an operation was performed on her by the surgeon named; that it provided certain gauze sponges for the operation and one of its employees, a nurse, to assist in said operation, and denied the other allegations in the petition.

The material portion of the second defense is as follows:

"Defendant says that it is now, and has been ever since it was organized, a public and charitable corporation; that it was incorporated and organized, and has been operated, exclusively for the purpose of providing hospital accommodations for the sick and injured; and that it never has had, has not now, and cannot have, any capital stock; that it never has declared, and cannot declare, dividends; and that it never made, and cannot make, any profits, either for the corporation or its members; that its funds and income have always been, and will continue to be, derived from the rents, donations, devises and bequests, moneys and supplies, from and by benevolent persons; that such funds and income have been heretofore used for the erection, support, and maintenance of a public and charitable hospital for the sick and injured, and they will have to be used in the future for the improvement of said hospital, and the support and maintenance of the sick and injured therein lodged; that the persons who have heretofore made such donations, grants, devises, bequests, and subscriptions are so numerous that they could not be stated in this pleading.

"Defendant further says that said hospital has always been, and is now, open to all persons who apply for its benefits and accommodations, as long as it has rooms to accommodate them; that it has had and now has six wards, which will accommodate forty-five patients, and which are for the occupation of patients who are gratuitously lodged and cared for, and it has had and now has forty-five rooms for those who are

Headnotes by the Court.

Note. — Generally as to the liability of charitable institutions, including those conducting hospitals, for personal injuries, see notes to *Farrigan v. Pevear*, 7 L.R.A. (N.S.) 481; *Bruce v. Central M. E. Church*, 10 L.R.A. (N.S.) 74; *Thornton v. Franklin Square House*, 22 L.R.A. (N.S.) 486; and *Hordern v. Salvation Army*, 32 L.R.A. (N.S.) 62.

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able to and willing to pay for lodging and care a reasonable compensation, and the income so received from pay patients has always been used to support and maintain the said hospital.

"Defendant further says that the said Nancy M. Taylor engaged and agreed to pay this defendant ten (\$10) dollars per week for her boarding and nursing during the time she was at the hospital. She occupied a room, and was furnished board and nursing from the 25th day of May until the 30th day of June, 1899, for which she paid the hospital the sum of \$51.40; that such sum so paid to this defendant was wholly inadequate as compensation for the board and nursing so furnished to the said Nancy M. Taylor."

Plaintiff in error filed a general demurrer to the second defense, which was overruled by the trial court, and, plaintiff not desiring to plead further, judgment was entered for defendant. This judgment was affirmed by the circuit court, and error is prosecuted to this court by the plaintiff to reverse the judgments of the courts below.

Mr. Ulric Sloane for plaintiff in error.

Messrs. Pugh & Pugh for defendant in error.

Johnson, J., delivered the opinion of the court:

The question presented by the demurrer to the second defense of the answer is whether, under the facts set out in that defense, the defendant is liable for the negligence of the nurse in leaving the sponge in the body of the deceased. More definitely: Do the averments that the defendant is a public and charitable corporation, engaged in operating, maintaining, and supporting a public charitable hospital in the manner and for the purposes set forth, exempt defendant from liability for the negligence of the nurse in connection with the operation on the decedent at the time she was a pay patient of the hospital? This question has been decided in some other jurisdictions, and counsel have rendered valuable assistance by able and exhaustive briefs.

Defendant contends that the judgments of the courts below may be sustained on all or any of several grounds, the first of which is that, being a charitable corporation operating a charitable hospital, it was not liable for the negligence of its employees, if such employees were selected with reasonable care. The position of plaintiff is that the doctrine of *respondet superior* applies, and should be enforced, notwithstanding the character of the corporation or the nature of its undertakings; and that, having

accepted deceased as a pay patient, a contractual relation existed between the parties, which imposed obligations on the defendant different from those to one who did not sustain such relation. Section 3240, Revised Statutes, provides for the election of trustees of a corporation, such as defendant, and § 3261, Revised Statutes, provides that the trustees of a corporation, created other than for profit, shall be personally liable for all debts of the corporation contracted by them.

There is a direct allegation in the answer in this case that defendant is a public and charitable corporation maintaining a public and charitable hospital. We think this hospital, owned and operated in the manner set out, is a public charity, and this without reference to whether some of the patients are what are termed pay patients or not.

In *Gerke v. Purcell*, 25 Ohio St. 229, the court declare: "The fact that the use of property is free is not a necessary element in determining whether the use is public or not. If the use is of such a nature as concerns the public, and the right to its enjoyment is open to the public upon equal terms, the use will be public, whether a compensation be exacted or not."

In *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529, the corporation, from the description of its objects and the manner of its creation and operation, was similar to the defendant in this case. The court say in deciding the case: "The fact that its funds are supplemented by such amounts as it may receive from those who are able to pay wholly or entirely for the accommodation they receive does not render it the less a public charity. All sums thus obtained are held upon the same trust as those which are the gifts of pure benevolence. . . . If, however, any contract can be inferred from the relation of the parties, it can be only on the part of the corporation that it shall use due and reasonable care in the selection of its agents. . . . The liability of the defendant corporation can extend no further than this: If there has been no neglect on the part of those who administer the trust and control its management, and if due care has been used by them in the selection of their inferior agents, even if injury has occurred by the negligence of such agents, it cannot be made responsible. The funds intrusted to it are not to be diminished by such casualties, if those immediately controlling them have done their whole duty in reference to those who have sought to obtain the benefit of them."

In *Hearns v. Waterbury Hospital*, 66

Conn. 98, 31 L.R.A. 224, 33 Atl. 595, the court state that the only question was the liability of the defendant for the negligent conduct of physicians and nurses employed by it, and in the selection of whom it has exercised due care. In this case there is a very full discussion of English and American cases touching the question; and the conclusion arrived at was that the hospital corporation was not liable, on grounds of public policy, for injuries caused by personal neglect of duty by a servant whom it has selected with due care.

The plaintiff, in *Powers v. Massachusetts Homoeopathic Hospital*, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294, was a pay patient, and was injured by the negligence of a nurse in placing a rubber bag full of hot water against her side, burning her. Her counsel contended, as counsel for plaintiff in this case contend, that, she being a pay patient, the hospital was liable, because she was not the recipient of its charity; but the court denied the relief, and say: "In our opinion, a paying patient in the defendant hospital, as well as a nonpaying patient, seeks and receives the services of a public charity."

Liability to a pay patient was denied in *Downes v. Harper Hospital*, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42, and one of the grounds on which the court put its decision was that decedent, having accepted the benefit of the charity, did so on the understanding that the fund could not be diverted by the torts of the managers of the fund or their employees. The court say: "The fact that patients who are able to pay are required to do so does not deprive the defendant of its eleemosynary character, nor permit a recovery for damages on account of the existence of contract relations."

Other cases in which the same conclusion was arrived at, some of the courts adopting a somewhat different line of reasoning, are: *Farrigan v. Pevear*, 193 Mass. 147, 7 L.R.A.(N.S.) 481, 118 Am. St. Rep. 484, 78 N. E. 855, 8 Ann. Cas. 1109; *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 1 L.R.A. 417, 6 Am. St. Rep. 745, 15 Atl. 553; *Union P. R. Co. v. Artist*, 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365.

Judge Stewart, in his excellent work on *Legal Medicine* (§ 96), after an examination of the cases on the subject, says: "The doctrine of the Massachusetts cases may be said to be the law followed by other states, and is the proper legal view to take of this question; the reasoning of the court being so sound as to seem irrefutable."

Counsel for plaintiff suggests that some of the American cases are predicated on the English case of *Holliday v. St. Leonard*, 39 L.R.A.(N.S.)

11 C. B. N. S. 192, 30 L. J. C. P. N. S. 361, 8 Jur. N. S. 79, 4 L. T. N. S. 406, 9 Week. Rep. 694, and some other cases which, he insists, have been impliedly repudiated by the later case of *Mersey Docks & Harbour Board v. Gibbs*, L. R. 1 H. L. 93, 11 H. L. Cas. 686, 35 L. J. Exch. N. S. 225, 12 Jur. N. S. 571, 14 L. T. N. S. 677, 14 Week. Rep. 872, which enforced the doctrine of *respondent superior*.

We think this contention is not sound, because the company in the latter case was a trading company, and not a public charity in the sense that defendant here and similar corporations are. Mr. Justice Blackburn, who gave opinions in the cases referred to, said, in *Mersey Docks & Harbour Board v. Cameron*, 11 H. L. Cas. 465, 22 Eng. Rul. Cas. 378: "Whatever may be the law as to exemption of property occupied for charitable purposes, it is clear that the docks in question can come within no such exemption."

But, even if it appears that the greater weight of authority outside of Ohio falls against his view, counsel for plaintiff insists that such authority is not in harmony with the established doctrine in this state, and refers to the cases of *Goodloe v. Cincinnati*, 4 Ohio, 500-514; *Dayton v. Pease*, 4 Ohio St. 80; *Dunn v. Brown County Agri. Soc.* 46 Ohio St. 96, 1 L.R.A. 754, 15 Am. St. Rep. 556, 18 N. E. 496; *Toledo v. Cone*, 41 Ohio St. 149; *Murphy v. Holbrook*, 20 Ohio St. 137, 5 Am. Rep. 633. We do not think these cases sustain plaintiff's view of the question made by this answer. *Goodloe v. Cincinnati*, *Dayton v. Pease*, and *Toledo v. Cone*, were cases in which the injury was done by employees of the cities, in the performance of public works undertaken for the benefit of the cities, and in the exercise of powers and duties granted and imposed on them as municipal corporations. Of course, under familiar rules, they were liable for the wrongful acts of their servants.

In *Dunn v. Brown County Agri. Soc.* the fair grounds were kept and the fair conducted, not as a thing free to the public. Judge Williams, in declaring the judgment of the court, says, as to the rule of exemption from liability, that it "has no application to corporations called into being by the voluntary action of the individuals forming them for their own advantage, convenience, or pleasure."

In *Murphy v. Holbrook*, the receivers of a railroad company were held liable for injuries to plaintiff's intestate, and it was held to be "no defense in such action that the receiver was a public officer, or that he was an agent or trustee." But the receivers of a railroad company or other cor-

poration hold the property in trust for the benefit of the company and its creditors; and when operated by the receivers under order of court the object is to preserve the property and, if possible, earn something for the benefit of the company and its creditors. It is not an enterprise to serve and benefit the public solely.

There is disclosed in some of the cases and in the argument for defendant a singular disposition to question the fundamental soundness of the doctrine of *respondet superior*. We are not disposed to lend support to such tendency. Experience has shown that the ends of justice are best secured by holding the master responsible for injuries caused by the wrongful acts of his servant, done in the prosecution of his private ends and for his benefit.

Doubtless the rule will be extended to meet the requirements of manifold new conditions brought about by growth and advance. Courts are constantly confronted with the necessity of extending established principles to new conditions. But in this case it is sought to extend the rule to masters different from others, and who do not come within its reason, and to hold a public charity involving no private profit responsible for the negligence of servants employed solely for a public use and a public benefit. We think such extension is not justified. Public policy should and does encourage enterprises with the aims and purposes of defendant, and requires that they should be exempted from the operation of the rule.

We think there is no error in the record, and the judgments of the courts below are affirmed.

Spear, Ch. J., and Davis, Shauck, Price, and Donahue, JJ., concur.

PENNSYLVANIA SUPREME COURT.

WELLINGTON R. HARE, Admr., etc., of
Patrick O'Brien, Deceased.

v.

ROBERT P. O'BRIEN, Appt.

(233 Pa. 330, 82 Atl. 475.)

Executors — domiciliary — judgment — right to enforce.

1. A statute declaring that foreign letters of administration shall not confer any of the powers or authority conferred by domestic letters does not prevent a domiciliary administrator who has obtained a judgment in the state of his residence from maintaining an action on it in the local courts.

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Same — enforcement of judgment — conflict of laws.

2. A judgment obtained by a domiciliary executor, at the place of his residence, is an asset located within that state; and he, in his individual capacity, and not an ancillary administrator appointed at the debtor's residence, in another state, has the right to sue in the courts of the latter state, to enforce the judgment.

Action — capacity in which brought — surplusage.

3. That a domiciliary administrator having a right to enforce in his own name, in the courts of another state, a judgment obtained in the courts of his appointment, institutes the suit in his representative capacity, is immaterial, since the official title is surplusage and may be disregarded.

(January 2, 1912.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Armstrong County in plaintiff's favor in an action brought to enforce payment of a judgment. Affirmed.

The facts are stated in the opinion.

Messrs. R. A. McCullough and R. L. Ralston, for appellant:

The authority of executors and administrators does not extend beyond the territory of the government appointing them.

Sayre v. Helme, 61 Pa. 299; Mansfield v. McFarland, 202 Pa. 173, 51 Atl. 763; Vioeca's Estate (Engelskirger's Appeal) 197 Pa. 280, 51 L.R.A. 876, 47 Atl. 233; Laughlin v. Solomon, 180 Pa. 177, 57 Am. St. Rep. 633, 36 Atl. 704; Moore v. Fields, 42 Pa. 467.

The Ohio judgment is a nullity in Pennsylvania. A court with equity jurisdiction will exercise that jurisdiction to give to its citizens the protection of its own laws.

Cole v. Cunningham, 133 U. S. 107, 138, 33 L. ed. 538, 550, 10 Sup. Ct. Rep. 269; Galbraith v. Rutter, 20 Pa. Super. Ct. 554; Sweeny v. Hunter, 145 Pa. 363, 14 L.R.A. 594, 22 Atl. 653; Com. v. Stambaugh, 22 Pa. Super. Ct. 386; Davis v. Headley, 22 N. J. Eq. 115.

Note. — *Right of domiciliary administrator to sue on judgment in another state.*

The general rule is that, in the absence of statute, an executor or administrator cannot, in his representative capacity, maintain a suit in one state or country by virtue of letters granted in another. 18 Cyc. 1237.

There seems to be an exception to this rule, however, in cases where the administrator has recovered a judgment in an action brought by him in his representative capacity in the jurisdiction of his appointment, and in such cases he may sue thereon

A foreign judgment for fraud may be impeached.

Story, Confli. L. § 608; *Hilton v. Guyot*, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139; *Lines v. Lines*, 142 Pa. 149, 24 Am. St. Rep. 487, 21 Atl. 809; *Davis v. Headley*, 22 N. J. Eq. 115.

Messrs. H. L. Golden and Harry C. Golden, for appellee:

Where a debt, fixed by the decree of a court of competent jurisdiction in another state, is due by citizens of Pennsylvania to the estate of one who had his domicile at the time of his death in said foreign state, the administrator of the domicile may sue for and recover the debt, in the courts of this state, without first taking out letters of administration here.

in his own name in another jurisdiction without taking out ancillary letters of administration.

"But there is a wide distinction between an attempt on the part of a foreign executor to bring a suit in this state upon an original cause of action due the decedent, and his right to enforce the payment of a judgment already recovered by him in the state where his letters testamentary were granted. In the latter case, the judgment becomes a new debt due to him as administrator, and his right to sue for the same does not depend upon his letters of administration." *Barton v. Higgins*, 41 Md. 539.

In § 522 of Story's Conflict of Laws, it is said that in view of the fact that there is no privity between persons to whom administration is granted in different states, an ancillary administrator in one state may not sue upon a judgment obtained in another state by the administrator there, but that the foreign administrator himself may, in such case, maintain a personal suit against the debtor in another state, because the judgment would as to him merge in the original debt and become personally due to the administrator in his own right.

The following cases support the rule laid down above, that a domiciliary administrator may sue in another state on a judgment obtained by him in the state of his appointment, without taking out ancillary letters: *Biddle v. Wilkins*, 1 Pet. 686, 7 L. ed. 315; *Newberry v. Robinson*, 36 Fed. 841; *Moore v. Kraft*, 103 C. C. A. 231, 179 Fed. 685; *Arizona Cattle Co. v. Huber*, 4 Ariz. 69, 33 Pac. 555; *McCarthy v. Troll*, 90 Ark. 199, 118 S. W. 416; *Lewis v. Adams*, 70 Cal. 403, 59 Am. Rep. 423, 11 Pac. 833; *Greason v. Davis*, 9 Iowa, 219; *Wayland v. Porterfield*, 1 Met. (Ky.) 638; *Barton v. Higgins*, 41 Md. 539; *Talmadge v. Chapel*, 16 Mass. 71; *Tittman v. Thornton*, 107 Mo. 500, 16 L.R.A. 410, 17 S. W. 979; *Rogers v. Hatch*, 8 Nev. 35; *Nichols v. Smith*, 7 Hun, 580; *Moore v. Fields*, 42 Pa. 467; *Hunt v. Lyle*, 6 Yerg. 412; *Page v. Cravens*, 3 Head, 383; *Nelson v. Bagby*, 25 Tex. Supp. 305.

The same rule was announced in *Green v. Heritage*, 63 N. J. L. 455, 43 Atl. 698, but 39 L.R.A. (N.S.)

Moore v. Fields, 42 Pa. 467; *Shakespeare v. Fidelity Ins. Trust & S. D. Co.* 97 Pa. 173; *Shinn's Appeal*, 166 Pa. 128, 30 Atl. 1028, 1030; *Wilkins v. Ellett*, 108 U. S. 256, 258, 27 L. ed. 718, 2 Sup. Ct. Rep. 641; *Talmadge v. Chapel*, 16 Mass. 72; *Tittman v. Thornton*, 107 Mo. 500, 16 L.R.A. 410, 17 S. W. 979; *Arizona Cattle Co. v. Huber*, 4 Ariz. 69, 33 Pac. 555; *McCarthy v. Troll*, 90 Ark. 199, 118 S. W. 416; *Miller v. Hoover*, 121 Mo. App. 568, 97 S. W. 210.

A foreign administrator may sue personally in this state on a judgment recovered by him, as administrator, out of this state.

Freeman, Judgm. 217; *Talmadge v. Chapel*, 16 Mass. 71; *Biddle v. Wilkins*, 1 Pet. 686, 7 L. ed. 315; *Low v. Burrows*, 12 Cal.

this case was reversed upon a jurisdictional point in 64 N. J. L. 567, 46 Atl. 634, without any expression of opinion upon the merits of the case.

And this rule applies although an ancillary administrator has been appointed in the state in which suit is brought. HARE v. O'BRIEN.

In such a suit by the administrator, a plea in defense that the defendant was first appointed administrator of the estate of the deceased in the state where the suit was brought, tenders an immaterial issue, and is bad on demurrer. *Biddle v. Wilkins*, 1 Pet. 686, 7 L. ed. 315.

In *Crawford v. Whittall*, reported in note to 1 Dougl. K. B. 4, note, it is held that the administrator may sue without profert of letters, and without showing the grounds of the judgment; and *Biddle v. Wilkins*, supra, agrees that the administrator is not bound to make profert of his letters.

Such a judgment in legal effect creates a new debt, and this may be enforced in another state. *Newberry v. Robinson*, 36 Fed. 841.

Such foreign administrator is not bound to sue as administrator, and if he does so name himself, the description will be regarded as surplusage. *Biddle v. Wilkins*, supra; *Talmadge v. Chapel*, 16 Mass. 71.

Naming himself as administrator does not alter his character or his right to sue. *Page v. Cravens*, 3 Head, 383.

The debt is merged in the judgment and is due to the administrator (*Biddle v. Wilkins*, supra; *Wayland v. Porterfield*, 1 Met. [Ky.] 638; *Talmadge v. Chapel*, 16 Mass. 71), and becomes an asset in the state wherein it was originally rendered. *Arizona Cattle Co. v. Huber*, 4 Ariz. 69, 33 Pac. 555.

So, where an action begun by the testator is revived by his executor and judgment is recovered therein, the executor may sue upon such judgment in another state without complying with the terms of a statute regarding debts "due to decedents." *Wayland v. Porterfield*, supra.

An administrator who has recovered judgment in the state where he received his appointment may sue upon the judgment in

188; *Lewis v. Adams*, 70 Cal. 403, 59 Am. Rep. 423, 11 Pac. 833; *Barton v. Higgins*, 41 Md. 539; *Rogers v. Hatch*, 8 Nev. 35; *Page v. Cravens*, 3 Head, 383; *State use of Minot v. Kaime*, 4 Mo. App. 481; *Rucks v. Taylor*, 49 Miss. 552; *McCully v. Cooper*, 114 Cal. 258, 35 L.R.A. 494, 55 Am. St. Rep. 66, 46 Pac. 82; *Cherry v. Speight*, 28 Tex. 503; *Boulden v. Pennsylvania R. Co.* 205 Pa. 264, 54 Atl. 906; *Viosca's Estate (Engelskirger's Appeal)* 197 Pa. 280, 51 L.R.A. 876, 47 Atl. 233; *McCullough v. Railway Mail Assn.* 225 Pa. 118, 73 Atl. 1007.

Mestrezat, J., delivered the opinion of the court:

Patrick O'Brien died intestate, in 1903, in the state of Ohio, and domiciliary letters of administration were granted to his widow. She resigned, and letters *de bonis non* were granted to Wellington R. Hare, the plaintiff in this case, who duly qualified.

his own name in a different state, and upon his death the suit may be revived in the name of his administrator appointed under the laws of that other state. *Tittman v. Thornton*, 107 Mo. 500, 16 L.R.A. 410, 17 S. W. 979.

Where an administrator is sued in the state of his appointment by parties from another state and, prevailing, he recovers judgment for costs, he may sue in the other state on the judgment without filing an exemplified copy of his letters; he is not suing in the right of his intestate, but in his own right, though an administrator. *Green v. Heritage*, 63 N. J. L. 455, 43 Atl. 698. This case was reversed upon a jurisdictional point in 64 N. J. L. 567, 46 Atl. 634, but no opinion was expressed upon the merits of the case.

Executors having recovered judgment in Canada may sue on it in New York in their individual names; the judgment is in the nature of a chose in action, and is to be used to establish their title and show the amount they are entitled to recover. *Nichols v. Smith*, 7 Hun, 580.

A superseding administrator may sue his predecessors in another state upon a judgment recovered by him against them in the state of his appointment, no matter whether he is called administrator in the record of the judgment or not. *Moore v. Fields*, 42 Pa. 467.

He may sue, or he may verify a judgment as a claim against the representative of the debtor in the other state. *Cherry v. Speight*, 28 Tex. 503.

Where an executor recovered judgment in Tennessee upon a cause of action arising after the death of his testator, and later compromised by accepting a certain amount of money and an assignment to him, and other beneficial owners of the debt, of rights under a conveyance of property in Mississippi, the executor and his coassignees may

Some time prior to his death, O'Brien had placed various sums of money in the hands of his son Robert, the defendant, in trust, to be invested and the interest or income to be paid Patrick. Hare brought an action against Robert in the court of common pleas of Wyandot county, Ohio, to enforce payment of the money alleged to have been placed in Robert's hands, and recovered a decree or judgment against Robert for \$18,000. The suit was in the nature of a foreign attachment; and certain real and personal estate of Robert, in Wyandot county, was attached in the hands of garnishees. Robert was not personally served, but appeared by counsel, put in an answer, and contested the suit. The decree or judgment entered against him in the common pleas was subsequently, on his appeal, affirmed by the supreme court of Ohio. About \$6,000 was realized on the judgment out of Robert's property in Ohio. On October 11, 1909, Hare brought

maintain an action upon the assignment in the latter state. *Rucks v. Taylor*, 49 Miss. 552.

In *Hall v. Harrison*, 21 Mo. 227, 64 Am. Dec. 225, the same rule is laid down with reference to judgments against defendants who might be citizens of the state where the judgments were recovered at the death of the intestate, but the court suggests a query as to whether the rule would apply in case the debtor were a citizen of the other state at that time and his property were situated there.

In *Macnicol v. Macnicol*, L. R. 19 Eq. 81, 31 L. T. N. S. 566, 23 Week. Rep. 67, where an administrator had obtained judgment in India, he was allowed to collect the amount due from the debtor's estate in England without taking out letters of administration.

But under the statutes of Pennsylvania, a foreign administrator cannot sue there for any part of an estate which is subject to administration under their laws. *Moore v. Fields*, 42 Pa. 467.

And where plaintiff sues on a foreign judgment obtained by deceased, claiming to be his widow and executrix of his will, under which she claims to have become owner of all his property after payment of his debts, but where no proof is offered of these allegations, although the answer puts them in issue, her proof fails upon the essential point of title to the judgment, and her case falls. *Winham v. Kline*, 72 Mo. App. 615.

Since it is but an act of comity for a state to open its courts so as to allow one clothed with power from a foreign authority to enter to assert the rights of his testator or intestate, the state having done so, it is only a reasonable rule that such state should also require such foreign representative to produce properly authenticated exemplification of his letters testamentary or of administration, and when he fails to

the present action in the common pleas of Armstrong county, Pennsylvania, on the decree or judgment obtained by him in Ohio, and seeks to recover the balance due thereon. On the trial of the cause, the court directed a verdict for the defendant, but subsequently entered judgment *non obstante veredicto* for the plaintiff. The defendant has taken this appeal. Hare has not administered on O'Brien's estate in Pennsylvania, but on September 1, 1909, letters of administration were issued in Armstrong county to Carl A. O'Brien.

The appellant denies the right of the plaintiff to recover, and contends that § 6 of the act of March 15, 1832 (P. L. 136; 1 Purdon's Dig. 13th ed. p. 1074), prohibits the plaintiff, a foreign administrator, from suing on the Ohio judgment in this state, and especially as there is an ancillary administrator here; that to allow a recovery would authorize the assets of the decedent to be removed from this

state to the injury of our citizens who are creditors, and that the Ohio court did not have jurisdiction over the subject-matter of the action.

At common law, a foreign executor or administrator had no authority as such to bring an action outside the jurisdiction of his appointment. Our act of 1705 (2 Stat. at L. p. 195) changed the common law in this respect, and provided that a foreign executor or administrator, producing letters here, could bring an action in any court of this province. The present law on the subject is the 6th section of the act of March 15, 1832 (P. L. 136; 1 Purdon's Dig. 13th ed. p. 1074), which re-established the common law, and provides as follows: "No letters testamentary or of administration, or otherwise purporting to authorize any person to intermeddle with the estate of a decedent, which may be granted out of this commonwealth, shall confer upon such person any of the

produce them according to the provisions of the statute, a nonsuit is proper. *Buck v. Johnson*, 67 Ga. 82.

In *Cobb v. Norwood*, 11 Tex. 556, it was held that, since a foreign administrator has no right to collect a debt from an administrator in Texas, a presentation of a claim by an agent of such foreign administrator based upon a sworn copy of the foreign judgment against the Texas administrator's intestate, and its rejection, was not sufficient to start the statute of limitations running against he claim.

It has also been held that a statute authorizing a foreign administrator, upon certain conditions, "to prosecute suits in any court in this state," also authorizes him to take out an execution on a judgment obtained by his intestate in the latter's lifetime, and such administrator need not resort first to a judgment in his own name and then sue on the judgment. *Keefer v. Mason*, 36 Ill. 406.

And when an executor is substituted as party plaintiff on the record of a judgment obtained by his testator in Pennsylvania, and by the practice of that state the executor thereupon becomes a party to the judgment, and may revive and bring an action upon it in his own name, such executor thus substituted may sue upon the judgment in Iowa in his own name. *Greason v. Davis*, 9 Iowa, 219.

But aside from statute or special rules of practice, the rule seems to be otherwise with regard to judgments obtained by the testator. Thus, it is said that in these cases, the administrator has become vested with the full legal title to the property, is in fact the trustee of an express trust, and as such can maintain an action relating to the property in his individual capacity. He obtained the judgment himself. But where the judgment is obtained by the testator

or intestate, his executor or administrator is no party of record to that judgment, and cannot sue upon it in another state as an individual; nor can he sue in his representative capacity; for the general rule against an administrator or executor appointed in one state maintaining an action in another state in his representative capacity would forbid it. *Miller v. Hoover*, 121 Mo. App. 568, 97 S. W. 210.

"To permit him to exercise this right in his representative capacity would be to permit him to use the courts of this state and their processes to collect a debt due the estate, and to withdraw to a foreign jurisdiction the proceeds realized, without in any way providing for the protection of the rights of our own citizens, who may be creditors of the estate. And to permit him to sue in his individual capacity could be justified only on the theory that the judgment itself is a species of chattel and, as such, had been reduced to actual possession by the Virginia administrator and by him brought into this state for enforcement. To indulge in this hypothesis would permit a mere fiction relating to the theoretical situs of an incorporeal thing to override the settled policy of our law, which has for its prime object the protection of the rights of our own citizens. The object of that policy will best be promoted by . . . adopting for the purposes of administration the common-sense doctrine, that a debt due the estate of a deceased person from a debtor, who resides in a different state from that in which the creditor was domiciled at the time of his death, is an asset at the place where the debtor resides, whether such debt be evidenced by simple contract, specialty, or judgment recovered prior to the death of the creditor." *Miller v. Hoover*, 121 Mo. App. 568, 97 S. W. 210. H. C. Sh.

powers and authorities possessed by an executor or administrator, under letters granted within this state." This act, it may be observed, is limited in its operation, and in terms simply prohibits a foreign representative from exercising in Pennsylvania "any of the powers and authorities possessed by an executor or administrator under letters granted within this state." A foreign administrator cannot sue here for choses in action or other assets of the decedent's estate whose situs is in this state. Under the statute, they must be administered by an ancillary administrator; and hence the domiciliary administrator cannot intermeddle with them. What the former may do, the latter cannot do. This is the settled law of the state. In this case, we are not dealing with assets of the decedent within this jurisdiction which can be administered by an ancillary administrator. The present action was brought on a judgment obtained by the plaintiff in Ohio, the domicile of the decedent, on a claim against the defendant, who appeared and resisted a recovery. The situs of the judgment was in Ohio, and it was an asset of decedent's estate in Ohio, and not in Pennsylvania. *Viosca's Estate* (Engelskirger's Appeal) 197 Pa. 280, 287, 51 L.R.A. 876, 47 Atl. 233; *Arizona Cattle Co. v. Huber*, 4 Ariz. 69, 33 Pac. 555; *Atty. Gen. v. Bouwens*, 4 Mees. & W. 171, 1 Horn & H. 319, 7 L. J. Exch. N. S. 297. As said by Woodward, J., in *Moore v. Fields*, 42 Pa. 467, 472, an action brought here by a foreign administrator on a decree obtained in another state: "That money was never subject to administration in Pennsylvania. It was an administered fund before it was brought here." The suit in Ohio was brought to enforce the payment of a claim for money placed in the hands of the defendant by the decedent in his lifetime, and to be subsequently accounted for to the decedent, and was not brought to recover specific securities of the decedent's estate in this jurisdiction in the possession of the defendant, a resident of this state.

The debt was merged in the judgment which belonged to the administrator personally, subject to the duty to account to the estate of the decedent in the state of the latter's domicile. He holds the legal title, subject only to his trust as administrator. 1 Freeman, *Judgments*, 4th ed. § 217. He is fixed for the amount of the judgment, and can relieve himself only by showing that he exercised reasonable diligence to recover it. It is his duty to pursue the judgment debtor wherever he may be found, if, by doing so, payment may be enforced.

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The domiciliary administrator may therefore sue in his own name in another state on a judgment recovered by him in his representative character in the state of the domicile. 1 Freeman, *Judgments*, 4th ed. § 217; 2 Wharton, *Conf. L.* 3d ed. § 615½; 18 Cyc. 1239, and cases cited in the notes. The administrator sues as an individual, and not in a representative capacity; and it may be added that he may bring a transitory action in any state where the defendant may be found, and on service of its process the court will acquire jurisdiction, regardless of where the cause of action arose. *Alley v. Caspari*, 80 Me. 234, 6 Am. St. Rep. 178, 14 Atl. 12; *Fisher v. Fielding*, 67 Conn. 91, 32 L.R.A. 236, 52 Am. St. Rep. 270, 34 Atl. 714; *Mowry v. Chase*, 100 Mass. 79. Judge Freeman says (§ 217): "He [the domiciliary administrator] may sue upon the judgment in his own name, without describing himself as administrator, and may therefore pursue the judgment defendant, by action on the judgment, in a different state from that in which the letters of administration were issued; and there can scarcely be a doubt that a judgment rendered in favor of an administrator so merges the debt that it may be treated as his personal effects so far as to authorize him to maintain suit thereon in a foreign country, without there taking out letters of administration." *Moore v. Fields*, supra, was an action of debt brought in the district court of Philadelphia by the public administrator of the city of New York on the record of a decree entered by the surrogate's court of New York. After saying that the decree, unappealed from, was conclusive between the parties, Woodward, J., delivering the opinion, continued (p. 472): "It is of no moment that he is called administrator in the surrogate's record. Had he been called trustee for creditors and heirs, or had no title whatever been given him, his right to recover in our courts upon such a record would have been the same as it is now. A judicial decree that a man receive a certain sum of money from defendants, who were duly warned and fairly subject to the jurisdiction, entitles him to sue for it in a Pennsylvania court, with or without his official title."

The ancillary administrator cannot sue on the judgment or for the debt, as he is not a party to the judgment nor in privity with the foreign administrator. *Talmage v. Chapel*, 16 Mass. 71. "An administrator under grant of administration in one state," says Grier, J., in *Stacy v. Thrasher*, 6 How. 44, 59, 12 L. ed. 337, 343, "stands in none of these relations to an administrator in

another. Each is privy to the testator and would be estopped by a judgment against him; but they have no privity with each other in law or in estate. They receive their authority from different sovereignties, and over different property. The authority of each is paramount to the other." The same principle is recognized and applied in *Brodie v. Bickley*, 2 Rawle, 431, 437; *Lewis v. Adams*, 70 Cal. 403, 59 Am. Rep. 423, 11 Pac. 833; and *Arizona Cattle Co. v. Huber*, 4 Ariz. 69, 33 Pac. 555.

It is equally clear that the ancillary administrator cannot bring an action against the defendant in this jurisdiction to recover the original indebtedness. The suit in Ohio was brought by the domiciliary administrator to recover a money judgment in the court of common pleas, which had jurisdiction of the cause of action, so far as the record discloses. The action was *in personam*, and not *in rem*. The defendant voluntarily appeared and contested the merits of the plaintiff's right to recover; and therefore the court had jurisdiction of his person. The judgment is conclusive between the parties (*Guthrie v. Lowry*, 84 Pa. 533), and is a bar to another suit for the same cause of action. The debt was merged in the judgment, which bars a new action, and the defendant can successfully interpose the judgment as a defense to a suit brought by the ancillary administrator.

There is no question of fraud in the case. The suit in Ohio was not brought to defeat the rights of Pennsylvania creditors to assets of the decedent in this state, but to assert a claim which was judicially determined to be legally due the plaintiff from the defendant. The domicile of the decedent being in Ohio, his administrator could lawfully sue in that state to recover the claim in question, and, the defendant having voluntarily appeared and contested the claim, he is concluded by the judgment of the Ohio court. It is not a fraud, nor any evidence of fraud, for a party to compel payment of a claim in a court of competent jurisdiction.

For the reasons stated, we are of opinion that the act of 1832 has no application to the facts of this case, and that the plaintiff can maintain the action on the Ohio judgment in this state. It is immaterial that he instituted the suit in his representative character as the domiciliary administrator of the decedent. The proper parties are on the record, and his official
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title is surplusage, and may be disregarded. 2 Wharton, Conf. L. 3d ed. § 615j.
The judgment is affirmed.

WASHINGTON SUPREME COURT.
(Department No. 2.)

LESLIE G. SLOCUM, Respt.,
v.

SEATTLE TAXICAB COMPANY, Appt.

(67 Wash. 220, 121 Pac. 67.)

Master and servant — right of superintendent to employ men — secret limitation.

A corporation cannot avoid liability upon a contract signed by its superintendent, who had authority to employ men, engaging a person to do a particular part of the work required by the corporation for a term of one year, because his authority was limited to employing help orally from day to day, since the other contracting party had a right to rely upon his apparent possession of the authority which he assumed to exercise.

(February 15, 1912.)

APPEAL by defendant from a judgment of the Superior Court for King County in plaintiff's favor in an action brought to recover damages for breach of a contract to employ plaintiff to do the repair work for defendant. Affirmed.

The facts are stated in the opinion.

Messrs. Brightman & Tenuant for appellant.

Messrs. Shorett, McLaren, & Shorett for respondent.

Mount, J., delivered the opinion of the court:

Defendant prosecutes this appeal from a judgment in favor of the plaintiff. There is no substantial dispute upon the following facts: In May, 1909, the defendant corporation occupied a building in Seattle, in which building the corporation kept and repaired a number of automobiles. This building was occupied by defendant as a tenant from month to month. Mr. A. C. Stevens was in active charge of the building, and was designated by the president of the company as superintendent. He had authority to employ and discharge such men as were needed about the business.

Note.—As to the time for which contracts of employment may be made on behalf of a corporation by its officers, directors, and agents, see notes to *Carney v. New York L. Ins. Co.* 49 L.R.A. 471, and *Laird v. Michigan Lubricator Co.* 17 L.R.A. (N.S.) 177.

On May 1, 1909, Mr. Stevens and the plaintiff entered into the following written agreement:

Seattle Taxi-Cab Company.
Broadway, Corner Union Street, Seattle.
Date May 1st, '09.
Contract.

Leslie G. Slocum agrees to pay the sum of \$25 per Mo. to Seattle Taxi-Cab Co. for shop on second floor for trimming & painting, and to do all the said Co.'s work at 25 per cent less than other shops. As long as above contract is fulfilled he is to have said shop one year from date.

A. C. Stevens,
Supt. of Taxi-Cab Co.
[Signed] Leslie G. Slocum.

The plaintiff thereupon partitioned off a room on the second floor of the building, and occupied the same, and did the defendant's work in a satisfactory manner. Bills for work done were rendered weekly by plaintiff, and the agreed rent was deducted therefrom. The balance was paid by the defendant until about January 3, 1910, when the defendant refused, apparently arbitrarily, to give the plaintiff any more work, and ejected him from the building. The president of the corporation did not know about the contract. It was shown to him by the plaintiff at that time. He thereupon informed plaintiff that the contract was void because Mr. Stevens had no authority to make it. The plaintiff at that time had done some work for which he had not been paid. He presented a bill therefor, amounting to \$89.05. The defendant issued a check to the plaintiff in payment of the bill. The plaintiff presented this check to the bank for payment, but payment was refused unless plaintiff would sign a receipt "in full of all claims to date" against the defendant company. Plaintiff refused to sign such receipt, but retained the check. He thereafter brought this action to recover upon three alleged causes of action. By the first cause he sought to recover \$1,773, alleged damages for failure to furnish him work for the balance of the year according to the contract. By the second cause he sought to recover \$1,000 for the alleged breach of the lease. By the third cause he sought to recover upon the check \$89.05. Upon the trial of the case the court found that the plaintiff had been damaged in the sum of \$316.35 by reason of the failure of the defendant to supply him with work. The court found upon the second cause of action that he was not entitled to recover for a breach of the contract of lease. The court found that he was entitled to recover \$89.05 upon the check.

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The defense made in the lower court and insisted upon here is that the contract was void because the superintendent, Mr. A. C. Stevens, had no authority to make it. The president of the company testified that Mr. Stevens had authority from him to superintend and look after the business, and employ and discharge men from day to day, but had no authority to enter into a written contract either of employment or for a lease of the building; that under the by-laws of the corporation the president only had such authority. We are satisfied that it was not incumbent upon the plaintiff or any other employee to hunt up the president of the company, or to obtain the charter or the by-laws of the company, in order to determine the authority of one who occupies the position of superintendent of a business, so as to make a valid contract of employment. It is conceded that the superintendent in charge had authority to employ men, and that he did so. The fact that he prepared and signed the written contract in this case as superintendent was sufficient to bind the company, because the contract was made in the course of his apparent authority as well as his expressed authority to hire and discharge men. This is especially true in this case, where the plaintiff acted in good faith and did not know, and had no reason to suspect, that the superintendent had no authority to reduce the contract to writing, or that he was limited in the employment of men to a day by day employment. In *Brace v. Northern P. R. Co.* 63 Wash. 417, 38 L.R.A. (N.S.) 1135, 115 Pac. 841, this court said: "If each and every individual having business with such a corporation must at his peril ascertain and determine the exact scope and limitation of the agent's authority, it is manifest that he could not safely deal with the acknowledged agent, and that the business of the corporation itself would be materially impaired. The public is compelled to rely upon the apparent authority of the conceded agents of such corporations, especially when, as managers or superintendents, they are placed in control of departmental affairs." In *Livieratos v. Commonwealth Security Co.* 57 Wash. 376, 106 Pac. 1125, we said: "In this day and age, when so large a part of the business of the commercial world is transacted through the agency of corporations, those dealing with them cannot be expected to prove the authority of corporate agents by producing a power of attorney under the corporate seal. They have a right to rely upon the apparent authority of those with whom they deal, and for acts done within the scope of that authority the corporation is bound."

We are of the opinion, therefore, that the company was bound by the contract in so far as it related to an employment of the plaintiff for the year.

The judgment must therefore be affirmed.

Dunbar, Ch. J., and Morris, Fullerton, and Ellis, JJ., concur.

Petition for rehearing denied.

ILLINOIS SUPREME COURT.

FIRST CONGREGATIONAL CHURCH OF
DE KALB, Appt.,
v.
BOARD OF REVIEW OF DE KALB
COUNTY.

(254 Ill. 220, 98 N. E. 275.)

Tax — exemption — parsonage.

An exemption from taxation of property used exclusively for religious work does not include a parsonage used as a residence for the pastor of a church and his family, and such religious work as naturally would center around the pastor's residence.

(Carter, Ch. J., and Farmer and Vickers, JJ., dissent.)

(April 18, 1912.)

Note. — Exemption of parsonage from taxation.

Generally, as to the effect of using property for a religious, charitable, or educational institution in secular business or for revenue upon its right to exemption from taxation, see note to Book Agents of Methodist Episcopal Church, South, v. Hinton, 19 L.R.A. 289.

As to the exemption from taxation of a "parish house," which is not the residence of the minister, pastor, or priest of a church, but was erected primarily for use, and is used, in connection with a principal church building, for the observance of religious services usually deemed essential in the support and maintenance of public worship, see *St. Paul's Church v. Concord*, and note thereto, in 27 L.R.A. (N.S.) 910.

A parsonage, rectory, or parish house, owned by a church society or corporation and occupied as a residence by the pastor, rector, or priest of the church, is not included within an exemption from taxation of "houses used exclusively for public worship" (*St. Peter's Church v. Scott County*, 12 Minn. 395, Gil. 280; *Hennepin County v. Grace*, 27 Minn. 503, 8 N. W. 761; *Ramsey County v. Church of the Good Shepherd*, 45 Minn. 229, 11 L.R.A. 175, 47 N. W. 783; *Watterson v. Halliday*, 77 Ohio St. 150, 82 N. E. 962, 11 Ann. Cas. 1096); or an exemption of property or places used exclusively for religious purposes (*Muldoon* 39 L.R.A. (N.S.)

CERTIFICATION by the auditor of public accounts for De Kalb County for the opinion of the Supreme Court of a question as to the correctness of a determination by the board of review assessing a parsonage for taxes. Approved.

The facts are stated in the opinion.

Messrs. McGoorty & Pollock, with Messrs. Cliffe & Cliffe, A. G. Kennedy and H. W. McEwen for appellant.

Messrs. W. H. Stead, Attorney General, Charles E. Woodward, Assistant Attorney General, and Edward M. Burst, for appellee:

One claiming a benefit under the statute is required to show clearly that the property is exempt within the contemplation of the law.

People ex rel. McCullough v. Deutsche Gemeinde, 249 Ill. 132, 94 N. E. 162; *Montgomery v. Wyman*, 130 Ill. 17, 22 N. E. 845; *People ex rel. Gore v. Peoria Mercantile Library Asso.* 157 Ill. 369, 41 N. E. 557; *People ex rel. Brey Meyer v. Watseka Camp Meeting Asso.* 160 Ill. 576, 43 N. E. 716; *Bloomington Cemetery Asso. v. People*, 170 Ill. 377, 48 N. E. 905; *Sanitary Dist. v. Martin*, 173 Ill. 243, 64 Am. St. Rep. 110, 50 N. E. 201; *State Council, C. K. v. Effingham County*, 198 Ill. 441, 64 N. E. 1104; *Re Walker*, 200 Ill. 566, 66 N. E. 144.

v. De Kalb County, 254 Ill. 336, 98 N. E. 673; *Vail v. Beach*, 10 Kan. 214; *People ex rel. Thompson v. First Cong. Church*, 232 Ill. 158, 83 N. E. 536); or of "public buildings for religious worship . . . and lots of ground thereto appurtenant and used therewith, so long as the same shall be actually used for that purpose, only" (*First Presby. Church v. New Orleans*, 30 La. Ann. 259, 31 Am. Rep. 224); or "buildings for religious worship," so far as they are occupied and used exclusively for religious purposes (*St. Joseph's Church v. Assessors of Taxes*, 12 R. I. 19, 34 Am. Rep. 597); — although it is also used for various incidental purposes connected with the church (*Ramsey County v. Church of the Good Shepherd*, 45 Minn. 229, 11 L.R.A. 175, 47 N. W. 783), or is also used to a great extent for services of the church and for its religious, charitable, and educational work (*Watterson v. Halliday*, 77 Ohio St. 150, 82 N. E. 962, 11 Ann. Cas. 1096), or contains a room which is used as a chapel in the celebration of certain services and sacraments of the church (*St. Joseph's Church v. Assessors of Taxes*, supra); or contains a chapel and is put to incidental religious uses (*Muldoon v. De Kalb County*, supra).

And under a statute exempting from taxation "houses used exclusively for public worship . . . and the grounds attached to such buildings necessary for the proper occupancy, use, and enjoyment of the same," a parsonage is not exempt, although built

The primary use to which the property is devoted determines its right to exemption, under the cause of the statute invoked.

People ex rel. McCullough v. Deutsche Gemeinde, 249 Ill. 132, 94 N. E. 162; People ex rel. Thompson v. First Cong. Church, 232 Ill. 158, 83 N. E. 536.

A parsonage, or residence of a minister or priest, is not within the meaning of a constitutional or statutory provision exempting from taxation all property used exclusively for religious purposes.

People ex rel. Thompson v. First Cong. Church, *supra*; State, Church of the Redeemer, Prosecutor, v. Axtell, 41 N. J. L. 117; Vail v. Beach, 10 Kan. 214; Ramsey

v. Church of the Good Shepherd, 45 Minn. 229, 11 L.R.A. 175, 47 N. W. 783.

A parsonage in which a minister or priest eats, sleeps, lodges, receives social callers, and discharges the proper and pleasant amenities of life, is devoted to a secular, and not to a religious, purpose.

Ibid.; St. Peter's Church v. Scott County, 12 Minn. 395, Gil. 280; Hennepin County v. Grace, 27 Minn. 503, 8 N. W. 761; People ex rel. Church of St. Mary v. Feitner, 168 N. Y. 494, 61 N. E. 762; St. Joseph's Church v. Assessors of Taxes, 12 R. I. 19, 34 Am. Rep. 597; Gerke v. Purcell, 25 Ohio St. 229; Watterson v. Halliday, 77 Ohio St. 150, 82 N. E. 962, 11 Ann. Cas. 1096.

on ground which might otherwise be exempt as attached to the church edifice. Gerke v. Purcell, 25 Ohio St. 229.

Nor is a parsonage, owned by a religious corporation and located on a portion of the same parcel of land with a church and used solely as a residence for the pastor of the church, exempt from taxation under a statute exempting "every building for public worship . . . and the several lots whereon such buildings so used are situated." People ex rel. Hutchinson v. O'Brien, 53 Hun, 580, 6 N. Y. Supp. 862, affirming People ex rel. Hutchinson v. Collison, 22 Abb. N. C. 52, 6 N. Y. Supp. 711.

Under a constitutional provision that the legislature may exempt from taxation "places of religious worship," it cannot exempt a parsonage belonging to a church and in which the rector of the church resides, as a parsonage is not a place of public worship. St. Mark's Church v. Brunswick, 78 Ga. 541, 3 S. E. 561.

And a statute exempting from taxation "every building erected for religious worship" does not exempt a parsonage which has been erected by a church corporation for the convenience and accommodation of the pastor of the church. Methodist Episcopal Church v. Ellis, 38 Ind. 3.

Under a statute exempting houses of religious worship, and expressly providing that "portions of such houses appropriated for purposes other than religious worship shall be taxed," a parsonage occupied by the settled minister of the religious society owning it, and used by him and his family as a dwelling house, free of rent, is not exempt from taxation, though erected upon land which had formed a part of that surrounding the church. Third Cong. Soc. v. Springfield, 147 Mass. 396, 18 N. E. 68.

Nor does an exemption from taxation conferred on places of religious worship include property adjoining a church and used as a residence by the bishop. State ex rel. Cunningham v. Board of Assessors, 52 La. Ann. 223, 26 So. 872.

But a devise to a church society of a dwelling house, "to be used and occupied only as a parsonage for said church," is 39 L.R.A. (N.S.)

exempt from succession tax under a statute exempting therefrom property which shall pass "to or for the use of . . . religious societies or institutions the property of which is by law exempt from taxation," although the property devised will not be exempt from yearly taxation under general laws,—real estate used as a parsonage not being included within the provision that "houses of religious worship owned by a religious society" shall be exempt. First Universalist Soc. v. Bradford, 185 Mass. 310, 70 N. E. 204.

Under a statute exempting "all churches, meeting houses, or other regular places of stated religious worship, with the grounds thereto annexed for the occupancy and better enjoyment of the same," a parsonage located on a lot separated by other property and a street from the church property is not exempt from taxation,—although "had the parsonage, in the present case, been built on the same lot with the church it might present a different question. Being erected on part of the curtilage, used for the better and more conformable enjoyment of the church, it would have stood on ground exempted from taxation while so held, and being used by the rector, a portion of the corporation, for the benefit of the church, it might possibly have claimed a part of the immunity conferred on the soil. It certainly could, with more plausibility be said to be 'annexed' to the church." Dauphin County v. St. Stephen's Church, 3 Phila. 189.

But a parsonage or rectory, though built on ground appurtenant to a church, but not an integral part of the church building, is not within a constitutional provision for the exemption from taxation of "actual places of religious worship." Church of Our Savior v. Montgomery County, 10 W. N. C. 170.

And a church parsonage, although erected on a portion of a church lot which would otherwise be exempt, and occupied by the minister or pastor of the church as a residence, free of rent, is not exempt from taxation under a constitutional provision exempting "places actually used for religious

Hand, J., delivered the opinion of the court:

The board of review of De Kalb county held that the parsonage of the First Congregational Church of the city of De Kalb was subject to taxation; and that decision has been certified to this court for review by the auditor of public accounts, under the provisions of the revenue act (Hurd's Rev. Stat. 1909, chap. 120).

The First Congregational Church of De Kalb owns two adjoining lots in the city of De Kalb, upon one of which is located its church building and upon the other its parsonage, which latter building is occupied by the pastor and his wife and two children as a home. The pastor was called and examined before the board of review as

worship, with the grounds thereto annexed and used and appurtenant to the house of worship" (Broadway Christian Church v. Com. 112 Ky. 448, 66 S. W. 32), or under a statute exempting "buildings erected and used for religious purposes" (State, Church of the Redeemer, Prosecutor, v. Axtell, 41 N. J. L. 117).

Nor does either a constitutional provision for the exemption from taxation of "actual places of religious worship," or a statute exempting "all churches, meeting houses, or other regular places of stated worship, with the grounds thereto annexed necessary for the occupancy and enjoyment of the same," include a church parsonage occupied by the pastor of the church as a residence, which is under the same continuous roof as the church, but is distinct from the church proper, separated therefrom by a party wall (Re Taxation of Central M. E. Church, 11 Kulp, 131); or a parsonage erected on ground appurtenant to a church, although religious services are occasionally held and ceremonies performed in the parsonage (Wood v. Moore, 1 Chester Co. Rep. 265).

And a parsonage used primarily as a home for the minister of a church and his family is not exempt from taxation under the Pennsylvania Constitution or statute, although it is physically annexed to the church edifice, with an entrance from it into a room in the church, used by the minister as a study, from which he ascends the pulpit, and although the parsonage is used at times for religious services and the dissemination of religious instruction. Re Parsonage Taxes, 25 Pa. Co. Ct. 570.

Nor is a clergy house or rectory, maintained by a church corporation as and for a residence for the rector of the parish and his assistant as a part of the compensation paid for their services, exempt from taxation, under the same constitutional or statutory provisions, although it is combined with and attached to the church edifice, but is separated from that part of the church building which is devoted exclusively to public worship by a wall of sufficient thickness and strength for an outside

a witness. His testimony was not contradicted, and it appears therefrom the parsonage stands about 30 feet from the church and is two stories high. On the first floor there are a hall and five rooms; that is, a parlor, sitting room, dining room, kitchen, and the pastor's study. On the second floor there are a hall and five rooms intended for sleeping rooms, and bath. The house is fitted up with the ordinary furniture and utensils for housekeeping. In the study the pastor has a desk and books, and there prepares his sermons, etc.; and he and his family have no other dwelling house or home in the city of De Kalb. The pastor also testified the duties of the pastor were to have entire charge of the spiritual work of the church and to have a share in

wall of either of the buildings, through which wall the only connection or means of communication between the clergy house and the church is a door in the basement and another on the first floor, the latter of which frequently serves as a secondary public entrance to the wholly public part of the church; and although on the lower floor of the clergy house are the parish offices, where the business of the parish is conducted and where the governing body of the church meets to transact the business of the parish. Philadelphia v. St. Elizabeth's Church, 45 Pa. Super. Ct. 363.

But where it appears only that a "part" of a church building is "in use as a parsonage," the building itself being concededly within constitutional and statutory exemptions from taxation, as "an actual place of religious worship" and a "regular place of stated worship," the whole building is exempt. Northampton County v. St. Peter's Church, 5 Pa. Co. Ct. 416.

In this case the court said: "We are not informed what part or how much of the building is thus used. As far as we know, the parson may live in the basement. This we think is not enough. . . . Had the fact been that the church and parsonage were essentially distinct, but cunningly constructed together so as to present to the public but one building, with the possible purpose of avoiding taxation, the learned counsel for the plaintiff is too careful a lawyer not to have had that fact spread upon the record, and in that event a more serious question would have arisen. But nothing of that kind is pretended; and in the absence of some such averment, and on the meager facts before us, it would seem to be clear that judgment should be entered for the defendant." Ibid.

A parsonage owned by a church is not exempt from taxation under a statutory provision exempting "the endowment or fund of any religious society," although the money for its purchase was raised by voluntary contributions of the members of the congregation. State, First Reformed Dutch Church, Prosecutor, v. Lyon, 32 N. J. L. 360.

the counsels and conferences by which the temporal work of the church was managed; that the officers and committees of the church and other organizations of the church meet at the parsonage; that the pastor is there consulted by people in reference to their spiritual welfare and in regard to their desire to live a godly life; that the marriage rite is solemnized there and

also the rite of baptism; that classes meet there at stated intervals for religious instruction, and sometimes Sunday school is held in the parsonage; that the keys of the church and chapel are kept there, as well as decorations used on stated special occasions; and that the utensils of the communion service and the elements used in celebrating the Lord's Supper are kept and pre-

And a church rectory occupied by the rector, his family, and servants as a residence, is not exempt from taxation under a statute exempting "the real property of a corporation or association organized exclusively for the moral or mental improvement of men or women, or for religious, bible, tract, charitable, benevolent, missionary, . . . or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes." *People ex rel. Church of St. Mary v. Feitner*, 168 N. Y. 494, 61 N. E. 762.

Nor are "priests' houses," belonging to the Roman Catholic Church and used primarily as places of residence for the priests and their assistants, exempt from taxation under a statute exempting "buildings belonging to institutions of purely public charity." *Watterson v. Halliday*, 77 Ohio St. 150, 82 N. E. 962, 11 Ann. Cas. 1096.

But a building owned by a church corporation and occupied solely as a parsonage, or as the residence of the rector of the church, without payment to the corporation, is exempt from taxation under a statute exempting all buildings of religious institutions and societies, devoted solely to the appropriate objects of these institutions, and not leased or otherwise used with a view to pecuniary profit. *Griwold College v. State*, 46 Iowa, 275, 26 Am. Rep. 138; *Cook v. Hutchins*, 46 Iowa, 706.

And a parsonage owned and maintained by an independently organized charitable corporation, by means of voluntary contributions, for the use and occupancy of such bishops of the Methodist Episcopal Church as may from time to time be designated to reside in the city where the parsonage is located, is exempt from taxation under a statute exempting all property used for purely charitable purposes. *Bishop's Residence Co. v. Hudson*, 91 Mo. 671, 4 S. W. 435.

Under a statute exempting from taxation "parsonages, whether of local churches or districts, and whether occupied by the pastor permanently or rented for his benefit," property rented of the owner by a religious association for a parsonage, and occupied as such by its pastor, the association owning no parsonage, is exempt from taxation. *Gray v. LaFayette County*, 65 Wis. 567, 27 N. W. 311.

And under a constitutional provision that "there shall be exempt from taxation all . . . parsonages . . . provided, that as to real estate, this exemption shall not extend beyond the buildings and premises actually occupied by such . . . parson-

ages, . . . although connected with charitable objects," a lot and buildings owned by a church and constituting its parsonage, are exempt from taxation, although not actually occupied by the rector or parson of the church, but temporarily rented out and the rent appropriated to the hiring of another residence for him, in another locality, for his personal convenience. *Protestant Episcopal Church v. Prioleau*, 63 S. C. 70, 57 L.R.A. 606, 40 S. E. 1026.

But a church parsonage which is not occupied by the minister, who owns and resides in another house, but which, by an arrangement between him and the trustees of the church, is rented out and the rent paid to him, is not exempt from taxation, under a constitutional provision exempting "all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion." *Broadway Christian Church v. Com.* 112 Ky. 448, 66 S. W. 32.

And a church parsonage situated on a lot entirely separate from the lot on which the church is situated, is not exempt from taxation under a statute exempting all churches and the ground whereon they are built, together with the parsonages thereon. *Foley v. Oberlin Cong. Church*, 67 Wash. 280, 121 Pac. 65.

In *Harris v. Whitby Twp.* briefly reported in 34 Can. L. J. 240, where a church and subsequently a parsonage had been erected upon land conveyed to the church society in trust for a churchyard and burial ground for the use of the members of the Church of England, it was "held that since 1890 the parsonage and a reasonable curtilage surrounding it were liable to taxation for municipal purposes."

Under a constitutional provision that property used exclusively for religious purposes may be exempted from taxation by general law, a statute purporting to exempt "all parsonages or residences actually and exclusively used by persons devoting their entire time to church work, when . . . owned by the congregation or the church authorities, and not used for pecuniary profit," is unconstitutional and void, as beyond the power of the legislature,—the use of a parsonage primarily for a family residence by the pastor of a church being primarily for a secular and temporal purpose, and not exclusively for religious purposes within the meaning of the Constitution. *People ex rel. Thompson v. First Cong. Church*, 232 Ill. 158, 83 N. E. 536.

C. W.

pared in the parsonage; that the religious and educational work of the church is conducted from the parsonage; that parents of the children in the Sunday school, teachers, and others interested in the work of the church and the various societies, consult together and with the pastor at the parsonage; that two thirds of the six days of the week are spent in the parsonage in religious work; that in the parsonage the pastor devotes his time to study, meditation, and prayer, and the preparation of discourses for the congregation; that the pastor's wife is also engaged in religious work in connection with the church, assisting the pastor in the preparation of the sermons, in the church work, and in religious instruction, and shares with the officers of the Ladies' Aid Society, at intervals, in the work of that society; that the parsonage was acquired in order to carry on the work of the church mere efficiently, by voluntary contributions from the congregation, and is maintained by like contributions, and the taxes are paid by voluntary contributions raised for the purpose of church work.

Section 3 of article 9 of the Constitution of 1870 authorizes the legislature to exempt from taxation, by general law, such property as may be used exclusively for religious purposes; and the statute in force at the time of the hearing before the board of review, which exempts church property from taxes, reads as follows: "All property used exclusively for religious purposes, . . . and not leased or otherwise used with a view to profit." And the question to be determined upon this record is: Does the Constitution and the statute exempt the parsonage of appellant from taxation?

Under the act of 1872 (Laws 1871-72, p. 1), the legislature exempted from taxation all church property actually and exclusively used for "public worship." That statute was held not broad enough to exempt from taxation a building which stood upon a lot which was separated from the church property by a 16-foot alley, and which was used by the church organization as a place in which to hold Sunday school, and for the social purposes of the church, and in which the janitor of the church had a room, on the ground that the use to which the building was put was not "public worship." *Re Walker*, 200 Ill. 566, 66 N. E. 144. The legislature amended the statute thereafter so that it exempted from taxation "all church property actually and exclusively used for public worship, and all parsonages or residences actually and exclusively used by persons devoting their entire time to church work, when the said buildings and the land on which said build-

ings are located (said land to be of reasonable size for the location of said buildings) are owned by the congregation or the church authorities, and not used for pecuniary profit." This statute was held unconstitutional in *People ex rel. Thompson v. First Cong. Church*, 232 Ill. 158, 83 N. E. 536, in so far as it attempted to exempt from taxation parsonages; and the present statute was passed, which follows substantially the language of the Constitution.

In determining whether the parsonage of the appellant is exempt from taxation under the statute now in force, it must be borne in mind that all property in this state is subject to taxation unless it is relieved from taxation by the Constitution, and the statutes which are passed in accordance with the Constitution, and that in determining the question whether property is exempt from taxation all statutes must be strictly construed and resolved against the exemption if there is any doubt upon the subject; that is, the exemption is not to be made by judicial construction, and one claiming benefit under the statute is required to show clearly that the property is exempt within the contemplation of the law. *Montgomery v. Wyman*, 130 Ill. 17, 22 N. E. 845; *People ex rel. Gore v. Peoria Mercantile Library Asso.* 157 Ill. 369, 41 N. E. 557; *People ex rel. Brey Meyer v. Watseka Camp Meeting Asso.* 160 Ill. 576, 43 N. E. 716; *Bloomington Cemetery Asso. v. People*, 170 Ill. 377, 48 N. E. 905; *Sanitary Dist. v. Martin*, 173 Ill. 243, 64 Am. St. Rep. 110, 50 N. E. 201; *State Council, C. K. v. Effingham County*, 198 Ill. 441, 64 N. E. 1104; *People ex rel. McCullough v. Deutsche Gemeinde*, 249 Ill. 132, 94 N. E. 162.

And in determining whether property falls within the terms of the exemption, whether it be constitutional or statutory, it is the primary use to which the property is put which must be considered, and not its secondary use. *People ex rel. Thompson v. First Cong. Church*, *supra*; *Ramsey County v. Church of the Good Shepherd*, 45 Minn. 229, 11 L.R.A. 175, 47 N. W. 783. And if the property is devoted, in a primary sense, to a religious purpose, the fact that it is incidentally used for secular purposes will not destroy the exemption, or if the primary use of the property is secular, the fact that a portion of it is incidentally used for a religious purpose will not make it exempt from taxation. *People ex rel. Thompson v. First Cong. Church*, and *Ramsey County v. Church of the Good Shepherd*, *supra*.

We think it obvious, therefore, that all would understand and readily concede that a church is a building which in its primary

sense is used for a religious purpose; that is, such use is its principal and general use, and that its occasional use as a lecture room or for other similar use would not destroy the exemption. On the contrary, we think it is equally well understood by all, as the very name signifies, that the primary use of a parsonage is as a home for the pastor and his family,—that is, that such use is its principal and general use,—and that the fact that some parts of the parsonage are used for purposes connected with the pastor's work or the work of the church would not make it a building used exclusively for religious purposes and exempt it from taxation.

We think it clear, therefore, that, as was held in *People ex rel. Thompson v. First Cong. Church*, supra, the primary purpose for which the parsonage in question was acquired and possessed by the appellant is not religious, but is secular, and that it is not exempt from taxation, and that the amendment of the statute after that case was decided did not change the law in this state so as to exempt the parsonage of the appellant from taxation. This case, in principle, differs in no way from that case, except here we have a little more elaboration, and the evidence points out perhaps more fully the incidental uses of this parsonage than was shown in that case. There is, however, no evidence found in this record which shows that the primary use of the parsonage in this case is other than that of a home provided by the church for the pastor and his family. We think therefore it is clear that the parsonage of the appellant does not fall within the terms of the present statute, which exempt church property which is used exclusively for religious purposes. While the statute is undoubtedly a valid enactment in so far as it applies to church property exclusively used for religious purposes and exempts such property from taxation, it does not apply to the parsonage in question, as that property is not used exclusively for religious purposes within the meaning of that constitutional provision.

The courts of last resort in numerous states of the Union have had the question here presented for decision before them, and it has very generally been held that residence property belonging to a church and used by its pastor as a home is not exempt from taxation under constitutional provisions similar to those in force in this state; and while many of the Constitutions of those states are not worded precisely as is ours, the general principle of taxation announced in those Constitutions is very similar to that announced in our Constitution, and some of the provisions found in 39 L.R.A. (N.S.)

those Constitutions are substantially identical with ours. At least what has been said by the courts of other states in determining this question is, while not conclusive, very persuasive. *St. Peter's Church v. Scott County*, 12 Minn. 395, Gil. 280; *Hennepin County v. Grace*, 27 Minn. 503, 8 N. W. 761; *People ex rel. Church of St. Mary v. Feitner*, 168 N. Y. 494, 61 N. E. 762; *Ramsey County v. Church of the Good Shepherd*, supra; *St. Joseph's Church v. Assessors of Taxes*, 12 R. I. 19, 34 Am. Rep. 597; *Gerke v. Purcell*, 25 Ohio St. 229; *Watterson v. Halliday*, 77 Ohio St. 150, 82 N. E. 962, 11 Ann. Cas. 1096; *Vail v. Beach*, 10 Kan. 214. The case of *Vail v. Beach*, supra, is very nearly in point. There the property exempted was such property as was "used exclusively for religious purposes," and the question then determined was that a dwelling used by the pastor of the church as a home was not exempt from taxation; and in *Ramsey County v. Church of the Good Shepherd*, supra, it was held that a parsonage used by the pastor of the church as a home was not used for a religious purpose in a primary sense, but for a secular purpose, and was not exempt from taxation. Those cases were cited and relied upon in *People ex rel. Thompson v. First Cong. Church*, supra. This shows, we think, conclusively, that it was the view of the court at that time that the legislature was without power, under the Constitution of 1870, to exempt from taxation a parsonage owned by a church organization and used by its pastor as a home. The cases of *Watterson v. Halliday*, 77 Ohio St. 150, 82 N. E. 962, 11 Ann. Cas. 1096; *Hennepin County v. Grace*, 27 Minn. 503, 8 N. W. 761, and *People ex rel. Church of St. Mary v. Feitner*, 168 N. Y. 494, 61 N. E. 762, clearly establish the proposition that the fact that a parsonage is used by a minister who devotes himself entirely to the services of God and to works of religion and charity, whereby the interests of his church are subserved, does not convert the parsonage from a secular into a religious use.

From a careful examination of this record we have reached the conclusion that the parsonage of the appellant is not used exclusively for religious purposes, but is, under the authorities and under the evidence, devoted principally and primarily to secular purposes, and that the board of review did not err in holding that it was subject to taxation.

The decision of the board of review of De Kalb county will therefore be approved.

Farmer, J., dissenting:

I am unable to agree to the opinion of

the court in this case. It seems to me the Constitution is broad enough to authorize the exemption of such church property as is sought to be taxed in this case. It is very evident from the legislation upon this subject that the legislature intended to exempt church parsonages. When it was held the act of 1872 was not as broad as the Constitution, and only exempted property exclusively used for "public worship," it was sought to remedy the defect by the act of 1905 (Laws 1905, p. 357). But that act failed to follow the Constitution. In addition to exempting property used exclusively for "public worship," it went beyond the power conferred by the Constitution, and purported to exempt property that might not come within the designation of property used exclusively for "religious purposes." The present act, so far as it applies to church property, is free from any constitutional objection, and whether it embraces property of the character here sought to be taxed is before us for the first time. We were not called upon in *People ex rel. Thompson v. First Cong. Church*, 232 Ill. 158, 83 N. E. 536, to determine what property would be embraced under the language of the Constitution, authorizing the legislature, by general law, to exempt property used exclusively for "religious purposes," as the statute then before the court did not contain the language. Of course, the parsonage would not be exempt, under the statute then before the court, as property used exclusively for "religious worship," but its exemption was claimed under the clause exempting "parsonages or residences actually and exclusively used by persons devoting their entire time to church work."

Section 3 of article 9 of the Constitution authorizes the exemption, by general law, of all property used exclusively for school purposes. Pursuant to the constitutional power, the legislature passed an act exempting "all property of institutions of learning, including the real estate on which the institutions are located, not leased by such institutions, or otherwise used with a view to profit." The case of *Monticello Female Seminary v. People*, 106 Ill. 398, 400, 46 Am. Rep. 702, arose under that statute. The institution was originally located upon an 8-acre tract of land. Afterwards it became the owner of about 75 acres more land, part of which was used for raising vegetables and fruit for use by the institution, part for raising hay, corn, an oats to feed cows and horses kept by the school, and part of it for pasture for the stock. This land was assessed for taxation by the tax authorities, and the institution claimed it was exempt under the

statute. This court sustained that claim, and said: "The evidence further shows that all this property is necessary for the proper carrying on of the institution; that said tracts of land are used exclusively for the purposes of the institution, and that no part of the same has been leased or otherwise used with a view to profit; that it is necessary, in connection with the institution, to have cows to supply milk for the scholars and teachers, all of whom, numbering about 175 persons, reside and live within and upon the grounds of the institution; that horses are required to do the necessary hauling connected with the seminary, and that all the hay, corn, and oats raised on the place go to the feeding of the stock thereon; that nothing is ever sold off the premises, and that what is raised is but a partial supply for the institution; that the object of the institution is, as far as possible, to make it a self-sustaining one; and that what is realized over and above actual expenses is used as a fund for the education of indigent females." If that land was held and "used exclusively for the purposes of the institution," and the facts brought the case, as said by the court, "within the very words of the exemption from taxation of the Constitution and the legislation upon the subject," I am unable to see why the facts in this case do not bring it within the exemption of the Constitution and the legislation upon the subject. If land devoted to raising vegetables and fruit for use by the teachers and students, and grain and hay for live stock owned by the institution, is, within the meaning of the Constitution, used exclusively for school purposes, it would seem a church parsonage owned and used as shown by the record in this case is used exclusively for religious purposes. The *Monticello Seminary Case*, 249 Ill. 481, 94 N. E. 938, has never been overruled, but has been frequently cited in subsequent cases.

In *Monticello Seminary v. Madison County*, 249 Ill. 481, 94 N. E. 938, the school was assessed on credits. It was the owner of interest-bearing securities amounting to \$127,411.71 and claimed it was all exempt from taxation. Of that amount \$25,000 was donations or endowment funds to be loaned and the income used in providing and maintaining scholarships in the school. The principal was not to be used. The rest of the fund (\$92,411.71) was derived from tuition, board, and other income of the institution. This court held that the \$35,000 was exempt, but that the other credits were subject to taxation, although three members of the court dissent-

ed and stated that in their opinion all of the credits were exempt.

It does not require a resort to the rule of liberal construction to hold that property acquired, owned, and used as is this property, is used exclusively for religious purposes within the meaning of the Constitution and statute. The exemption authorized by the Constitution is not restricted to property used exclusively for public worship, but embraces all property exclusively—that is, primarily—used for religious purposes. A church building for public worship is essential to the successful carrying out of the work of the church, and a pastor or priest is also necessary for efficient work. The pastor or priest is a man who feels himself called of God to devote his time, energies, and talents to the work of his church and the persuading of men and women to accept religion and lead pure and holy lives. No church, society, or congregation builds a church for other than a religious purpose. A purpose is “the idea or ideal kept before the mind as an end of effort or action.” The purpose of building church houses is to promote the cause of religion, and this requires the services of a pastor or minister. As he is usually a man who devotes all his time to the work of the church and has no income except such as is paid by his congregation, it is customary to provide a place for him to live. Sometimes such provision is made a part of or connected with the church building, and sometimes, as in the case before us, a house is built on a lot adjoining the church lot. But wherever the building in which the pastor is to live is located, it is a part of the plan of the congregation to benefit mankind by preaching and teaching religion. The idea before the mind in furnishing the pastor a house is to make efficient the religious work and purpose of the church. The use to which the property is devoted, as well as its ownership, must be considered in determining whether it is exempt from taxation. If the primary object and purpose of the building is religious, its character as property exclusively used for religious purposes would not be destroyed by the fact that some uses made of it are not of a religious character. In *People ex rel. Thompson v. First Cong. Church*, supra, it was said when a building is used primarily for religious purposes and secondarily for a secular purpose, or if there should be in a church building some room used as a lodging room by the sexton or some other person employed by the church, the building would not thereby lose its character as a building used for religious purposes. The evidence in this case is that the work of the church cannot

be carried on efficiently without the constant care and attention of the pastor. The parsonage was paid for with contributions made by the church congregation. It was erected for the benefit it would be in promoting the work of the church, and not for the benefit of the pastor. There is nothing in the Constitution or statute which limits church property that may be exempted from taxation to that necessarily used for public worship. The limitation is to property exclusively or primarily provided and used for religious purposes.

In my opinion the board of review erred in deciding the property was not exempt and in ordering it taxed.

Carter, Ch. J., and Vickers, J.: We concur in the foregoing dissenting opinion of Mr. Justice Farmer.

OKLAHOMA SUPREME COURT. (Division No. 2.)

NATIONAL BANK OF COMMERCE, Plff.
in Err.,
v.
OKLAHOMA CITY.

(— Okla. —, 122 Pac. 644.)

Pleading — variance — issuance of municipal certificates.

1. The allegation that by gross negligence of city officers duplicate certificates were issued and placed on the market is not sustained by proof that they were never delivered by any one having authority to deliver them, but that they were taken without right by one having no authority to deliver them.

Municipal corporation — tax certificates — wrongful issuance — liability.

2. A mayor and city clerk, by an oversight, signed duplicate paying tax certificates in favor of the contractor. An employee in one of the city offices stole the duplicates, and he, or some one in collusion,

Headnotes by ROSSER, C.

Note. — *Liability of government or other public body for its own obligations, stolen from it.*

It will be observed that in *NATIONAL BANK v. OKLAHOMA CITY*, among a considerable number of assessment certificates to order, charged against particular lots of land, several were signed in duplicate by mistake of the city officers, and these duplicates were abstracted from the office by a clerk and through a forged indorsement came into the hands of an innocent holder for value; and that it was held that the instruments were not negotiable, and that in relying upon the honesty of the clerk the

forged the indorsement of the contractor and delivered them to plaintiff as collateral for a loan. Plaintiff made no investigation as to whether the certificates had been delivered, or as to the genuineness of the indorsement. The loan was not paid. In a suit by plaintiff against the city for negligence of its officers in signing the duplicates, held:

(1) That plaintiff was negligent in accepting the certificates without making investigation as to whether they had been regularly issued.

(2) That the fact that duplicate certificates were signed was not the proximate cause of the bank's loss. The proximate cause was the fraudulent acts of the city employee.

(March 19, 1912.)

city was no more negligent than the plaintiff in lending him money upon the certificates.

It will be seen that in the few cases on the subject of this note the courts are not agreed as to whether an obligation of a government or other public body can be given vitality by theft before delivery or after redemption.

Theft of obligations before issue.

In *Trust & Loan Co. v. Hamilton*, 7 U. C. C. P. 98, where the debentures of a city made out to a certain person or bearer were stolen before issue, it was held that under the applicable statute the debentures were negotiable instruments like promissory notes, and that they were good in the hands of a bona fide holder for value.

But it was held in *Germania Sav. Bank v. Suspension Bridge*, 73 Hun, 590, 26 N. Y. Supp. 98, that there could be no valid inception of a paper without delivery. In that case the board of water commissioners caused certain bonds to be prepared, three of which they delivered to a contractor illegally for temporary use, but these three were afterwards redeemed by the board, and the court held that the contractor had never had any title to them. The board directed the treasurer to destroy all the first bonds, and, supposing them to have been destroyed, issued other bonds of the same nature and number but at a larger rate of interest. The three bonds aforesaid and one other of the first lot of bonds, which was never delivered to anyone by the board, were stolen and sold by the treasurer, and reached the hands of a bona fide purchaser for value. The court, in holding the bonds void, said they had "disposed of the case under the theory that these bonds never were issued," and that while they did not intimate that there had been any carelessness on the part of the board, it was "unnecessary to inquire or determine whether the members of the board of water commissioners were careless or negligent in failing to insure the destruction of the bonds in question, because the defendant cannot be charged with liability 33 L.R.A. (N.S.)

ERROR to the District Court for Oklahoma County to review a judgment in defendant's favor in an action brought to recover damages for the negligent issuance of certain paving warrants by defendant which were taken by plaintiff as collateral for a loan to a third party. Affirmed.

The facts are stated in the opinion.

Messrs. Devereux & Hildreth, for plaintiff in error:

The city is liable.

Wichita Sav. Bank v. Atchison, T. & S. F. R. Co. 20 Kan. 519; *St. Louis & S. F. R. Co. v. Adams*, 4 Kan. App. 305, 45 Pac. 920; *Cincinnati, N. O. & T. P. R. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351, 43 L.R.A. 777, 47 N. E. 249; *Allen v. South Boston R. Co.* 150 Mass. 200, 5

upon that ground; they could only impose liability upon the defendant in the manner prescribed by the law which created them."

It may be allowable in this connection to refer to *Cooke v. United States*, 91 U. S. 389, 23 L. ed. 237, where in holding that if the genuine treasury notes of the United States were fraudulently and surreptitiously issued and unlawfully and surreptitiously put into circulation, the government was liable therefor in the hands of a bona fide holder, the court said: "The notes were perfect and complete as soon as printed. They did not require the signature of any officer. As soon as they had received the impression of all the plates and dies necessary to perfect their form, they were ready for circulation and use. In this respect they did not differ from the coins of the mint, when fully stamped and prepared for issue. Coin is the money of commerce, and circulates from hand to hand as such. These notes represent the promise of the government to pay money, and were intended to circulate and take the place of money, to some extent, for commercial purposes. Although not made legal tender as between individuals, they were, for their then face value, exclusive of interest, as between the government and its creditors."

—fraud of issuing officers.

There are some cases where the theft or embezzlement has been on the part of the issuing officers.

Thus in *Ronede v. Jersey City*, Fed. Cas. No. 12,031a, where city bonds had been prepared and delivered to the city treasurer, to be used in settlement of claims as presented according to a specified list, and he absconded, taking with him certain of the bonds, the court, in giving judgment for the holder, said the only questions were as to the authority to issue the bonds and the bona fides of the holder, as the principle was "well settled by the supreme court that in a suit by a bona fide holder against a municipal corporation to recover the amount of coupons due or bonds issued under authority conferred by law, no question of

L.R.A. 716, 15 Am. St. Rep. 185, 22 N. E. 917; *Archer v. Dunham*, 89 Hun, 387, 35 N. Y. Supp. 387; *Fifth Avenue Bank v. 42d Street & G. Street Ferry R. Co.* 137 N. Y. 231, 10 L.R.A. 331, 33 Am. St. Rep. 712, 33 N. E. 378; *Jarvis v. Manhattan Beach Co.* 148 N. Y. 652, 31 L.R.A. 776, 51 Am. St. Rep. 727, 43 N. E. 68; *Richardson v. Delaware Loan Asso.* 9 Houst. (Del.) 354, 32 Atl. 980; *Havens v. Bank of Taboro*, 132 N. C. 214, 95 Am. St. Rep. 627, 43 S. E. 639; *Rogers v. Burlington*, 3 Wall. 654, 18 L. ed. 79; *East Lincoln v. Davenport*, 94 U. S. 801, 24 L. ed. 322; *Pompton Twp. v. Cooper Union*, 101 U. S. 196, 25 L. ed. 803; *Ronede v. Jersey City*, Fed. Cas. No. 12,031a; *Hainer*, Modern Law of Municipal Securities, § 432; *National L. Ins. Co. v. Board of Education*, 10 C. C. A. 637, 27 U. S. App. 244, 62 Fed. 778; *West Plains Twp. v. Sage*, 16 C. C. A. 553, 32 U. S. App. 725, 69 Fed. 943; *Cadillac v. Woonsocket Inst. for Savings*, 7 C. C. A. 574, 16 U. S. App. 545, 58 Fed. 935; *Seward County v. Aetna L. Ins. Co.* 32 C. C. A. 585,

61 U. S. App. 41, 90 Fed. 222; 2 *Smith*, Modern Law of Mun. Corp. § 1671; *Black v. Cohen*, 52 Ga. 621; *Lane v. Schomp*, 20 N. J. Eq. 82; *Moran v. Miami County*, 2 Black, 722, 17 L. ed. 342; *Farr v. Lyons*, 21 Blatchf. 110, 13 Fed. 377; *Bartholomew County v. Bright*, 18 Ind. 93; *Copper v. Jersey City*, 44 N. J. L. 634; *Comanche County v. Lewis*, 133 U. S. 198, 33 L. ed. 604, 10 Sup. Ct. Rep. 286; *State v. Wichita County*, 62 Kan. 494, 64 Pac. 45.

Mr. James S. Twyford for defendant in error.

Rosser, C., filed the following opinion:

In 1903 Oklahoma City entered into a contract with the Barber Asphalt Paving Company, by which that company was to do certain curbing and paving on Harvey avenue in the city of Oklahoma City. The contract was lawful and entered into in pursuance of a valid ordinance of the city. The company did the work in compliance with its contract. As compensation for its work, there was issued to the company

form merely, or irregularity or fraud, or misconduct on the part of the agents of the corporation, can be considered."

The same theft was the cause of *Copper v. Jersey City*, 44 N. J. L. 634, where the court, in holding that a bona fide holder of the bonds might recover of the city, places its decision expressly on the point that here the bonds had been issued to the city's agent, and said: "If this bond had been executed by the municipal corporation, and locked up in its safe depository for future negotiation, and Hamilton, being without authority either to issue or negotiate it, had feloniously obtained possession of it, and put it in circulation, a different question would be presented."

In *Montvale v. People's Bank*, 74 N. J. L. 464, 67 Atl. 67, where certain city bonds payable to bearer were signed by the mayor and sealed, and duly attested by the borough clerk, some of them were sold by the borough, and the remainder left by it in the custody of the mayor until some further disposition of them should be made by it. In an action by the borough against a bank to recover certain of the bonds pledged with the bank by the mayor to secure a loan to him, it was held that the bonds were negotiable instruments, that the bank was a holder in due course under the 52d section of the negotiable instruments law, and that the bank was entitled to retain them under the provision of the 16th section of that law, providing that "where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed."

In *School List No. 16 v. State Bank*, 8 Neb. 168, where a school district placed its bonds in the hands of an agent for sale, and there was doubt as to whether the agent

had pledged the bonds to secure his own debt, the court, in holding that there had been no pledge of the bonds, was of opinion that any disposition of the bonds made by the agent to a bona fide holder for value would be binding upon the school district.

(It should be noted that in *Portsmouth Sav. Bank v. Ashley*, 91 Mich. 670, 30 Am. St. Rep. 511, 52 N. W. 74, referred to at length in the opinion of the court in *NATIONAL BANK v. OKLAHOMA CITY*, it does not appear how the bonds reached the railroad company.)

Obligations stolen after redemption.

In *District of Columbia v. Cornell*, 130 U. S. 655, 32 L. ed. 1041, 9 Sup. Ct. Rep. 694, the district had issued certificates payable to bearer, secured by the pledge of assessments on special property, and these certificates were redeemed and canceled by the district, and so stamped. Afterwards they were stolen by one of the clerks, the cancellation marks more or less removed, and they were placed upon the market before their date of maturity; and it was held that the district was not liable therefor; that although the instruments were negotiable instruments they did not partake of the character of commercial paper so as to make them good in the hands of bona fide holders for value; and that the omission to obey the provision of the act of Congress requiring that certificates on redemption should be destroyed by burning did not make the district liable therefor after they had been unmistakably canceled.

In *Branch v. Sinking Fund Com'rs*, 80 Va. 427, 56 Am. Rep. 590, where bonds were redeemed by the state, and were afterwards stolen from the treasurer's office, and

certificates, in which the cost of the work was assessed and charged against the tracts of land liable therefor. These certificates were issued in large numbers, and the mayor and clerk of the city signed and sealed them without checking them up. Duplicate numbers from 145 to 160, both inclusive, having a face value of \$3,026.01, were signed. A man named Roundtree was working in some of the city offices of Oklahoma City, though the evidence does not show in what office he was working. He wrote to the plaintiff, National Bank of Commerce, at Guthrie, and inquired if the bank would lend a friend of his \$1,200 on certain paving certificates. The plaintiff replied that if the paving certificates were regular it would make the loan, and asked him to forward copies of the original ordinance, under which the paving certificates were issued, and also a blank of the form used in the certificates. He did that, and the note was prepared at the bank and mailed to him. It was returned to the bank, signed by C. E. Biller; and what pur-

ported to be sixteen paving certificates, numbered from 145 to 160, inclusive, were inclosed with the note as collateral security for its payment. The bank then sent Roundtree a draft for \$50 and the balance of the amount to Biller. The paving certificates purported to be indorsed by the Barber Asphalt Paving Company, by E. B. Demarest, attorney in fact, and were also indorsed by C. E. Biller. The indorsement of the Barber Asphalt Paving Company was a forgery, and the certificates inclosed were never issued or delivered by the city, but were duplicates of the certificates issued to the Barber Asphalt Paving Company. The bank did not correspond with any of the officials of Oklahoma City, or with anyone else, except Roundtree, with reference to the certificates. It appears that Roundtree has absconded. There is some doubt whether such a person as Biller ever existed. If so, he was never produced.

When the first instalment came due, the certificates were presented by the bank and

reached the hands of bona fide holders for value, the court said that the holders were negligent in not making inquiry as to the bonds, as there were many reports at the time of missing state bonds, but placed its decision mainly on the ground that the bonds had ceased to be the obligation of the state, saying: "We are of opinion that, after these bonds with their appurtenances had been redeemed by the state, and taken into her possession and custody, they ceased to be her obligations, and could not again become such unless she voluntarily redelivered or reissued them. They had run their career, and fulfilled their mission, and had returned to the dusty depository of dead matter in the treasury; and they had been substituted by outstanding equivalents which represent the legal and moral obligations of the state. They had no longer any legal inception or existence as the bonds of the state, and they were and are as though they never had been; and their vitality could never be restored without intentional and voluntary redelivery by the state: certainly they could not be resurected to the righteous judgment of a court of justice by robbery or theft."

But in *Ehrlich v. Jennings*, 78 S. C. 269, 125 Am. St. Rep. 795, 58 S. E. 922, 13 Ann. Cas. 1166, it was held where a bond payable to bearer redeemed by the state was stolen by a clerk from the vault, the state was liable upon the bond to a bona fide holder for value. The bond was unmarked in disobedience of the statute, which provided that a surrendered bond "shall immediately upon such surrender be canceled and filed by the state treasurer with the permanent records of his office." The court distinguished the case of *Branch v. Sinking Fund Comrs.* supra, as being based in part on the negligence of the holders in failing

to inform themselves as to the genuineness of the bonds, and points out that in the *Cornell Case*, supra, the court declined to class the certificates with commercial paper.

In *State v. Wells, F. & Co.* 15 Cal. 336, various warrants of the state of California, made out to order, were duly delivered to the payees, indorsed by them in blank, and later paid and discharged by the treasurer, but were not, as required by statute, receipted for on their back with the date. Thereafter they were stolen, and were later presented anew by a bona fide holder, to the treasurer, who in ignorance of their prior payment exchanged bonds of the state therefor payable to bearer, and it was held that the state could not recover the bonds from such bona fide holder. The court said: "The principle applies in such case, that the loss should fall on him by whose fault or confidence it came. The condition of the person in possession would be the better under such a state of facts. We see no difference between a state and an individual in the application of this principle. A state should act with as much justice, and be held to as strict responsibility, as one of her own citizens in these matters of dealing and contract; and it is better that she should be held responsible for the acts of her agents, than that she should reap the benefits of fraud committed upon innocent third persons by those agents, under cover and color of authority."

In *Arents v. Com.* 18 Gratt. 750, coupons on the bonds of the city of Wheeling, guaranteed by the state of Virginia, were paid by the state and thereafter stolen from the auditor and, after maturity, acquired by a bona fide purchaser for value, and it was held that he could not hold them as against the state.

B. B. B.

the first instalment paid. When the second instalment came due, the Barber Asphalt Paving Company produced the valid certificates and collected the amount, and the city refused to make further payment to the plaintiff upon the certificates held by it.

The defendant filed a demurrer to the original petition, and the court took the demurrer under advisement from March, 1900, until November 15, 1907. On the last-mentioned date, the demurrer was overruled. The plaintiff contends that when the demurrer was overruled the law, as decided upon the demurrer, became the law of the case, and that the finding of law upon the demurrer could not be questioned during the further progress of the case, except by appeal. It further contends that every material allegation in the petition was proven by the testimony, and that therefore its right to recover was fixed by the overruling of the demurrer. It contends, further, that, the demurrer having been overruled November 15, 1907, all questions adjudicated in the demurrer became *res judicata* upon the expiration of one year after the demurrer was sustained, and that the order overruling the demurrer could not be appealed from after the expiration of one year.

The evidence did not prove all the material allegations of the petition. The petition, after alleging, in substance, the facts as stated above, and after alleging the issuance of valid certificates, alleges: "That by the gross negligence and carelessness of the defendant corporation and of the defendants Van Winkle and Blaise, duplicate certificates for the numbers hereinafter set out were issued by said city, and were placed on the market." The proof showed that the city did not issue the certificates. So far as the proof went, it tended to show that the certificates were fraudulently abstracted from the offices of the city and transferred to the plaintiff by forged indorsements. There is no proof whatever that the city issued the certificates; but, on the other hand, all the evidence shows that it did not do so.

The city is not liable. The tax certificates were not negotiable instruments. It is admitted that the city is not liable upon the certificates; but it is claimed that it is liable for the negligent act of its officers, by which Biller or Roundtree, or whoever committed the fraud, was enabled to defraud the bank. It is claimed that the mayor and city clerk were negligent in signing the certificates. The only act of negligence that can be charged against the mayor and clerk is that they did something

which permitted a dishonest man to perpetrate a wrong. If the officials of the city had all been honest—in other words, if Roundtree had been honest—there would have been no danger in signing the certificates. But it is claimed here that, because those certificates were duplicates of valid certificates, the city would be responsible, because the mayor and clerk did not investigate to see whether they were signing duplicate certificates. The face of the certificate covers almost two printed pages, and it appears that there were 160 of them. To have read each certificate, and compared each of the 160, would have been quite a task. Of course, the numbering might have been observed; but the mere numbering of the certificate was a matter which, of all others, would most likely be left to a subordinate employee. If, in issuing certificates of this sort, it is necessary for the mayor or chief official to check over the numbers, and to attend to such mere clerical matters, then it will not be safe for cities to employ clerical help at all; such help would be practically valueless.

In relying upon Roundtree's honesty, the city did no more than the plaintiff itself did in lending him the money upon the faith of the certificates. In the case of *Fuller v. Mower*, 81 Me. 380, 17 Atl. 312, where a town order was signed in blank by a selectman and delivered to the chairman of the board of selectmen, to be used for legitimate purposes, the chairman issued it to the plaintiff, who loaned to him certain money, relying upon his assurance that the town was in need of money to pay debts, and that the board had authority to borrow the money. The town had not authorized the borrowing of the money, and suit was brought against the selectmen who had signed the order. It was held that he was not liable. In the course of the opinion, the court said: "It is urged that the defendant was careless in signing a blank order and leaving it with Skinner. Perhaps he was. It can now be seen that it was dangerous to do so. But the defendant was not more careless in trusting Skinner with a blank order than the plaintiff was in trusting him with money when no other member of the board was present to witness or sanction the transaction. And in this particular they are *pari delicto*. And if it be true, as counsel urge, that Skinner's fraud would not have been possible but for the defendant's negligence, it is equally true that the fraud would not have been possible but for the plaintiff's negligence. Both trusted him, and both were deceived by him."

In *Portsmouth Sav. Bank v. Ashley*, 91 Mich. 670, 30 Am. St. Rep. 511, 52 N. W. 74, the village council authorized the president and clerk to sign certain bonds, but did not authorize them to deliver them. The bonds were delivered to a railroad company, which sold them to a bona fide purchaser. It was held that the purchaser could not recover. The court said: "The mere signing of bonds did not bind the village to the payment of them. They were still incomplete, and remained in the hands of the village, subject to the direction and control of the council. The village council was the only power, under the statutes, which had authority to direct the issue or delivery for the purposes for which the bonds were executed. No direction whatever was given by it to deliver the bonds, and, until authority was given by the council, the president had no more power to dispose of them than a stranger to the proceedings; and a disposition of them by the president would not confer upon the holder any greater right to enforce payment than though they were stolen from the village treasury."

In *Gould v. Wise*, 97 Cal. 532, 32 Pac. 576, 33 Pac. 323, the grantee in a deed took the deed from the table where it was lying while a purchase-money mortgage was being prepared, carried it out of the room, and executed a mortgage on the land to an innocent third person, and then returned and signed the note and mortgage for the purchase money. The court held that permitting him to take the deed out of the room was not such negligence as estopped the grantor from asserting his mortgage in preference to that of the innocent third person.

In the case at bar, the bank had no more right to trust Roundtree than did the city. Though the instrument was not negotiable, the bank made no effort to ascertain how it came into Biller's hands, made no effort to ascertain who Biller was, and relied entirely upon Roundtree to ascertain whether or not the certificates were genuine.

In *Merchants' Exch. Nat. Bank v. Bergen County*, 115 U. S. 384, 24 L. ed. 430, 6 Sup. Ct. Rep. 88, the court, speaking by Mr. Justice Field, said: "This is not a case where there existed in the board a general power to issue negotiable securities of the county, so that parties would be justified in taking them when properly executed in form by its officers. It is a case where there was no power, except as specially delegated by law for a particular purpose. All persons taking securities of municipalities having only such special power must see to it that the conditions prescribed for the exercise of the power existed. As an

essential preliminary to protection as a bona fide holder, authority to issue them must appear."

In *Anthony v. Jasper County*, 101 U. S. 693, 25 L. ed. 1005, which was an action to recover upon certain bonds issued to a township in the state of Missouri, the court said: "In order to recover in this case, it became necessary for the plaintiff to prove that the bonds from which the coupons sued on were cut had been executed according to law. He did prove that they were signed by the presiding justice and clerk of the court, and were sealed with the seal of the court. This, before the act of March 30, 1872, would have been enough; but after that more was necessary. The public can act only through its authorized agents; and it is not bound until all who are to participate in what is to be done have performed their respective duties. The authority of a public agent depends on the law as it is when he acts. He has only such powers as are specifically granted; and he cannot bind his principal under powers that have been taken away by simply antedating his contracts. Under such circumstances, a false date is equivalent to a false signature; and the public, in the absence of any ratification of its own, is no more estopped by the one than it would be by the other. After the power of an agent of a private person has been revoked, he cannot bind his principal by simply dating back what he does. A retiring partner, after due notice of dissolution, cannot charge his firm for the payment of a negotiable promissory note, even in the hands of an innocent holder, by giving it a date within the period of the existence of the partnership. Antedating, under such circumstances, partakes of the character of a forgery, and is always open to inquiry, no matter who relies on it. The question is one of the authority of him who attempts to bind another. Every person who deals with or through an agent assumes all the risks of a lack of authority in the agent to do what he does."

In *Terry v. Allis*, 20 Wis. 32, the first paragraph of the syllabus is as follows: "Where a city order has never been delivered to or indorsed by the payee, no one can acquire such a title to it as will enable him to collect its amount of the city."

It must not be forgotten that the certificates were not obligations of the city. They were tax certificates creating a lien on certain lots for paving tax, and were payable by the lot owners.

The distinction between liability upon the certificates and liability for negligence in signing them has not been overlooked. The term "negligence," in this connection,

though commonly used, is probably inaccurate. It seems to be more a question of estoppel. If the question were one of negligence, it would be easy of solution. "In order to render a person liable for negligence, it must be shown that the damage was the ordinary or probable consequence of the act." It will not do to reverse the ordinary presumption that people are honest, and say that the ordinary or probable consequence of signing too many certificates is that some one will steal them and place them in circulation. See *Burson v. Huntington*, 21 Mich. 436, 4 Am. Rep. 497. Besides the act of signing was not the proximate cause of the bank's loss. The proximate cause was the theft of Roundtree, which was not necessarily connected with the signing of the certificates. The signing of the duplicates, at most, was only a condition, and not a cause of plaintiff's loss. The principle here involved is discussed in *O'Herron v. Gray*, 168 Mass. 573, 40 L.R.A. 498, 60 Am. St. Rep. 411, 47 N. E. 429. Among other things, it is said: "If the negligence is such as might be an appropriate foundation for an action at law to recover damages by one who advances his money, it may be availed of by way of estoppel, to avoid circuitry of action. But the facts of this case fall short of showing such negligence. The guardian intrusted the certificates to a national bank of good reputation. Neither she nor anybody else had any reason to anticipate larceny or embezzlement of the property, and a fraudulent use of it, to deceive others, by a trusted officer of the bank. She had no reason to expect that, if the certificates were stolen, anybody would take them without inquiring whether, as trust property, they had been disposed of by the guardian for the benefit of her wards. The conduct of the guardian was not a cause, but a mere condition of the defendant's advance of money upon the faith of the certificates. A criminal act of Francis intervened as the cause of the defendant's loss; and this the guardian had no reason to anticipate."

The cases cited by plaintiff are not in point. In all the cases cited, the securities on which recovery was had were actually delivered by the person authorized to deliver them. In this case, the certificates were never delivered. They were stolen.

The principle that when one of two innocent persons must suffer by the act of a third, he who first trusted must first suffer, does not apply. The city did not trust Roundtree any further than it did any other employee. It in no way clothed him with evidence of ownership. The fact that the certificates were issued in duplicate

possibly made it easier to perpetrate the fraud. At least, it probably prevented the fraud from being discovered as soon as if there had been only one set of certificates. It may be that the opportunity to perpetrate the fraud may have tempted Roundtree to attempt it; but the bona fide purchaser from the thief, who entered by an unlocked door, cannot defend against the owner because of his negligence in leaving the door unlocked. Roundtree could have stolen valid certificates and defrauded the bank in the same way.

It is not necessary to enter into the questions arising out of the fact that the instruments, out of which this cause of action arises, were special tax certificates, upon which, if genuine, the city would not be liable, and out of the distinctions that might be urged as existing between the liability of a public and private corporation under the same circumstances.

The judgment of the lower court should be affirmed.

Per Curiam:

Adopted in whole.

NORTH CAROLINA SUPREME COURT.

H. W. CALDWELL, Appt.,
v.

JOSEPH W. LITTLE, Admr., etc., of D. T. McCulloch, Resp't.

(158 N. C. 351, 74 S. E. 10.)

Insurance — legal dependents — definition.

Brothers and sisters and nephews and nieces not living with or supported by assured are not legal dependents within the meaning of a provision making the proceeds of a benefit insurance policy payable to such persons, and the proceeds are therefore assets in the hands of the administrator.

(March 13, 1912.)

APPEAL by plaintiff from a judgment of the Superior Court for New Hanover County holding the proceeds of a mutual benefit policy to be assets in the hands

Note. — The question, Who is a "dependent," within the statutes or rules defining beneficiaries of mutual benefit societies, is covered in the notes to *Caldwell v. Grand Lodge*, A. O. U. W. 2 L.R.A.(N.S.) 653; *Royal League v. Shields*, 36 L.R.A.(N.S.) 208; and *Goff v. Supreme Lodge*, R. A. 37 L.R.A.(N.S.) 1191.

As to who is a member of a "family" within contract of benefit society, see note to *Supreme Lodge, O. M. P. v. Nevins*, 3 L.R.A.(N.S.) 334.

of the administrator for payment of debts as against the claims of brothers, sisters, nephews, and nieces. Affirmed.

The facts are stated in the opinion.

Messrs. Rountree & Carr for plaintiff.

No counsel for defendant.

Brown, J., delivered the opinion of the court:

The only assignment of error relates to the correctness of the following ruling of the judge: "Second. That the funds received from the Junior Order of United American Mechanics are hereby declared to be assets in the hands of the administrator for the payment of debts of D. T. McCulloch, and the court finds as a fact, on the admission of all parties, that the deceased was a bachelor and died without leaving children, or any relative living with him, but did have brothers, sisters, and nephews and nieces, whom the court holds not 'legal dependents' under the terms of the certificate offered in evidence." It appears that the membership certificate in the Junior Order of United American Mechanics provides that any benefit accruing thereunder shall be payable to the legal dependents of the deceased. The benefit for \$500 was paid over to the administrator by the Junior Order of United American Mechanics, with the understanding that it was to be distributed as provided by law, and the administrator desires to disburse it among creditors, or among the brothers and sisters and nephews and nieces of the deceased, as the court may hold is proper.

Upon the findings of fact, we agree with the court below that the deceased died leaving no "legal dependents" within the meaning of the certificate of membership. His brothers and sisters did not live with him, and, for aught that appears, were in no legal sense dependent upon him, any more than he was dependent upon them. While the meaning of the term "legal dependent" has not been defined in any case before this court, we have abundant authority from other courts, as well as text writers, in support of our decision. Webster's Dictionary defines the word "dependent" primarily to mean "one who depends; one who is sustained by another, or who relies on another for support or favor." In *Keener v. Grand Lodge, A. O. U. W.* 38 Mo. App. 543, the "legal dependents" of a person were restricted to those whom he was legally bound to support. Upon this theory a mistress is held not to be a legal dependent, and the same as to servants and retainers. *Ibid.* *West v. Grand Lodge, A. O. U. W.* 14 Tex. Civ. App. 471; 37 S. W. 966. In a Wisconsin case the supreme court defined the word "depend-

ent" as follows: "We think the true meaning of the word 'dependent,' in this connection, means some person or persons dependent for support in some way upon the deceased." *Ballou v. Gile*, 50 Wis. 614, 7 N. W. 561. Mr. Bacon, in his work on *Benefit Societies*, vol. 1, § 261, after reviewing the cases, says: "We are forced to the conclusion that they limit the term 'dependents' to those who reasonably rely upon another for subsistence, nourishment, and support." In Massachusetts it is held a mother not living with her son, and not relying on him for support, is not a legal dependent. *McCarthy v. Supreme Lodge, N. E. O. P.* 153 Mass. 314, 11 L.R.A. 144, 25 Am. St. Rep. 637, 26 N. E. 866. And the same ruling as to a brother is made in *Supreme Council, A. L. H. v. Smith*, 45 N. J. Eq. 466, 17 Atl. 770. In *Supreme Council, A. L. H. v. Perry*, 140 Mass. 580, 5 N. E. 634, it is held that a sister (nothing else appearing) is not a legal dependent. In 3 Am. & Eng. Enc. Law, 2d ed. 969, it is said: "In passing upon the designation of 'dependents,' the courts have generally construed it strictly, and held it to mean those relying upon the insured for support." In 2 Words & Phrases, pp. 1991, 1992, many cases are cited and quoted from at length, sustaining this definition of the term.

As there are no "legal dependents," it follows that the administrator is entitled to the fund to be applied to the debts of the deceased, if any, and otherwise distributed in due course of administration. Affirmed.

MISSOURI SUPREME COURT.

THOMAS C. CAMPBELL, Appt.,

v.

CITY OF CHILLICOTHE, Resp't.

(239 Mo. 455, 144 S. W. 408.)

Highway — gate across sidewalk — liability of municipality.

1. A municipal corporation is liable for injury to a pedestrian on a sidewalk by collision, in the night, with a gate which is so constructed that it will stand open across the walk so as to obstruct it, if the municipality had notice of, or, by the exercise of

Note. — For exhaustive discussion of the liability of a municipal corporation for permitting an obstruction to be placed in the street, see note to *McKim v. Philadelphia*, 19 L.R.A.(N.S.) 507.

The whole matter of the liability of municipality corporations for defects or obstructions in streets is covered by a note to *Elam v. Mt. Sterling*, 20 L.R.A.(N.S.) 513.

ordinary care, could have discovered, the defect in time to remedy it prior to the injury.

Same — sufficiency of notice.

2. It is error to make the right to recover against a municipal corporation for injury caused by a defect in a sidewalk depend upon actual notice for the defect, if there is evidence tending to show that it was chargeable with constructive notice.

Evidence — absence of light on highway — action for injury.

3. Although the fact that an electric light located near the place where an accident occurred on a public street, was not burning at the time of the accident, is not evidence of negligence on the part of the municipality, it may be considered by the jury as tending to show why the injured person did not avoid the obstruction.

Appeal — instruction — absence of objection.

4. An exception to an instruction is sufficient to raise the question of its correctness, although no objection is made to it.

(February 6, 1912.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Linn County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Scott J. Miller and Charles M. Miller, for appellant:

It is negligence to hang a gate so that when open it swings over and on the sidewalk.

Decatur v. Hamilton, 89 Ill. App. 561; *Bohen v. Waseca*, 32 Minn. 176, 50 Am. Rep. 564, 19 N. W. 730; *Jarrell v. Wilmington*, 4 Penn. (Del.) 454, 56 Atl. 379; *Bieling v. Brooklyn*, 120 N. Y. 98, 24 N. E. 389; *Hume v. New York*, 74 N. Y. 264; *Mansfield v. New York*, 119 App. Div. 199, 104 N. Y. Supp. 386; *Kiley v. Kansas City*, 69 Mo. 102, 33 Am. Rep. 491; *Barr v. Kansas City*, 105 Mo. 550, 16 S. W. 483.

Instruction 7 is erroneous and should not, under the evidence, have been given. It was prejudicial to plaintiff and reversible error.

Clark v. Brookfield, 97 Mo. App. 16, 70 S. W. 934; *Deland v. Cameron*, 112 Mo. App. 708, 87 S. W. 597; *Cropper v. Mexico*, 62 Mo. App. 388; *Maus v. Springfield*, 101 Mo. 613, 20 Am. St. Rep. 634, 14 S. W. 630; *Sneed v. Salisbury*, 94 Mo. App. 429, 68 S. W. 369; *Huff v. Marshall*, 97 Mo. App. 547, 71 S. W. 477; *Young v. Webb City*, 150 Mo. 342, 51 S. W. 709; *Market v. St. Louis*, 56 Mo. 189; *Shipley v. Bolivar*, 42 Mo. App. 401.
39 L.R.A. (N.S.)

Messrs. Frank W. Ashby and Frank Sheetz & Son, for respondent:

If the gate was properly constructed, in reasonably good repair, and afforded, when closed, a reasonably safe sidewalk for public use, it was a nuisance *per se*.

Fehlauer v. St. Louis, 178 Mo. 635, 77 S. W. 843; *Stoetzele v. Swearingen*, 90 Mo. App. 588.

Roy, C., filed the following opinion:

This is a suit to recover damages for personal injuries, tried in the circuit court of Linn county, at Brookfield, on a change of venue from Livingston county. The verdict being for defendant, plaintiff appeals.

The defendant is a municipal corporation under a special charter, having at the time of the trial a population of about 10,000.

The facts constituting the negligence are stated in the petition as follows: "That on or about February 20, 1906, and for a long time prior thereto, there was a certain gate (which was about 3 feet high and 3½ feet long) so hung or fastened to a post or fence, so that in opening said gate, or when opened, it would swing out over and stand on said street and sidewalk within and upon the east side of Elm street, and in front of a house and lot situated and abutting on said sidewalk and street, known as No. 823 Elm street, in said city. That said gate, when so hung or fastened, as aforesaid, and when open on said street and sidewalk, constituted a dangerous obstruction and a nuisance on said street and sidewalk, and persons passing thereon were liable to be injured by reason of said gate and obstruction. Plaintiff further states on or about February 20, 1906, and for a long time prior thereto, that the defendant carelessly and negligently maintained and caused or permitted said gate to be so hung or fastened, as aforesaid, well knowing that said gate was dangerous, and that it would be open many times a day and night, and when open it would stand out on and over said sidewalk and street, and would constitute a dangerous obstruction and a nuisance in and upon said sidewalk and street; and that persons passing along and over said sidewalk and street would be liable to be injured thereby, and that said gate and obstruction was negligently and carelessly caused or permitted by said defendant to be and remain in a dangerous and defective condition, and to habitually stand open in and on said sidewalk and street for a great length of time prior to and including the 20th day of February, 1906; that the defendant knew, or by the exercise of ordinary care would have known, of the

existence of said gate, and that it was so hung or fastened, as aforesaid, and was in a defective condition, and habitually stood open in and on said sidewalk and street, and of the dangerous condition of said sidewalk and street by reason thereof, in time, by the exercise of ordinary care, to have caused said gate and obstruction to be removed, and said sidewalk and street made secure and safe, before plaintiff was injured, but carelessly and negligently failed and neglected to do so." The answer is a general denial, with a plea of contributory negligence.

Plaintiff was a citizen of Chillicothe, a traveling salesman, and on returning home on the night of February 20, 1906, a dark night, with a misting rain, he ran into or against a wooden picket gate in front of the residence of Mr. Theodore Carpenter, and broke both bones of his leg just above the ankle. The gate was standing more or less open out, on, or across the sidewalk. The nearest street light, about a block distant, was out. The gate was about two blocks from the public square, and about one block from the plaintiff's residence. The gate, having been removed from its place in the gateway, was rehung some time in November, 1906, and, after being up a few weeks, was knocked down or torn down in some way, and, after setting in the yard for a considerable time, was again rehung in its old place, with a strap hinge below and a door screen hinge, with a spring, at the top. Plaintiff's evidence tended to show that it was hung the last time six or eight weeks before the injury, and that the top hinge was broken, so as not to hold the gate, for a week or more before the injury. Defendant's evidence tended to show that the last hanging of the gate was a week or ten days before the injury, and the breaking of the top hinge two days before the injury. Mr. Grace, a member of the city council, passed there on the sidewalk three or four times a day. There was evidence tending to show that the gate usually stood open, and evidence to the effect that it was kept closed. A witness for defendant testified the gate would naturally lean out if not kept closed; and another testified that the latch would not fasten, but by pulling the gate in between the posts it would remain there tight.

Among other instructions, the court gave the following at the instance of defendant:

"(2) The court instructs the jury that the fact that the electric light was not burning on the corner of Calhoun and Elm streets at the time the plaintiff alleges he was injured is no evidence against the defendant of any negligence, and you will not therefore consider it."

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"(3) The court instructs the jury that the city is not an insurer or warrantor of the condition of its sidewalks; nor is every obstruction thereon actionable, though it may have caused the injury sued for. And, though you may believe from the evidence that the gate in question did, when open, swing over the line of the sidewalk, still a property owner abutting on a sidewalk has a right to make a proper and reasonable use thereof, as long as such use is consistent with the easement of the public to pass over it. Therefore, if you believe from the evidence that the gate in question, when closed, afforded a reasonably safe sidewalk for public use, you cannot find for plaintiff because of the fact that said gate did, when in a proper condition of repair and opened for the purpose of enabling persons to pass in and out of the premises, open and swing outward and partially across the sidewalk at a point where the injury is said to have occurred."

"(7) The court instructs the jury that there is no evidence in this case that the defendant city had any actual notice that the gate mentioned in the evidence was standing upon or over the sidewalk."

"(8) The court instructs the jury that if they believe from the evidence that the gate mentioned in the evidence was put in place on February 13, 1906, then, before the plaintiff can recover in this case, he must show to your satisfaction, by a preponderance of the evidence, not only that the gate was standing or hanging over the sidewalk after that date, but, also, that said gate was so standing open over said sidewalk a sufficient length of time prior to the accident that the defendant, by the exercise of ordinary care, could have discovered the same, and, unless the plaintiff has so shown, your verdict must be for the defendant."

1. The obligation of a city to keep its streets and sidewalks in repair is not limited to the defects existing in a street. Dangerous ditches, excavations, and walls by the side of a sidewalk are within the rule holding a city liable. *Kiley v. Kansas City*, 87 Mo. 103, 56 Am. Rep. 443; *Bassett v. St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446; *Halpin v. Kansas City*, 76 Mo. 335; *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528.

In *Kiley v. Kansas City*, supra, it was held the duty of the city to guard against injuries to persons using a sidewalk by the falling of a dangerous wall standing on the side of the street; and in *Franke v. St. Louis*, 110 Mo. 516, 19 S. W. 938, the city was held liable for negligently permitting the wall of a burned building to stand on the side of the sidewalk with

loose stones therein, which fell and injured the passer-by on the sidewalk.

It has been very recently held in Massachusetts, in *Keating v. Boston*, 206 Mass. 327, 92 N. E. 431, 19 Ann. Cas. 464, that a jury is warranted in finding that a coal-hole cover which, when stepped upon, will tip up unless fastened, is so likely to be unfastened that a city which used reasonable diligence after it had, or in the exercise of proper care might have had, notice of this condition, would not allow it to be there at all.

If the gate was so constructed and used that at times, while no one was passing through or holding the same, it would stand open on or across the sidewalk, so as to be an obstruction to the sidewalk, and if its condition and use in that respect were such that an ordinarily prudent person, responsible for and knowing its condition and use, would have remedied the same, then the city is liable, provided it had notice of that condition, or by the exercise of ordinary care could have discovered it, in time to remedy it prior to the injury. In order that a city be held responsible for injury by a falling wall, it is not necessary that the city should know that the wall is falling. It is sufficient that it knows the wall is so liable to fall that ordinary care requires its abatement. So in this case it was not necessary that the city should know that the gate was standing open at the particular time of the injury. It was sufficient if the city knew, or by the exercise of ordinary care and caution would have known, the condition and use of said gate, in time to remedy the same before the injury. Such being the law, instructions numbered 3 and 8, given for defendant, were clearly wrong.

2. Instruction No. 7 is erroneous. It is true that there was no direct evidence of notice; but there was circumstantial evidence from which the jury might infer notice. This same instruction was held reversible error in the case of *Clark v. Brookfield*, 97 Mo. App. 16, 70 S. W. 934. The evidence, as above stated, shows that Mr. Grace, a member of the city council, passed several times a day along the sidewalk by that gate, and from that fact the jury might have inferred that the city had notice. Besides, there was other evidence tending to the same effect.

3. Instruction No. 2 is erroneous. The fact that the electric light was not burning was not evidence of negligence on the part of defendant; but it was proper evidence going to show why it was that plaintiff did not see the obstruction, and the jury had a right to consider it for that purpose.

Respondent makes the point that, al-

though there was an exception to the giving of defendant's instructions, there was no objection made to such instructions. It is insisted that under the ruling in *Sheets v. Iowa State Ins. Co.* 225 Mo. 613, 126 S. W. 413, the question is not properly before the court. That case was expressly overruled as to that point in *Harding v. Missouri P. R. Co.* 232 Mo. 444, 134 S. W. 641, Ann. Cas. 1912 B. 1221.

The judgment is reversed, and the cause remanded.

Bond, C., concurs.

Per Curiam:

The foregoing opinion of **Roy, C.**, is adopted by the court.

All the Judges concur.

FLORIDA SUPREME COURT.

WALTER ACKER, JR., Plff. in Err.,
v.

WILLOCK L. BELL.

(— Fla. —, 57 So. 356.)

Militia — enlistment of minor — validity.

Under the Constitution and statutes of Florida, a minor over the age of eighteen years is bound by his enlistment into the military service of the state, even though the consent of his parents was not obtained for such enlistment.

(December 12, 1911.)

Headnote by PARKHILL, J.

Note. — Enlistment of minor without parent's consent in army, navy, or militia.

This note is confined strictly to the question as to whether the enlistment of a minor in the army or navy without the consent of parent or guardian is, under the statute regulating such enlistments then in force, a valid contract; and also as to whether such statute is for the benefit of the minor, or for the benefit of the parent or guardian only. The question of the right of a minor unlawfully enlisted in the army and navy, to discharge on habeas corpus from custody of court-martial under charge of desertion or fraudulent enlistment, is considered in a note attached to *Dillingham v. Booker*, 18 L.R.A.(N.S.) 956, and so is not touched upon in this note. That Congress, under the Constitution of the United States, has power to enlist minors in the army and navy without the consent of the parents, guardians, or masters, is not questioned, but the effect of statutes prohibiting the enlistment of minors without such consent has given rise to many decisions many of which are

ERROR to the Circuit Court for Escambia County to review a judgment granting a writ of habeas corpus for the discharge of petitioner's minor son from the custody of respondent. Reversed.

The facts are stated in the opinion.

Mr. Emmett Wilson for plaintiff in error.

Mr. Scott M. Loftin for defendant in error.

Parkhill, J., delivered the opinion of the court:

On the 2d day of August, 1911, the defendant in error filed his petition for a writ of habeas corpus, seeking the discharge of Bryant Merritt Bell, the son of petitioner, from the custody of Walter

Acker, Jr., as the commanding officer of Company M, First Regiment of the National Guard of Florida. The discharge of Bryant Merritt Bell was sought upon the ground that his enlistment as a private in said company was illegal and without authority of law, in that he enlisted on the 1st day of June, 1911, when twenty years old, being then and now under the age of twenty-one years, and without the consent and against the wishes of his father, and that his father is entitled to the custody of his said minor son.

The writ issued, and Acker, for return thereto, alleged that he is the captain commanding said Company M, First Regiment, Florida National Guard, and that he only requires said Bryant Merritt Bell to appear

conflicting. The cases have been classified with reference to the acts in force when they were decided, so as to enable the reader the better to judge of their value as precedents in cases arising under the acts now in force.

Regular army—1802.

The act of 1802 provided that no person under the age of twenty-one should be enlisted by any officer without the consent of his parent, guardian, or master first had or obtained; and this provision was in force until 1872, when § 1117 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 813), went into effect, except when it was suspended to meet the exigencies of the War of 1812, the Mexican War, and the Civil War. And so enlistments of minors during the period that such provision was in force, which were made without the consent of parent or guardian, were held to be illegal in the following cases: *Re Keeler*, 1 Hempst. 306, Fed. Cas. No. 7,637; *Re McDonald*, 1 Low. Dec. 100, Fed. Cas. No. 8,752; *Seavey v. Seymour*, 3 Cliff. 439, Fed. Cas. No. 12,596; *United States v. Anderson*, Cooke, 143, Fed. Cas. No. 14,449; *Re Carlton*, 7 Cow. 471; *Re Wiesenberger*, 7 Ohio Dec. Reprint, 529; *United States ex rel. Henderson v. Wright*, 5 Phila. 299, Fed. Cas. No. 16,778; *Com. ex rel. Webster v. Fox*, 7 Pa. 336; *Com. ex rel. Leake v. Blake*, 8 Phila. 523; *United States v. Anderson*, Cooke (Tenn.) 143.

And in *Re Andrews*, 1 Haskell, 87, Fed. Cas. No. 369, it was held that a minor who enlisted in the army without the parent's or guardian's consent must be discharged on request of the father.

But in *Re Riley*, 1 Ben. 408, Fed. Cas. No. 11,834 (decided in 1867), it was held that enlistment of a minor over eighteen years without the consent of the father was valid, and his release was, on the petition of the father, refused. This decision was based on the opinion that the provision of the act of 1802 prohibiting the enlistment of minors under twenty-one years of age without the consent of parent or guardian was in effect

repealed and superseded by the act of 1814, which authorized the enlistment of men between the ages of eighteen and fifty, and that such act was then still in force. This decision is in direct conflict with *Re Andrews*, supra, decided in the same year, where it was held that enlistment of any minor without the consent of guardian or parent was invalid, the court there stating that the act of 1815, which was not noted in *Re Riley*, and which provided that men should be recruited in the same manner and with the same limitations as were authorized by the act of 1802, repealed the act of 1814, and revived the provision of the act of 1802 in respect to the validity of enlistment of minors without the consent of parent or guardian. And the same opinion was expressed in *Re McDonald*, 1 Low. Dec. 100, Fed. Cas. No. 8,752. And in *Seavey v. Seymour*, 3 Cliff. 439, Fed. Cas. No. 12,596, it was said that in *Re Riley*, the court, in making its decision, overlooked the act of 1815.

And *Phelan's Case*, 9 Abb. Pr. 286, which held that enlistment of minors of eighteen without the parent's consent was valid, is cited in *Re McDonald*, 1 Low. Dec. 100, Fed. Cas. No. 8,752, as being of little weight, as the act of 1815 was overlooked.

And in *Dabbs's Case*, 12 Abb. Pr. 113, 21 How. Pr. 68, it was held that the provision of the act of 1802 requiring consent of parents of minors to enlistment, which had been abrogated by the act of 1814, was restored by the act of 1815.

—section 1117, U. S. Rev. Stat.

Section 1117 of U. S. Rev. Stat. provides that no person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardian, provided that such minor has parents or guardian entitled to his custody and control.

And so in *Re Von Dieselskie*, 5 Mackey, 485, it was held that under such section a minor cannot be legally enlisted in the

for regular and special drills of said company, and that otherwise he has not restrained the liberty of the said Bell. A motion to quash the return was sustained, and Bryant Merritt Bell was discharged from custody of said Acker. Thereupon a writ of error was sued out to this court.

Under the assignments of error and pleadings herein, the only question presented is whether the consent in writing of parents or guardians of a minor over the age of eighteen years is necessary for the valid enlistment of such minor in the National Guard of Florida.

According to the provisions of § 1 of article 14 of the Constitution of 1885 of this state, "all able-bodied male inhabitants of the state, between the ages of eighteen

and forty-five years, that are citizens of the United States, or have declared their intention to become citizens thereof, shall constitute the militia of the state."

Section 670 of the General Statutes of 1906 of this state provides: "That portion of the militia organized as a land force shall be known and designated as the Florida State Troops, and shall be composed of able-bodied volunteers between eighteen and forty-five years of age. Every applicant for enlistment shall furnish satisfactory proof of good character, and shall, before taking the oath of enlistment, be subjected to a physical examination conforming, as nearly as possible, to the requirements for enlistment in the United States Army."

Like unto the statute of this state is the

United States army without the consent of his parent or guardian.

And in *Re Chapman*, 2 L.R.A. 332, 37 Fed. 327, and *United States ex rel. Deming v. Hanchett*, 18 Fed. 26, it was held that under such section the enlistment of a minor without the written consent of parent or guardian was illegal and of no effect.

And to same effect are *Re Kaufman*, 41 Fed. 876, and *Ex parte Houghton*, 129 Fed. 239.

But in *Re Dowd*, 90 Fed. 718, and *Ex parte Lewkowitz*, 163 Fed. 646, it was held that under § 1117 the enlistment of a minor without his parent's consent was voidable only.

And also in *Re Morrissey*, 137 U. S. 157, 34 L. ed. 644, 11 Sup. Ct. Rep. 57, and *Re Miller*, 52 C. C.A. 472, 114 Fed. 838, it was held that the enlistment of a minor under twenty-one, under § 1117, was valid as to the infant.

In *Re Perrone*, 89 Fed. 150, it was held that § 1117 did not authorize the release of a minor whose parents are nonresident aliens, on petition of a guardian appointed since the enlistment.

In *Ex parte Hubbard*, 182 Fed. 76, it was held that a minor under sixteen who enlisted in violation of § 1118 of the Revised Statutes of the United States, prohibiting enlistments at such age, and who remained in the army until he passed the age of sixteen, stands like a minor who has enlisted without his parent's consent when over sixteen years of age.

And so the rule seems now to be that the enlistment of a minor under § 1117 is valid as to the infant, but that it is voidable at the instance of the parent or guardian entitled to his services.

Enlistment in volunteer army.

In *United States v. Lipscomb*, 4 Gratt. 41, it was held that a minor who enlisted as a volunteer without the consent of his father, under the act of 1846, for the prosecution of the Mexican War, would not be discharged either on application of himself or his father, as such act did not forbid 39 L.R.A.(N.S.)

enlistment of infants under twenty-one years in the volunteer corps.

And in *United States v. Blakeney*, 3 Gratt. 405, it was held that the master to whom a minor who had enlisted under the same act was apprenticed could not secure his release.

In *Lenahan v. Birge*, 30 Conn. 438, it was held that the provisions of the acts of Congress of 1802, 1808, and 1815, prohibiting enlistments of minors without the parent's consent, had no application to enlistments of volunteers under authority of the state for the service of the United States, and so the parent's petition for the discharge of a minor over eighteen, who enlisted without his consent as a member of a regiment of volunteers organized under an act of the state of 1861, which prescribed no limit as to age of volunteers, was refused.

And in *Re Disinger*, 12 Ohio St. 256; *Re Gregg*, 15 Wis. 479; and *Re Higgins*, 16 Wis. 351, it was held that, under the act of 1862, which abrogated requirement of consent of parent or guardian to enlistment of a minor, and provided only that no minor under eighteen years should be enlisted, the enlistment of a minor over eighteen without the parent's consent was valid, and so his discharge on habeas corpus at the suit of the father was refused.

And in *Re Beswick*, 25 How. Pr. 149, it was held that under the act of 1862 the consent of parents was unnecessary to the enlistment of a minor over eighteen years in the volunteer service.

State militia.

In *Stevens v. Foss*, 18 Me. 19; *Porter v. Sherburne*, 21 Me. 258, and *Re Dewey*, 11 Pick. 265, it was held that the enlistment of a minor between eighteen and twenty-one in a state militia without the consent of parent, guardian, or master was binding upon such minor.

Navy.

In *United States v. Bainbridge*, 1 Mason, 71, Fed. Cas. No. 14,497, Judge Story was of the opinion that, under the naval acts then in force, the consent of the father was

act of Congress entitled "An Act to Promote Efficiency of the Militia, and for Other Purposes,"—Act Jan. 21, 1903, chap. 196, 32 Stat. at L. 775, (U. S. Comp. Stat. Supp. 1909, p. 377), as amended by Act May 27, 1908, chap. 204, 35 Stat. at L. 399, (U. S. Comp. Stat. Supp. 1909, p. 379), and as amended by Act April 21, 1910, chap. 185, 36 Stat. at L. 329, U. S. Comp. Stat. Supp. 1911, p. 429,—declaring in § 1:

"That the militia shall consist of every able-bodied male citizen of the respective states and territories and the District of Columbia, . . . who is more than eighteen and less than forty-five years of age, and shall be divided into two classes: The organized militia, to be known as the National Guard of the state, territory, or Dis-

trict of Columbia, or by such other designations as may be given them by the laws of the respective states or territories; the remainder to be known as the reserve militia," etc.

"An enlistment," said Mr. Justice Brewer, in the case of *Re Morrissey*, 137 U. S. 157, 34 L. ed. 644, 11 Sup. Ct. Rep. 57, "is not a contract only, but effects a change of status. . . . It is not, therefore, like an ordinary contract, voidable by the infant. At common law an enlistment was not voidable either by the infant or by his parents or guardians. *Rex v. Rotherfield Greys*, 2 Dowl. & R. 628, text 634, s. c. 1 Barn. & C. 345, text 350; *Rex v. Lytchet Matraverse*, 1 Mann. & R. 25, text 31, s. c. 7 Barn. & C. 226, text 231, 6 L. J. Mag. Cas. 11; *Com. v.*

not necessary to the valid enlistment of the minors, while District Judge Davis was of the contrary opinion.

In *Com. v. Downes*, 24 Pick. 227 (decided in 1836), it was held that a minor who enlisted in the navy should be discharged on application of his nonconsenting guardian.

—act of 1837.

The act of 1837 provided that "it shall be lawful to enlist boys for the navy with the consent of their parents or guardians, not being under thirteen nor over eighteen years of age, to serve until they shall arrive at the age of twenty-one; and it shall be lawful to enlist other persons for the navy, to serve for a period not exceeding five years. . . ." 5 Stat. at L. 153, chap. 21.

And so in *Re Collins*, 25 How. Pr. 157; *Gormley's Case*, 12 Ops. Atty. Gen. 258, and in 21 Ops. Atty. Gen. 327, it was held that under such act a minor over eighteen could enlist in the navy without the consent of parent or guardian, such minors being considered as included in term such "other persons." And to the same effect is *United States ex rel. Rush v. Watson*, 2 Hayw. & H. 226, Fed. Cas. No. 16,650a.

But in *Re McLave*, 8 Blatchf. 67, Fed. Cas. No. 8,876, it was held that a proper construction of the act of 1837 made unlawful the enlistment of boys for the navy, unless they were boys not under thirteen nor over eighteen, and unless, when they were of that description, they enlisted with the consent of their parents or guardians; and so the enlistment of a minor eighteen years and five months old was held illegal, and he was discharged on petition of his father, who had not consented to the enlistment.

—sections 1418 and, 1419 U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 1007.

Section 1418, U. S. Rev. Stat. provides that boys between the ages of fourteen and eighteen may be enlisted to serve in the navy until they reach twenty-one; other persons may be enlisted to serve for a period not exceeding five years, etc. Section 39 L.R.A. (N.S.)

1419 provides that minors between fourteen and eighteen shall not be enlisted without the consent of their parents or guardians. These sections were enacted in 1837, and have been carried forward in various revisions of the statute since that time.

In *Thomas v. Winne*, 58 C. C. A. 613, 122 Fed. 395, and *Re Oliver*, 1 Alaska, 1, it was held that under § 1418, a minor over eighteen could be enlisted without the consent of the parents or guardians.

And in *Re Norton*, 98 Fed. 606, discharge of a minor over eighteen when he enlisted was refused on habeas corpus at the suit of the parent.

And in *Re Hayes*, Fed. Cas. No. 6,261a, a minor twenty years of age who had enlisted in the navy without the consent of his mother, who was the only surviving parent, was discharged on habeas corpus proceedings upon refunding the amount of advance made upon enlistment.

In *Re Falconer*, 91 Fed. 649, it was held that under § 1419 enlistment of a minor under eighteen without the parent's consent was void, though he had falsely stated that his parent was dead. And it was further said that the father's failure to take out a writ until after his son was eighteen years of age did not validate the enlistment, nor was the continued service of the son after eighteen tantamount to a re-enlistment; and so his release was granted on petition of his father.

And in *Ex parte Lisk*, 145 Fed. 860, it was held that a minor between fourteen and eighteen cannot, under any circumstances, under § 1419, be lawfully enlisted without the consent of parent or guardian.

But in *United States v. Reaves*, 60 C. C. A. 675, 126 Fed. 127, it was held that under § 1419 enlistment in the navy of a minor under eighteen was valid as to the minor, but voidable at the instance of the parent, reversing 121 Fed. 848, which held that the enlistment of a minor without the father's consent was void from the beginning as to the father.

In *Ex parte Bakley*, 148 Fed. 56, affirmed in 82 C. C. A. 659, 152 Fed. 1022, it was held that the parents of a boy seven-

Gamble, 11 Serg. & R. 93; *United States v. Blakeney*, 3 Gratt. 405, text 411-413."

In *United States v. Blakeney*, supra, Baldwin, J., said: "Thus it will be seen that in England neither the common law nor the statute law protects minors from the effect of their contracts of enlistment; and no one has ever supposed that parents or guardians have the right to reclaim them from military service." He points out that the whole difficulty in the subject arises from the failure to discriminate between the public or national law and the municipal or domestic law. "It seems to me obvious," says he, "that the enlistment of a minor capable

of bearing arms does not fall within the general rule of the municipal law in regard to the incapacity of infants under the age of twenty-one, to bind themselves by contract. Nor am I disposed to regard the enlistment as an exception to that rule. The rule, I think, has no application to the subject. The capacity of all citizens or subjects to bear arms to bind themselves to do so by voluntary enlistment is in itself a high rule of the public law, to which the artificial and arbitrary rule of the municipal law forms no exception. The rule of the public law is subject to but two conditions, the ability [of the party] to carry arms, and his con-

teen were, under § 1419, entitled to his release on habeas corpus.

Marine corps.

In *Com. ex rel Gormley v. Selfridge*, 7 Phila. 76, it was held that under the act of Congress of 1858, providing for enlistment in the marine corps of boys between eleven and seventeen years with consent of parent or guardian, the enlistment of a minor under seventeen in the United States marine corps without the consent of parent or guardian was illegal and void.

There seems to be a decided conflict of opinion as to whether enlistments in the marine corps are governed by statutes relative to enlistments in the navy or those to enlistments in the army.

In *Re McNulty*, 2 Low. Dec. 270, Fed. Cas. No. 8,917 (decided in 1873), it was held that the marine corps follows the rule of the army and a minor between the ages of eighteen and twenty-one cannot be lawfully enlisted in the marine corps without the parent's consent.

And in *Re Doyle*, 18 Fed. 369 (decided in 1883), in dismissing habeas corpus proceedings prosecuted by a minor, it was held that the marine corps is a part of the naval service, and that, under §§ 1418 and 1608 of the Revised Statutes of the United States, U. S. Comp. Stat. 1901, pp. 1007, 1095, a minor over eighteen years of age may be enlisted therein without the consent of his parents.

But in *Re Shugrue*, 3 Mackey, 324 (decided in 1883), it was held that § 1419, relating to enlistment in the navy, does not apply to the marine corps, but such enlistments are governed by § 1117, U. S. Rev. Stat. relative to enlistments in the army, and so a minor cannot be enlisted therein without the consent of the parent, who retains control of such minor.

Again in *Elliott v. Harris*, 24 App. D. C. 11 (decided in 1904), it was held that the marine corps is a part of the navy rather than the army, and so under § 1419 a minor over eighteen years of age who enlists without the consent of the parent will not be discharged on habeas corpus proceedings brought by such parent, the court citing *Re Doyle*, supra, as authority, and criticizing *Re Shugrue*, supra.
39 L.R.A. (N.S.)

But in *McCalla v. Facer*, 75 C. C. A. 219, 144 Fed. 61 (decided in 1906), it was held that the marine corps is not a part of the navy, and so § 1419 does not apply to enlistments therein, and that therefore no minor can enlist in the marine corps without the consent of his parents or guardians as required by § 1117, the court citing with approval *Re Shugrue*, supra, as presenting the true construction of the law, rather than *Re Doyle*, supra, and not referring to *Elliott v. Harris*, supra.

Who may prosecute writ for discharge.

In *State v. Dimick*, 12 N. H. 194, 37 Am. Dec. 197, it was held that though a minor who enlisted in the United States army without his parents consent might avoid such enlistment at majority, the contract could be ratified, and continuance in service one year after majority, receiving pay and rations, without dissent and without any reasonable excuse for not making application for discharge, amounted to a ratification, and so discharge was refused.

In *Com. v. Harrison*, 11 Mass. 63 (decided in 1814), it was held that the United States statutes prohibiting the enlistment of minors without the consent of parents or guardian applied to foreigners, and so a minor belonging in Russia was discharged on habeas corpus at the suit of the master of the Russian vessel to whom such minor had been apprenticed, and even though the minor consented to the restraint.

In *Re McNulty*, supra, it was held that a minor himself may avoid an enlistment in the marine corps which is invalid because without the consent of his parent.

—enlistment under § 1117, U. S. Rev. Stat.

Under § 1117 the minor may prosecute the writ for discharge. *United States ex rel. Deming v. Hanchett*, 18 Fed. 26; *Re Chapman*, 2 L.R.A. 332, 37 Fed. 327.

But in *Re Cosenow*, 37 Fed. 668, it was held that under such section no one but the parents or guardian could claim the minor's discharge, the court stating that the position taken by courts holding that a minor himself may prosecute the writ is unsound.

And in *Re Davison*, 21 Fed. 618, and in *Re Hearn*, 32 Fed. 141, it was held that such

sent to do so; and these conditions may exist in as full force at the age of eighteen as at the age of twenty-one. . . . We know as a matter of fact that at the age of eighteen a man is capable intellectually and physically of bearing arms; and that it is the military age recognized by the whole legislation of Congress, and of the state of Virginia, and of all the states of the Union, perhaps without exception."

In *Com. v. Gamble*, 11 Serg. & R. 93, Gibson, Ch. J., put the case on the broad ground of public policy, which requires that a minor be at liberty to enter into a contract to serve the state, whenever such con-

tract is not positively forbidden by the state itself, during which service parental authority over him is suspended, though not annihilated. This, he said, is the common law of England.

It is competent for the legislature to declare by a new statute a minor to be of full age and capable of acting for himself at eighteen instead of twenty-one years, and emancipate the child from the control of its parents. And so it seems clear that the statutes governing this case contemplate the military, not the civil, age of consent to obligatory engagements.

It will be observed that by the statutes

section was not for the protection or benefit of the minor, *Re Hearn* citing *Re Davison*, *supra*, and *United States ex rel. Deming v. Hanchett*, as the only cases holding to the contrary.

And also in *Solomon v. Davenport*, 30 C. C. A. 664, 59 U. S. App. 52, 87 Fed. 318, it was held that such section gives no privilege to the minor, but is for the benefit of the parent or guardian. And to the same effect is *Re Morrissey*, 137 U. S. 157, 34 L. ed. 644, 11 Sup. Ct. Rep. 57.

In *Re Scott*, 75 C. C. A. 237, 144 Fed. 79, it was said that since the decision in the *Morrissey Case*, *supra*, it is settled law that the enlistment of a minor in the army or navy without the written consent of his parent or guardians, and against the prohibition of the statutes of the United States, is not void, but voidable only, and that only at the instance of the parent or guardian.

And in *Re Baker*, 23 Fed. 30, it was held that under § 1117 the father of a minor who enlisted without his written consent was entitled to his release on habeas corpus, the court declining to express an opinion as to whether the minor would be discharged on his own application.

In *Doane v. Burkman*, 111 C. C. A. 373, 190 Fed. 541, it was held that under § 1117 one to whom, by articles of agreement, the control, care, and custody of a child has been given by the child's mother, has a right to maintain proceedings for the discharge of the minor, who enlisted without his consent.

—enlistment in navy under § 1419, U. S. Rev. Stat.

Section 1419 is intended for the protection of the parent or guardian, and a minor between the ages of fourteen and eighteen cannot question the validity of the enlistment. *United States ex rel. Hendricks v. Pendleton*, 167 Fed. 690. And to the same effect is *United States ex rel. Wagner v. Gibbon*, 24 Fed. 135.

—right of mother of minor without father or guardian.

In *Com. v. Murray*, 4 Binn. 487, 5 Am. Dec. 412 (decided in 1812), it was held that a mother had no legal authority over a minor between seventeen and eighteen, though he had no father, guardian, or mas-

ter, and so enlistment in the navy without and against her consent was legal. This is the only case found which decided that the mother of an infant had no right to prosecute a writ for his release.

In *Com. v. Callan*, 6 Binn. 255 (decided in 1814), it was held that the mother is a parent within the act of 1813 for the enlistment of minors, and so where such minor had no father, guardian, or master, his enlistment without her written consent was held invalid.

And in *Ex parte Mason*, 5 N. C. (1 Murph.) 336 (decided in 1809), it was held that the consent of the mother was necessary to the enlistment of a minor, where the father was dead and the boy was without guardian or master; and so he was discharged at the suit of the mother.

And in *Shomer's Case*, Fed. Cas. No. 12,808, it was held that the provision in act of 1812 which prohibited the enlistment of minors without consent of parent, guardian, or master included a mother, where the father was dead and there was no guardian or master, and so enlistment without her consent was void.

In *Ex parte Burke*, Fed. Cas. No. 2,156a (decided in 1863), a minor seventeen who had enlisted into the army without her consent was discharged on habeas corpus at the suit of the mother.

In *Re McNulty*, 2 Low. Dec. 270, Fed. Cas. No. 8,917 (decided in 1873), was held that a mother who is the surviving parent can secure the release of a minor who enlisted in the marine corps without her consent.

In *Dies v. Hurtel*, 34 Ga. 109, it was held that a minor under seventeen who enlisted in the Confederate army without his mother's consent, she being the only surviving parent, was entitled to his discharge on habeas corpus.

In *Re Hayes*, Fed. Cas. No. 6,261a, it was held that under § 1419, where the mother is the only surviving parent, she may secure a minor son's release from the navy, when enlistment was without her consent.

So the weight of opinion seems to be that a mother who is the only surviving parent will succeed to the rights of the father in the procuring of the release of a minor from either the army or navy, when such enlistment was without her consent. J. H. B.

above quoted no consent in writing or otherwise is required from parents or guardians, and no exception is given to minors who do not obtain such consent. As Congress and the legislature have authorized the minor Bell in this case to engage in the service of this state by enlisting in the militia or National Guard, without requiring the previous consent of his parent to the contract of enlistment, and no contention being made that such contract has not been fairly made with an infant of reasonable discretion, his contract will be deemed to have a semblance of benefit to him, and to be essential to the public welfare, and therefore binding to all intents and purposes upon him and his parent.

The enlistment of the minor Bell is not controlled by the provisions of § 1117 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 813) which is as follows: "No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians, provided that such minor has such parents or guardians entitled to his custody and control."

The minor Bell has not been enlisted in the military service of the United States. The provisions of § 1117 of the Revised Statutes of the United States are not made applicable to the enlistment of Bell by the act of Congress of May 27, 1908, that "the organization, armament, and discipline of the organized militia in the several states . . . shall be the same as that which is now or may hereafter be prescribed for the regular army of the United States," and the provisions of § 872 of the General Statutes of 1906 of Florida to the same effect. The word "organization," as used in said act, does not relate to or include the enlistment of a soldier. Organization relates to the distribution of the personnel of the army or militia, both commissioned and enlisted, into units. It provides for the distribution of the personnel into different arms and corps, such as infantry, cavalry, artillery, staff corps, medical corps, signal corps, etc., and the distribution of the personnel in each arm of the service corps into different units, such as divisions, brigades, companies, platoons, section, squads, etc., and, further, into different ranks or grades, such as generals, colonels, lieutenant colonels, majors, captains, lieutenants, sergeants, corporals, privates, etc. Enlistment is the contract of service that a soldier, as distinguished from the officer, enters into with the state or the United States. The enlistment may be different in each state, some for seven years, some for five years, some for three years, with varying provisions for enlistment, and 39 L.R.A. (N.S.)

yet the organization of all may be the same; but it is essential to the effectiveness and efficiency of the forces called into the national service, that the organization thereof should be the same,—one harmonious whole.

Neither are the provisions of § 1117 of the Revised Statutes of the United States made applicable to or controlling of the enlistment of Bell by the provision "that every officer and enlisted man of the militia who shall be called forth . . . [by the President] shall be mustered for service without further enlistment, and without further medical examination," etc. Section 5, Act May 27, 1908, chap. 204, 35 Stat. at L. 399, U. S. Comp. Stat. Supp. 1909, p. 380.

The provision that, when called into service of the President, no further enlistment is necessary, simply does away with the delay necessary to the physical examination or other prerequisites of a similar nature to the enlistment of the soldier, and has no reference to the necessity of the consent of his parents or guardian. In the provision of § 5, chap. 204, quoted above, the words "mustered" and "enlistment" are both used. A soldier may be either enlisted or mustered into the military service of the United States. If a man be already enlisted in the National Guard of Florida, he may be called forth by the President without further enlistment, but he must be mustered into the service of the United States; but when he presents himself upon the call of the President to be mustered into the service of the United States, and it appears that the enlisted man is a minor and the consent of his parents or guardian has not been given thereto, he shall not be mustered by the provisions of § 1117 of the Revised Statutes of the United States.

The enactment of § 1117 of the Revised Statutes of the United States, requiring the consent of the parents or guardians of the minor to his enlistment, shows the necessity for just such a provision, and that when the duty to serve is by law placed upon minors over eighteen years of age, and they are allowed by law to enter into a contract of enlistment, and no right is reserved by the law specifically to the parents or guardians to object, then the right of the state to the services of such minors must be considered paramount to the control of the parents or guardians. And so we find that the Congress has sometimes changed the law in reference to requiring the consent of the parents or guardians, leaving that provision or reservation out of the statute when the exigencies of war arose, and restoring it upon the return of peace.

If the minor Bell had been mustered into the service of the United States, either the

volunteer or regular army thereof, or upon the call of the President, he would be clearly entitled to his discharge, as was done in the case of *Re Burns* (C. C.) 87 Fed. 796. In that case *Malachi G. Burns*, being nineteen years of age, enlisted in the Massachusetts militia as a private, on May 4, 1898. On May 9, 1898, he was mustered into the service of the United States volunteer army; his parents not having consented thereto. The contention of counsel in the instant case that this conclusion would lead to the anomalous situation "of the parent of a minor being bound by his enlistment until the National Guard was called into the service of the United States, and then the parents or guardian could step in and secure the discharge of all minors who had not obtained the consent of their parents or guardian, at a time above all others when it would be most embarrassing to the government," is fully answered by District Judge Lowell in the case of *Re Burns*, supra, as follows: "If it be said that this construction of the statutes which permits the parents or guardian of a minor to prevent his enlistment in the active military forces of the United States unduly hampers the national government in the prosecution of the present war, it may be answered that the entire matter is within the control of Congress, which can require military service from any citizen of the United States, whatever his age, and without the consent of anyone. If the Acts of 1864 and 1865, as amended by the Act of 1872, are unwise, they can be repealed or modified at once."

This young man, however, seeks his discharge from the National Guard of Florida. We think it clear that, by the statutes of this state and the United States, the militia, known as the National Guard of the state, consists of able-bodied male citizens or volunteers between eighteen and forty-five years of age, and that, so long as it is not sought to muster them into the service of the United States, the contract of enlistment of a minor is not voidable, either by the infant or by his parents or guardians. *Re Morrissey*, 137 U. S. 157, 34 L. ed. 644, 11 Sup. Ct. Rep. 57.

The legislation on this subject by the United States is simply this: That the militia known as the National Guard of the state consists of able-bodied male citizens who are more than eighteen and less than forty-five years of age (32 Stat. at L. 775, chap. 196, U. S. Comp. Stat. Supp. 1909, p. 377); but when under the age of twenty-one years, they shall not be mustered into the military service of the United States without the written consent of their parents or guardians. Section 1117, U. S. Rev. Stat. 39 L.R.A. (N.S.)

If the legislation is unwise, or if it unduly hampers the national government, it may be repealed or modified, as Judge Lowell said in the case of *Re Burns*, supra.

It seems, however, that this legislation is founded on reason, and has been enacted with deliberation. There is reason for requiring the consent of parents or guardians for enlistment of a minor in the regular or volunteer army of the United States that does not exist when he enlists in the militia of his own state. In the service of the United States the minor is taken entirely away from parental control, from civil life and labor, and becomes solely a soldier for a protracted period of time, exposed to the hardships and dangers of actual service. In the militia he remains at home, devoting practically all his time to civil occupations, and only doing military service in his home state, under local officers and for short periods of time, and, when the exigency calling him into active service passes, he returns to his home and civil life at once. Service in the militia is of a personal benefit to the minor, too, as it gives him the training that will fit him for service in the time of war, when the national government may force him into its service, and he will be the better able to take care of himself, and find it easier to become an officer and enjoy the privileges and opportunities attendant thereon. In this way, too, the state is enabled to train its youth for military life at a time when the ability to learn and physical development is easiest.

The judgment discharging the minor *Bryant Merritt Bell*, from custody, is erroneous, and is hereby reversed.

Taylor and Hocker, JJ., concur.

Whitfield, Ch. J., and Shackelford and Cockrell, JJ., concur in the opinion.

ARKANSAS SUPREME COURT.

E. O. McDERMOTT

v.

KIMBALL LUMBER MANUFACTURING COMPANY, Impleaded, etc.

(— Ark. —, 144 S. W. 524.)

Sale — delivery of lumber in stacks — sufficiency.

Sufficient delivery of lumber stacked in

Note. — As to sufficiency of selection or designation of goods sold out of a larger lot, in order to pass title, see note to *Barber v. Andrews*, 26 L.R.A. (N.S.) 1, in which, at page 40, may be found the decisions involving the same specific aspect of the question as is presented by the case above reported.

the mill yard to pass title as against subsequent purchasers is effected by the agent of the buyer, upon paying a portion of the purchase price, estimating the quantity and marking the stacks with the name of the purchaser, the intention of both parties being thereby to transfer the title, and that the balance of the purchase money shall be paid when the lumber is smoothed and barked.

(February 12, 1912.)

CROSS APPEALS from a judgment of the Circuit Court for Ashley County in defendant's favor for an amount less than the alleged value of the property in a replevin suit to recover possession of certain lumber; plaintiff appealing from so much of the judgment as refused to recognize its title, and defendant appealing from so much as fixed the value of the property. Affirmed.

The facts are stated in the opinion.

Mr. James C. Norman, for appellant: The Kimball Lumber Company had no title.

Deutsch v. Dunham, 72 Ark. 141, 105 Am. St. Rep. 21, 78 S. W. 767; Newmark, Sales, chap. 10, § 115; Hardwick v. American Can. Co. 113 Tenn. 657, 88 S. W. 797; Gibson v. Ray, 28 Ky. L. Rep. 444, 89 S. W. 474; Baird Bros. v. Pratt, 6 Ind. Terr. 38, 89 S. W. 648; Com. v. Adair, 121 Ky. 689, 89 S. W. 1130.

Messrs. George & Butler for appellee.

Frauenthal, J., delivered the opinion of the court:

This is an action of replevin, instituted by E. O. McDermott, to recover a certain lot of lumber said to be about 22,000 feet. It was instituted against J. M. and W. H. Cox and the Kimball Lumber Company, and the latter defendant alone made defense. The lumber was manufactured by said J. M. Cox, who owned and operated a sawmill situated about 1 mile from Cypress, a railroad station.

It appears that said Cox was operating his sawmill in December, 1909, at Wilmot, and then traded with plaintiff, who was conducting a mercantile business at that place. He continued doing business with plaintiff and became indebted to him, and this indebtedness continued until in April or May, 1910, when it amounted to between eight and nine hundred dollars. In January, 1910, the manager of the Kimball Lumber Company wrote to said Cox that if he would move his plant to land owned by it near Cypress, it would buy the lumber manufactured by him; that it would advance thereon \$10 per thousand feet when the lumber was on the sticks at the mill,

and would pay therefor, when loaded on the cars at said railroad station, certain named prices for specified grades of the lumber, ranging from \$10 per thousand for No. 1 common to \$28 per thousand for firsts and seconds. And it appears that said Cox accepted this proposition and proceeded to move the mill to a point near Cypress. On March 5, 1910, when the mill plant was about half completed, Cox obtained from the Kimball Lumber Company \$400, and gave a receipt therefor, in which it was stated that he agreed to deliver lumber therefor in accordance with the terms of the above letter, during the months of March and April, 1910, or for a period of sixty days thereafter, in event that that time was needed to make such delivery. Of this sum, Cox paid to plaintiff \$175 on the indebtedness due by him, and informed him of the correspondence and agreement he had made with the Kimball Lumber Company for the sale of his lumber. On April 1, 1910, Cox began sawing lumber, and in the latter part of that month notified the Kimball Lumber Company to send its agent to estimate the amount of lumber then stacked at the mill.

In pursuance of this request, the Kimball Lumber Company sent its agent, who, on April 29, 1910, estimated the lumber then on the yard. At that time, the lumber was stacked in piles at the mill, and this agent estimated the amount in each pile, and then placed upon each pile the amount so estimated by him, and also tagged or marked each pile with the name of the Kimball Lumber Company. This agent and said J. M. Cox, and his son and manager, W. H. Cox, testified that said J. M. Cox then sold and delivered the lumber to the Kimball Lumber Company, and that it was understood by the parties that the lumber was then the property of the Kimball Lumber Company. They testified that they estimated the lumber at 22,000 feet; that according to the contract Mr. Cox was to receive \$10 per thousand on such estimate, but had already received \$400 thereon, which was more than the estimate entitled him to; that the remainder of the purchase money for said lumber was to be paid after it had been hauled to the railroad station, and there graded and measured and placed on board the cars. The testimony on the part of the defendant tended further to prove that the Kimball Lumber Company directed and employed said Cox to move this lumber to the railroad station, which he did in the early part of June. Thereafter the plaintiff instituted this action and replevined the lumber.

It appears from the testimony in behalf

of plaintiff that on May 2, 1910, said J. M. Cox was indebted to him in the sum of \$860.80, and that they then entered into a written contract whereby, amongst other things, it was provided that said Cox did release and sell to said plaintiff "all the lumber stacked in the yards of the mill at Cypress or near that place, with the exception of the lumber taken up and sold to the Kimball Lumber Company." On May 28, 1910, Cox gave to plaintiff an order upon the Kimball Lumber Company for \$424, which said company refused to honor or pay. Thereupon, and on June 1, 1910, in consideration of \$424 due by him to the plaintiff, said Cox executed a bill of sale to the plaintiff, in which it was stated that he did sell and deliver to him "the lumber [22,000 feet] that was inspected by the Kimball Lumber Company, they having refused to pay my order in favor of Dr. McDermott;" and it is under this bill of sale that plaintiff claims title to the lumber.

The case was tried by a jury, which returned a verdict in favor of the Kimball Lumber Company for the lumber, and placed its value at \$400. From the judgment entered upon this verdict, both parties have appealed. Plaintiff has appealed, for the purpose of reversing the judgment, chiefly upon the ground that there was no delivery of the lumber to the Kimball Lumber Company, so as to complete the alleged sale thereof to it. The Kimball Lumber Company has appealed on the ground that the uncontroverted testimony shows that the value of the lumber was largely in excess of \$400.

The court gave a number of instructions, both at the request of the plaintiff and of the defendant, relative to the question as to whether or not the alleged sale of the lumber to the Kimball Lumber Company was completed, and the title passed to it. We do not think that it would serve any useful purpose to set these instructions out or to note them in detail. We are of the opinion that the court committed no prejudicial error in its rulings relative to the instructions given or refused, and that those given sufficiently presented to the jury the law applicable to this case. The question then to determine is whether or not there is sufficient evidence to sustain the finding of the jury that the alleged sale of the lumber to the Kimball Lumber Company was consummated by sufficient delivery thereof.

It is urged by counsel for plaintiff that a sale is not complete as long as anything remains to be done between the buyer and seller in relation to the goods, and that for this reason the alleged sale to

the defendant under the evidence was not complete. If there was a sufficient delivery of the lumber to the defendant, then, under the testimony, the only thing that remained to be done between him and the seller, J. M. Cox, was for defendant to pay the remainder of the purchase money for the lumber, after grading and measuring it. In the case of *Beller v. Block*, 19 Ark. 573, it was said: "The purchase money may remain to be paid, and yet the sale may be complete, if the goods be delivered." It has been uniformly held by this court that the title to personal property will pass, and the sale be complete, if it is the intention of the parties to transfer the title, on the one part, and to accept the property, on the other, and in pursuance thereof a delivery is made, even though something remains to be done, as, for example, the fixing of the quantity or amount of the property or the payment of the purchase money. *Chamblee v. McKenzie*, 31 Ark. 155; *Gans v. Holland*, 37 Ark. 483; *Shaul v. Harrington*, 54 Ark. 305, 15 S. W. 835; *Priest v. Hodges*, 90 Ark. 131, 118 S. W. 253; *Guion Mercantile Co. v. Campbell*, 91 Ark. 240, 121 S. W. 164.

Thus, in the case of *Lynch v. Daggett*, 62 Ark. 592, 37 S. W. 227, it was held that a contract of sale was complete, although the property was thereafter to be moved by the seller to the place named. In the case of *Anderson-Tully Co. v. Rozelle*, 68 Ark. 307, 57 S. W. 1102, it was held that a sale was complete, and the title to lumber passed to the buyer, although it was thereafter to be hauled to another place and there measured, and the balance of the purchase price determined by such measurement was then to be paid.

The question then recurs, Was there a sufficient delivery of the lumber to the Kimball Lumber Company to make the sale complete as against the rights of the subsequent purchaser? In the sale of personal property, the delivery of the thing sold is essential as against the rights of third parties asserting a title, right, or interest therein subsequently acquired from the seller. A delivery may be either actual or constructive, and in either event it will be effective to pass title. Where property is of such a nature and so situated that actual delivery thereof can be made, then that is necessary. Where the property is too ponderous and bulky for an actual change of its possession, a symbolic or constructive delivery thereof will be equivalent to and effective as an actual delivery. The delivery of such property may be made by doing everything necessary to identify it, and by placing on it

outward *indicia* to show a change of the possession and ownership.

In the case of Little Rock & Ft. S. R. Co. v. Page, 35 Ark. 304, it was held (quoting syllabus): "What constitutes delivery depends upon the situation and character of the property. Removal from the premises is not necessary. It is sufficient if the contract of sale has been definite and unconditional, and everything has been done in pursuance of it by the vendor which is necessary to identify the property and separate it from the other, so that it may be known what, specifically, has been sold."

In the case of Smith v. Jones, 63 Ark. 232, 37 S. W. 1052, it was held (quoting syllabus): "Proof that the vendors of a large quantity of lumber directed the vendees to mark it in their name, which was accordingly done, is sufficient to support a finding that there was a delivery of the lumber in pursuance of the sale." See also King v. Jarman, 35 Ark. 190, 37 Am. Rep. 11.

It will thus be seen from these cases that the question as to whether or not a contract of sale is complete, so as to pass title as against those subsequently obtaining an interest or claim to the property, is determined by whether or not it was the intention of the parties to fully consummate the sale and pass the title, and as to whether or not such a delivery thereof was made as the nature of the property would admit of, and such outward *indicia* or marks of a change of ownership had been made, so as to advise third parties dealing therewith of such change of the ownership. Lee Wilson & Co. v. Crittenden & County Bank & T. Co. 98 Ark. 379, 135 S. W. 885.

In the case at bar, the testimony on the part of the defendant shows that its agent was sent to the mill to estimate the lumber then stacked upon the yards, and to take it up for the defendant. The lumber was stacked in piles, and this agent then estimated it in the presence of the seller, and after doing so marked upon each pile the number of feet it contained, and also the name of the Kimball Lumber Company, to whom the owner then sold it; and by these outward *indicia* of possession both the seller and the buyer intended to show that the lumber was actually delivered to the Kimball Lumber Company. Both the seller and the agent of the buyer testified that it was the intention then to make a complete sale of the lumber and pass the title thereto to the defendant. Of this the plaintiff was notified, because thereafter, on May 2d, he entered into the above-written contract with said Cox, by 39 L.R.A. (N.S.)

which said Cox sold to him the other lumber, and in this contract it is expressly stated that the lumber in controversy had been taken up and sold to the Kimball Lumber Company, and was excepted from said contract of sale to the plaintiff. In addition to this, at the time the lumber was estimated and marked in the name of the Kimball Lumber Company, an agreement was made between the defendant's agent and said Cox, the seller, that Cox would haul the lumber to the railroad station for the defendant, which was done; and this suit was not instituted until after such removal had been made.

* We are of the opinion that there was sufficient evidence adduced upon the trial of this case to show a delivery of the lumber by said Cox to the Kimball Lumber Company on April 29th, and that such delivery was made in pursuance of a sale which, according to the intention of both buyer and seller, was then complete, and that the title then passed to the Kimball Lumber Company, although it was understood that the balance of the purchase money was thereafter to be paid after the lumber had been graded and exact measurement made thereof. The title to the lumber having passed to the defendant on April 29, 1910, the plaintiff could not obtain title thereto from Cox by the bill of sale executed to him on June 1, 1910.

It is urged by counsel for defendant that the uncontroverted evidence shows that the value of the lumber was far in excess of \$400, and that it amounted at the lowest sum to \$680, the price at which it was subsequently sold by the plaintiff. The defendant asks that the judgment be affirmed, in so far as it adjudges a recovery of the property to it, and it only seeks to have this judgment modified in regard to the value of the property. The verdict upon which this judgment is based is entire, and, even if it should be held that the judgment could be in part affirmed and in part modified, we do not think that such modification is warranted by the testimony relative to the value of this lumber. The lumber never had been graded, and there is no testimony as to its exact grades, or as to the amount that there was in the different grades. It appears from the letter of defendant introduced in evidence, that the lumber of this character runs from common No. 1 to firsts and seconds, and that the value thereof ranges from \$10 per M. to \$28 per M. There were 22,000 feet of lumber replevined, and we cannot say from this testimony whether it was of the value of \$10 per M. or more. We cannot say, therefore, from the testi-

mony adduced, that the jury were not warranted in finding the value of this lumber to be \$400.

The judgment is accordingly affirmed.

KENTUCKY COURT OF APPEALS.

PEASLEE-GAULBERT COMPANY, Appt.,
v.

D. D. McMATH, Admr., etc., of Herbert
McMath, Deceased.

(148 Ky. 265, 146 S. W. 770.)

Venue — explosion of paint dryer —
negligence — injury.

1. An action to recover damages for injury caused by the explosion of a paint dryer because of failure to put a caution signal on the package may be brought in the county where the injury occurred, under a statute permitting actions in tort against corporations to be brought in the county where the tort was committed, although the package was sold at defendant's place of business in another county.

Negligence — dangerous substance —
failure to label — liability of dealer.

2. A wholesale dealer who buys a standard paint dryer in the open market without knowledge that it is explosive or inflammable if used with ordinary care is not bound to ascertain its qualities or warn consumers of possible danger in its use, or liable to one for injury by an explosion when he attempts to transfer it from one receptacle to another by artificial light.

(Winn, J., dissents from proposition 1.)

(May 9, 1912.)

APPPEAL by defendant from a judgment of the Circuit Court for Christian County in plaintiff's favor in an action brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence. Reversed. The facts are stated in the opinion.

Note. — As to liability of dealer for personal injuries from article not obviously dangerous, see note to Clement v. Rommeck, 13 L.R.A.(N.S.) 382, and subsequent cases in this series: Cunningham v. C. R. Pease House Furnishing Co. 20 L.R.A.(N.S.) 236, and Gately v. Taylor, post, 472.

As to liability of druggist for injury to stranger from drug or poison sold by him, see note to McKibbin v. Bax, 13 L.R.A.(N.S.) 646.

As to liability of manufacturer, packer, or vendor to persons not in privity of contract, for injury from defect in article sold, see note to Tomlinson v. Armour & Co. 19 L.R.A.(N.S.) 923, and later cases: Wolcho 39 L.R.A.(N.S.)

Messrs. Trabue, Doolan, & Cox and Trimble & Bell, with Mr. Selden Y. Trimble, for appellant:

If the appellant committed any tort at all, it was committed in Jefferson county, and not in Christian county. Therefore, the venue of this action was improperly laid in Christian county.

Charles Brown Grocery Co. v. Becket, 22 Ky. L. Rep. 393, 57 S. W. 458; John Matthews' Apparatus Co. v. Renz, 22 Ky. L. Rep. 1528, 61 S. W. 9; Seven Hills Chautauqua Co. v. Chase Bros. Co. 26 Ky. L. Rep. 334, 81 S. W. 238; Com. v. Gast, C. & Co. 143 Ky. 674, 137 S. W. 515; Kahn's Sons v. Com. 143 Ky. 297, 136 S. W. 638; Whitmire v. Com. 140 Ky. 734, — L.R.A.(N.S.) —, 135 S. W. 767; McDermott v. Com. 29 Ky. L. Rep. 750, 96 S. W. 474; Com. v. Price & L. Cider & Vinegar Co. 31 Ky. L. Rep. 1356, 105 S. W. 102; Com. v. Hogan, M. & T. Co. 25 Ky. L. Rep. 41, 74 S. W. 737; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inter. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Pabst Brewing Co. v. Com. 32 Ky. L. Rep. 1010, 107 S. W. 728; Com. v. Read Phosphate Co. 113 Ky. 39, 67 S. W. 45; Brown v. Wieland, 116 Iowa, 711, 61 L.R.A. 417, 80 N. W. 17; Loveland v. Dinnan, 81 Conn. 111, 17 L.R.A.(N.S.) 1119, 70 Atl. 634; 3 Page, Contr. 2592; Benjamin, Sales, §§ 520, 521; May v. Hoaglan, 9 Bush, 171.

Appellant bought and sold to Whitlow & Son this can of dryer and could, by the exercise of ordinary care, have known its dangerous qualities; Whitlow & Son in turn bought the can and actually knew its dangerous qualities, and failed to label and failed to notify their servant, McMath. The clearest case of negligence is set up in the petition against Whitlow & Son, but no cause of action at all against appellant.

King v. Creekmore, 117 Ky. 172, 77 S. W. 689; Standard Oil Co. v. Tierney, 92 Ky. 367, 14 L.R.A. 677, 36 Am. St. Rep. 595, 17 S. W. 1025; Simons v. Gregory, 120 Ky. 116, 85 S. W. 751; Heindirk v. Louisville Elevator Co. 122 Ky. 675, 5 L.R.A.

v. A. J. Rosenbluth & Co. 21 L.R.A.(N.S.) 571, and Pizzo v. Wiemann, 38 L.R.A.(N.S.) 678.

As to liability of manufacturer or dealer for personal injuries caused by defects in automobile, see note to Olds Motor Works v. Shaffer, 37 L.R.A.(N.S.) 560.

As to implied warranty of goods bought for a special purpose, see note to Nettograph Mach. Co. v. Brown, 34 L.R.A.(N.S.) 737, and earlier notes there referred to.

As to applicability of rule *res ipsa loquitur* in action for personal injuries from defects in articles manufactured or sold by defendant, see Dail v. Taylor, 28 L.R.A.(N.S.) 949, and note.

(N.S.) 1103, 92 S. W. 608; *Berger v. Standard Oil Co.* 126 Ky. 155, 11 L.R.A. (N.S.) 238, 103 S. W. 245; *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159, 53 L. ed. 453, 29 Sup. Ct. Rep. 270; *Clement v. Rommeck*, 149 Mich. 595, 13 L.R.A. (N.S.) 382, 119 Am. St. Rep. 695, 113 N. W. 286; *Leavitt v. Fiberloid Co.* 196 Mass. 440, 15 L.R.A. (N.S.) 855, 82 N. E. 682; *Tomlinson v. Armour & Co.* 75 N. J. L. 748, 19 L.R.A. (N.S.) 925, 70 Atl. 314; *Standard Oil Co. v. Murray*, 57 C. C. A. 1, 119 Fed. 572; *O'Neill v. James*, 138 Mich. 567, 98 L.R.A. 342, 110 Am. St. Rep. 321, 101 N. W. 828, 5 Ann. Cas. 177; *Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 605, 15 L.R.A. 821, 33 Am. St. Rep. 482, 19 S. W. 630; *Slattery v. Colgate*, 25 R. I. 220, 55 Atl. 639; *Olds Motor Works v. Shaffer*, 145 Ky. 616, 37 L.R.A. (N.S.) 560, 140 S. W. 1047.

Messrs. Hunter Wood & Son and C. H. Bush for appellee.

Carroll, J., delivered the opinion of the court:

Herbert McMath, an experienced house painter, was killed in Christian county, Kentucky, by the explosion of a can of "No. 1, T Japan Dryer." His administrator brought this action against the Peaslee-Gaulbert Company, wholesale dealers in paints and varnishes, who sold the dryer to Whitlow & Sons, for whom McMath worked, and recovered judgment for \$5,000. Before taking up the merits of the case, we will dispose of the question of jurisdiction raised by counsel for appellant in the lower court and in this. The action was brought in Christian county, Kentucky, and the summons served on an officer of the appellant company in Jefferson county, Kentucky, at which place is located its home office and chief place of business. Whitlow & Sons were merchants doing business in Christian county, Kentucky, and they gave an order at their place of business in Christian county to a traveling salesman for Peaslee-Gaulbert Company for the Japan dryer. This salesman only had authority to take orders for goods, and send them to the home office of the Peaslee-Gaulbert Company, at which place they were accepted or rejected by the company. The order sent by the salesman was accepted by the company, and the goods were shipped f. o. b., Louisville, Kentucky, to Whitlow & Sons, who paid the freight. The basis of the cause of action, which sounded in tort, was the failure of Peaslee-Gaulbert Company to put a danger or caution mark, sign, or label on the can of Japan dryer. It was shipped without anything indicating its contents, except an attached tag show-

ing that the can contained "No. 1 T Japan Dryer."

It is insisted for appellant that, under these facts, the circuit court of Christian county had no jurisdiction of the cause of action, and that it should have been brought in Jefferson county. Section 72 of the Civil Code, which fixes the venue of the action, provides in part that " . . . an action against a corporation which has an office or place of business in this state, or a chief officer or agent residing in this state, must be brought in the county in which such office or place of business is situated, or in which such officer or agent resides; or, if it be upon a contract, in the above-named county, or in the county in which the contract is made or to be performed; or, if it be for a tort, in the first-named county, or the county in which the tort is committed." Under this section, an action for tort may be brought against a corporation which has an office or place of business in this state, or chief officer or agent residing in this state, in the county in which such office or place of business is situated or in which such officer or agent resides, or in the county in which the tort is committed. It is, of course, conceded that the action might have been brought in Jefferson county; and, if the tort complained of was committed in Christian county, it is obvious that the Christian circuit court had jurisdiction of the action. This being so, the precise question for decision is, Was the tort committed in Christian county? as the only ground upon which it is claimed that the Christian circuit court had jurisdiction is the fact that the tort was committed in that county. Assuming that the failure to put a danger or caution mark on the can containing this dryer was actionable, it is the contention of counsel for the appellant that the tort was committed in Jefferson county, at which place the dryer was sold by the appellant company and delivered, as the property of Whitlow & Sons, to a common carrier for shipment to their place of business. On the other hand, it is insisted by counsel for appellee that, although the cause of action was based upon the failure to put a danger or caution mark on the can containing the dryer, the tort, in the meaning of the Code, was committed in the county where the injury resulting from this failure occurred.

A good deal is said in argument concerning the place where the Japan dryer was sold, one side insisting that the sale took place in Jefferson county, the other that it took place in Christian county. But we do not deem it important or necessary, in disposing of the question, to enter into a discussion of the place where the

sale took place. We will assume that the sale was made in Louisville, at which place the order was accepted and the goods delivered to a common carrier to be transported at the risk of the consignees to their place of business. If there had been no explosion, no person could have maintained an action against the appellant company for selling and sending out this article without a caution or danger sign attached to it. In other words, no actionable tort would have been committed either in Jefferson county or in Christian county. It is the fact that the explosion occurred with resulting injury that furnished the basis for the cause of action. The thing that gave life to the cause of action occurred in Christian county, where the accident happened; and so it would naturally seem that in Christian county, if at all, the tort complained of was committed.

It is said, however, that, as the failure to put the caution or danger sign on the can is the sole ground upon which the action rests, this negligence or tort on the part of the appellant company was necessarily committed in Jefferson county. Undoubtedly, if appellant company was guilty of negligence or tort in this respect, it was committed in that county; but, conceding this much, it does not follow that that county was the only county in which the tort was committed or the negligence done. The negligence and wrongdoing, if any, had its beginning in Jefferson county, but it was, if anything, a continuing act of negligence or wrongdoing, for which an action might be brought in any county in which injury resulted therefrom, and the cause of action did not arise until some person suffered injury or loss by reason of the wrongful act. As no actionable tort could have been committed until either person or property was injured, it seems quite clear that, if the words of the Code are to be given their reasonable meaning, the venue of the action was in the county where the tort was in fact committed by the infliction of injury, as well as in the county where the tort feisor resided. There may be a continuing species of wrongdoing that only becomes actionable when injury results therefrom; and in such a state of case we know of no reason why the venue of the action should not lie in the county where the overt act of wrongdoing, if we may so term it, is committed. A tort is nothing more than an injury or wrong for which a civil action may be brought by the injured party against the wrongdoer; and, to give full effect to the Code provision that the action to recover damages may be brought in the county where the tort was committed, it should be con-

strued to mean that it may be brought in that county in which the injury or wrong complained of was committed. To give to this section the construction contended for by appellant would in many instances confine the jurisdiction to the county of the defendant's residence, when it was intended that it might also be brought in the county where the person or property was in fact injured, which is usually the county of the residence of the complaining party. If it had been intended to limit the jurisdiction to the county in which the corporation resided or had its chief office, there would have been no reason for inserting the provision that the action might also be brought in the county where the tort was committed; and, as in the present case, the tort could not have been committed in any other county than that in which the injury complained of occurred, we have no doubt that the Christian circuit court had jurisdiction.

A case strongly supporting this construction of the Code is *Mitchell v. Ripy*, 82 Ky. 516. In that case it appears that an action was brought in Marion county by *Mitchell* against *Ripy*, *Cohen*, and *Edwards*, to recover damages for false imprisonment. The affidavit upon which *Mitchell* was arrested was made by *Edwards* in Anderson county, and a warrant of arrest was issued against *Mitchell* in that county and returned "not found." Thereupon it was sent to Marion county, where *Mitchell* was arrested and brought to Anderson county, and acquitted of the charge. Section 74 of the Code, which regulated the venue of the action in that case, provides that "every other action for an injury to the person of the plaintiff, and every action for an injury to the character of the plaintiff, against a defendant residing in this state, must be brought in the county in which the defendant resides, or in which the injury is done." In holding that the Marion court had jurisdiction, the court said: "As all the defendants resided in the county of Anderson when the action was brought, the jurisdiction of the Marion circuit court depends upon the meaning of the words 'in which the injury was done.' In determining this question, the first and most natural inquiry that arises is, For what injury to the person of the plaintiff was this action brought? The affidavit was made and the warrant for the arrest was issued in the county of Anderson. But it is clear that, if nothing more had been done, the plaintiff could not have maintained this action in any court. The personal injury of which the plaintiff complains, and for which this action was brought, is his arrest and imprisonment.

That was accomplished—done—in Marion county. The action is against defendants, who, it is alleged, maliciously and without probable cause procured the warrant of arrest to issue, by means of which the injury complained of was done; and in our opinion the jurisdiction of such an action is, in the meaning of the Code, no more determined by the county in which the criminal law may be wrongfully put in motion than it is controlled in an action for assault and battery by the place where a conspiracy may be hatched to accomplish the beating or wounding. Necessarily, every injury to the person, accompanied with force, must be done at the place where the person is at the time of the injury." See also *Alabama G. S. R. Co. v. Carroll*, 97 Ala. 126, 18 L.R.A. 433, 38 Am. St. Rep. 163, 11 So. 803; *Chicago, St. L. & N. O. R. Co. v. Doyle*, 60 Miss. 977; *Smith v. Southern R. Co.* 136 Ky. 162, 26 L.R.A. (N.S.) 927, 123 S. W. 678. The cases of *Com. v. Grand Central Bldg. & L. Asso.* 97 Ky. 325, 30 S. W. 626, and *Com. v. Remington Typewriter Co.* 127 Ky. 177, 105 S. W. 399, relied on by counsel for appellant, are not in conflict with the views we have expressed. The question of jurisdiction raised in these cases came up under a statute very different from § 72 of the Code, and under a statute intended to meet very different conditions from the Code provision.

On the merits of the case, a recovery was sought upon the ground, as stated in the petition, that there had been shipped by Peaslee-Gaulbert Company to Whitlow & Sons a supply of paints and oils, including a can of dryer, "but the said can was not labeled, and there was nothing about it to indicate that there was any explosive substance in it, and nothing to warn any person that it contained anything of the kind that was dangerous or explosive; and it was not known by the said Whitlow & Sons, or either of them, or plaintiff's intestate, or anyone in the employ of the said Whitlow & Sons, so far as the plaintiff knows or believes, that the said can did contain any explosive or dangerous substance. Plaintiff further states that the said intestate, Herbert McMath, exercised care and caution in handling said dryer, and that he did not know, and could not have known, by the exercise of ordinary or reasonable care, that it was explosive or dangerous. He further states that the defendant, Peaslee-Gaulbert Company, did know, or could have known by the exercise of ordinary care, that said dryer was explosive and dangerous, and also knew that it had to be handled by workmen engaged in painting, and that in shipping and

delivering same to the said Whitlow & Sons, knowing that it was purchased to be used in drying paint, and had to be used by the workmen of Whitlow & Sons, without labeling it so as to give notice or warning of its being dangerous, and being an explosive, or containing explosive substances, the said defendant was guilty of gross negligence, and by reason of its negligence aforesaid the said Herbert McMath came to his death." And it is earnestly insisted that, although the evidence may not show that Peaslee-Gaulbert Company knew the explosive and dangerous quality of the dryer, they are yet liable if, by the exercise of ordinary care, they could have known its explosive and dangerous character.

The evidence shows that McMath had been engaged for several years in the business of house painting. At the time of the accident he was in the employ of Whitlow & Sons, and went to their place of business after dark for the purpose of getting a small can that he had with him filled with dryer, and, in company with W. H. Payne, went to the wareroom in which Whitlow & Sons kept their paints and varnishes. The room was quite dark, and Payne carried a lighted candle in his hand. When McMath, who was holding the 5 gallon can of dryer, first commenced to pour it into the small can he had brought for the purpose of having filled. Payne held the lighted candle a few feet from the can of dryer; but, discovering that McMath had some difficulty in pouring the dryer into the small can, Payne asked McMath if it was dangerous, and upon his answering "No, not a bit," he put the lighted candle close to the mouth of the can out of which the dryer was being poured, and at once the explosion occurred that resulted in the death of McMath. It is evident that the flame from the candle came in actual contact with the dryer as it was being poured out by McMath, or else so close to it that it caused it to ignite and explode. McMath did not request Payne to hold the candle closer, nor does it appear, except from inference, that he knew how close Payne was holding the candle to the mouth of the can. Payne did not know anything about the danger that would attend contact between the dryer and the lighted candle, nor, indeed, does it appear that he knew what kind of material McMath was pouring into the can. There was only attached to the can a label with the words "No. 1 T Japan Dryer" on it, and no danger or caution sign or mark on the can, or anything to indicate that it was dangerous to hold a lighted candle near to the liquid when it was being poured out. It also

appears from the evidence that the name "No. 1 T Japan Dryer" is merely a trade-name, having no significance outside of the trade, and giving no evidence of the contents or ingredients of the dryer to persons not familiar with the article. It is a standard dryer, in general use by painters, and is manufactured by a large number of concerns in different parts of the country; there being six firms in Louisville alone that manufacture and sell it. Peaslee-Gaulbert Company, although wholesale dealers in paints and varnishes, had never manufactured this article of trade, but had been buying it for a number of years from the Louisville Varnish Company, a concern that manufactured it, and it was from this company that the can was bought that was sold to Whitlow & Sons.

A number of witnesses who were qualified to testify from experience in its use, and who knew the ingredients and qualities of this dryer, said that it was not explosive or dangerous unless brought in contact with a lighted flame. Practically all of them testified that all varnishes were inflammable, and that it was not safe to go with a burning lamp or light into a room where varnishes were kept; that these varnishes, including this dryer, gave off gases that were easily ignited, and that almost any kind of varnish would explode, or at least catch on fire, if brought in contact with a light of any kind. They also testified that this dryer, as well as other varnishes, were not regarded by the trade as dangerous, but that it was necessary to exercise some care in handling and using them to keep a light or flame from coming in contact with the varnishes or the gases that might escape therefrom. It was further shown, without contradiction, by a number of manufacturers and wholesale dealers who made and sold the dryer in question, that no caution or danger sign or tag was ever put on the can or receptacle containing the article. The superintendent of the Louisville Varnish Company testified that he had been making for about fifteen years "No. 1 T Japan Dryer" from the same formula as that by which the dryer Peaslee-Gaulbert Company sold was made, and had been selling it to the trade all over the country, and that his company had never placed any caution or danger sign on it. This witness gave the ingredients of the dryer, which consist, among other things, of linseed oil, turpentine, and naphtha. As illustrating the character of evidence, we may take Frank A. Lane, who had many years' experience in the manufacture and use of var-

nishes, including "No. 1 T Japan Dryer." He testified that it was a type of standard dryer used by practically every varnish maker in the business; that it was not considered explosive, but was inflammable, and would easily flash and burn if exposed to an open flame, or, if agitated or stirred up in a confined space and then subjected to an open flame, the vapors from the material would cause an explosion, the extent of which would depend entirely upon the amount of gas that had been generated and how close it was confined; that it would not explode or take fire spontaneously, or unless it came in contact with an open flame or a live spark. He also said that it had never been the custom of manufacturers, dealers, or handlers of dryer to put caution or danger labels on the packages, indicating any hazard in using or handling them.

In brief, the substance of all the evidence is that this dryer was not explosive or inflammable, unless brought in contact with a lighted flame, and was not inherently or imminently dangerous or dangerous at all if handled or used with ordinary care; that "No. 1 T Japan Dryer" was manufactured substantially by the same formula all over the country, and sold to the trade generally as an article of common use in the varnish business; that none of the manufacturers or dealers ever placed on their cans containing this dryer any danger or caution sign or mark or other thing to indicate that care should be used in handling it. It might also be here remarked that there is no statute in this state requiring a danger or caution mark of any kind to be placed on articles like this.

There is no evidence in the record that Peaslee-Gaulbert Company knew that this dryer was explosive or inherently or imminently dangerous, or at all dangerous if used with reasonable care, nor is there any evidence that they had ever heard of any accident caused by its ignition or explosion.

If we should assume that this dryer was an explosive or an inherently or imminently dangerous article of trade, there is no evidence that Peaslee-Gaulbert Company had any knowledge of its dangerous qualities when they sold it to Whitlow & Sons. Nor is there any suggestion that they made any representations or warranties concerning it, or concealed from the purchaser any fact in connection with it. It was bought by them on the open market in the ordinary and usual course of business as an article of general and common use all over the country that they and other dealers in paints and varnishes had been

buying and selling for many years. In all their experience and observation no can or receptacle containing it, either bought or sold by them, or by other dealers, ever had a caution or danger label or sign on it. They doubtless knew, as would other persons of ordinary intelligence who were accustomed to the use of paints and varnishes, that it was dangerous to bring a lighted flame in contact with varnish or dryer, as it was a very inflammable article; but, so far as the evidence shows, they had never heard of any person being injured by its use. Nor is there any evidence that their attention had ever been directed by any person or by any incident to the inflammable or explosive quality of this dryer. Of course, if Peaslee-Gaulbert Company could be made liable in an action like this, so could any other merchant or dealer to whom they sold the article, and who bought it and sold it as they did. No difference in respect to liability can be made between the wholesale dealer and the retail dealer, or between the merchant who buys from the manufacturer and the merchant who sells directly to the consumer. If the conditions and circumstances surrounding the purchase and sale are alike, the measure of responsibility of all merchants and dealers is the same.

If a dealer or merchant, whether he be a wholesale dealer or a retail dealer, or the original purchaser of the article, or the person who makes the sale to the consumer, knows that the article is inherently or imminently dangerous in the use for which it is intended, because of its inflammable or explosive qualities, it is his duty to label or mark the package containing the article in such a way as to indicate its dangerous contents.

But the dealer who purchases and sells an article in common and general use in the usual course of trade and business, without knowledge of its dangerous qualities, is not under a duty to exercise ordinary care to discover whether it is dangerous or not. He may take it as he finds it on the market. He is not required to investigate its qualities, or endeavor to ascertain whether it is dangerous for the use intended before he can absolve himself from liability in the event injury results from its use. There are many necessary articles and things in common and general use throughout the country that are dangerous unless used with care, but the dealer who buys and sells them in the open market in the usual and ordinary course of his business, and who makes no representations or concealments, and who does not know that the article is explosive or dangerous in its ordinary use, is not to be

made liable merely because some person is injured or killed while handling it.

The merchant or dealer can only be made responsible in damages to a party who has no contractual relations with him when the article is imminently or inherently dangerous in the ordinary use for which it is intended, or the use to which it may reasonably be expected the article will be put or applied; and when with knowledge of this fact he sells or puts it on the market without giving notice to the purchaser of its dangerous quality, or when he represents the thing as being safe for the use intended, when, in fact, it is not. As stated in *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64: "It is well settled that a man who delivers an article which he knows to be dangerous or noxious to another person, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result and which does in fact result therefrom to that person or any other who is not himself in fault." To hold dealers who buy and sell articles that are in general and common use, and that are dangerous only when carelessly or inattentively used, liable in damages for the failure to give notice of their qualities or the danger in their use when the dealer does not know of the danger, would be to impose a greater burden than the protection of the public requires, and to put on dealers a higher degree of care in the conduct of their business than they should be expected to bear. But if the dealer knows that the article is inherently or imminently dangerous, or is highly explosive, or if he conceals or misrepresents its qualities, or warrants or represents it to be safe for the use intended, when it is not, there is no reason why he should not be held chargeable with the reasonable and proximate consequences of his act in selling it without notice of the danger in its use.

Questions like this have come before this court, as well as courts of other states, in many cases, but they have generally arisen in actions against manufacturers for selling and putting on the market without proper notice articles that were inherently or imminently dangerous.

The authorities are practically agreed that, when a manufacturer puts on the market for use without notice of its dangerous quality an article that is imminently or inherently dangerous, he will be liable in damages to any person who, while himself in the exercise of ordinary care, suffers injury as a result of the dangerous quality of the article, and the manufacturer as a rule will be charged with notice of the quality of the article that he

himself has made, and cannot excuse himself upon the ground that he did not know its dangerous qualities. It is not, however, necessary or indeed pertinent to the matter in hand that we should extend this opinion in a discussion of the duty and liability of the manufacturer, or the degree of care he must exercise in the sale of his products. Full discussion of these questions may be found in the cases of *Clement v. Crosby & Co.* 148 Mich. 293, 10 L.R.A.(N.S.) 588, 111 N. W. 745, 12 Ann. Cas. 265; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Leavitt v. Fibroid Co.* 196 Mass. 440, 15 L.R.A.(N.S.) 855, 82 N. E. 682; *Tomlinson v. Armour & Co.* 75 N. J. L. 748, 19 L.R.A.(N.S.) 923, 70 Atl. 314; *Watson v. Augusta Brewing* 124 Ga. 121, 1 L.R.A.(N.S.) 1178, 110 Am. St. Rep. 157, 52 S. E. 152; *Heindirk v. Louisville Elevator Co.* 122 Ky. 675, 5 L.R.A.(N.S.) 1103, 92 S. W. 608; *Standard Oil Co. v. Tierney*, 92 Ky. 367, 14 L.R.A. 677, 36 Am. St. Rep. 595, 17 S. W. 1025; *Berger v. Standard Oil Co.* 126 Ky. 155, 11 L.R.A.(N.S.) 238, 103 S. W. 245; *Olds Motor Works v. Shaffer*, 145 Ky. 616, 37 L.R.A.(N.S.) 560, 140 S. W. 1047; *Huset v. J. I. Case Threshing Mach. Co.* 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 865; *Woodward v. Miller*, 119 Ga. 618, 64 L.R.A. 932, 100 Am. St. Rep. 188, 46 S. E. 847; *Weiser v. Holzman*, 33 Wash. 87, 99 Am. St. Rep. 932, 73 Pac. 797. But there is and should be a difference between the liability of the manufacturer and the liability of the dealer in this class of cases. The manufacturer should be and is held to a higher degree of care than the dealer in putting on the market dangerous compounds, because he knows or should be charged with notice of the quality and contents of the article that he manufactures; and, being the originator of it, should be required to give notice of the danger in its use, if it is dangerous. But the dealer who buys from the manufacturer occupies practically the same position as does the purchaser from the dealer, and is not presumed to know the formula by which the article is made, or whether it is inherently dangerous or not, and it is doubtless due to the limited liability of the dealer when he is not guilty of misrepresentation or fraud that so few cases can be found presenting the precise question here involved. A case in point is *Clement v. Rommeck*, 149 Mich. 595, 13 L.R.A.(N.S.) 382, 119 Am. St. Rep. 695, 113 N. W. 286. There the action was brought by a third party against Crosby & Company, the manufacturer, and Rommeck, the merchant who sold the article, to

recover damages for injuries sustained in the use of a stove polish. A demurrer to the petition was sustained on behalf of the merchant, and in affirming this ruling the court said: "It is manifest from a reading of this declaration that the theory fairly to be deduced from it is that, though the defendant Rommeck bought the preparation from Crosby & Company, properly labeled in the open market, and sold it in the open market, the positive duty rested upon him to know the property of the goods and their inflammable nature, and to communicate the facts to the purchaser. It is to be noted that the declaration contains no averment that the defendant Rommeck had actual knowledge of the inflammable nature of the goods; nor is it averred in what manner he was negligent in not knowing their inflammable nature. It gets down to this: Whether a dealer—a hardware merchant, for example—who buys in the open market stove polish which purports to be safe and proper for use, and sells the article for a purpose for which it is apparently intended, is liable, in the absence of negligence, if it turn out that the article is not adapted to the use, and causes injury. We think it clear, upon principle, that no such liability exists." Another similar case is *West v. Emanuel*, 198 Pa. 180, 53 L.R.A. 330, 47 Atl. 965. There an action was brought against a retail druggist to recover damages for injuries sustained in the use of a headache powder. In holding the druggist not liable, the court said: "The Kohler headache powders were in demand at least twelve or fifteen years ago, and from that time on they were to be found for sale in most, if not all, of the principal drug stores. They were recognized and regarded as an efficient and proper remedy for headaches, and were mainly used to relieve them. They were a patent or proprietary medicine manufactured by Kohler, and sold by him to the drug stores, which sold them to their customers. In the sales of patent or proprietary medicines furnished by the compounder of the ingredients which compose them, the druggist is not required to analyze the contents of each bottle or package he receives. If he delivers to the customer the article called for, with the label of the proprietary or patentee upon it, he cannot be justly charged with negligence in so doing." See also *White v. Oakes*, 88 Me. 367, 32 L.R.A. 593, 34 Atl. 175. In our opinion the petition was defective, and evidence was not sufficient to take the case to the jury. The court should have sustained the motion for a peremptory instruction requested in behalf of appellant.

Wherefore the judgment is reversed for proceedings in conformity with this opinion.

Winn, J., dissenting in part:

I dissent from so much of the court's opinion herein as holds that the Christian circuit court had jurisdiction of this action. The cause of action arose upon a tort committed by the sale of an explosive substance without any notice or label of its dangerous nature. The evidence is conclusive that every act done by appellant in connection with this substance was done in Jefferson county, and there the appellant parted with all ownership of or control over it. The wrong it committed was in permitting the article to go out without brand. The failure to brand it was a failure in Jefferson county. No part of the tort, whether of commission or omission, was done in Christian county, and therefore § 72 did not give the circuit court of that county any jurisdiction of the action. The case of *Mitchell v. Ripy*, 82 Ky. 516, cited in the opinion herein as controlling, is not in point. That case arose under § 74 of the Civil Code. It was in damages for false arrest. The arrest was made in Marion county, "the injury was done" there, and, of course, under the express provision of § 74, the county where the injury was done was the county of the jurisdiction; while under § 72, not the place where the injury is done, but the place where the wrong itself is committed, is the place of jurisdiction. In my judgment the court's opinion in the case at bar confuses the commission of the tort named in § 72 with the injury suffered named in § 74, as fixing the jurisdiction. The theory of a continuing wrong or of a continuous act will not bear analysis. It is not a case of a continuous action or motion, as where, for instance, a man might stand in one county and fire a pistol, injuring one in another county. On the contrary, the sale of the unlabeled article was entire and complete in Jefferson county; and, since the Code makers said that the jurisdiction should be in the county where the tort was committed, it is not within our province to add to the Code that the action can as well be brought in any county where anyone may suffer injury.

MASSACHUSETTS SUPREME JUDICIAL COURT.

MATTHEW E. GATELY, Admr., etc.,
v.

JOSEPH B. TAYLOR et al.

(211 Mass. 60, 97 N. E. 619.)

Trial — jury — composition of stove polish — naphtha.

1. The jury must determine whether or not stove polish composed of naphtha, col-
39 L.R.A.(N.S.)

ored and slightly thickened so as to make the mixture adhesive when applied, is merely naphtha under an assumed name, the sale of which is prohibited by statute.

Negligence — sale of dangerous article — liability for injury — retailer.

2. A retailer who sells a stove polish which is merely naphtha under an assumed name, the sale of which is prohibited by a statute, is liable for injury caused by its attempted use, although he had no knowledge of the constituent parts of the article.

Pleading — duplicity — remedy.

3. Objections to a pleading for duplicity can be raised only by motions to strike out or to compel the pleader to elect.

Negligence — illegal sale of naphtha — injury — other offenders.

4. A merchant cannot escape liability for injuries caused by his selling naphtha as stove polish contrary to statute, by the fact that other dealers did the same thing.

(February 26, 1912.)

EXCEPTIONS by defendants to rulings of the Superior Court for Middlesex County made during the trial of an action brought to recover damages for the suffering of plaintiff's intestate prior to death which occurred through the ignition of her clothing by the explosion of stove polish purchased from defendants. Overruled.

The facts are stated in the opinion.

Mr. G. L. Mayberry for defendants.

Messrs. James E. Cotter and Michael J. Connolly, for plaintiff:

An obligation rests upon the one who delivers an article which he knows, or ought to know, to be peculiarly dangerous, to give notice of its character, or bear the natural consequences of his failure to do so.

Leavitt v. Fiberloid Co. 196 Mass. 440, 15 L.R.A.(N.S.) 855, 82 N. E. 682; *Provost v. Cook*, 184 Mass. 315, 68 N. E. 336; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298.

There was evidence from which the jury might have found that the defendants sold naphtha under an assumed name, in violation of chapter 102, § 108.

Such violation constituted evidence of negligence to be considered by the jury under the second count.

Finnegan v. Winslow Skate Mfg. Co. 189 Mass. 580, 76 N. E. 192; *Ives v. Welden*, 114 Iowa, 476, 54 L.R.A. 864, 89 Am. St. Rep. 379, 87 N. W. 408.

There was evidence that the deceased was in the exercise of due care.

Thompson v. Cambridge Gaslight Co. 201 Mass. 77, 87 N. E. 486; *Smith v. Boston*

Note. — As to liability of dealer for personal injuries from article not obviously dangerous, see *Peaslee-Gaulbert Co. v. McMath*, ante, 465.

Gaslight Co. 129 Mass. 318; Hilton v. Boston, 171 Mass. 478, 51 N. E. 114.

Braley, J., delivered the opinion of the court:

The plaintiff sues in tort under Rev. Laws, chap. 102, § 108, and at common law to recover damages for the conscious suffering of his wife and intestate, alleged to have been caused by the wrongful acts of the defendants. The refusal to give the first three requests, that upon all the evidence and the pleadings the plaintiff could not recover under either count, presents for decision, as the principal question, whether the jury were warranted in returning a general verdict for the plaintiff. Oulighan v. Butler, 189 Mass. 287, 289, 75 N. E. 726; Murphy v. Russell, 202 Mass. 480, 89 N. E. 107. The defendants, as retail dealers in hardware and stoves, kept for sale and sold, with other stove polishes, a liquid stove polish known as "6-5-4 Self-Shining Stove Lusta." It was contained in small round cans with a label, on which, under the heading of directions, the excellencies of the preparation, as a stove polish and the manner of application were elaborately printed. The article, with the knowledge and assent of the defendants, as appeared by their testimony, had been advertised in the local papers by the manufacturers from whom they purchased it in bulk, as being kept for sale by them, and although the advertisement recommended its use they were ignorant of its composition. The conflicting expert testimony left to the jury the credibility of the witnesses, and the weight of the evidence; and they could accept the opinion of the plaintiff's witness, who positively stated that it was "naphtha with some pigment, and a little thickening," and "notwithstanding all that is said about qualifying phrases it is naphtha just as much as half a dollar is silver," rather than the conclusion of the defendants' expert, that it was "an asphalt paint." The son of the decedent at her request bought a can of the defendants, and in the afternoon of the day of purchase, while she was using the contents on a cooking range in which the fire had not been extinguished, an explosion suddenly followed, enveloping her in flame and causing such grave injuries that her death followed after a period of intense pain. If it were not that the defendants urge the question of her due care, it would be unnecessary to add that the "directions" specified, "if a greater luster is desired apply when iron is warm," and that generally stove polishes in common experience do not explode, even when applied to heated surfaces. It is sufficient

that as matter of law, she was not shown to have been careless. Baldwin v. American Writing Paper Co. 196 Mass. 402, 407, 82 N. E. 1; Thompson v. Cambridge Gaslight Co. 201 Mass. 77, 87 N. E. 486.

The substantial inquiry upon this evidence is the construction to be given to Rev. Laws, chap. 102, § 108, making it a penal offense to sell, offer, or keep for sale, "naphtha under an assumed name." Naphtha has been defined as a product of petroleum intermediate between the associate products of gasolene and benzine, all of which do not differ in their essential nature, but vary only in the degree of inflammability when brought into contact with radiant heat. Webster, New Int. Dict.; Morse v. Buffalo F. & M. Ins. Co. 30 Wis. 534, 536, 11 Am. Rep. 587. The inflammable and explosive qualities of petroleum and its products have been generally recognized, as calling for statutory regulations governing their storage and sale, for the protection of the public; and in this jurisdiction the first legislation upon the general subject is Stat. 1865, chap. 244. The statute, however, and the succeeding Stat. 1866, chap. 285, which repealed the previous act, went no farther than to provide that crude petroleum or any of its products should not be kept, manufactured, or refined in quantities exceeding 500 gallons without a license from the public authorities, unless "stored, kept, manufactured, or refined in detached and properly ventilated buildings specially adapted to the purpose, and surrounded by an embankment so constructed as to effectually prevent the overflow of said petroleum or any of its products" beyond the premises. The next enactment, the Stat. of 1867, chap. 286, which repealed the Stat. of 1866, chap. 262, is entitled, "An Act Regulating the Sale of Coal and Petroleum Oils." By § 5, any person who sold, kept, or offered for sale naphtha under the name of oil was, upon conviction, subject to fine or imprisonment or both, and by § 3 also was made liable in damages to any person suffering injuries from the explosion or ignition of such oil unlawfully sold. Wellington v. Downer Kerosene Oil Co. 104 Mass. 64. Stat. 1869, chap. 152, followed, and while by § 2 no person shall mix for sale naphtha and illuminating oils, or shall sell or offer for sale such mixtures, unless for the purposes of remanufacture into illuminating oil made from coal or petroleum, which would not ignite beyond a fixed standard of temperature, by § 4, the sale of naphtha under an assumed name was for the first time generally prohibited. This section appears without change in Pub. Stat.

1882, chap. 102, § 71, and Rev. Laws, chap. 102, § 108. It is not impossible to say that the prohibition refers only to the sale of naphtha under the name of petroleum or some of its other enumerated products. But this would not reach the mischief which the statute obviously was intended to prevent. The designations under which naphtha might be sold would be as various as its fluid nature would permit, and the seller would not be subject to a penalty. A commercial compound of which one of the substantial parts might be naphtha, yet when combined with other ingredients it became as a whole a distinct and independent product, would not come within the statute. But if the contributed parts merely supplied coloring to the fluid, with a slight thickening, making the mixture adhesive when applied, then the jury must determine whether the article sold does not remain really and essentially naphtha. *Com. v. Wentworth*, 118 Mass. 441, 442.

The statutory regulation is absolute, and in a criminal prosecution want of knowledge by the seller would not be a defense. He violates the statute, which is a police regulation, at his peril. *Com. v. New York C. & H. R. R. Co.* 202 Mass. 399, 23 L.R.A. (N.S.) 350, 132 Am. St. Rep. 507, 88 N. E. 764, 16 Ann. Cas. 587; *Com. v. Mixer*, 287 Mass. 141, 31 L.R.A. (N.S.) 467, 93 N. E. 249, 20 Ann. Cas. 1152. Section 108, however, not only imposes a penalty, but under § 106 the defendants, if found to have transgressed, also were made liable in a civil action for any damage suffered by the decedent from the explosion or ignition of the naphtha, independently of any question of negligence on their part. *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64, 70; *Hourigan v. Nowell*, 110 Mass. 470, 473. The allegations of the first count were sufficient under the statute, and the jury were warranted in finding that they had been sustained by the evidence to which sufficient reference has been made. The plaintiff under the second count offered no affirmative evidence that the defendants knew of the nature of the contents of the can. or had any information of its dangerous qualities which should have put them upon inquiry. The defendants, however, sold the article illegally; and their illegal act, having contributed to the decedent's injury, the plaintiff, under the second count, could sue at common law as well as under the statute. *Coffin v. Field*, 7 Cush. 355, 358; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64; *Pollock v. Eastern R. Co.* 124 Mass. 158; *Ransom v. Boston*, 192 Mass. 299, 78 N. E. 481, 7 Ann. Cas. 733; 1 Comyn's 39 L.R.A. (N.S.)

Digest, Action upon Statutes, 442. See *Cooley*, Torts, 3d ed. 1408, note 96, and *Wharton*, Neg. § 443n, for a collection of cases.

The duty imposed is for the safety and welfare of the members of the community, and "as a general rule," said Mr. Justice Devens in *Parker v. Barnard*, 135 Mass. 116, 120, 46 Am. Rep. 450, following *Salisbury v. Herchenroder*, 106 Mass. 458, 460, 8 Am. Rep. 354, "where an act is enjoined or forbidden under a statutory penalty, and the failure to do the act enjoined, or the doing of the act forbidden has contributed to an injury, the party thus in default is liable therefor to the party injured, notwithstanding he may also be subject to a penalty." If the jury were satisfied of the violation of the statute there was evidence for their consideration of the defendants' negligence, which was aptly charged in the allegations of this count. *Brunelle v. Lowell Electric Light Corp.* 188 Mass. 493, 498, 74 N. E. 676; *Finnegan v. Winslow Skate Mfg. Co.* 189 Mass. 580, 582, 76 N. E. 192; *McCarthy v. Morse*, 197 Mass. 332, 337, 83 N. E. 1109; *Field v. Gowdy*, 199 Mass. 568, 573, 19 L.R.A. (N.S.) 236, 85 N. E. 884; *Davis v. John L. Whiting & Son Co.* 201 Mass. 91, 96, — L.R.A. (N.S.) —, 87 N. E. 199; *Moran v. Dickinson*, 204 Mass. 559, — L.R.A. (N.S.) —, 90 N. E. 1150; *Horsman v. Brockton & P. Street R. Co.* 205 Mass. 519, 522, 523, 91 N. E. 897; *Siemers v. Eisen*, 54 Cal. 418; *Corrigan v. Stillwell*, 97 Me. 247, 61 L.R.A. 163, 54 Atl. 389; *Baxter v. Coughlin*, 70 Minn. 1, 72 N. W. 797; *Horton v. Wylie*, 115 Wis. 505, 95 Am. St. Rep. 953, 92 N. W. 245; *Brannock v. Elmore*, 114 Mo. 55, 21 S. W. 451; *McRickard v. Flint*, 114 N. Y. 222, 226, 21 N. E. 153.

The objection that because of some of the expressions used by the pleader the second count might be objectionable for duplicity could be raised, if at all, only by a motion to strike out, or a motion to compel the plaintiff to elect at the close of the evidence. *King v. Howard*, 1 Cush. 137, 141; *Burns v. Scooffy*, 98 Cal. 271, 33 Pac. 86; *Golding v. Wharton Salt Works Co. L. R. 1 Q. B. Div. 374*, 34 L. T. N. S. 474, 24 Week. Rep. 423. And whatever apprehension the defendants may have had, that they might be held liable in deceit for misrepresentations as to the nature of the article sold as "lusta," was removed by the giving of their requests on this point, accompanied with appropriate comments. No exceptions were taken to the instructions, except so far as they were inconsistent with the first, second, third, fifth, and ninth requests, which for reasons sufficiently stated the judge properly declined to give. If the

defendants deemed the instructions as to the second count insufficient or erroneous, they should have specifically excepted; but not having done so, this part of the charge cannot be reviewed. *Ridenour v. H. C. Dexter Chair Co.* 209 Mass. 70, 78, 95 N. E. 409, and cases cited.

Nor were the rulings upon questions of evidence incorrect. The answer of the defendants put in issue every material allegation of the declaration, and the advertisement that they kept "lusta" for sale was clearly relevant, while the evidence offered by them that it was an article generally sold in the market before as well as since the injury to the decedent was rightly excluded. If other dealers, whether within or without this commonwealth, sold naphtha as "lusta," this fact afforded the defendants no justification for their violation of the statute.

Exceptions overruled.

MASSACHUSETTS SUPREME JUDICIAL COURT.

JOSEPHINE K. MATHESON

v.

JOSEPH O'KANE.

(211 Mass. 91, 97 N. E. 638.)

Trial — jury — payment by joint tort feisor — effect.

1. The jury must determine the effect of evidence tending to show that money received from one of several joint tort feisors was not intended as a satisfaction of the claim.

Joint tort feisor — covenant not to sue — effect on liability of others.

2. A covenant not to sue one of several joint tort feisors, upon receiving from him a consideration therefor, does not operate to discharge the others, who contribute no part of the consideration, from liability to suit.

Action — joint — partial discontinuance — effect.

3. The discontinuance as to some of the defendants of an action against several

joint tort feisors has no effect upon the liability of the others.

(February 27, 1912.)

R EPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court after direction of verdict in favor of defendant in an action brought to recover damages for personal injuries through a fall on a sidewalk which was alleged to have been caused by defendant's negligence. Reversed.

Joseph O'Kane, Frank T. Horgan, and Edward B. Townsend, as trustee, owned adjoining houses on East Canton street, in Boston. A common gutter conducted the water from these houses down upon the sidewalk. Water so conducted accumulated and froze upon the walk, and plaintiff, in attempting to pass over it, fell and was injured. Horgan and Townsend had indemnity insurance and the insurers paid plaintiff three hundred and two hundred dollars respectively, and she executed to Horgan and Townsend an instrument of which the following is a copy:

"Know All Men by These Presents: That I, Josephine K. Matheson, of Boston, in the County of Suffolk, in the commonwealth of Massachusetts, in consideration of two hundred (\$200) dollars and other valuable considerations, to me duly paid, do hereby covenant with Edward B. Townsend, trustee, that I will never sue or attach the said Townsend, trustee, or his estate, for or on account of a certain claim for damages described in the plaintiff's declaration in a certain action brought by her against said Townsend, trustee, and others, in the superior court in the county of Suffolk, which action is numbered 51-303, and that these presents may be pleaded as a defense to any action or other proceeding which may be brought, instituted, or taken by me against the said Townsend, trustee, or his estate, in breach of this covenant. In witness whereof, I have hereunto set my hand and seal this twenty-fifth day of August, A. D. 1909."

The action was originally brought against

Note. — The decisions upon the effect of a covenant not to sue one joint tort feisor, as a release of another, are collated in notes to *Abb v. Northern P. R. Co.* 58 L.R.A. 299, and *Musolf v. Duluth Edison Electric Co.* 24 L.R.A. (N.S.) 451.

As to the effect of a release of one joint tort feisor of a reservation of right as against others, see *Eden v. Fletcher*, 19 L.R.A. (N.S.) 618, and note.

As to the right to show by extrinsic evidence that the payment of a judgment against, or consideration for the release of, an alleged joint tort feisor, was not a satisfaction of the claim, see notes to *Ryan v. Becker*, 14 L.R.A. (N.S.) 330, and *Fitzgerald v. Union Stock Yards Co.* 33 L.R.A. (N.S.) 983.

As to the effect of the release of one person from liability for a tort to release another, where the former was not in fact or law liable, see note to *Snyder v. Mutual Teleph. Co.* 14 L.R.A. (N.S.) 321.

As to the effect of obtaining a judgment against one joint tort feisor upon the liability of the other, see note to *Blackman v. Simpson*, 58 L.R.A. 410.

all three, but, upon the execution of these instruments, it was discontinued against Horgan and Townsend, and O'Kane thereupon set up an accord and satisfaction and asked that the action be discontinued as to him.

Further facts appear in the opinion.

Messrs. Boutwell & Hastings and F. P. Miller, for plaintiff:

A covenant never to sue an existing demand is not technical release, and will not operate as a defense in favor of a person who is not a party to such covenant, and from whom comes no part of the consideration paid.

Perkins v. Gilman, 8 Pick. 229; Allen v. Kimball, 23 Pick. 473; Kenworthy v. Sawyer, 125 Mass. 28; Saunders v. Saunders, 154 Mass. 337, 28 N. E. 270; Clare v. Hatch, 180 Mass. 194, 62 N. E. 250; Clark v. Bullard, 208 Mass. 586, 94 N. E. 1042; Walsh v. Hanan, 93 App. Div. 580, 87 N. Y. Supp. 930; Gilbert v. Finch, 173 N. Y. 455, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133; Hirschfeld v. Alsberg, 47 Misc. 141, 93 N. Y. Supp. 617; McCrillis v. Hawes, 38 Me. 566; Ellis v. Esson, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518; Sloan v. Herrick, 49 Vt. 327; Edens v. Fletcher, 79 Kan. 139, 19 L.R.A.(N.S.) 618, 98 Pac. 784; Carey v. Bilby, 63 C. C. A. 361, 129 Fed. 203; El Paso & S. R. Co. v. Darr, — Tex. Civ. App. —, 93 S. W. 166; Snow v. Chandler, 10 N. H. 92, 34 Am. Dec. 140; Texarkana Teleph. Co. v. Pemberton, 86 Ark. 329, 111 S. W. 257; Arnett v. Missouri P. R. Co. 64 Mo. App. 368; Chicago & A. R. Co. v. Averill, 224 Ill. 516, 79 N. E. 654.

Messrs. Dolan & Dolan and Damon E. Hall, for defendant:

For an injury arising from the tort of two or more wrongdoers there can be but one satisfaction, and if a plaintiff accepts money in satisfaction of her claim from any one of them, she thereby discharges all.

Brown v. Cambridge, 3 Allen, 474; Stone v. Dickinson, 5 Allen, 29, 81 Am. Dec. 727; Curley v. Harris, 11 Allen, 113; Goss v. Ellison, 136 Mass. 503; Stimpson v. Poole, 141 Mass. 502, 6 N. E. 705; Aldrich v. Parnell, 147 Mass. 409, 18 N. E. 170; Brewer v. Casey, 196 Mass. 385, 82 N. E. 45; Ellis v. Bitzer, 2 Ohio, 89, 15 Am. Dec. 534; Ruble v. Turner, 2 Hen. & M. 38; Ayer v. Ashmead, 31 Conn. 447, 83 Am. Dec. 154; Brown v. Kencheloe, 3 Coldw. 192; Chetwood v. California Nat. Bank, 113 Cal. 414, 45 Pac. 704; Turner v. Hitchcock, 20 Iowa, 310; Long v. Long, 57 Iowa, 497, 10 N. W. 875; Snyder v. Mutual Teleph. Co. 135 Iowa, 215, 14 L.R.A.(N.S.) 321, 112 N. W. 776; Cleveland, C. C. & St. L. 39 L.R.A.(N.S.)

R. Co. v. Hilligoss, 171 Ind. 417, 131 Am. St. Rep. 258, 86 N. E. 485; Dulaney v. Bufum, 173 Mo. 15, 73 S. W. 125; Williams v. Le Bar, 141 Pa. 149, 21 Atl. 525.

The covenants not to sue given by the plaintiff to two of the three defendants should be construed as a bar to the present action.

Kenworthy v. Sawyer, 125 Mass. 28; Brewer v. Casey, 196 Mass. 384, 82 N. E. 45; Brown v. Cambridge, 3 Allen, 474; Goss v. Ellison, 136 Mass. 503; Leddy v. Barney, 139 Mass. 394, 2 N. E. 107; Seither v. Philadelphia Traction Co. 125 Pa. 397, 4 L.R.A. 54, 11 Am. St. Rep. 905, 17 Atl. 338; McBride v. Scott, 132 Mich. 176, 61 L.R.A. 445, 102 Am. St. Rep. 416, 93 N. W. 243, 1 Ann. Cas. 61; Chetwood v. California Nat. Bank, 113 Cal. 414, 45 Pac. 704; Smith v. Consolidated Gas Co. 36 Misc. 131, 72 N. Y. Supp. 1084; Ruble v. Turner, 2 Hen. & M. 38; Ellis v. Bitzer, 2 Ohio, 89, 15 Am. Dec. 534; Gilbert v. Timms, 7 Ohio C. C. N. S. 253, 28 Ohio C. C. 107; Long v. Long, 57 Iowa, 497, 10 N. W. 875; Cleveland, C. C. & St. L. R. Co. v. Hilligoss, 171 Ind. 417, 131 Am. St. Rep. 258, 86 N. E. 485; Murphy v. Penniman, 105 Md. 452, 121 Am. St. Rep. 583, 66 Atl. 282.

De Courcy, J., delivered the opinion of the court:

The judge of the superior court ruled that, as the plaintiff's claim was unliquidated, the taking of money and the giving of the papers under seal to the defendants Horgan and Townsend, trustee, was a bar to any recovery against the defendant O'Kane. The correctness of this ruling is now presented for our determination.

The long-established doctrine that a release of one of several joint tortfeasors operates to discharge all is not applicable here, because no release was given by the plaintiff. Bacon, *Abbr. title Release* (B); Brown v. Cambridge, 3 Allen, 474; Aldrich v. Parnell, 147 Mass. 409, 18 N. E. 170. It is equally true that a satisfaction from one discharges all, as the plaintiff has only a single cause of action and is entitled to but one satisfaction in damages. Cocke v. Jenner, Hobart, 66; Brewer v. Casey, 196 Mass. 384, 82 N. E. 45. The claim argued by the defendant, however, that the plaintiff accepted the money from the other defendants in full satisfaction for her injuries, and thereby discharged her cause of action, does not seem to be raised by the report. The ruling made does not refer to such alleged accord and satisfaction. And when the plaintiff attempted to show that there was no intention to release her claim,

the judge excluded the evidence, not on account of the form of the question objected to, but on the broad ground that "the paper speaks for itself." Even if we assume that this contention is fairly open to the defendant, the question whether the plaintiff accepted the money of the other defendants in full satisfaction of all injuries caused by the accident was one of fact for the jury on the evidence.

The main question in this case is whether the covenants not to sue, given by the plaintiff to two of the three joint tortfeasors, operate as a defense in favor of the defendant O'Kane, who was not a party to the covenants and contributed no part of the consideration therefor. The point in dispute never has been decided in this commonwealth.

The rule of law that a release which discharges the liability of one joint tortfeasor releases the others seems to be based upon the nature of their liability, which is one and indivisible, and is necessarily destroyed by the discharge of one. In like manner after satisfaction, although it moved from only one of the wrongdoers, no foundation remains for an action against anyone. 11 Ann. Cas. 397, note; 25 Harvard L. Rev. 203.

This basis for the rule does not exist in the case of a covenant not to sue one of several jointly liable. Here the liability is not discharged, and the plaintiff's right of action is retained against all the wrongdoers. For a breach of his covenant not to sue, he becomes liable for the damages suffered by the one to whom the covenant was given. It is true that a covenant not to sue an individual debtor may be pleaded in bar to the original cause of action. But this exception was early established in order to avoid circuity of action, as otherwise the court would be burdened with cross actions for the same damages, one on the original liability and the other on the covenant not to sue. *Hodges v. Smith*, Cro. Eliz. pt. 2, p. 623; *Lacy v. Kynaston*, 12 Mod. 548; *Foster v. Purdy*, 5 Met. 442.

The great weight of authority supports the doctrine that a covenant not to sue one of several joint tortfeasors does not operate as a release of the others from liability. *Texarkana Teleph. Co. v. Pemberton*, 86 Ark. 329, 111 S. W. 257; *Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271; *Chicago & A. R. Co. v. Averill*, 224 Ill. 516, 79 N. E. 654; *Drinkwater v. Jordan*, 46 Me. 432; *Musolf v. Duluth Edison Electric Co.* 108 Minn. 369, 24 L.R.A.(N.S.) 451, 39 L.R.A.(N.S.)

122 N. W. 499; *Arnett v. Missouri P. R. Co.* 64 Mo. App. 368; *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140; *Line v. Nelson*, 38 N. J. L. 358; *Irvine v. Millbank*, 56 N. Y. 635; *Id.* 15 Abb. Pr. N. S. 378; *Robertson v. Trammell*, 98 Tex. 364, 83 S. W. 1098; *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752; *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518. This distinction between a release and a covenant not to sue has long been recognized in this commonwealth in actions of contract. *Shed v. Pierce*, 17 Mass. 623; *Draper v. Weld*, 13 Gray, 585; *Kenworthy v. Sawyer*, 125 Mass. 28. Generally speaking, it would seem that in this respect the same principle should apply alike to actions *ex contractu* and those *ex delicto*, and some of the courts have expressly so held. *Duck v. Mayeu*, [1892] 2 Q. B. 511, 62 L. J. Q. B. N. S. 69, 4 Reports, 38, 67 L. T. N. S. 547, 41 Week. Rep. 56, 57 J. P. 23; *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140.

The confusion and apparent conflict of authorities have not arisen in cases like that at bar, where the agreement given to one of the joint wrongdoers is clearly an agreement not to sue, and nothing more. The distinction between the legal effect of a release and of a covenant not to sue is generally recognized. The controversy concerns rather the construction of a particular writing as a release or as a covenant not to sue, and the means whereby the two are to be distinguished. Where it is apparent from the paper that the intention was to discharge the liability of one of the joint wrongdoers, the courts quite generally hold that the original joint and indivisible liability is thereby extinguished, and that any clause by which parties seek to reserve a right of action against the other wrongdoers is repugnant to the release and void. *Ducy v. Patterson*, 11 Ann. Cas. 393, note; *Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504; *McBride v. Scott*, 132 Mich. 176, 61 L.R.A. 445, 102 Am. St. Rep. 416, 93 N. W. 243, 1 Ann. Cas. 61; *Seither v. Philadelphia Traction Co.* 125 Pa. 397, 4 L.R.A. 54, 11 Am. St. Rep. 905, 17 Atl. 338; *Abb v. Northern P. R. Co.* 28 Wash. 428, 58 L.R.A. 293, 92 Am. St. Rep. 864, 68 Pac. 954. But where it is evident that the consideration paid to the plaintiff was not intended to be full compensation for his injuries, and the agreement signed by him, although in form a release, was clearly intended to preserve the liability of those who were not parties to it, many of the courts have sought to give effect to that intention by construing the agreement as in legal effect a

covenant not to sue, and not a technical release. As stated by A. L. Smith, L. J., in *Duck v. Meyen* [1892] 2 Q. B. 511: "A rule of construction for such a document was laid down by the court of Queen's bench in *Price v. Barker*, 4 El. & Bl. 760, at page 777, 3 C. L. R. 927, 24 L. J. Q. B. N. S. 130, 1 Jur. N. S. 775, where it was held that, in determining whether the document be a release or a covenant not to sue, the intention of the parties was to be carried out, and, if it were clear that the right against a joint debtor was intended to be preserved, inasmuch as such right would not be preserved if the document were held to be a release, the proper construction, where this was sought to be done, was that it was a covenant not to sue, and not a release." And see *Edens v. Fletcher*, 79 Kan. 139, 19 L.R.A. (N.S.) 618, 98 Pac. 784; *McAllester v. Sprague*, 34 Me. 296; *Gilbert v. Finch*, 173 N. Y. 455, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133; *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 753; *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518; *Carey v. Bilby*, 63 C. C. A. 361, 129 Fed. 203. The lack of harmony in the cases is partly due also to distinctions sometimes drawn between the effect of a release under seal and one not under seal; and between settlements made where the damages are certain or subject to computation, and where they are uncertain and a mere matter of opinion. But we are not concerned with this controversy in the present case, as the writings given by this plaintiff were admittedly nothing more than agreements not to sue.

The discontinuance of the action against the other defendants in itself does not affect the liability of the defendant O'Kane. The plaintiff at her election might have sued one or two or all of the tortfeasors. The discontinuance simply placed Horgan and Townsend in the same position they occupied before the litigation began. *Sloan v. Herrick*, 49 Vt. 328; *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 753, 58 L.R.A. 303, and cases collected in note.

We are of opinion that the covenants not to sue given in this case do not constitute a bar to the plaintiff's claim against the defendant O'Kane, and that the issue of accord and satisfaction was one of fact for the jury. Accordingly, the judge was not warranted in directing a verdict for the defendant as matter of law. We deem it unnecessary to consider the question of evidence raised, as it is not likely to arise at another trial.

New trial ordered.
39 L.R.A. (N.S.)

CONNECTICUT SUPREME COURT OF ERRORS.

PARK CITY YACHT CLUB

v.

CITY OF BRIDGEPORT.

(85 Conn. 366, 82 Atl. 1035.)

Appeal — second appeal — law of case.

1. A ruling by an appellate court that in assessing benefits for a change in a highway, the court should have considered the history of the change, the fact that the municipality contemplated the change made, and its effect upon abutting property, is the law of the case upon a second appeal.

Highway — cutting off access — right to damages.

2. The owner of abutting property is entitled to damages for a change in a highway which results in raising a portion of its width to carry it over a bridge, leaving only a narrow strip terminating at the water in front of his property, the effect of which is to cut off travel past his property, and leave access to it only by a *cul-de-sac* which can be used by vehicles only when they back in one direction.

(April 9, 1912.)

RESERVATION by the Superior Court for Fairfield County for the opinion of the Supreme Court of Errors of questions arising upon an appeal from an assessment of special benefits for the improvement of Stratford avenue, in the city of Bridgeport. Judgment for plaintiff advised.

The facts are stated in the opinion.

Mr. John W. Banks, for plaintiff:

The plaintiff is entitled to recover the entire amount of damages assessed by the trial court, including those arising from the diversion of traffic.

Park v. Chicago & S. W. R. Co. 43 Iowa, 636; *Newton v. New York, N. H. & H. R. Co.* 72 Conn. 420, 44 Atl. 813; 1 Lewis, Em. Dom. 3d ed. § 198, p. 368; *Brazell v. Seattle*, 55 Wash. 180, 104 Pac. 155; *Randolph*, Em. Dom. § 410.

Where the plaintiff's property has been left upon a dead end with access from one direction entirely cut off, the cases uniformly hold that he has suffered special damages which can be recovered.

Chicago v. Burcky, 158 Ill. 103, 29 L.R.A. 569, 48 Am. St. Rep. 142, 42 N. E. 178;

Note.—The right of a property owner whose means of access from one direction is shut off or interfered with by closing of adjoining street or portion of street upon which he is situated, to recover damages therefor, is discussed in notes to *Hyde v. Fall River*, 2 L.R.A. (N.S.) 269, and *Newark v. Hatt*, 30 L.R.A. (N.S.) 637.

Rigney v. Chicago, 102 Ill. 64; Chicago v. Taylor, 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820; Vanderburgh v. Minneapolis, 98 Minn. 329, 6 L.R.A.(N.S.) 741, 108 N. W. 480; Buchholz v. New York, L. E. & W. R. Co. 148 N. Y. 640, 43 N. E. 76; Park v. Chicago & S. W. R. Co. 43 Iowa, 636; Re Melon Street, 182 Pa. 397, 38 L.R.A. 275, 38 Atl. 482; Johnston v. Old Colony R. Co. 18 R. I. 642, 49 Am. St. Rep. 800, 29 Atl. 594; Highbarger v. Milford, 71 Kan. 331, 80 Pac. 633; Dean v. Ann Arbor R. Co. 137 Mich. 459, 100 N. W. 773; Chicago v. Baker, 30 C. C. A. 364, 58 U. S. App. 569, 86 Fed. 753; Winnetka v. Clifford, 201 Ill. 475, 66 N. E. 384; Chamberlain v. West End & C. P. R. Co. 2 Best & S. 605, 32 L. J. Q. B. N. S. 173; Gillespie v. South Omaha, 79 Neb. 441, 112 N. W. 582; Scrutchfield v. Choctaw, O. & W. R. Co. 9 L.R.A.(N.S.) 496, note; Dana v. Boston, 170 Mass. 593, 49 N. E. 1013; Cutter v. Boston, 200 Mass. 400, 86 N. E. 798; Cullen v. New York, N. H. & H. R. Co. 66 Conn. 211, 33 Atl. 910.

Messrs. James A. Marr and John S. Pullman for defendant.

Wheeler, J., delivered the opinion of the court:

The record in this case when before this court upon a former occasion (81 Conn. 76, 70 Atl. 631), contains a statement of facts substantially similar to those of the present record, by which it appears that the plaintiff is a yacht club, owning and occupying a clubhouse upon the south side of Stratford avenue, in Bridgeport, and on the easterly bank of an arm of the harbor, which was crossed by Stratford avenue by means of a solid stone causeway. Acting under its charter and the various votes and orders of its common council, committees, and boards, all of which appear in detail in the opinion in that case, the city tore down, in 1901 and 1902, the part of this causeway just west of plaintiff's premises and north of the present roadway in front of said premises, and laid out a highway and constructed a bridge north of the causeway, being parallel with said causeway, but much higher in grade, and having a high and immovable railing along its south side and extending 150 feet east of the entrance to the clubhouse. South of the bridge is a gap of water 23 feet wide left by the tearing out of the causeway. The traveled way remaining over the old causeway is only 24 feet wide. The plaintiff's property is thus left as a result of this improvement on a *cul-de-sac*. The former finding did not state directly whether or not the improvement ordered

by the city contemplated a construction such as that in fact made. The present finding sets forth in detail the history of the building of the bridge and of the changes actually made, as evidence received to show that, at and before the lay-out and appraisal, the city contemplated the construction of the bridge and the physical changes in front of plaintiff's premises, and finally it sets forth the ultimate fact that this "was contemplated by the city before the said lay-out and appraisal." The court reserved the question whether the history and facts showing what use the city contemplated making of Stratford avenue as widened should have been excluded.

Two principal questions have been urged in argument: (1) That the superior court could not in this proceeding consider the effect upon the plaintiff's property of the physical changes proved. (2) That the damages suffered by the plaintiff by reason of these physical changes, and by reason of diversion of travel, are not recoverable.

In the former opinion we held that (p. 80) "the application alleges, in substance, that the improvement in question, namely, the lay-out, alteration, exchange, discontinuance, and enlargement of Stratford avenue, contemplated such a construction and working of the highway established in place of the one previously existing, that the plaintiff would be largely shut off from free and direct access from its adjoining property to the main traveled path of the highway," and that "the application appears to have been tried to the court upon the denial of these allegations." The opinion recites the proof of physical changes made by the city subsequent to the confirmation of the assessment, which accorded with the contemplated changes as alleged in the application, and says (p. 82): "The finding does not state directly whether or not the court found to be true the allegation of the complaint that the improvement ordered by the city contemplated a construction such as that proved upon the trial. It would perhaps appear from the memorandum of decision that the fact alleged was a fair inference from the facts proved." Upon the application and facts found, the trial judge had held that "'the only question open upon this proceeding is the effect of the widening of Stratford avenue,' and that, in consequence of this ruling, he 'did not, in fact, estimate the effect of said changes other than the widening of said highway upon the value of the appellant's property.'" The basis of the ruling was that the scope of

the application was limited by the vote of the common council to the widening of Stratford avenue, and hence other physical changes were not elements of damage to be considered in this proceeding. This was the important question involved in the appeal reported in 81 Conn. 76, and was the most strongly argued of the questions presented on this reservation.

After reciting the various provisions of the charter and the proceedings thereunder, we say in our former opinion (pp. 78, 83): "This action of the common council completed a lay-out of the public improvement previously resolved upon by the common council, by which Stratford avenue was altered, changed, discontinued, and enlarged, as set forth in the report. . . . And in this case that improvement as established in front of the plaintiff's premises was a highway involving an alteration, extension, and practical discontinuance for public use of portions of a previously existing highway." We held this public improvement was of a very peculiar nature, and under this application, based, as it must have been, upon the action of the common council in instituting the improvement as contemplated by the city, "the superior court were bound to consider any injurious effect upon the value of the plaintiff's property, which might result from the contemplated peculiar construction of the highway, as well as any beneficial effect which might result from other causes, in determining whether or not the whole effect of the improvement was to specially benefit the plaintiff; . . . [and that] the provisions of the charter do not so limit the jurisdiction of the court."

We thus held that, under this application, all physical changes contemplated by the improvement should have been considered by the trial court, and that the record showed by inference that these physical changes had been contemplated by the improvement. Because of this we held the error of the trial court harmful. That no objection had been made to the proof of these physical changes was unimportant. We held them to be relevant and material to this action, otherwise we should not have deemed the failure of the trial court to consider them erroneous. This action is a retrial of the same application, with a denial of the allegations of physical changes contemplated by the city.

The material facts found are the same as on the former trial, with the addition of facts showing the history of the improvement, and that the city contemplated the

construction and physical changes which we said was perhaps "a fair inference from the facts proved." As we have seen, we held that the superior court had jurisdiction in this proceeding to consider the effect of all of said physical changes upon the plaintiff's property. The former decision upon this point must be accepted as the law of this case. It follows that all of this evidence was properly received.

One other question is reserved which was not specifically included in our former decision: Whether in assessing damages the diversion of travel from passing the plaintiff's premises is an element to be considered. As an abutting owner, the plaintiff has a special and peculiar interest in the street fronting his premises. *Cullen v. New York, N. H. & H. R. Co.* 66 Conn. 221, 226, 33 Atl. 910. We have spoken of these rights collectively as the easement of access to the premises of an owner. *Newton v. New York, N. H. & H. R. Co.* 72 Conn. 420, 426, 427, 44 Atl. 813. It is a general rule of law that the owner can recover damages for a direct injury to his right of access, one which is special and peculiar to him, differing from a general damage suffered by him in common with the public, not merely in degree, but also in kind. This right to compensation arises either through constitutional prohibition or statutory provisions.

The statutory appeal provided by § 59 of the charter of the city of Bridgeport (12 Special Laws, p. 538), giving the court the power to "confirm, annul, or modify the said assessments, or make such order in the premises as equity may require," is certainly broad enough to include all cases of damage within this general rule. Whether it would include cases not within the rule we need not now consider.

The vacation of a street closes the lots fronting upon it and destroys the owner's access. The vacation of a part of a street does not ordinarily permit a recovery to an owner fronting on another part of this street. And this is true, even though it result in some inconvenience to his access, or compel a more circuitous route of access, or a diversion of travel in front of the premises, and a consequent diminution of value.

To this general rule there are exceptions, and the leading case of *Smith v. Boston*, 7 Cush, 254, 256, recognizes their existence. Chief Justice Shaw, in discussing this rule, said: "We do not mean to be understood as laying down a universal rule." *Newton v. New York, N. H. & H. R. Co.* 72 Conn.

420, 426, 427, 44 Atl. 813, is an example of the application of the general rule. There the improvement did not change the highway in front of the plaintiff's premises, nor cut off travel from either direction. It merely required the distant travel from the south to take a somewhat longer course, and affected his property no differently than all other property on the street.

The case before us presents an entirely different set of facts; indeed, the physical changes resulting from this improvement are of a most unusual character, and make the case a clear exception to the general rule. The plaintiff's premises are in *cul-de-sac*, and the traveled way remaining is so narrow as to prevent ordinary modern travel coming to these premises, unless it backs out the 150 feet to the main highway. Access to this property by travel from the west is destroyed, access to it from the north is prevented and from the east is seriously interfered with. All traffic to and fro in front of plaintiff's premises is absolutely shut off. In many ways this is a practical discontinuance of the highway. The vacation of a part of a street which leaves property abutting on the remaining part of the street, with access to the system of streets in either direction, has generally been held to constitute no actionable injury. But the vacation of a part of a street which destroys all access by property abutting on the remaining part of the street, to the system of streets in one direction, thus putting the property on a *cul-de-sac*, has generally been held to constitute an actionable injury. *Johnston v. Old Colony R. Co.* 18 R. I. 642, 49 Am. St. Rep. 800, 29 Atl. 594; *Chicago v. Burcky*, 158 Ill. 103, 109, 110, 29 L.R.A. 568, 49 Am. St. Rep. 142, 42 N. E. 178; *Highbarger v. Milford*, 71 Kan. 331, 340, 80 Pac. 633; *Lewis Em. Dom.* 3d ed. § 198, p. 368. The destruction of and interference with access to this property could not help but injuriously affect its value. The diversion of travel must be, as the court has found it to be, a large element of damage, and it ought to be included in the assessment of damages. The exception to the general rule, applying to property placed in a *cul-de-sac*, is in our judgment necessary to relieve a somewhat harsh rule of law of a part of its rigor.

The Superior Court is advised to render judgment setting aside the assessment of benefits made by the board of appraisal, and awarding the plaintiff damages above benefits in the sum of \$1,200. In this opinion the other Judges concur.

39 L.R.A. (N.S.)

FLORIDA SUPREME COURT.

ROBERT MUGGE, Plff. in Err.

v.

HENRY B. BRACKEN.

(— Fla. —, 58 So. 128.)

Highway — negligent collision — liability.

Where a person who is not careless, but who is properly walking along or across a street, is injured by a vehicle rapidly and negligently driven upon him before he has reasonable opportunity to escape, the party so driving the vehicle is liable in damages for injuries proximately caused by the negligence.

(March 12, 1912.)

ERROR to the Circuit Court for Hillsborough County to review a judgment in plaintiff's favor in an action brought to

Headnote by WHITFIELD, Ch. J.

Note. — Duty of pedestrian when crossing or traveling public street to avoid passing teams.

The early cases upon the question of the duty of pedestrians when crossing or traveling public streets to avoid passing teams is covered in the note to *Borg v. Spokane Toilet Supply Co.* 19 L.R.A. (N.S.) 160; and the present note includes only cases which have passed upon the question since the writing of that note.

Duty to look and listen.

The rule requiring a person to look up and down applies only to steam railroads, and is not applicable to a pedestrian crossing a street; as to such person there is no absolute rule, but it is always a question of due care under the circumstances. *Kayser v. New York Mail Co.* 133 N. Y. Supp. 440.

The failure of a pedestrian to look and listen for approaching teams as he passes over a cross walk at a junction of two streets is not necessarily such negligence as will prevent recovery if he is run over by a passing team. *Donovan v. Bernhard*, 208 Mass. 181, 94 N. E. 276.

However, one who attempts to cross a street upon which there are car tracks and passing teams on a jog or a run is bound to be watchful for teams every moment of the time. *Ennis v. Connery*, 156 Ill. App. 554.

See *Berler v. Kane*, under division entitled "Children."

Duty when traveling in street or crossing where there is no cross walk.

There is no rule of law which makes it negligence for a person to stand in the street for a few minutes when he has taken proper precautions to look for any ap-

recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. W. F. Himes and M. B. Withers, for plaintiff in error:

Plaintiff was guilty of such contributory negligence as prevents any recovery.

Borg v. Spokane Toilet Supply Co. 50 Wash. 204, 19 L.R.A.(N.S.) 160, 96 Pac. 1037; *Harris v. Commercial Ice Co.* 153 Pa. 278, 25 Atl. 1133; *Dimuria v. Seattle Transfer Co.* 50 Wash. 633, 22 L.R.A.(N.S.) 471, 97 Pac. 657; *Belton v. Baxter*, 54 N. Y. 245, 13 Am. Rep. 578; *Gerity v. Haley*, 29 W. Va. 98, 11 S. E. 901; *German-American Lumber Co. v. Hannah*, 60 Fla. 70, 30 L.R.A.(N.S.) 882, 53 So. 516.

proaching vehicles. *Berler v. Kane*, 139 App. Div. 76, 123 N. Y. Supp. 835.

A pedestrian has the legal right to travel on foot upon the traveled way, whether the sidewalk is at that time passable or impassable, but whether he acts with reasonable care in leaving the sidewalk or the traveled way at that time depends upon whether his conduct under the circumstances conform to that of an ordinarily prudent person under the same circumstances. *Hope v. Valente*, 84 Conn. 248, 79 Atl. 583. The court said: "A sleet or snowstorm may compel this course. He may find the sidewalk obstructed or impassable. He may desire to cross the roadway. He may be left in the roadway on alighting from a car or an omnibus. He may be leading a cart or pushing a wagon. He may walk upon the roadway to escape the crowded sidewalk. These and other reasons may take him upon the traveled way. His legal right to be there is undoubted. The situation may be so dangerous that it would be negligence to walk in the roadway. The circumstances would determine that, and the negligence of the pedestrian cannot be asserted as matter of law, nor can his presence in the roadway be *prima facie* evidence of want of care."

But one who stands in the roadway of a street places himself in a position necessarily fraught with danger, and must exercise care corresponding to the exigencies of the situation. *Boker v. H. Koehler & Co.* 116 N. Y. Supp. 540, affirmed in 135 App. Div. 914, 119 N. Y. Supp. 1115.

A pedestrian has the right to cross a street at any point, exercising reasonable care for his own safety. *McAvoy v. Paterson Brewing & Malting Co.* 78 N. J. L. 633, 75 Atl. 743.

So he has the right to cross the street between its regular crossings, but he is bound when so doing to be reasonably careful. *Peterson v. Ballantine*, 205 N. Y. 29, — L.R.A.(N.S.) —, 98 N. E. 202.

A pedestrian and the driver of a wagon have equal rights in the street, and while the sidewalk is the place for pedestrians alone, yet they have the right also to walk across or along the street; and it is the 39 L.R.A.(N.S.)

Messrs. Dickenson & Dickenson, for defendant in error:

A footman, whether of full age or an infant, who does not anticipate and take special precaution against injury from the reckless conduct of horsemen in riding or driving at an unusual and dangerous rate of speed, cannot be said as matter of law, under ordinary circumstances, to be guilty of contributory negligence.

Coombs v. Purrington, 42 Me. 332; *Williams v. Richards*, 3 Car. & K. 81; *Stringer v. Frost*, 116 Ind. 477, 2 L.R.A. 614, 9 Am. St. Rep. 875, 19 N. E. 331; *Moebus v. Herrmann*, 108 N. Y. 349, 2 Am. St. Rep. 440, 15 N. E. 415, 29 Cyc. 530, 531, note; *Hennessey v. Taylor*, 189 Mass. 583, 3 L.R.A.(N.S.) 345, 76 N. E. 224, 4 Ann.

duty of both pedestrians and travelers by vehicles to recognize the right of each to be upon the street; and it is the duty of travelers by vehicle to keep the same under control so as not to injure pedestrians in the proper exercise of their rights. *American Bolt Co. v. Fennell*, 158 Ala. 484, 48 So. 97.

Children.

Where a boy who has been roller skating put his foot upon the curb for the purpose of taking off his skates, looked for approaching vehicles not only when he left the sidewalk, but after he had been standing in the street for some minutes, the question of contributory negligence is for the jury; it appearing that at the time it was daylight and that the wagon which struck him came from behind without warning. *Berler v. Kane*, 139 App. Div. 76, 123 N. Y. Supp. 835.

In *Pastore v. Livingston*, 72 Misc. 555, 131 N. Y. Supp. 971, there was held to be a total absence of prudence and care on the part of those in charge of an infant a little over five years of age which was imputable to the infant, where his grandmother sent him downstairs to his father's store, telling him that his mother would go across the street with him to a candy store, and the infant disregarded her advice and went across the street—which at the hour of night when the accident happened was a busy one—alone, and was struck by a wagon when attempting to recross the street.

See also *Beller v. Levy* under division entitled, "Failure to discover approaching vehicle."

Failure to discover approaching vehicle.

The question of the plaintiff's contributory negligence is for the jury where it appears that an infant plaintiff looked in both directions before stepping off of the curb, and saw no wagon approaching, although her view was in no way obstructed, but was struck by a wagon being driven at 6 or 8 miles an hour, the driver of which

Case 396; Farnsworth v. Tampa Electric Co. — Fla. — 57 So. 233; *Hainlin v. Budge*, 56 Fla. 342, 47 So. 825; *William Bensel Constr. Co. v. Homer*, 2 Ga. App. 369, 58 S. E. 489; *Stringer v. Frost*, 116 Ind. 477, 2 L.R.A. 614, 9 Am. St. Rep. 875, 19 N. E. 331; *Coombs v. Purrington*, 42 Me. 332; *Boss v. Litton*, 5 Car. & P. 407; *Williams v. Richards*, 3 Car. & K. 81; *German-American Lumber Co. v. Hannah*, 60 Fla. 70, 30 L.R.A.(N.S.) 882, 53 So. 516.

Whitfield, Ch. J., delivered the opinion of the court:

Bracken recovered a judgment against Mugge for personal injuries received by being run against by a horse and buggy

driven by Mugge in a street in the city of Tampa, Florida, and Mugge took writ of error. The briefs state that "it is contended that contributory negligence is apparent from the facts testified to by the plaintiff himself and by his witnesses."

It appears that as Bracken was crossing Twigg's street towards the northeast, to enter Jefferson street going north, he saw Mugge's team coming rapidly from the west about a block away on Twigg's street. After crossing Twigg's street, Bracken entered Jefferson street, and the team, continuing at the high rate of speed and with much noise, turned into Jefferson street, striking Bracken from the rear, when he had not looked back or noticed its approach in time to avoid it. It also appears

gave no warning, when she was at a distance of about 3 feet from the curb. *Beller v. Levy*, 68 Misc. 182, 124 N. Y. Supp. 411. The court said: "A person who looks and sees no wagon approaching for a sufficient distance to warrant an ordinarily cautious person in believing that it is safe to attempt a crossing has the right to proceed, relying on the assumption that a warning would be given of an approaching vehicle at an excessive rate of speed and which was not in sight when he left the sidewalk; and the absence of additional facts calling for the exercise of greater vigilance cannot be said to be negligence as a matter of law if she does not thereafter look in the direction from which danger happens to come."

And where a pedestrian about to cross a street looked and saw a car approaching in the street at his right hand, but there is nothing to show that there was anything on his left which indicated danger, he is not guilty of contributory negligence as a matter of law, although he was struck by a team which was driven rapidly from the left, before he reached the car tracks. *Donovan v. Bernhard*, 208 Mass. 181, 94 N. E. 276.

So the fact that a pedestrian did not see an approaching cab which struck him does not necessarily show contributory negligence on his part, where the proximate cause of the accident was the rapid pace of the vehicle and the failure to check its speed at a point where pedestrians were to be expected. *Mordente v. New York Cab Co.* 109 N. Y. Supp. 12.

And where one alighted from a street car, looked for approaching vehicles, and started across the street, and while so proceeding was run over and injured, she is not precluded from recovery because she did not constantly look for vehicles while walking across the street, since if she looked when she started across and saw no approaching danger, it should not be declared as a matter of law that she was guilty of such negligence as would preclude a recovery, simply because she did not constantly keep up a vigilant watch. *Patton* 39 L.R.A.(N.S.)

v. Morrin-Powers Mercantile Co. 231 Mo. 298, 132 S. W. 684.

In *Gallagher v. Kahn*, 223 Pa. 451, 72 Atl. 854, it was held that the question of negligence and contributory negligence was properly submitted to the jury, where the plaintiff when about to cross the street saw a car coming easterly thereon, and walked one third over the street, stopped to let the car pass, and then, before starting, looked and saw another car approaching at some distance and continued on his way, and when about half way between the east-bound track and the south curb line, was knocked down and run over by a cab coming from the west at a high rate of speed, he having testified that he did not see the cab until it was right upon him, the court said: "In order to safeguard himself while crossing the street, the plaintiff was under the need of looking in more than one direction. Cars and vehicles of all kinds were liable to pass either way. He was bound to avoid collision with other pedestrians if any were there, and to keep a reasonable lookout for obstructions of any kind in the street. Nor was he bound to foresee that a cab would come down upon him at the regular street crossing at an unusual rate of speed. It was only the ordinary conditions of the street traffic that he was bound to anticipate. Plaintiff said that he was looking straight ahead of him as he walked across the street, but that his line of vision took in as much as 20 feet on each side of him. It was for the jury to say whether, if this statement of plaintiff was true, he was justified in proceeding to cross as he did. It may be that a pedestrian could ordinarily cross in safety the line of travel of a horse and cab, if it was not within 20 feet of him when he started to cross that line. At any rate it was not for the court to say that he was, under the circumstances, negligent in making the attempt. In such cases as this, where the line of separation between questions of law and questions of fact is very shadowy, and minds equally intelligent and impartial might draw different conclusions, the safer

that Mugge made no effort to avoid the collision, and that the team approaching from the rear was upon Bracken in Jefferson street before he knew of its approach on that street, though his sight and hearing were good.

While Bracken cannot in law excuse himself from all care for his safety upon the theory that he supposed Mugge would continue on Twiggs street, and not turn into Jefferson street, yet if Bracken was exercising ordinary care in proceeding along Jefferson street, and Mugge suddenly turned his team into Jefferson street, going at a high rate of speed, and struck Bracken before he reasonably could have escaped, there is no contributory negligence, and Mugge is liable. Mugge and Bracken had

equal rights in the use of the streets; but each is required to exercise due care for the rights of others, as well as for his own safety.

Where a person who is not being careless, but who is properly walking along or across a street, and is injured by a vehicle rapidly and negligently driven upon him before he has reasonable opportunity to escape, the party so driving the vehicle is liable in damages for injuries proximately caused by the negligence. Even if Bracken reasonably should have expected that Mugge, who was rapidly driving down Twiggs street, would or might turn up Jefferson street, into which street Bracken had passed, the law did not require Bracken to anticipate that Mugge would continue

and wiser plan is to take the judgment of twelve impartial men of the average experience of the community. We are satisfied that disputed questions of negligence and contributory negligence were very properly submitted to the determination of the jury, and the judgment is affirmed."

And the question of contributory negligence is for the jury where the plaintiff's evidence tended to show that he looked down the street before alighting from the driver's seat on a wagon, and saw no car or vehicle approaching, and then stepped upon the ground, and was suddenly struck by the wheel of a wagon which was not traveling on the right side of the street, but came diagonally across it from the opposite side. *McKernan v. Los Angeles Gas & Electric Co.* 16 Cal. App. 280, 116 Pac. 677.

In *Kayser v. New York Mail Co.* 133 N. Y. Supp. 440, where the plaintiff was run over by a wagon going at a fast trot, in the evening, when the weather was muggy and dark, and the lights were lighted just before he reached the sidewalk, and he testified that before starting across the street and again when half way across he looked up and down the street, and did not see the wagon, it was held that the question of contributory negligence was for the jury.

In *Nack v. Michaeliski*, 134 N. Y. Supp. 1113, there was held to be a clear case of contributory negligence established, where the evidence tended to show that the plaintiff stepped off of a moving street car, and was immediately struck by a horse which had been driven alongside of the car for some distance, and there was evidence that the plaintiff did not look back before alighting from the car, although he testified that he looked enough to see that it was clear.

And where the evidence shows that one who was struck by a team which was negligently driven wore a heavy overcoat turned up and a heavy ear cap, which was down, and there was nothing to prevent him from seeing the approaching team, but he walked diagonally across the street in the direction from which the team was coming, looking ahead, he is guilty of con-

tributory negligence where it appears that there was a clear space between him and the team. *Peterson v. Ballantine*, 205 N. Y. 29, — L.R.A.(N.S.) —, 98 N. E. 202.

Where approaching vehicle is seen.

Where a pedestrian first saw the team which injured her when she had just crossed the second track on her way diagonally across a street, and continued to cross the street, but was struck in the confusion resulting from the driver of the wagon and herself turning backward and forward in attempting to avoid each other, she was not necessarily guilty of contributory negligence in not keeping out of the way after first seeing the team. *McAweeny v. Journal Printing Co.* 114 Minn. 262, 130 N. W. 1103.

Articles projecting or sagging from vehicle.

The case of *Young v. Herrmann*, 119 App. Div. 445, 104 N. Y. Supp. 72, which is set out in the earlier note, sustaining the proposition that it is for the jury to determine whether a pedestrian who at night attempted to cross a busy street, between vehicles, and was tripped by a rope attaching them together, exercised due care, was affirmed in 192 N. Y. 554, 85 N. E. 1118, without opinion.

Where a pedestrian who was part way across the street and stopped to allow a wagon to pass, testified that the wagon appeared to be an ordinary wagon with an ordinary load, and that she did not see protruding iron at the back of the wagon although she looked; and it appeared that she stood on the side of the cross street in a position that would place her out of danger from a wagon normally loaded, in case a turn was made either way in the cross street,—she is not guilty of contributory negligence, since the only thing she did not anticipate was that the wagon carried iron protruding 8 or 10 feet from the back of the bed, and this she was not bound to do. *Gielens v. Fidelity Transfer & Storage Co.* 63 Wash. 383, 115 Pac. 850.

And in an action by one who was injured

his rapid speed, when he turned into Jefferson street and saw Bracken walking in that street ahead of him. The vehicle Mugge was driving approached Bracken from the rear at a rapid speed, while Bracken was walking where and as he had a right to do, with apparently nothing in his surroundings to warn him of the careless rapid driving of the vehicle into the street just behind him. If Bracken had looked behind, he would have seen the approaching team; but he was not required to look behind, when the surrounding circumstances did not make that precaution reasonably necessary for his safety. He had a right to pass along Jefferson street, and he also had a right to assume that the drivers of teams in the street

would have due and proper regard for his safety. There is nothing to indicate that Bracken was not exercising ordinary care under the circumstances for his own safety. When Mugge turned into Jefferson street, it was his duty to drive his team with due regard for the rights and safety of others in the street; and as he saw Bracken walking ahead of him he should have slackened his speed or stopped, if necessary, to prevent injury to the pedestrian. He evidently could have avoided the collision, which was caused by his fault in driving rapidly and in disregard of Bracken's rights before and at the time of the injury. The evidence indicates that the rapid passage of the team over the paved

while standing on the curb, by being struck by timbers projecting from a wagon negligently driven around a corner, an instruction that, if the plaintiff was standing in such a position on the sidewalk as to render it dangerous, and that as the wagon approached the corner he was warned of the danger and was heedless of the warning; and the jury believed that an ordinarily prudent man under like circumstances, in the exercise of ordinary care, would have moved from the position, and if plaintiff had moved he would not have been injured, he could not recover,—is as favorable to the defendants as they are entitled to. *Firor v. Taylor*, 116 Md. 69, 81 Atl. 389.

Acts in emergency.

It is not contributory negligence as a matter of law for one who was struck by a wagon driven at a high rate of speed to step backwards, in front of the wagon, upon a warning shout being given by a bystander, where it appeared that she was walking across the street to take a car and was about to stop for a car when the warning was given. *Wyer v. Ratican*, 150 Mo. App. 474, 131 S. W. 155. The court said: "Both plaintiff's mother and defendant's wagon had an equal right to the use of the street; and, while the law enjoins upon defendant the duty of exercising ordinary care for pedestrians or others rightfully in the thoroughfare, it is true enough that the same obligation rested upon plaintiff's mother as to her own safety. However, in going into the street for the purpose of boarding a car, she had the right to assume that defendant would exercise ordinary care for the safety of herself and others there being, and not drive its team upon her in a race with others at a rate of 10 miles per hour. The evidence tends to prove that the driver was oblivious to the deceased's position of peril, while her attention was directed toward the approaching car, which she intended to board. As before stated, the fact that plaintiff's mother, in the excitement incident to the occa-

sion, without an opportunity for reflection, stepped backward, in front of the team, upon a warning halloosed by a bystander, is not sufficient to charge her with contributory negligence as a matter of law; for beyond doubt she conducted herself in the premises as other ordinarily prudent persons might do under the same circumstances. The law, in its exactions with respect to the exercise of ordinary care for one's safety, is neither unreasonable nor unjust, but makes allowances for rash conduct under stress of circumstances, induced by another's negligence, which tend to excite one's judgment or distract attention."

Vehicles approaching from behind.

In *Di Iorio v. Jordan Marsh Co.* 211 Mass. 280, 97 N. E. 905, where the plaintiff, with one foot in the street and the other on the sidewalk, was pulling backward and attempting with another to move a good sized box which was partially on the sidewalk and partially projecting over the curb, and was struck by a wagon which came from behind, it appearing that she had looked around once, it was held that it could not be said as a matter of law that she was guilty of contributory negligence. The court said: "The plaintiff was a traveler upon a public way. It was lawful for her to move the box from one store to another on the same side of the street. There was a narrow sidewalk on a narrow street, and both were crowded. It cannot be said that there was any lack of care in selecting the curb of the sidewalk as the portion of the way in which to move the box. The circumstances in which the plaintiff was placed were somewhat unusual. She was pulling at a box which by its size and shape afforded a considerable protection. It projected into the street probably farther than her body. It was so large that it would not escape the observation of any careful driver on the street. It was being moved slowly, and by protruding into the street might cause her to think that others would avoid collision with it, and that by reason of her nearness to it and partial

street made much noise, and it is urged that this noise should have warned Bracken of the danger. This is not tenable, since the jury were warranted by the evidence in finding, as they in effect did, that it was not Bracken's duty to look back under the circumstances, or to expect Mugge to violently drive against him. There is positive evidence that Bracken apparently, and in fact, did not know of the approach of the team upon him until it was too late to avoid it; and the evidence is clear that

Mugge knew or should reasonably have known that Bracken, who was in front of him, going in the same direction, with his back to the team, apparently did not know the team was upon him until it was impossible to escape injury. See 2 Elliott, Roads & Streets, § 1088; Shea v. Reema, 36 La. Ann. 966; Bowser v. Wellington, 126 Mass. 391; Stringer v. Frost, 116 Ind. 477, 19 N. E. 331, 2 L.R.A. 614, 9 Am. St. Rep. 875, and notes; Hennessey v. Taylor, 189 Mass. 583, 76 N. E. 224, 3

shelter by it she might relax her outlook for danger. Although one must use proper care while upon a public way, he may rely in part upon the presumption that other travelers will use a reasonable degree of care. Moreover, the plaintiff was being aided by a man at the other end of the box, who was facing in the direction from which any team would come, and on whom, without express stipulation to that effect, on account of his opportunity for constant knowledge of her position, she might in some slight degree rely to warn her of approaching harm. Her purpose was to move the box only a very short distance. Ordinarily, one walking backward on such a street would be lacking in due care. But the present facts are in a measure exceptional, and, though close to the line, the plaintiff's conduct cannot in our opinion be pronounced negligent, as matter of law."

In *Vaughn v. William J. Lemp Brewing Co.* 152 Mo. App. 48, 132 S. W. 293, the case was held to be properly left to the jury where the plaintiff's evidence was, in substance, that at the time of the injury there was a fire in the business part of a large city, which caused a throng of people to collect in the street; and that she was struck in such street from behind by the defendant's wagon when crossing the street, after having looked and seen no vehicles approaching; while the defendant's evidence tended to show that there was no crowd in the street the time of the accident, and that the driver of the wagon shouted a warning to the plaintiff, but she paid no attention to it, and did not attempt to stop, and that he put the brakes on the wagon and attempted to stop it.

See also *Berler v. Kane* under division entitled "Children."

Reliance upon presumption of exercise of due care by driver.

A pedestrian has a right to presume that those using the street will exercise a proper degree of care, and while he must use proper care himself he may trust something to this presumption. *Donovan v. Bernhard*, 208 Mass. 181, 94 N. E. 276.

And a pedestrian who stopped to allow a wagon to pass after she had proceeded half way across the street has a right to presume that, if the place at which she stood while waiting for the wagon was a place of danger because of some abnormal

condition on the road, the driver of the wagon would warn her of that fact, either requesting her to stand further away, or bringing the team to such a rate of speed that the danger would be avoided. *Gielens v. Fidelity Transfer & Storage Co.* 63 Wash. 383, 115 Pac. 850.

And where a pedestrian was crossing a proper cross walk, walking in the usual way, after having looked in each direction and stopped to keep out of the way of an approaching automobile, which he observed, he was not bound to anticipate that a horse and wagon would come rapidly down a cross street, turn suddenly, and run against him. *Keaveny v. Moran*, 208 Mass. 277, 94 N. E. 274.

A finding that a pedestrian is not guilty of contributory negligence is supported by evidence that she was crossing at the proper place, twice looked to see if danger threatened, and believed that she could safely cross, and apparently could have done so except for the increase of speed by the driver of a team just preceding the collision, which occurred just as she was in the act of stepping to the curb. *Talbot v. Ginocchio*, — Cal. App. —, 123 Pac. 223.

And it might properly be found that one who was injured when going around the end of a standing car was not negligent where she knew that teams going along the road on the other side of the car went on the further side of the street, and there was no evidence that she knew or had reason to believe that teams would carelessly be driven on the side of the road next the car, in such a manner as to render it highly dangerous to those alighting therefrom. *Chatel v. Schonland*, 75 N. H. 543, 139 Am. St. Rep. 739, 78 Atl. 128.

And where the evidence in an action brought by one who was injured by being run into by a buggy is such that the jury may properly infer that the horse and buggy were so near, and the conduct of the driver such, that the plaintiff had the right to suppose that the horse was held up to allow him to cross in safety, a nonsuit is improper. *McAvoy v. Paterson Brewing & Malting Co.* 78 N. J. L. 633, 75 Atl. 743.

As to reciprocal duty of operator of automobile and pedestrian, see note to *Baker v. Close*, 38 L.R.A.(N.S.) 487, and notes there referred to covering the early cases upon this question. J. T. W.

L.R.A.(N.S.) 345, 4 Ann. Cas. 396, and notes.

Among the charges given to the jury at the request of the plaintiff was the following:

"The questions of negligence of the defendant and of contributory negligence on the part of the plaintiff are both for the jury to decide from all the facts and circumstances of the case; but I charge you as a matter of law that a traveler on a highway is not, as a matter of law, bound to be continuously looking or listening to ascertain whether vehicles are approaching, under the penalty that his failure to do so will constitute contributory negligence, precluding a recovery for injuries sustained in a collision. The usual rule of ordinary care does not impose upon him the burden of being constantly on the lookout to see if his path is free from danger, or in a state of apprehension of personal injury from other travelers. He has not only the right to presume that the way is reasonably fitted for his use, but also has the right to presume that those who may be lawfully using it with himself will exercise a proper degree of care."

While the precise language of this charge is not approved, yet it is clear that under the facts in evidence this charge could not reasonably have misled the jury to the injury of the defendant. In view of the injuries shown to have been sustained by the plaintiff, it is not clear that the \$400 damages allowed are excessive.

This discussion disposes of the specific as well as the general contentions of the plaintiff in error; and the conclusion follows that there was no reversible error in overruling the demurrer to the evidence, in denying the motion for new trial, and in giving the charge assigned and argued as error.

Counsel for the plaintiff in error rely largely upon the following cases: *Borg v. Spokane Toilet Supply Co.* 50 Wash. 204, 19 L.R.A.(N.S.) 160, 96 Pac. 1037; *Harris v. Commercial Ice Co.* 153 Pa. 278, 25 Atl. 1133; *Dimuria v. Seattle Transfer Co.* 50 Wash. 633, 22 L.R.A.(N.S.) 471, 97 Pac. 657; *Belton v. Baxter*, 54 N. Y. 245, 13 Am. Rep. 578; *Gerity v. Haley*, 29 W. Va. 98, 11 S. E. 901. Those cases do not present facts analogous to the ones here considered. Here the plaintiff below did not by his carelessness subject himself to the danger afforded by another's negligence; but he was proceeding on the street within his rights, and in the exercise of ordinary care, when he was injured by the negligence of another.

The judgment is affirmed.

39 L.R.A.(N.S.)

Taylor, Shackelford, Cockrell, and Hocker, JJ., concur.

A petition for rehearing having been filed the following *Per Curiam* response was handed down on April 16, 1912:

The statements contained in the demurrer to the evidence do not show contributory negligence on the part of the plaintiff.

It clearly appears that the plaintiff knew the defendant was rapidly driving down Twiggs street, making a noise, and that the plaintiff turned into Jefferson street, but did not know the defendant had turned into that street behind him until it was too late to avoid the injury; and that "the defendant was driving in a run or gallop and whipping his horse when coming on Twiggs street to said crossing, and continued to do so until after plaintiff was struck."

A rehearing is denied.

KANSAS SUPREME COURT.

J. P. SUNDGREN

v.

JOHN STEVENS.

(86 Kan. 154, 119 Pac. 322.)

Damages — assault — inadequacy — new trial.

1. In an action for damages for assault and battery, the testimony showed that the defendant, without legal justification, struck plaintiff in the face, causing some injury to the nose and profuse bleeding therefrom, followed for over two months by pain and clogging up of the nose. The defendant admitted the assault, and introduced no evi-

Headnotes by WEST, J.

Note. — *When verdict in action for assault set aside for inadequacy of damages.*

As to review by appellate court of ruling of the trial court on motion to grant a new trial in an action for bodily injuries, on the ground of inadequacy of damages awarded, see note to *Toledo R. & Light Co. v. Mason*, 28 L.R.A.(N.S.) 130.

Earlier cases on the point here annotated are to be found in a subdivision of the note to *Benton v. Collins*, 47 L.R.A. 33, on the subject of inadequacy of damages as a ground for setting aside a verdict.

By the general common-law rule new trials were not granted upon the ground of inadequate damages in actions of trespass, and perhaps in all cases of tort. But this rule has been relaxed, and it is now held both in England and in the courts of the United States that no reason can be given for setting aside verdicts because of

dence. The court instructed the jury that if they found that the plaintiff had been unlawfully assaulted and beaten, they should allow reasonable compensation. The jury found for the plaintiff, and assessed his damages at \$1; 50 cents for physical pain, and 50 cents for insult and indignity. Held, that the verdict should be set aside for inadequacy.

Trial — disregarding testimony.

2. While the jury are the exclusive judges of the credibility of the witnesses, they are not authorized arbitrarily, or from partiality or caprice, to disregard uncontradicted and unimpeached testimony, or facts shown beyond question, both by testimony and by admission.

(Mason and Burch, JJ., dissent.)

(December 9, 1911.)

APPEAL by plaintiff from a judgment of the District Court for Saline County after verdict in his favor for less than the

excessive damages which does not apply to setting them aside for inadequacy of damages. *Leavitt v. Dow*, 105 Me. 50, 134 Am. St. Rep. 534, 72 Atl. 735, 17 Ann. Cas. 1072, 3 Cyc. 1109.

In *Barrette v. Carr*, 75 Vt. 425, 56 Atl. 93, it was said: "The true rule is, that where the verdict is either so great or so small as to plainly indicate that in reaching it the jury either disregarded the testimony or acted from passion or prejudice, it is the duty of the court to set it aside. Where the damages rest in the judgment of the jury, they are, of course, not to be held either excessive or inadequate, unless they are grossly so; and in that respect actions of tort for personal injury commonly differ from actions in which there is some standard of damages disclosed by the contract of the parties or by exact evidence of pecuniary loss."

In *Henning v. Bartz*, 25 Ohio C. C. 15, the court said in argument: "If the verdict [in an action for assault] is so small as to be clearly contrary to the weight of the evidence, considering the injury sustained, we think that a judgment might be reversed on that ground."

A verdict for the plaintiff of \$1 damages for an assault will be set aside as inadequate where the evidence clearly shows that he was severely wounded and suffered great pain, paid his doctor \$63 for treatment, and \$10 for other things needful to one in his condition; and that he had made a contract to teach a three months' school at \$40 per month, which he was unable to perform because of his injury. *Dunbar v. Cowger*, 68 Ark. 444, 59 S. W. 951. "To suffer such a verdict as to the damages to stand," said the court, "would be a travesty upon justice."

And where the jury's award was for less than one half of the actual pecuniary loss sustained by the plaintiff up to the time of 39 L.R.A. (N.S.)

amount claimed in an action brought to recover damages for an assault and battery. Reversed.

The facts are stated in the opinion.

Mr. Z. C. Millikin for appellant.

Messrs. C. W. Burch and B. I. Litowich for appellee.

West, J., delivered the opinion of the court:

Plaintiff, Sundgren, went to see his neighbor, Stevens, about helping fix a fence between their farms, which adjoined. Stevens and his son were in the feed lot. It was just at dusk. Stevens claimed that plaintiff had told him he would not stand by some arrangement he had made, to which plaintiff replied that he did not do that—that he never backed out—to which Stevens replied that plaintiff was calling him a liar (which plaintiff denied), and jerked a whip from a buggy, but did not strike. Later in the conversation plaintiff again

the trial, and was manifestly inadequate as compensation for the damages he had sustained, it was held that the trial court should have granted the motion for a new trial. *De Freitas v. Nunes*, 130 Ill. App. 195, wherein it appeared that the defendant, with a revolver, deliberately caused the plaintiff to lose his left eye, and the uncontroverted evidence showed that, as a result of his injury, he was unable to work for nine months,—thereby sustaining damages to the amount of \$450; that his hospital expenses were \$60; that he incurred liability for professional services of a physician and oculist to the amount of \$200; and that he owed \$100 for the services of nurses who attended him.

Where two separate, unprovoked assaults, accompanied by grossly insulting language, were publicly made by the defendant upon the plaintiff, and he suffered some physical, was forced to spend \$30 for expenses incurred in consequence of the assault, and was subjected to much humiliation, it was held in *Leavitt v. Dow*, supra, that a verdict in his favor for the nominal sum of 1 cent was clearly inadequate, and that a new trial should be granted.

In *Lerner v. Cohen*, 116 N. Y. Supp. 567, where the defendant, without provocation, struck the plaintiff a violent blow in the mouth, which caused a tooth to be knocked out and another loosened, and his face to swell and bleed, it was held that the plaintiff was entitled to substantial damages, and upon the jury's bringing in a verdict for nominal damages of 6 cents, it was set aside as inadequate, and a new trial ordered.

Where the plaintiff, who was assaulted and ejected from a building, paid out at least \$10 in the care of the wound he received, and unquestionably suffered damages in pain, inconvenience, and loss of time, it was held that a verdict for \$10 was

said that he always stood by his arrangements, when Stevens struck him in the face, and he fell against a spring wagon or buggy. Plaintiff sued for damages for assault and battery, and the defendant answered, denying the allegations of the petition, but admitting that he struck the plaintiff at the time alleged, and claimed that plaintiff had come upon his premises with intention to provoke a quarrel, and was an intruder and trespasser, and came for the purpose of disturbing his peace, and had made repeated statements that defendant was falsifying facts. The defendant was present at the trial, but did not testify or offer any evidence.

The testimony of plaintiff was that the defendant struck him on the nose and eye, bruising and breaking his nose and cracking his lip; that his lip was split, and he fell against a spring wagon or buggy; that he was not angry, but spoke kindly, and did not intend to fight, or go for that pur-

pose; that as he rode away the defendant told him if he said anything more about the matter he would knock him off his horse, and "beat the stuffin' out of him;" that after the blow the defendant asked him to go into the house and wash, which he refused to do, the defendant stating that he was sorry he had hit him, but that plaintiff had aggravated him until he did it; that it was a straight blow, as hard as the defendant could strike; that plaintiff went home, and then to the justice of the peace, and made complaint; that his nose bled profusely; that he had suffered a great deal of pain and clogging up of the nose, and had pain in his nose for over two months, and at the time of the trial, some ten months afterwards, it still pained him occasionally; that after seeing the justice plaintiff came by a store, where there were three or four men, and where there was some conversation about the affair; that he did not wash the blood

inadequate, and that the court very properly set it aside. *Barrette v. Carr*, supra.

Where the plaintiff, while traveling as a passenger, was intentionally thrown from a car by the conductor of the defendant, and, as a consequence, was confined to his bed for six weeks, and to the house for two more, two of his ribs were broken, both of his legs injured, as were also his back and spine, as a result of which, from the time of the accident to the time of the trial (nearly two years), he had fainting spells, and some of his injuries were permanent, a verdict for \$200 was held to be inadequate, and a new trial was granted. *Tourtelotte v. Westchester Electric R. Co.* 120 App. Div. 417, 105 N. Y. Supp. 50.

Jackson v. Humboldt, 84 Kan. 445, 113 Pac. 1047, is directly in point, but is sufficiently set out in *SUNDGREN v. STEVENS*.

In Kentucky, under a statute (Civil Code, § 370) providing that "a new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, nor in any other action where the damages shall equal the actual pecuniary injury sustained," it was held in *Taylor v. Howser*, 12 Bush, 465, that the rule does not apply to the assessment of the actual pecuniary damages resulting directly from the wrong; so that where the value of the plaintiff's services during the time he was disabled by his wound and the amount he reasonably expended for medicines and medical attention in effecting his cure, as matters of special damages, were clear, and the jury disregarded this proof and the peremptory instructions of the court by finding 1 cent in damages, a new trial was granted.

But in *Shoff v. Wells*, 1 Neb. 168, under an identical statute, where the testimony showed that the plaintiff paid his physician \$15 for medical attendance rendered necessary by reason of the assault upon him, 39 L.R.A. (N.S.)

and tended to show that for ten days he was unable to work, and that \$4 per day was what he could have earned, the court, upon a verdict being rendered for \$17.50, granted a new trial on the ground that the damages awarded were inadequate. Upon the new trial a verdict of \$37.10 was returned. When the case came before the supreme court of Nebraska for review, it was remanded with instructions to reinstate the first verdict and set aside all subsequent proceedings. It was said of the statute in question: "The reading and interpretation contended for by the counsel for the defendant in error is that, in an action for damages for an injury to the person or reputation, as well as in all other actions, the damages must equal the actual pecuniary injury sustained. This claim is opposed not only to the letter, but to the obvious spirit, of the section. In cases of assault and battery, libel and slander, so many matters in aggravation or justification are disclosed upon the trial that it is left for the jury to determine, in view of all the circumstances, what should be given as damages. With their findings, courts rarely interfere. Scarcely a case can be found where a new trial has been granted because of the smallness of the damages assessed. This section, we think, is but declaratory of the practice which has so long obtained."

In *Ward v. White*, 86 Va. 212, 19 Am. St. Rep. 883, 9 S. E. 1021, it was held that a verdict for \$1,375 would not be set aside for insufficiency and inadequacy where the plaintiff sustained no permanent bodily injury and there was no definite proof of any actual outlay, costs, and expenses, except generally, and the evidence disclosed that the plaintiff knew that he was to be attacked, and did nothing to avoid the injury, but, on the other hand, armed himself with pistols, and marched forth to give battle.

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from his nose until he finally returned, after his visit to the justice and stop at the store. The doctor who was consulted two days later testified that the nasal bone was broken; that there was no displacement; that he did not remember any injury to the lip, but his impression was that the eyes were still discolored; that he noticed no bruises on the forehead. What he "saw was with his hands;" that he examined the nose, and found crepitation of the bone, thus detecting the fracture; that no charge was made, and no treatment given; that he told plaintiff to be careful about blowing his nose, and not to get any displacement, and it would be all right; that the nasal bones were separated, but not displaced. The wife testified that when plaintiff came home from his call on the justice he was covered with blood, his nose still running with blood; that there was a bruise over the eye; that his eye was turned blue on both sides of his nose, and his nose was swollen up for a day or so "about three times as big," and was bleeding every time he would wipe it for three days. He seemed kind of weak. Another witness testified that he saw the plaintiff in the evening at the store; that his face was bloody; that his clothes were covered with blood, and one of his eyes looked as though it were swollen some; that his lip was bleeding, and appeared to be cut.

The defendant was fined \$5 by the justice and 95 cents costs, and he directed the justice to notify the plaintiff that if he ever came upon the place he would beat the life out of him.

The court instructed the jury that provocative words or acts, if any, constituted no justification for an assault, and could only be considered, if at all, in mitigation of punitive damages, and that if they found that the defendant had unlawfully assaulted and beaten the plaintiff they should allow reasonable compensation, not exceeding \$500. The jury returned a verdict for \$1; 50 cents for physical pain, and 50 cents for insult and indignity. The plaintiff appeals, and claims that a new trial should be granted, for the reason that the jury violated the instructions and awarded damages palpably inadequate.

It is suggested by the defendant that the plaintiff not only took pains to exhibit his alleged wounds and his bloody condition, but that he and his wife so exaggerated their testimony that they were disbelieved by the jury; that the question of damages was one for the jury, and could not be measured by any fixed standard; and that before a new trial could be granted it should appear that the jury were mis-

led by mistake, or influenced by prejudice or passion. The case of *Pritchard v. Hewitt*, 91 Mo. 547, 60 Am. Rep. 265, 4 S. W. 437, is cited as an example of numerous cases holding that in actions of this kind inadequacy of damages is not a ground for a new trial, unless the verdict appears to have been the result of passion, prejudice, or partiality. In this decision by the supreme court of Missouri is found a quotation (p. 550) from page 451 of volume 1 of the second edition of *Graham & Waterman on New Trials*, to the effect that the reason for refusing to disturb verdicts in cases of this kind is that there is no scale by which the damages are to be graduated with certainty; that the law presumes the jury to have done their duty; and until the result of their deliberation appears in a form calculated to shock the understanding and impress no dubious conviction of their prejudice and passion, their verdict will not be disturbed.

The plaintiff insists that, the assault being admitted, and the court having instructed to award compensation, a verdict for nominal damages was a disobedience of the instruction, and contrary to the evidence, and cites numerous authorities in support of his contention. Whatever may have been the manner or appearance of the plaintiff and his wife upon the stand, it was shown beyond dispute, in addition to the admission of defendant, that, without legal justification, he struck plaintiff in the face, the effect of which at least was to separate the nasal bones, and to cause profuse bleeding of the nose; to a charge of assault, he pleaded guilty. Whether the plaintiff was mistaken in his statement that the blow was straight from the shoulder, or whether he was mistaken in stating that the one blow injured his nose, split his lip, and bruised his forehead, it does appear that his lip was injured, and that his eye was discolored. It was held in *Loneragan v. Small*, 81 Kan. 48, 25 L.R.A. (N.S.) 976, 105 Pac. 27: "An assault upon another is an intentional infringement upon the absolute right of personal security, for which the law gives a right of action against the wrongdoer, in which damages for mental suffering which is the proximate and natural result of such wrong may be awarded, although there was no battery or bodily injury inflicted."

Whenever it is manifest that the jury have found against the clear weight of the evidence, and that the party asking for a new trial has not, in all probability, had a fair trial, nor received substantial justice, it is an imperative duty to set aside the verdict and grant a new trial. *Cherokee & P. Coal & Min. Co. v. Stoop*, 56 Kan.

426, 43 Pac. 766. In *Nofztger v. Moffett*, 63 Kan. 354, 65 Pac. 670, the evidence showed that the attorney suing for compensation was entitled to a substantial recovery, and it was held that the court erred in holding that he was not entitled to recover anything. In *Thompson v. Burtis*, 65 Kan. 674-676, 70 Pac. 604, evidence was offered as to the extent and value of the legal services for which compensation was sought, which was not contradicted or impeached, and which showed a right to recover a substantial amount, if anything. The jury awarded the nominal sum of \$1, and this was held to involve an inconsistency, and not to be sustained by the testimony. In the opinion, Chief Justice Johnston said: "The jury, it is true, was not obliged to accept as conclusive the opinions of experts as to the value of legal services, but they could not overlook competent testimony that was unimpeached." "In some way the jury were warped from the direct line of duty, and, instead of awarding a substantial sum, gave the mere nominal amount of \$1. This was error." (pp. 675, 676.)

In *Harrod v. Latham Mercantile & Commercial Co.* 77 Kan. 466, 95 Pac. 11, a verdict was directed for the plaintiff. Evidence of certain facts was uncontradicted, but it was there said that the facts sought to be proven by such evidence were in issue. "When, therefore, there is no dispute as to the ultimate facts upon which the right of recovery depends, the court may direct a verdict." (p. 474.) It was, however, further said: "Whenever the testimony must be weighed and conclusions deduced therefrom, the jury alone must make the deductions in the first instance." (p. 475.) And the directing of the verdict was held to be erroneous.

In *Saindon v. Morrell*, 78 Kan. 53, 95 Pac. 1056, it was held that a judgment would not be reversed for the reason only that the evidence "may seem to justify" the recovery of a larger sum. That was an action for damages for assault and battery, in which only \$15 was awarded. It was held that if, as a question of law, all the undisputed testimony of the witnesses was to be taken as true, the plaintiff was entitled to a larger verdict; but that it was the province of the jury to determine, in the first instance, the credibility of the witnesses, and what their testimony proved, though they were not contradicted; and that the judgment would not be reversed because the evidence would seem to justify a larger verdict. But no such admission and no such instruction as those now under consideration were discussed in the opinion. In *Heineken v.*

Benton Twp. 84 Kan. 881, 115 Pac. 592, it was held that the verdict could not be set aside for inadequacy, not being for nominal damages, not inconsistent with the facts, and not showing passion or prejudice.

In *Miller v. Miller*, 81 Kan. 397, 398, 105 Pac. 544, 545, an action to recover the value of personal services, it was not disputed that services of substantial value were rendered; but it was claimed that they were to be gratuitous, which was disputed. The jury found for plaintiff, assessing his damages as \$1. The verdict was set aside, on the ground that the recovery was too small. In the opinion it was said: "By finding for the plaintiff, the jury determined the issue in his favor, and it only remained to award reasonable compensation. This is not a case for nominal damages, such as are allowed for the breach of a legal duty which has caused no material loss. Such an award is permissible, in a proper case, to vindicate a right where damages are possible, but have not been suffered." (p. 398.)

In *Bressler v. McVey*, 82 Kan. 341, 343, 108 Pac. 97, 98, there was no dispute that the plaintiff was entitled to the amount claimed, if entitled to recovery at all. The jury found in his favor, awarding one half the amount claimed. It was held that such verdict should be set aside at the instance of either party. In the opinion Mr. Justice Mason said: "The jury were called upon to determine which condition existed; but instead of doing so they assumed to settle the controversy by allowing one half of the claim and disallowing the other half, no doubt with the idea that 'splitting the difference' was a fair method of compromising the dispute. But in this they mistook their function." (p. 343.)

In *Jackson v. Humboldt*, 84 Kan. 445, 113 Pac. 1047, an action to recover for assault and battery, the evidence tended to show that the plaintiff had been grievously wounded, his face disfigured, his sight permanently impaired, and that he had suffered great pain, lost considerable time, and incurred material expense. The jury found in his favor, assessing his damages at \$1. This was held to be erroneous, and that a new trial should have been ordered.

The fact that the provision of the former Code, forbidding a new trial for smallness of damages, was omitted from the present Civil Code, is an indication that the legislature deemed inadequacy a proper ground for a new trial; it having been said in *Metropolitan Street R. Co. v. O'Neill*, 68 Kan. 253, 74 Pac. 1107, that "the rule may be hard, and in some cases may be productive of injustice, but that is a consider-

ation to be addressed to the lawmakers, and not to the law interpreters." (p. 256.)

In *Miller v. Delaware, L. & W. R. Co.* 58 N. J. L. 428, 33 Atl. 950, a woman sued for damages, caused by the company's neglect to provide a bench for her to alight on. There was considerable evidence showing the serious character of the hurt, and that it was painful and chronic, and there was no evidence to the contrary. The jury rendered a verdict for 6 cents, and the supreme court of New Jersey said: "This result of the trial in this case cannot be explained on any ground that will harmonize it with justice or with common sense." (p. 429.)

In speaking of a verdict resulting from passion, prejudice, or partiality, or a mistake or failure to take into consideration the proper elements of damage, it was said, in *McDonald v. Walter*, 40 N. Y. 551: "But, when the case does plainly show such a result, justice as plainly forbids that the plaintiff should be denied what is his due, as that the defendant should pay what he ought not to be charged." (p. 554.) In *Tathwell v. Cedar Rapids*, 122 Iowa, 50, 97 N. W. 96, the supreme court of Iowa held that, the unimpeached testimony of the plaintiff having shown him entitled to a much greater sum than that awarded by the jury, the trial court rightfully set the verdict aside because inadequate under the evidence. In *Leavitt v. Dow*, 105 Me. 50, 53, 134 Am. St. Rep. 534, 72 Atl. 735, 736, 17 Ann. Cas. 1072, it was said: "And it is now held, both in England and in courts of the United States, that no reason can be given for setting aside verdicts because of excessive damages which does not apply to setting them aside for inadequacy of damages." (p. 53.)

It was held by the supreme court of New York, in *Lewis v. New York City R. Co.* 50 Misc. 535, 99 N. Y. Supp. 462: "The positive testimony of an unimpeached, uncontradicted witness cannot be disregarded by a court or a jury arbitrarily or capriciously." . . . The rights of the people would have no safeguard, and the courts of justice would afford no forum for the redress of wrongs, if the unimpeached and uncontradicted testimony of a witness can be overthrown without reason."

In *Newton v. Pope*, 1 Cow. 109, 110, it was said: "But there is no difficulty in saying that where (as in this case) the witness is unimpeached, the facts sworn to by him uncontradicted, either directly or indirectly, by other witnesses, and there is no intrinsic improbability in the relation given by him, neither a court nor jury can, in the exercise of a sound discretion,

disregard his testimony. It is no less the duty of a court than of a jury to decide according to evidence. But it is mockery to talk of evidence, if it is discretionary with the tribunal to which it is addressed to disregard it, upon the vague suggestion, unsupported by proof, of the bias of the witness." (p. 110.)

In *Lionberger v. Pohlman*, 16 Mo. App. 392, 398, it was said by Judge Thompson: "But, after mature deliberation, we are of opinion that the correct rule is that, where the testimony offered in support of the allegations of the party who sustains the burden of proof is, if believed, sufficient to make out his case, and is clear, consistent with itself, delivered by an unimpeached witness, and no circumstance is developed tending to cast suspicion upon it, and no substantial countervailing evidence is offered by the other party, if the jury nevertheless disregard it, and return a verdict against it, it will be the duty of the trial court on a motion for a new trial, and of an appellate court on appeal or error, to set it aside as being the result of a manifest mistake." (p. 398.)

The supreme court of Wisconsin, in *Engmann v. Immel*, 59 Wis. 252, 18 N. W. 183, said: "The jury might as well in their arbitrary and sovereign pleasure render a verdict without evidence as against evidence." (p. 252.) Lord Stowell, in *Elwes v. Elwes*, 1 Hagg. Consist. Rep. 269, thus states the matter: "If witnesses come unimpeached in point of general integrity, if they depose with characters of fairness in their particular narrations, the facts must be received, or there is an end of all judicial inquiry." (p. 409.) See also *Hughey v. Sullivan* (C. C.) 80 Fed. 72; *Barrette v. Carr*, 75 Vt. 425, 56 Atl. 93; *Ford v. Minneapolis Street R. Co.* 98 Minn. 96, 107 N. W. 817, 8 Ann. Cas. 903, and note; *Brown v. Petersen*, 25 App. D. C. 359, 4 Ann. Cas. 980.

The rule, founded upon justice and reason, and supported by the weight of authority, is that in cases of this kind, if the verdict is so inadequate as clearly to indicate partiality, passion, or prejudice on the part of the jury, or failure to heed the evidence and facts actually shown, it should be set aside; that, while the jury are the exclusive judges in the first instance of the weight of the evidence and the credibility of the witnesses, this means that they are in fact judges thereof, acting with reason and fairness, and not from partiality or caprice, or arbitrarily.

With the facts before them that beyond any question of doubt the assault was made without legal justification, that it was of sufficient violence to cause pro-

fuse bleeding at the nose and a separation of the nasal bones, and with the direction by the court to return such a verdict as would amount to compensation, the conclusion seems inevitable that the jury, either from partiality or caprice, or from failure to obey the instruction of the court, returned a verdict, not for compensatory but for nominal damages. Men are to be commended for seeking legal redress in court, instead of taking vengeance into their own hands. Common sense and the common instincts of humanity revolt at the notion that for the physical pain and humiliation caused by the assault, \$1—50 cents for each—could be otherwise than farcical.

The judgment of the trial court is reversed, and the cause remanded, with directions to grant a new trial.

Johnston, Ch. J., and Smith, Porter, and Benson, JJ., concur.

Mason, J., dissenting:

The petition alleged that the defendant struck the plaintiff, and thereby inflicted certain specified injuries. The answer contained a general denial, admitting the striking, thereby, as it seems to me, denying that the plaintiff had received any substantial injury, and placing upon him the burden of proof in that regard. If he had offered no evidence, he would have been entitled to a verdict for nominal damages for the invasion of his legal right, but to nothing more. The jury obviously disbelieved his entire evidence as to the extent of his injury, and rendered the only verdict conformable with that belief. The trial court approved the verdict. The rule is that this court will not set aside a verdict, merely because it is in conflict with oral testimony which no witness contradicted. The decision seems to proceed upon the theory that the facts were as testified to by the plaintiff's witnesses, and that the defendant had admitted as much. I think the defendant admitted nothing beyond a technical assault, and that it was the province of the jury to say whether anything more was committed.

Burch, J., dissenting:

There is nothing about which the plaintiff was more positive than that all his claimed injuries proceeded from one straight blow. He described it in words several times, always the same, and he described it, as the record shows, by an indicating gesture. If, however, that were true, the claimed results were incredible. The opinion of the court recognizes this difficulty, and recognizes the necessity of

eliminating some portions of the plaintiff's story. So the opinion picks out what is certainly true, and make the palliative suggestion as to a mistake on the part of the plaintiff as to one or the other of two incompatible sets of statements. The jury did precisely the same kind of work in the exercise of what has heretofore been believed to be its proper function, and the law in such cases is clearly as stated by Mr. Justice Mason.

What about damages for humiliation? The evidence is open to the interpretation that the plaintiff repeated and repeated statements which the defendant regarded as an impeachment of his veracity, and so aggravated the defendant into striking him. The defendant was immediately sorry for his act, and wanted to do what he could to repair it. The plaintiff had a nosebleed, and seemed to regard it as a very valuable asset. He would not wash at the defendant's house, or permit the defendant to send some water out to him for the purpose, and went home. He would not wash himself there, but carried his ensanguined front to the home of a neighbor living north of him, where he inquired for the justice of the peace. After making this exhibition of his humiliation, he went to the justice of the peace. The plaintiff lives a mile and a half north of Kipp, and the justice lives west and north of Kipp. After initiating his criminal proceeding, the plaintiff went to Kipp. He said he had no business there, but he went to the store and paraded his humiliation there, meantime having wiped the blood over his face. Then he went home. In view of this and other peculiar testimony, the jury doubtless concluded that the plaintiff was simply trying to lay the foundation for a big lawsuit, and that substantial damages for genuine humiliation of feelings were not established.

Then what about personal injuries? The defendant was present in court, and the jury could estimate his physical strength. The plaintiff said the defendant struck him a straight blow as hard as he could. Yet the plaintiff was not knocked down. Despite his story of cut lip, contused forehead, black eyes, and broken nose, when he went to the doctor two days afterward, visible traces of injury had substantially, if not entirely, disappeared. The doctor's only positive testimony was this: "Do you recall what you saw? A. Yes, sir. Q. What did you see? A. What I saw, I saw with my hands." By taking hold of the nose a crepitation was perceptible, indicating a separation of the nasal cartilage from the cheek bone. The cartilage was not cracked, and there was no dis-

placement; no treatment was necessary; none was given; and no charge was made. The doctor has nothing whatever to say of exhibited pain or discomfort of any kind, and the plaintiff lost no time, except it be in getting his lawsuits under way. The result is the plaintiff was discredited by his doctor, as well as in other ways, and upon all the evidence the jury concluded that the result of the blow was really inconsequential, and not worthy of more than nominal damages. Because the jury, after seeing and hearing all the witnesses, inferred falsification where the court infers mistake, threw out what it believed to be the product of falsification, and exercised its judgment in a matter respecting which even the opinion of the court vouchsafes no standard of measurement, I am not willing to brand the jury as arbitrary, capricious, partial, etc., nor willing to convict the trial judge, who, with advantages which this court does not possess, approved the verdict, of sanctioning a farce against which common sense revolts.

In the case of *Heineken v. Benton Twp.* 84 Kan. 881, 115 Pac. 592, almost the entire amount of the plaintiff's claim of \$4,500 was for physical injuries, impaired health, doctor's bills, and the cost of medicine. He told how he, together with his team and buggy, went over an embankment, and how his head was driven into the sand in the bottom of the creek. He claimed that his health failed, that he was under the doctor's care for a long time, and that he spent much money in an effort to restore his health. Nobody saw the remarkable occurrence upon which he based his claim for these damages, and the jury, disbelieving his story respecting it, allowed him nothing. The jury did allow him \$45 for injury to his buggy and \$5 for injury to his harness. Had these items not been included, the case would be exactly parallel in principle to this one.

WISCONSIN SUPREME COURT.

GUSTAVE JAEGER et al., Respts.,
v.

GRAND LODGE OF ORDER OF HERMANN'S SONS, Appt.

(— Wis. —, 135 N. W. 869.)

Insurance — mutual benefit — retro-active — rate — deduction from policy.

Consent by a member of a mutual benefit society, to be bound by all present and future rules of the order, does not empower the society to make an increase in the rate of his assessment date from the inception 39 L.R.A. (N.S.)

of his policy, and deduct the amount owing by him under such arrangement from the face of his policy.

(April 23, 1912.)

A PPEAL by defendant from a judgment of the Circuit Court for Milwaukee County in plaintiffs' favor in an action brought to recover the amount alleged to be due upon a mutual benefit certificate. Affirmed.

Statement by Kerwin, J.:

This action was brought against the defendant to recover upon a benefit certificate or policy for \$1,000 issued September 1, 1888. The plaintiffs recovered judgment for \$363.93 damages and costs; said damages being the amount which the court below held balance due plaintiffs upon the certificate or policy. Upon the trial the defendant admitted there was due and paid over \$536.07, and the judgment recovered was the difference between this amount and the face of the certificate less \$100. The case was tried by the court without a jury, and the court found that the defendant made the certificate or policy September 1, 1888, to the deceased, Claus Jaeger. That said Jaeger paid all assessments levied and imposed upon him by the Grand Lodge for the maintenance of his certificate or policy, and did also pay all lodge dues imposed upon him and required to be paid, and at the time of his death was in all respects a member of said order in good standing. That at a regular meeting of said Grand Lodge in 1897, a by-law was enacted requiring every member then belonging to said order, or who should subsequently join, to submit to a deduction of 10 per cent, or \$100, of the \$1,000 stipulated in his policy to be paid his beneficiary or beneficiaries upon his death, said \$100 to be paid into a guaranty fund, and the remaining \$900 only should be paid to the beneficiary or beneficiaries designated in said policy. That the wife of said Claus Jaeger, who was designated as beneficiary in his said policy, died at the city of Milwaukee on or about the 1st day of January, 1906. That, in pursuance of a stipulation contained in said policy, said Claus Jaeger did, on the 27th day of February, 1906, change the beneficiary originally named, and designated his six children as beneficiaries, namely, Adolph, Carl, Henry,

Note.—The question of the right of a mutual benefit society to increase rates is covered by annotation appended to *Reynolds v. Supreme Council*, R. A. 7 L.R.A. (N.S.) 1154, and *Dowdall v. Supreme Council*, C. M. B. A. 31 L.R.A. (N.S.) 417.

Helen, Paul, and Fred, and requested that the amount of insurance due on such policy less 10 per cent be paid to said newly designated beneficiaries, and that such 10 per cent thereof, pursuant to the above mentioned by-law, be paid into the guaranty fund, and that a memorandum of such declaration changing such beneficiaries, and providing that a deduction of 10 per cent of the amount designated in the policy be paid into the guaranty fund, was indorsed on said policy and subscribed by the grand secretary of said Grand Lodge. That from and after said incorporation of said Grand Lodge of Wisconsin of the Order of Hermann's Sons, said defendant corporation duly assumed all the obligations of said Grand Lodge, which it had entered into prior to its said incorporation, and thenceforth, and up to the time of the death of said Claus Jaeger, received and collected all the assessments payable by said Jaeger upon said policy and all other assessments levied upon all members of said order. That about the year 1897 said Grand Lodge enacted a certain by-law to meet the losses due the increasing death rate of members, also to the effect that all members who should be such on and prior to the 1st day of March, 1898, should, from and after that day, be required to pay for the maintenance of their respective policies of \$1,000 each certain monthly assessments varying according to ages attained by such members at the time of becoming members, increasing from ages between eighteen and twenty-five years up to ages between forty and forty-five years; and that members who, at the time they became members, had attained an age between forty and forty-five years, should pay a monthly assessment of \$2.75; and that by said by-law it was further provided that all members who should become members after said 1st day of March, 1898, should be required to pay on policies of \$1,000 lower monthly assessments, which also varied and increased between the ages of eighteen and twenty-five years up to between forty and forty-five years; and that all persons who, at the time of becoming members, had attained an age between forty and forty-five years, should pay a monthly assessment of \$2.04. Said Claus Jaeger became a member of Robert Blum Lodge No. 4 in 1879, and was then forty-four years of age, and from and after March 1, 1898, paid for the maintenance of his policy a monthly assessment of \$2.75 up to the time of his death, all of which assessments were duly paid to said Grand Lodge. Said Jaeger died on the 3d day of January, 1910, and at the time of his death was a member in good standing of said Robert Blum Lodge 39 L.R.A. (N.S.)

No. 4. That on the 11th day of January, 1910, due notice of the death of said Claus Jaeger was given in writing to said Grand Lodge, and more than ninety days expired before the commencement of this action. That on the 26th day of March, 1910, Adolph Jaeger, Carl Jaeger, Henry Jaeger, and Fred Jaeger, four of the beneficiaries designated in the policy, did for value received duly assign and transfer to plaintiff Gustave Jaeger all their right, title, and interest in said policy, and in and to said sum of \$1,000 mentioned therein, and ever since said Gustave Jaeger has been, and still is, the owner of an undivided four sixths of said policy and the money thereby secured. That the plaintiffs Paul Jaeger and Helen Jaeger, two of the beneficiaries designated, are minors, and are still the owners of an undivided one sixth each of said policy. That upon proceedings duly had in the county court of Milwaukee county, said Gustave Jaeger was, on the 9th day of April, 1910, duly appointed general guardian of the above-named minors, and letters of guardianship were duly issued, and said Gustave Jaeger ever since has been and still is the general guardian of said minors. That the defendant Grand Lodge has in its possession a reserve fund exceeding \$20,000. That before the commencement of the trial of this action, said defendant paid to the plaintiffs \$536.07, the amount admitted to be due upon said policy, without prejudice to the rights of plaintiffs to continue said action for the sum of \$463.93 and interest thereon, denied by defendant to be due. That at its annual session in August, 1909, said defendant adopted an amendment to its by-laws to the effect that all members of said order who were such prior to the 1st day of March, 1898, should be advanced to their attained age as of that date, or, in lieu thereof, be given the following options: First, the privilege of paying in cash the amount they ought to have paid into the benefit fund, had they been charged the present table of rates from the time they were initiated into the order to the 1st day of March, 1898, to wit, that they should be charged one payment a month at the age at which they were initiated at the rate provided by the present table of rates, against which they should be credited with the amount they actually paid during that period of time, and the balance should be the deficiency; second, that said members may have said deficiency charged against their benefit certificate with 2½ per cent simple interest so long as the same remains unpaid, with accrued interest thereon, which deficiency, with interest at the time of the death of said member, should

be deducted from the face of his benefit certificate; and that said by-laws should apply only to members who were initiated into the order before March 1, 1898. That, pursuant to the above by-laws, the grand secretary of said defendant did, about September, 1910, compute the amounts of said alleged deficiencies to be charged against the respective policies of members who joined before March 1, 1898, and that the amount so computed as a deficiency against the policy of Claus Jaeger was \$363.93, and that said secretary issued a printed circular in which each member was requested to signify his choice, whether he would pay the deficiency in cash, or would suffer the same to be deducted with 2½ per cent interest from the amount of his policy at his death. That said Claus Jaeger never acquiesced in said amendment, and did not manifest any choice as to whether he would pay cash or suffer the same to be deducted from the amount of his policy. That, before the commencement of this action, the plaintiffs duly demanded of defendant payment of the amount of \$1,000 named in the policy, which payment was refused.

The court concluded that said by-law of 1897, which required every member then belonging to said order and every future member to submit to a deduction of 10 per cent, or \$100, at his death from his \$1,000 policy, to be paid into a reserve fund, and that only the remaining \$900 should be paid to the beneficiary or beneficiaries of such policy, was and is unreasonable and void as to said Claus Jaeger and all members who joined said order prior to the passage of said law; but that since in and by the written declaration made by said Claus Jaeger for the substitution of said six children as beneficiaries in lieu of his wife, who had died, he requested that 10 per cent, or \$100, of the amount of the policy be deducted from such policy, and paid into the reserve fund of said Grand Lodge, he, said Claus Jaeger, consented to such deduction, and thereafter was, and these plaintiffs now are, estopped from questioning or disputing the right of the Grand Lodge to deduct said \$100 from the amount of said policy; that said amendment of its laws enacted by said defendant at its session in 1909, to the effect that each member of said order who had joined prior to the 1st day of March, 1898, should be required to pay the difference between the total amount of assessments he had paid from time of initiation to said 1st day of March, 1898, and the amount which he would have paid had he paid the highest rate of assessment then payable by him according to the then present rates of assess-

ments, or to suffer such deficiency to be deducted from the amount of his policy with 2½ per cent interest added at time of his death, was and is unreasonable and void; that there is now due and owing from the said defendant to the plaintiffs the sum of \$363.93, with interest thereon from the 12th day of April, 1910.

Judgment was entered in accordance with the findings of fact and conclusions of law, from which this appeal was taken.

Messrs. O'Connor, Schmitz, Wild, & Gross, for appellant:

The enactment of the laws of 1897 and 1909, relating to the mortuary guaranty and reserve funds, was proper.

Borgards v. Farmers' Mut. Ins. Co. 79 Mich. 440, 44 N. W. 856; Sargent v. Supreme Lodge, K. H. 158 Mass. 557, 33 N. E. 650; Stohr v. San Francisco Musical Fund Soc. 82 Cal. 557, 22 Pac. 1125; Bowie v. Grand Lodge, L. W. L. 99 Cal. 392, 34 Pac. 103; Parish v. New York Produce Exch. 169 N. Y. 34, 56 L.R.A. 149, 61 N. E. 977; Supreme Commandery, K. G. R. v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; Caldwell v. Grand Lodge, U. W. 148 Cal. 195, 2 L.R.A.(N.S.) 653, 113 Am. St. Rep. 219, 82 Pac. 781, 7 Ann. Cas. 356; Supreme Lodge, K. P. v. Kutscher, 179 Ill. 340, 70 Am. St. Rep. 115, 53 N. E. 620; Fullenwider v. Supreme Council, R. L. 180 Ill. 621, 72 Am. St. Rep. 239, 54 N. E. 485; Olson v. Court of Honor, 100 Minn. 117, 8 L.R.A.(N.S.) 621, 117 Am. St. Rep. 676, 110 N. W. 374, 10 Ann. Cas. 622; Schmidt v. Supreme Tent, K. M. 97 Wis. 528, 73 N. W. 22; Hughes v. Wisconsin Odd Fellows Mut. L. Ins. Co. 98 Wis. 292, 73 N. W. 1015; Loeffler v. Modern Woodmen, 100 Wis. 79, 75 N. W. 1012; Thomas v. Covert (Thomas v. Supreme Lodge, K. H.) 126 Wis. 593, 3 L.R.A.(N.S.) 904, 105 N. W. 922, 5 Ann. Cas. 456.

The members of benefit associations are bound by laws adopted after their contracts of insurance were issued, if such contracts provide that members shall be so bound; and subsequent amendments are held valid as to them.

Hobbs v. Iowa Mut. Ben. Asso. 82 Iowa, 107, 11 L.R.A. 299, 31 Am. St. Rep. 466, 47 N. W. 983; Supreme Lodge, K. P. v. Knight, 117 Ind. 489, 3 L.R.A. 409, 20 N. E. 479.

Messrs. Schelber & Orth, for respondents:

The benefit certificate is a solemn contract for a specific amount, and cannot be changed by either party without the consent of the other.

Wuerfler v. Grand Grove, W. O. D. 116

Wis. 19, 96 Am. St. Rep. 940, 92 N. W. 433.

Where there is a conflict between the policy and the laws of the Order the policy controls.

Ledebuhr v. Wisconsin Trust Co. 112 Wis. 657, 88 N. W. 607; Bruger v. Princeton & St. M. Mut. F. Ins. Co. 129 Wis. 281, 109 N. W. 95; Wuerfler v. Grand Grove, W. O. D. supra; Baumann v. Metropolitan L. Ins. Co. 144 Wis. 206, 128 N. W. 864; Langan v. Supreme Council, A. L. H. 174 N. Y. 266, 66 N. E. 932; Beach v. Supreme Tent, K. M. 177 N. Y. 100, 69 N. E. 281; Weber v. Supreme Tent, K. M. 172 N. Y. 490, 92 Am. St. Rep. 753, 65 N. E. 258; Hale v. Equitable Aid Union, 168 Pa. 377, 31 Atl. 1066; Newhall v. Supreme Council A. L. H. 181 Mass. 111, 63 N. E. 1; Gaut v. American Legion of Honor, 107 Tenn. 603, 55 L.R.A. 470, 64 S. W. 1070.

Members cannot be charged up with back assessments.

Wuerfler v. Grand Grove, W. O. D. 116 Wis. 19, 96 Am. St. Rep. 940, 92 N. W. 433; Strauss v. Mutual Reserve Fund Life Asso. 126 N. C. 971, 54 L.R.A. 605, 83 Am. St. Rep. 699, 36 S. E. 352, 128 N. C. 485, 54 L.R.A. 609, 83 Am. St. Rep. 703, 39 S. E. 55.

Discrimination in rates is unlawful.

Benjamin v. Mutual Reserve Fund Life Asso. 146 Cal. 34, 79 Pac. 517; Ebert v. Mutual Reserve Fund Life Asso. 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457; Strauss v. Mutual Reserve Fund Life Asso. 126 N. C. 971, 54 L.R.A. 605, 83 Am. St. Rep. 699, 36 S. E. 352.

Kerwin, J., delivered the opinion of the court:

The facts in this case as found by the court are undisputed. They appear in the foregoing statement of the case.

Error is assigned upon the conclusions of law. We are reminded by the learned counsel for appellant of the great importance of the principles involved in this case to fraternal societies generally, and we approach the consideration of the case fully conscious of the fact that the legal principles involved are far-reaching in their importance to all fraternal associations. The deceased, Claus Jaeger, became a member of the lodge in 1879, and continued to 1888, when, under a new arrangement, the certificate under consideration was issued, by the terms of which the defendant promised to pay \$1,000 to the beneficiaries provided for upon the death of said Claus Jaeger, and the said Claus Jaeger, by the terms of said certificate, promised to "comply with the laws, rules, and regulations now governing this order and its beneficiary

fund, and with all such as may hereafter be enacted to govern said order and fund." The deceased paid all dues and complied with all rules, regulations, and by-laws, except that he refused to pay \$100 deduction from the face of his policy by the by-law of 1897, and also refused to comply with another by-law passed in 1909 giving two options,—one to pay a sum in gross to be ascertained by advancing his payments from the time he entered from \$1.60 per month to \$2.75 per month, and charging the difference upon the policy or certificate, or by deducting such amount from the face of the policy when paid, as more fully appears from the statement of facts. The effect of this by-law, as will be seen by examination of the facts found, was to scale down the certificate or policy by charging up from the time the deceased obtained his certificate, in 1888, a sum aggregating \$363.93, together with \$100 ordered deducted by the first by-law above referred to, making a total cut from the face of the certificate of \$463.93. But, as found by the court below on sufficient evidence, the deceased consented at the time of change of beneficiaries, to the \$100 cut. Therefore the plaintiffs cannot complain on that account, since the right to make that deduction from the policy was assented to by deceased as found by the court below.

The main question, therefore, for determination, is whether the defendant could charge the \$363.93 against the certificate in suit. The court below held that it could not, and that such amount was due to plaintiffs in addition to the \$536.07 tendered by defendant. The case turns upon the power of the defendant to pass the by-law under which it claims the right to impose the burden upon its members. It will be remembered that the burden imposed upon deceased and his certificate or policy is a charge of \$2.75 per month from the time of the issuance of the certificate up to 1909, less the amount which he had paid during that time, after deceased had paid the regular dues imposed by the defendant up to that time, namely, \$1.60 per month. The effect of the by-law is to take, as we have seen, \$363.93 out of the \$900 due on the policy by a retroactive cut, after deceased had paid the dues imposed and complied with all the rules and regulations of the defendant from the time of issuance of the certificate until 1909, a period of over twenty years. The appellant's claim is that the provision in the certificate to the effect that the deceased will comply with all by-laws then existing, or which may be subsequently passed, gives such right, and several authorities are cited which it is claimed support the contention.

We shall briefly refer to those chiefly relied upon by appellant.

Borgards v. Farmers' Mut. Ins. Co. 79 Mich. 440, 44 N. W. 856, was a case limiting liability in the future in case of loss by sparks escaping from a steam engine used in threshing grain. *Sargent v. Supreme Lodge, K. H.* 158 Mass. 557, 33 N. E. 650, has reference to change of beneficiaries. *Stohr v. San Francisco Musical Fund Soc.* 82 Cal. 557, 22 Pac. 1125, held that a by-law passed limiting benefits after continuous payments for six months was valid. The by-law clearly related to future benefits, and referred to a matter over which the company had control and power to limit payments by by-law, and in no way violated any contract relations between the parties, because permission to do what was done and change the by-law in that regard was a part of the contract, and it was said in the case that the change could not be retroactive. The contract was held to mean that, in case of sickness, the member is to receive payments subject to the power of defendant to change the provision authorizing such payments so far as future payments are concerned. *Parish v. New York Produce Exch.* 169 N. Y. 34, 56 L.R.A. 149, 61 N. E. 977, held that a by-law diverting a fund from the purpose specified in the charter is unreasonable and void, because an attempt to divert the fund to a different purpose after the fund had been accumulated by payments for a series of years. The case is not in favor of appellant's position, but rather against it. *Supreme Commandery, K. G. R. v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332, holds certificate to be a contract, not subject to impairment, but accepted subject to the laws of the order then in force or thereafter enacted, but was silent on the question of suicide; and it was further held that a by-law enacted after the issuance of certificate declaring it void if the member should take his own life was valid. *Caldwell v. Grand Lodge, U. W.* 148 Cal. 195, 2 L.R.A. (N.S.) 653, 113 Am. St. Rep. 219, 82 Pac. 781, 7 Ann. Cas. 356, relates to change of beneficiaries, and it was held that, where the original by-law allowed any person to be named by a member as beneficiary, a change in the by-laws requiring one to be designated as a member of the family, or related by blood, or "who shall be dependent upon him," is reasonable. *Supreme Lodge, K. P. v. Kutscher*, 179 Ill. 340, 70 Am. St. Rep. 115, 53 N. E. 620, is a case holding that a by-law forfeiting claim for the death of a member by suicide or intoxication is reasonable and binding upon a member joining before its

passage, who contracts to be bound by subsequent by-laws. *Fullenwider v. Supreme Council, R. L.* 180 Ill. 621, 72 Am. St. Rep. 239, 54 N. E. 485, involves right to change rate of assessment by subsequent by-law. It does not appear, as we understand the opinion, that the subsequent by-law had any retroactive effect. Moreover, the case is ruled by a bare majority, three judges dissenting. *Olson v. Court of Honor*, 100 Minn. 117, 8 L.R.A. (N.S.) 521, 117 Am. St. Rep. 676, 110 N. W. 374, 10 Ann. Cas. 622, is where a by-law passed subsequently to the issuance of certificate, limiting the benefit in case of suicide to 5 per cent of the face of the certificate for each year during continuance of membership in the society, was held unreasonable and void as to existing members. This authority is against appellant's contention.

Counsel for appellant also cites the following Wisconsin cases: *Schmidt v. Supreme Tent, K. M.* 97 Wis. 528, 73 N. W. 22, which is a case where the subsequent by-law was against prohibited occupation. *Hughes v. Wisconsin Odd Fellows Mut. L. Ins. Co.* 98 Wis. 292, 73 N. W. 1015, is where there was a subsequent by-law against suicide, rendering the policy void. *Loeffler v. Modern Woodmen*, 100 Wis. 79, 75 N. W. 1012, is where there was a by-law against entering into a prohibited business. *Thomas v. Covert (Thomas v. Supreme Lodge K. H.)* 126 Wis. 593, 3 L.R.A. (N.S.) 904, 105 N. W. 922, 5 Ann. Cas. 456, seems to be against appellant's contention, because it recognizes the rule that an agreement or certificate similar to the one in question must in terms or by implication authorize the change in the contract, otherwise the subsequent by-law effecting such change is void. A careful examination of the foregoing cases will show that they are not controlling in favor of the appellant, and some of them are against appellant's contention. The case of *Wuerfler v. Grand Grove W. O. D.* 116 Wis. 19, 96 Am. St. Rep. 940, 92 N. W. 433, rules the instant case. That case is so strongly in point both on facts and upon principles enunciated that we quote at length from the opinion. At page 26 of 116 Wis. the court said: "Respondent did not possess unlimited authority to change its plan of insurance, giving the change retroactive effect, under the reserve power made a part of the insurance contract, to make changes in the rules, by-laws, and regulations of the order. Such a reserve power is held to warrant only reasonable variances of insurance contracts, —variances required, in the judgment of the order, in those matters of detail neces-

sary or advisable in carrying out efficiently the fundamental principle or scheme of insurance, not changes destroying it. Obviously, changes in the by-laws, rules, and regulations regarding the execution of a plan of insurance are quite different from changing the plan itself and nullifying all contracts entered into under it, as was done in this case. The essential features of the plan of insurance here were that each certificate holder's beneficiary should receive \$1,000 upon and at the maturity of his contract, and that a fund should be accumulated by assessments upon the memberships in the order sufficient for that purpose. The way was undoubtedly open for the order to make reasonable changes respecting the hazards members might subject themselves to, and in regard to the number and amount of the assessments, the time of payment thereof, the effect of default in such payment, the notice required of assessments to put members in default, and many other matters of detail that might be mentioned. But after a member had paid assessments for a long period of time, contributing to accumulate money to meet the matured obligations of \$1,000 each to beneficiaries, a change in the constitution of the order (the word 'constitution, is here used as synonymous with 'by-laws') rendering the certificate at maturity, instead of worth \$1,000, worth an indefinite amount and probably not half that sum, cannot seriously be considered a reasonable change in rules, regulations, and by-laws as regards existing contracts." This court has held that, where there is a conflict between the policy and the laws of the order, the policy controls. *Ledebuhr v. Wisconsin Trust Co.* 112 Wis. 657, 88 N. W. 607; *Bruger v. Princeton & St. M. Mut. F. Ins. Co.* 129 Wis. 281, 109 N. W. 95. The change attempted to be made here by deducting \$363.93 from the policy amounted to an abrogation of the contract. In *Langan v. Supreme Council, A. L. H.* 174 N. Y. 266, 66 N. E. 932, the benefit certificate had been issued for \$5,000 on the death of plaintiff. After plaintiff had become a member, the by-laws were amended so that on the death of plaintiff only \$2,000 should be paid. In an action involving the validity of such amendment the court said: "The action of the defendant, in the attempted amendment of the by-law which was in force when the plaintiff joined the association and received his certificate, was wholly ineffectual to deprive him of any rights which had become vested. It was beyond the power of 39 L.R.A.(N.S.)

the defendant to affect the obligation expressed in the certificate without the consent of its holder." To the same effect are *Beach v. Supreme Tent, K. M.* 177 N. Y. 100, 69 N. E. 281; *Weber v. Supreme Tent, K. M.* 172 N. Y. 490, 92 Am. St. Rep. 753, 65 N. E. 258; *Hale v. Equitable Aid Union*, 168 Pa. 377, 31 Atl. 1066. In *Newhall v. Supreme Council A. L. H.* 181 Mass. 111, 63 N. E. 1, an attempt was made by the adoption of a subsequent by-law to cut the amount of the certificate from \$5,000 to \$2,000, and, although the usual promise was contained in the certificate to comply with subsequent by-laws, it was held that the full sum mentioned in the certificate, \$5,000, could be recovered. See also *Gaut v. American Legion of Honor*, 107 Tenn. 603, 55 L.R.A. 465, 64 S. W. 1070, where it was held that an agreement by the holder of a benefit certificate to be governed by laws subsequently enacted does not authorize the reduction of the benefit called for in the certificate after payment has been made for years on original value.

We are of opinion that the by-law making the rebate from the policy of \$363.93 was unauthorized and void. The by-law making the 10 per cent cut, or \$100, on the \$1,000 certificate, was assented to by deceased when he made the change of beneficiaries, and cannot be questioned here. Some other questions are raised by respondents which they claim are sufficient to defeat the appellant, on the ground that the by-laws referred to are unreasonable, because all members, new and old, were not put upon the same basis as to rates. On this point attention is called to the following authorities in addition to those already cited: *Strauss v. Mutual Reserve Fund Life Asso.* 126 N. C. 971, 54 L.R.A. 605, 83 Am. St. Rep. 699, 36 S. E. 352; *Id.*, 128 N. C. 465, 54 L.R.A. 609, 83 Am. St. Rep. 703, 39 S. E. 55; *Benjamin v. Mutual Reserve Fund Life Asso.* 146 Cal. 34, 79 Pac. 517; *Ebert v. Mutual Reserve Fund Life Asso.* 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457. Whether this last contention as to discrimination between old and new members as to rates in the future is sufficient to defeat the by-law making new rates, independent of the retroactive cut on old members, we need not and do not decide, because the by-law scaling down the certificate by a rebate of \$363.93 cannot be upheld, and the by-law attempting to accomplish such purpose is unauthorized under the contract, and void. The judgment of the court below, therefore, is right, and must be affirmed.

KANSAS SUPREME COURT.

HENRY WESTERMAN

v.

KIZER CORDER and Wife, Appts.

(86 Kan. 239, 119 Pac. 868.)

Estoppel — false representations — knowledge.

1. Where false representations are made by a vendor in the sale of property, the application of the doctrine of equitable estoppel does not necessarily depend upon the knowledge of the vendor of the falsity of the representations, but may rest upon the principle that one who, by representing that a certain state of facts exists, has misled another, is precluded from denying the truth of such representations and from setting up a claim inconsistent with the facts as represented, where such claim would result in loss to the other and operate as a fraud upon him.

Headnotes by BENSON, J.

Note. — Knowledge by vendor of falsity of his misstatements as to title as a condition of equitable estoppel against him.

As to the effect of the purchaser's concealment or misrepresentation of fact affecting the value of real estate, see note in 30 L.R.A. (N.S.) 748.

As to the question whether fraud may be predicated of a misstatement as to title, see note in 28 L.R.A. (N.S.) 202.

As to whether a false statement as to the cost, selling or market price of property or offers therefor constitute a fraud, see note in 35 L.R.A. (N.S.) 175.

Few if any cases have considered this specific question. Although as shown in a note in 35 L.R.A. (N.S.) 1182, the question has come up with reference to quitclaim deeds, both where they contain covenants and where they do not. That note, however, does not discuss the question as to the effect of knowledge of the falsity of either statements or covenants in a deed as affecting the question of estoppel. The question of the effect of knowledge is discussed to a limited extent in *Crosby v. Meeks*, 108 Ga. 126, 33 S. E. 913, holding an agent to be estopped from acquiring and setting up a title adverse to that conveyed by his principal, by his representations to the grantee, that his principal had the true title to the land. In this case the trial court instructed the jury that if these representations were made with the knowledge of their falsity the agent was estopped. Upon appeal the court, after remarking that they were inclined to think that the judge, in his charge to the jury, really gave the agent the benefit of a principle to which he was not entitled, since he based his charge as to the agent's right to assert an adverse title subsequently acquired, not only upon the idea that he made the untrue statements

Fraud — right to act on representations.

2. When a false representation is of a matter presumably within the knowledge of the person making it, not made in the way of commendation or as an opinion merely, but as a positive assertion of an existing fact to induce the other party to enter into the contract, such party, having no knowledge to the contrary, may, if he act in good faith, accept the representation as true, and is not bound to make inquiries or examination for himself.

(January 6, 1912.)

APPEAL by defendants from a judgment of the District Court for Thomas County quieting title to a tract of land in the plaintiff. Affirmed.

The facts are stated in the opinion.

Mr. E. H. Benson for appellants.

Messrs. Mahin & Mahin for appellee.

alleged upon which the defendants acted to their injury, but also that he knew they were untrue when he made them, added: "We do not think that even if he had made the statements in good faith, this fact would have been of any avail to him in this action; for it would have been no less a wrong to the defendant so far as the injury to them is concerned, whether the statements were made in good or bad faith."

It has been held that a vendor who represents that his deed of conveyance covers a certain parcel of land, whereas, as a matter of fact, it conveys a different parcel of land, is estopped from thereafter asserting title to the land he represents as conveyed by the deed; and that this is true whether he acted fraudulently or in good faith. *Black v. Baskins*, 75 Ark. 382, 87 S. W. 647.

So, where a defendant in an execution, after having parted with the title to land as collateral to a loan, pointed the land out to the sheriff as his land, and in reliance upon his statement a levy thereon was made and the land sold, and he accepted the balance of the proceeds after paying the execution, he is thereafter estopped from asserting title under a deed subsequently procured from the first vendee. *Whelchel v. Green*, 102 Ga. 113, 29 S. E. 169.

A minor owning land scrip, who assigns the scrip, representing that he has reached his majority, who after reaching his majority appoints the assignee of the scrip as his attorney to relocate land thereunder, the location formerly made having been canceled because of his minority, is estopped from asserting the invalidity of intermediate deeds based upon the original location, although such deeds were executed prior to a valid entry of the land with the scrip. *Coursolle v. Weyerhauser*, 69 Minn. 328, 72 N. W. 699.

A. G. S.

Benson, J., delivered the opinion of the court:

The defendants, Kizer Corder and wife, appeal from a judgment quieting the title to a tract of land in the plaintiff, Henry Westerman. The appellants claim title to an undivided one half of the tract under a quitclaim deed from the Kansas Town & Land Company. The appellee is in possession under a deed from the appellants, purporting to convey the land, made and delivered before the conveyance from the land company was executed, and contend that the appellants are estopped from asserting their after-acquired title, because of their previous conveyance to the appellee, and because of the representations of the appellant Kizer Corder that he was the owner of the land.

The district court found that the conveyance by the appellants to the appellee was by quitclaim deed, and that it did not estop the grantors therein. The appellee contends that, while the word "quitclaim" is used in the deed, it nevertheless purports to convey an indefeasible estate in fee simple in the land, and not the grantor's interest merely, and that it therefore works an estoppel as provided in § 1656 of the General Statutes of 1909. The language of the deed is quite similar to that of the deed referred to in *Bruce v. Luke*, 9 Kan. 201, 12 Am. Rep. 491, which was held to create no estoppel. The district court found for the appellee on the other question presented, *viz.*, that the appellants were estopped by their representations. The evidence of both parties shows, and the court found, that while negotiations were pending for the sale and purchase of the land the appellant Kizer Corder stated that he owned the land by warranty deed from C. F. Jilson, except an interest therein held by one Tilden, and that a conveyance from the appellants would vest the absolute title, except that outstanding interest which he advised the appellee to purchase. The appellee believed these representations to be true, and, relying upon them, entered into an agreement with the appellants for a conveyance of the land for \$650, which sum he paid, and received the conveyance as agreed, and also bought the Tilden interest, paying \$500 therefor; all in reliance upon the truth of the representations so made. When he made the representations, and when he delivered the deed Corder believed that he owned the land (except the Tilden interest), and that his statements concerning the title were true, and intended that the deed by him and wife should convey a perfect title; but about ten months afterwards he was informed by an abstracter that the Kansas

Town & Land Company owned an interest in the land, and thereupon he obtained a quitclaim deed from that company of its title and interest for the sum of \$2, and this is the interest adjudicated against him in the district court.

The only question that need be decided is whether the representations concerning the title so made and relied upon estop the appellants from asserting and holding adversely the interest so acquired after their conveyance to the appellee. While admitting that the representations were made and that they were untrue, it is contended that because they were made in good faith, believing them to be true, and no fraud was intended, therefore an estoppel was not created. It must be conceded that the effect is the same as it would have been if guilty knowledge had been shown. It does not repair the loss of the grantee to be told that the grantor supposed he was telling the truth.

It has often been held that false representations made and acted upon to the injury of another, although not known to be false by the party making them, may, nevertheless, in a proper case, afford ground for the recovery of damages. Thus it was said in *Holcomb v. Noble*, 69 Mich. 396, 399, 37 N. W. 497, 498: "Careful examination of the cases adjudicated in this state satisfies me that the doctrine is settled here, by a long line of cases, that if there was in fact a misrepresentation, though made innocently, and its deceptive influence was effective, the consequences to the plaintiff being as serious as though it had proceeded from a vicious purpose, he would have a right of action for the damages caused thereby, either at law or in equity." The decision last cited was applied and followed in an action for damages on the sale of real estate, in *Aldrich v. Scribner*, 154 Mich. 23, 18 L.R.A. (N.S.) 379, 117 N. W. 581.

The Nebraska supreme court in considering this subject, in *Johnson v. Gulick*, 46 Neb. 817, 50 Am. St. Rep. 629, 65 N. W. 883, said: "Whether, in an action for damages for false representations, it is necessary either to aver or prove the *scienter*, the authorities do not agree. The better rule, and the one adopted by this court, is that the intent or good faith of the person making false statements is not in issue in such a case." "It is immaterial whether such statements are made innocently or knowingly. It is as fraudulent to affirm the existence of a fact about which one is in entire ignorance as it is to affirm what is false, knowing it to be so." *Bullitt v. Farrar*, 42 Minn. 8, 6 L.R.A. 149, 18 Am. St. Rep. 485, 43 N. W. 566. This subject

is reviewed in a case note in 7 L.R.A. (N.S.) 646.

Whatever may be the rule respecting guilty knowledge in actions for damages for deceit, the application of the doctrine of equitable estoppel does not necessarily depend upon such knowledge, but may rest upon the principle that one who, by false representations that a certain state of facts exists, has misled another, is precluded from denying the truth of such representations where such denial would result in loss to the other party and operate as a fraud upon him. *Cornell University v. Parkinson*, 59 Kan. 365, 373, 53 Pac. 138; 2 *Tiffany*, Modern Law of Real Prop. § 457; 16 Cyc. 728. Equitable estoppel in general terms has been defined as "such conduct . . . that it would be . . . a fraud upon the rights of another . . . to repudiate, and to set up claims inconsistent with it." Note in 1 L.R.A. 522. "It is in strict agreement with equitable notions to say of such party that his repudiation of his own prior conduct which had amounted to an estoppel, and his assertion of claims notwithstanding his former acts or words, would be fraudulent,—would be a fraud upon the rights of the person benefited by the estoppel." 2 Pom. Eq. Jur. 3d ed. § 803. This principle has been applied to representations concerning title to real estate. *Kirk v. Hamilton*, 102 U. S. 68, 77, 26 L. ed. 79, 82; *Bigelow v. Foss*, 59 Me. 102.

In *Babcock v. Case*, 61 Pa. 427, 100 Am. Dec. 654, 6 Mor. Min. Rep. 618, the grantee in a tax deed represented that he had examined the title and that it was good. The suit was to recover the consideration paid for the land. The court said that although the action was at common law it was still equitable. "The seller was bound to exhibit the truth of the case as it existed, whether he knew them [the facts] or not. That is to say, his ignorance of them, having undertaken truly to state them, would not redeem a falsehood in regard to them in any material matter, from being a fraud, and a fraud that would avoid the contract." "When the vendee relies on the representations of the vendor, and acts upon the faith thereof, without relying on his own judgment or opinion, and this is known to the vendor, the latter cannot shelter himself under the pretense that his representation was a mere expression of opinion, when it is discovered to be false." *Rimer v. Dugan*, 39 Miss. 477, 77 Am. Dec. 687. "It is not necessary to an equitable estoppel that the party should design to mislead. It is enough that the act was calculated to mislead and actually did mislead the defendants while acting in good faith, and 39 L.R.A. (N.S.)

with reasonable care and diligence." *Blair v. Wait*, 69 N. Y. 113, 116.

It is contended that the appellee should be denied relief because he did not examine the records. It would be highly inequitable to say to one who in good faith has relied upon the express declaration of another that he owned the land and could convey a perfect title, that he might have ascertained its falsity by proceeding to the county seat, which in this case was 17 miles distant, and making an examination of the record. The obligation of ordinary good faith precludes the vendor from seeking shelter under such a claim. *Ewart, Estoppel*, 137; *Bigelow, Estoppel*, 1st ed. p. 608; 2 Pom. Eq. Jur. 3d ed. § 810.

When a false representation is of a matter presumably within the knowledge of the party making it, not made in the way of commendation or as an opinion merely, but as a positive assertion of an existing fact to induce the other party to enter into the contract, such party, having no knowledge to the contrary, may, if he act in good faith, accept the representation as true, and is not bound to make inquiries or examination for himself. This rule accords with fair dealing and is sanctioned by authority. 2 Pom. Eq. Jur. 3d ed. §§ 891, 893; *Culver v. Avery*, 7 Wend. 380, 22 Am. Dec. 586; *Hunt v. Barker*, 22 R. I. 18, 84 Am. St. Rep. 812, 46 Atl. 46; *Dodge v. Pope*, 93 Ind. 480; *Kiefer v. Rogers*, 19 Minn. 32, Gil. 14; *Beaupland v. McKeen*, 28 Pa. 124, 131, 70 Am. Dec. 115. See also, as bearing upon the question generally, *Lanyon Zinc Co. v. Freeman*, 68 Kan. 691, 697, 75 Pac. 995, 1 Ann. Cas. 403.

General expressions in a commissioner's decision in *Chellis v. Coble*, 37 Kan. 558, 15 Pac. 505, are cited as opposed to some of the principles followed in this opinion, but, as applied to the facts of this case, these principles are well founded in equity and sustained by the authorities.

The judgment is affirmed.

MARYLAND COURT OF APPEALS.

NEW YORK, PHILADELPHIA, & NORFOLK RAILROAD COMPANY, Appt.,
v.
WILLIAM WALDRON.

(116 Md. 441, 82 Atl. 709.)

False imprisonment — detaining witness — liability of railroad company.
1. A railroad company is liable for false imprisonment, if its conductor, when directing officers to arrest a disorderly passen-

ger, causes him to lock up another passenger who merely witnessed the disorder, as a witness against the guilty party.

Master and servant — arrest by conductor — scope of authority — liability of railroad.

2. Express authority to a conductor to cause the arrest and detention of a witness to disorderly conduct on the train is not necessary to render a railroad company liable for such arrest and detention of a passenger, as a witness against a passenger whom the conductor, while acting within the line of his duty, caused to be arrested.

Evidence — authority of conductor — admissibility.

3. Evidence that the conductor had no authority to cause the detention of a passenger as a witness to a misdemeanor on the train is not admissible in an action to hold the railroad company liable for false imprisonment because of such detention.

Trial — instructions — variance from evidence — materiality.

4. The assumption in an instruction in an action to hold a railroad company liable for false imprisonment of a passenger, that the conductor telegraphed for "officers," is not error, although the evidence tends to show that he telegraphed for an officer, if more than one met the train in response to the message.

Same — abstract — protection from injury and insult.

5. An instruction that it is the carrier's duty to use reasonable care to protect its passenger from personal injury and insult, in an action to hold it liable for causing his false imprisonment, is not abstract, because not based on any state of facts in the case.

Evidence — damages — false imprisonment.

6. Upon the question of damages for causing the arrest and detention of a passenger as a witness, evidence is admissible

Note. — Detention of one as witness as false imprisonment.

There seems to be little of authority on this point in addition to *NEW YORK, P. & N. R. Co. v. WALDRON*.

Bates v. Kitchel, 160 Mich. 402, 125 N. W. 684, holds that since the statute in reference to the commitment of a person for refusing to give a recognizance for his appearance as a witness in a criminal case did not extend jurisdiction in respect thereof to justices of the peace, an accused who secured, by a justice's order, the arrest of a prospective witness, was liable to the latter for false imprisonment. On subsequent appeal in 166 Mich. 695, 132 N. W. 459, it was further held that the right of action was not affected by the fact that the plaintiff could have avoided imprisonment by giving the recognizance.

The case of *Fire Asso. of Philadelphia v. Fleming*, 78 Ga. 733, 3 S. E. 420, involved 39 L.R.A. (N.S.)

that he was taken to the jail and compelled to leave a cash deposit as bail.

(November 25, 1911.)

APPEAL by defendant from a judgment of the Circuit Court for Worcester County in plaintiff's favor in an action brought to recover damages for false arrest and imprisonment. Affirmed.

The facts are stated in the opinion.

Messrs. Joshua W. Miles and Henry L. D. Stanford, for appellant:

The general rule in actions for torts is that the wrongdoer is liable for all such consequences flowing from his wrongful acts as, according to human experience and the usual course of events, might have been anticipated.

Sloan v. Edwards, 61 Md. 99; *Wiley v. West Jersey R. Co.* 44 N. J. L. 247; *Sheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 252, 26 L. ed. 1071; *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 768.

It was wrong to charge that "it was the duty of the defendant to use all reasonable care to protect the plaintiff from personal injury and insult." This was simply stating an abstract proposition of law, based on a state of facts not shown to exist.

Washington F. Ins. Co. v. Davison, 30 Md. 92; *Moore v. McDonald*, 68 Md. 336, 12 Atl. 117; *Marshall v. Haney*, 4 Md. 498, 59 Am. Dec. 92; *Harness v. Steele*, 159 Ind. 299, 64 N. E. 875; *Palmer v. Maine C. R. Co.* 92 Me. 412, 44 L.R.A. 673, 69 Am. St. Rep. 513, 42 Atl. 800.

There was not, in a legal sense, any arrest of the plaintiff by any officer, at the instance of the conductor.

Ahern v. Collins, 39 Mo. 151; *Smith*

an action for malicious arrest and false imprisonment, against a fire insurance company whose attorney, without express authority, directed a detective to stop the departure from town of the plaintiff, whom the attorney desired as a witness in respect of the alleged arson of a building insured by the company. The case, however, was disposed of with the remark that if the defendant was liable at all, a verdict for \$1,000 was excessive, where there was no arrest or confinement, and the plaintiff was permitted to leave in less than a day. The court said that if the detective did actually arrest the plaintiff, he might be personally liable, but intimated that the company could not be held, since an arrest was beyond the scope of the detective's instructions.

Generally, as to whether false imprisonment may be predicated of a partial or conditional restraint, see the note in 20 L.R.A. (N.S.) 968.

L. A. W.

v. State, 7 Humph. 43; Johnson v. Tompkins, Baldw. 571, Fed. Cas. No. 7,416; Pockock v. Moore, Ryan & M. 321; Lansing v. Case, 4 N. Y. Leg. Obs. 223.

Messrs. Ellegood, Freeny, & Walles and Hope H. Barroll, for appellee:

The imprisonment and detention was the gravamen of the offense, and to forbid the plaintiff to prove that would be to deny him the right to prove his case.

Baltimore v. Lobe, 90 Md. 313, 45 Atl. 192.

It is not to be supposed that a railroad company ever authorizes or orders its conductors to commit any wrong upon a passenger. The duty of a conductor is not a mere negative one to do no harm to a passenger, but it is a positive duty to protect his passengers against all persons and all wrongs.

Haver v. Central R. Co. 62 N. J. L. 282, 43 L.R.A. 84, 72 Am. St. Rep. 647, 41 Atl. 916; 4 Elliott, Railroads, § 1638; Gillingham v. Ohio River R. Co. 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243; Daniel v. Petersburg R. Co. 117 N. C. 592, 4 L.R.A.(N.S.) 435, 23 S. E. 327; Dwinelle v. New York C. & H. R. R. Co. 120 N. Y. 117, 8 L.R.A. 225, 17 Am. St. Rep. 611, 24 N. E. 319; New Jersey S. B. Co. v. Brockett, 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039; Denver & R. G. R. Co. v. Harris, 122 U. S. 597, 30 L. ed. 1146, 7 Sup. Ct. Rep. 1286; Stewart v. Brooklyn & C. T. R. Co. 90 N. Y. 591, 43 Am. Rep. 185; Baltimore & O. R. Co. v. Cain, 81 Md. 105, 28 L.R.A. 688, 31 Atl. 801; Tolchester Beach Improv. Co. v. Scharnagl, 105 Md. 207, 65 Atl. 916; Baltimore & O. R. Co. v. Barger, 80 Md. 30, 26 L.R.A. 220, 45 Am. St. Rep. 319, 30 Atl. 560.

Pattison, J., delivered the opinion of the court:

This is an action for false arrest and imprisonment brought by the appellee, William Waldron, against the appellant, the New York, Philadelphia, & Norfolk Railroad Company. The case was tried before a jury upon issues joined on plea of not guilty, and the result was a verdict and judgment for the plaintiff, from which the defendant has appealed.

There are twelve bills of exceptions in the record; one relates to the ruling of the lower court on the prayers for instructions to the jury, and the other eleven to the rulings of the court upon questions of evidence.

The plaintiff offered three prayers, the defendant four. To the granting of the plaintiff's prayers, the defendant objected, "both generally and because there was no

legally sufficient evidence to sustain them." All of the plaintiff's prayers were granted, while two of the defendant's prayers were granted and two rejected. To the ruling of the court in granting the plaintiff's prayers, and in the rejection of the defendant's third and fourth prayers, the defendant excepted. The defendant's fourth prayer asks the court to instruct the jury that, under the pleading and evidence in the case, there was no evidence legally sufficient to entitle the plaintiff to recover; and by the other rejected prayer of the defendant (the third prayer), the court was asked to instruct the jury "that there is no evidence legally sufficient to prove that any of the agents or officers of the defendant corporation, the New York, Philadelphia, & Norfolk Railroad Company, was ever authorized by said company to do or commit any of the acts complained of by the plaintiff, or that the said defendant company ever adopted or ratified said acts of said officers or agents; and the verdict of the jury must therefore be for the defendant."

The plaintiff testified: That on Saturday, the 30th day of November, 1907, while holding a ticket entitling him to passage upon the defendant's steamer and over its road and its connecting roads, from Norfolk to Philadelphia, he boarded its steamer at Norfolk, from whence he went to Cape Charles, at which point he entered the car of the defendant. That after taking a seat therein two young men, strangers to him, but whose names, as he afterwards learned, were McDorman and Freeze, entered the car, and after being seated a short while one of them took from his pocket a bottle of whisky. They drank from the bottle and then passed it to a number of others in the car, including the witness, who drank from it. The witness stated, however, that it was the first drink he had taken that day, and would not have taken that only they insisted on it. McDorman and Freeze then separated; McDorman taking a seat to himself, with his head leaning up against the window. While in this position. Freeze approached and struck McDorman, breaking the window glass. At this time, Truitt, the conductor, was not in the car; but when he learned of the glass being broken, he told Freeze that he would have to pay for it, which he did. In his conversation with the conductor, Freeze charged McDorman and others in the car, including the plaintiff, with stealing his money, and became boisterous and profane in his language. While the plaintiff was sitting by himself, and after the train had left one of the stations on the road, Kellar's, as the witness thought, the

conductor approached him and told him that he had intended to have Freeze arrested at the station just passed, but that he could not find any officer, and that he had to take him to Princess Anne; that he had phoned up or wired to Princess Anne for the sheriff to arrest him there. When the train was near Princess Anne, the conductor told the plaintiff that he would have to have him as a witness, and wrote down his name and address in Philadelphia, which were given to him by the plaintiff, and was told by the plaintiff that he would come down at any time he would notify him. Later, and just as the train was slowing up for Princess Anne, the conductor said to the plaintiff, "You have got to go with them," meaning the officers who were to arrest Freeze, to which the plaintiff replied, "Are you going to lock me up?" The conductor said: "Yes; we shall have to hold you as a witness." To which the plaintiff replied: "All right; I will have to go; that is all." When the train stopped at the station, the sheriff and, as he supposed, his deputy, came into the car, and as the deputy with Freeze approached the plaintiff, the conductor said: "You take this man along as witness. There is no charge against him; but we have got to have him as a witness." The officers said to him, "Come with me," and he went. They went from the station to the jail. When they reached the jail, they entered and went so far as the corridor. Freeze was placed in a cell. The sheriff then asked the plaintiff if he could give any bail, as there was no charge against him. The plaintiff replied that he knew no one in Princess Anne; that it was the first time he was ever in the town, but said he had some money, \$75, "if that would do any good." He was told by the sheriff to put up \$50 for his appearance when needed. He thus gave to the sheriff \$50, for which the sheriff gave to him a receipt, and he went to the hotel. This was about 1 o'clock Sunday morning; the hour for the arrival of the train at Princess Anne being about 12 o'clock at night. On Sunday morning, he again saw the sheriff, at which time the sheriff returned to him his money and released him from the necessity of returning as a witness. He then went to the hotel and paid his bill, and from there he went to the station, where he bought a ticket to Delmar, paying therefore 65 cents. The conductor had taken the coupon off that part of the ticket that carried him to Delmar; the ticket was good from Delmar to Philadelphia.

S. Uphur Long, the sheriff of Somerset county referred to in plaintiff's testimony, on behalf of the plaintiff, testified: "That 30 L.R.A. (N.S.)

he received a message to go to what is called the midnight train that night [the occasion referred to in plaintiff's testimony], and that he went there, as sheriff, somewhere between 12 and 1 o'clock. That on his way to the depot he met John H. Packard, at that time bailiff of Princess Anne, who was also going out to the depot; he having been asked, as he stated, to go to the station for the same purpose for which the sheriff was going. When they reached the depot, the conductor inquired if the sheriff or police were there, and upon being told that they were, they were invited by the conductor aboard the train, and were shown "this fellow, Freeze, that he had a charge against;" also Waldron, the plaintiff, whom the conductor said he wanted to hold as a witness. Thereupon Waldron, the plaintiff, was taken to and in jail by Mr. Packard. That the plaintiff put up \$50 as bail for his appearance as a witness when needed.

Packard, who at the time of the occasion referred to in the testimony above stated, was bailiff of Princess Anne, and at the time of the trial of the case below, was in the employment of the defendant as fireman, testified, on behalf of the defendant, that after entering the car he and the conductor went to the north end of it, and there the conductor said: "That is the man there; this other was witness to the whole thing." He did not remember that the conductor said more, and from that he told the plaintiff to come on, and the plaintiff went with him. He did not recall that the conductor said there was no charge against the plaintiff, but remembered that he told the plaintiff there was no charge against him; that he was only held as a witness.

Oscar M. Jones, telegraph operator at the station, testified "that he received a message in reference to said occurrence from Conductor Truitt, and after phoning it uptown the message was destroyed; but to the best of his knowledge the message was, 'Have officer arrival of No. 50 at Princess Anne.'"

William G. Truitt, offered by the defendant, testified: That on the 30th day of November, 1907, he was, and had been for twenty-six years, conductor on defendant's road. That he remembered the occasion when, on the said 30th day of November, 1907, there was a disorderly passenger, Freeze, on his train. That he first learned of the misbehavior or misconduct of this passenger when at or near Nassawadox, a station about 19 miles above Cape Charles. That at the time of the assault made by Freeze on McDorman he was in the Jim Crow car. That when he re-

turned to the car in which Freeze was seated, he was pointed out to him by the brakeman. He spoke to Freeze of his misconduct, and told him that he would have to put him off the train, and that he would also have to pay for the window-glass which he did. He accused many of those in the car of robbing him, but finally quieted down. Later, however, he charged the plaintiff with robbing him, about which time he (the conductor) sent a message from Hallwood to the operator at Princess Anne, in which he said, "Please have officer at train on arrival of No. 50." Freeze continued his disorderly conduct until he got near to Kings Creek, Maryland, among other things threatening the life of the plaintiff and accusing the plaintiff of robbing him. Finally he said to the plaintiff: "My friend, I am going to have that fellow taken off at Princess Anne, and I would suggest that you get off there as a witness." Plaintiff did not say whether he would or would not get off. When the train arrived at Princess Anne, the conductor stepped to the door and asked if the officer was there, and Mr. Long and Mr. Packard stepped forward. With them, he entered the car and said, "Gentlemen, here is the man," and walked back to where Freeze was, and further said: "Here is the man who raised all this disturbance, and here is another man who I have suggested to get off and appear as a witness." That he did not say to the sheriff (referring to Waldron), "Take this man off," or, "Take this man along as a witness. I have no charge against him." He denied saying, "Yes, we shall have to hold you as a witness," to Waldron's asking him, "Are you going to lock me up?" He also denied having any conversation with the plaintiff in which he asked plaintiff about his address. That he did not know the man's name, where he lived, or anything about it. The conductor did not hear the officer tell the plaintiff to come along. That he made the suggestion to Waldron to get off as a witness to protect him, as Freeze had threatened his life and accused him of robbing him. That he sympathized with Waldron and felt sorry for him and wanted to protect him. That Freeze was full of whisky. That Freeze was disorderly both in Virginia and in Maryland; kept up his disorderly conduct after leaving Peninsula Junction until he got to Princess Anne. Truitt was then asked by the defendant company: "Now, then, Mr. Truitt, you have stated that you were the conductor of the New York, Philadelphia, & Norfolk Railroad Company, and you were the conductor at the time of the occurrence to 39 L.R.A. (N.S.)

which you have referred. Please state what, if any, authority you have ever had from the railroad company, or from any of its officers, to arrest or take into custody, or cause to be arrested or taken into custody, any passenger as a witness to any criminal occurrence or disorder occurring on your train?" To which question the plaintiff objected, and, the court sustaining the objection, the witness was not permitted to answer. To this ruling of the court, the defendant excepted, and this forms the ninth bill of exceptions. We refer to this exception at this time, because it will be considered and discussed in connection with the ruling upon the defendant's rejected prayers.

In our opinion, the court below committed no error in repeating the third and fourth prayers of the defendant.

There is in this case evidence sufficient to go to the jury, tending to show a false arrest and imprisonment of the plaintiff, procured by the servant of the defendant, under circumstances that render the defendant liable therefor to the plaintiff. "False imprisonment is a wrong akin to the wrongs of assault and battery, and consists in imposing, by force or threats, an unlawful restraint upon a man's freedom of locomotion." Cooley, Torts, 196; Gillingham v. Ohio River R. Co. 35 W. Va. 595, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243. And, as was said in Kirk v. Garrett, 84 Md. 409, 35 Atl. 1092: "False imprisonment consists in the unlawful detention of one against his will." "It is the unlawful restraint of a man's liberty by imprisonment, or by words and array of force." Tomlin v. Hildreth, 65 N. J. L. 438, 47 Atl. 649.

The plaintiff, with others, while a passenger upon the train of the defendant, witnessed the disorder produced by the misconduct of another passenger, a stranger to him, in the car in which the plaintiff was seated. The plaintiff was in no way a party to the disorder; nor was he in any wise responsible therefor. The conductor, after deciding to prosecute the party creating the disorder, obtained from the plaintiff his name and address, so that he could communicate with him, should he be needed as a witness in the prosecution of the offender. The plaintiff expressed his willingness to appear as a witness when wanted and notified; but, notwithstanding this readiness and willingness on his part to attend the trial and testify against the accused when needed, he was told by the conductor that he would be held as a witness, and to secure his attendance he would be "locked up;" and when the train arrived at Princess Anne the plain-

tiff was pointed out by the conductor to the officers who were there to meet the train upon its arrival, pursuant to the order wired by the conductor to the agent at that station, and the officers were told by the conductor to hold him as a witness to testify against the disorderly passenger. The officers took him and carried him to jail, at which place he was asked by them, or one of them, if he would give bail for his appearance as a witness when his presence should be needed at the trial of the disorderly passenger. Upon being told that he could not, as he was a stranger in the town and knew no one, he was then released upon his depositing with one of the officers \$50, to secure his appearance as a witness at such trial.

This court, in the case of *Hall v. Somerset County*, 82 Md. 620, 32 L.R.A. 449, 51 Am. St. Rep. 484, 34 Atl. 771, quoted approvingly from Lord Hale, 2 Hale, P. C. 282, in which that author, in enumerating the compulsory methods by which witnesses can be brought in to testify, states that "the more ordinary and more effectual means [employed for such purposes], the justices or coroner that take the examination of the person accused, and the information of the witnesses, may at that time, or at any time after and before the trial, bind over the witnesses to appear at the sessions, and in case of their refusal either to come or to be bound over, may commit them for their contempt on such refusal."

This court in that case (*Hall v. Somerset County*) further stated, that § 13 of article 35 of the Code, which provides for the payment of fees for witnesses committed to prison upon their failure to find security for their appearance to testify against the accused, "clearly recognizes the power of a magistrate to commit a witness, in order that his attendance to testify against a person accused of crime may be secured; it is a power which can only be exerted after the witness fails to give such reasonable security for his appearance as may be demanded of him." This statute, however, which provides for the payment of fees of imprisoned witnesses, refers only to such as are committed by magistrates. Therefore the recognition therein found of the right to imprison witnesses upon their failure to find security for their appearance to testify against a person accused of crime can extend no further than the right of the magistrate to commit in such cases.

But, whatever may be the power and authority, if any, of an officer under extreme conditions and circumstances, to hold temporarily in restraint of his liberty a

person as a witness to testify against an accused person, such authority or power does not exist in this case. The nature and character of the offense and the conditions and circumstances thereof and the relations existing between the parties do no warrant the arrest and imprisonment of the plaintiff, procured, as it was, by the servant of the defendant, in order to secure his attendance as a witness at the trial of the accused party. "The illegality of the arrest and the unlawfulness of the detention are indispensable elements in this form of action." *Kirk v. Garrett*, supra. In our opinion, these indispensable elements are found to exist in this case. But, by the defendant's rejected third prayer, the court below was asked to instruct the jury that there was no legally sufficient evidence that the conductor, servant of the defendant company, was ever authorized by the defendant to commit the acts complained of, or that such acts were ever adopted or ratified by the defendant company.

We will now consider the ruling of the court in refusing to grant this instruction. The plaintiff having purchased a ticket from the defendant company entitling him to transportation from Norfolk, Virginia, over the lines of the defendant and its connecting lines, to the city of Philadelphia, he became a passenger upon the car of the defendant, and was such a passenger at the time of the acts complained of in this case. As a passenger, he was entitled to all the rights, privileges, and protection which the law accords to passengers, and subject to the duties and liabilities which the law imposes on a carrier for the safety and proper treatment of its passengers.

In the case of *Stewart v. Brooklyn & C. T. R. Co.* 90 N. Y. 590, 43 Am. Rep. 185, the court there said: "The trial court dismissed the plaintiff's complaint, on the ground that the defendant's servant, in assaulting the plaintiff [a passenger in the car], was not acting within the scope of his employment, but attacked the plaintiff to gratify some wicked and malicious purpose of his own. Had the person assaulted been one to whom the defendant owed no duty, the dismissal of the plaintiff's complaint would probably have been correct; but the rule which applies in such a case has no application as between a common carrier and his passenger. In such a case, a different rule applies." And this court, in the case of *Maryland & P. R. Co. v. Tucker*, 115 Md. 43, 80 Atl. 688, filed February 3, 1911, said, in the case of *Stewart v. Brooklyn & C. T. R. Co.* supra: "It was held that a carrier undertakes to protect his passengers while being con-

veyed, against the misconduct of its own servants while engaged in executing the contract."

In the case of *Haver v. Central R. Co.* 62 N. J. L. 282, 43 L.R.A. 84, 72 Am. St. Rep. 647, 41 Atl. 916, which was an action brought against the carrier for the assault made by a brakeman upon a passenger, the court there said: "The case now before the court depends, not upon the law of liability of a master for the acts of his servants, but upon the duty imposed on the railroad company in the carriage of the plaintiff as a passenger. The duty of a carrier of passengers is to safely and securely carry persons who bear to it the relation of passengers. The carrier is under obligation . . . to carry the passenger therein to the end of his route, to protect him against assault and other ill treatment by those employed by and under the carrier's control while on the way."

In the case of *New Jersey S. B. Co. v. Brockett*, 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039, Justice Harlan, speaking for the court, said: "The plaintiff was entitled, in virtue of that contract [as passenger], to protection against the misconduct or negligence of the carrier's servants. Their misconduct or negligence while transacting the company's business, and when acting within the general scope of their employment, is of necessity to be imputed to the corporation which constituted them agents for the performance of its contract with the passenger. Whether the act of the servant be one of omission or commission, whether negligent or fraudulent, 'if . . . it be done in the course of his employment, . . . it makes no difference that the master did not authorize or even know of the servant's act or neglect; or even if he disapproved or forbade it, he is equally liable, if . . . [it] be done in the course of his servant's employment. . . . This rule . . . is founded upon public policy and convenience.'"

And this court, in the case of *Baltimore & O. R. Co. v. Cain*, 81 Md. 105, 28 L.R.A. 688, 31 Atl. 805, held that, "if the plaintiff had been guilty of no breach of the peace, his arrest at the instance of the conductor was unlawful, and, having been made in the defendant's depot whilst the plaintiff, a passenger, was still entitled to be protected by the defendant against assaults and injuries by the defendant's own employees, if wrongfully made by or at the request of the defendant's own servants whilst they were in and about the performance of their prescribed duties, the master would be liable."

From these authorities, it will be seen 39 L.R.A. (N.S.)

that the defendant company is liable for the acts of its conductor in ordering and procuring the arrest and imprisonment of the plaintiff, which were committed in the course of his employment, even though he was not authorized to do so by the defendant company; and thus the third and fourth prayers of the defendant, as well as the testimony offered in the ninth exception, were properly rejected.

The only objection urged against the plaintiff's first prayer is that it assumes there was evidence that the conductor wired the agent at Princess Anne to have officers meet the train at that point, when, as the defendant contends, the evidence was that he wired the agent to have "officer" meet the train, etc. The conductor testified that the word "officer," and not the word "officers," was used by him in the telegram; the agent to whom the telegram was sent was unable to give the exact language. But whether the word "officer" or "officers" was used, the sending of the despatch resulted in two officers meeting the train. This, we think, is an unimportant variance, should any exist at all, and does not render the prayer bad. We think the court committed no error in granting the prayer.

In the second prayer of the plaintiff, the jury is instructed that "it is the duty of the defendant to use all reasonable care to protect the plaintiff from personal injury and insult." This, the defendant contends, is stating an abstract proposition of law, based on a state of facts not shown to exist in this case. It contends that no personal injury was done or insult offered the plaintiff by reason of his being held and detained under conditions and circumstances which we hold herein constitute false arrest and imprisonment. We cannot adopt this contention of the defendant, that no personal injury has been done or personal insult has been offered the plaintiff by his false arrest and imprisonment. Not only was it a personal indignity and insult, but a personal injury as well. "A personal injury includes libel, slander, criminal conversation, seduction, and malicious prosecution; also an assault, battery, false imprisonment, or other actionable injuries to the person." 6 Words and Phrases, p. 5341.

The first eight and the tenth and eleventh exceptions found in the record are to the rulings of the court in permitting the plaintiff to show that he was taken to the jail and security demanded of him by the officers holding him as a witness under the direction of the defendant's servant, and the fact that he deposited with said officers, as security for his appearance as a

witness, the sum of \$50. The plaintiff in this case was taken into the custody of the officers upon the request of and at the direction of Truitt, the conductor of the defendant company, to hold him as a witness to testify against Freeze, who was at the same time arrested upon the request and direction of Truitt, charged with disorderly conduct. The plaintiff's unlawful detention commenced at the time that he was so taken into the custody of the officers. It was then that his liberty was restrained, and, in a legal sense, he was imprisoned from that time. This was at 12 o'clock Saturday night. With directions from the conductor to hold the plaintiff as a witness, what was he to do but to carry him to jail, or take from him security for his appearance as a witness? These, as it would seem, were unavoidable incidents to his being held as a witness, as directed by defendant's servant; and these unavoidable incidents should have been known and considered by the conductor at the time that he gave the direction to hold the plaintiff as a witness. We think this evidence was properly admitted.

The point is made by the defendant that the judgment in this case is erroneously entered, for the reason that interest is allowed thereon from the date of the verdict, and not from the date of the rendition of the judgment. This question was not presented to or passed upon by the circuit court, but the point is made for the first time in this court; thus the question is not properly before this court to be considered by it. *Anders v. Devries*, 26 Md. 222.

From what we have said, we find no errors in the rulings of the court below, and will therefore affirm its judgment.

Judgment affirmed, with costs to the appellee.

WISCONSIN SUPREME COURT.

JOSEPH KROPIDLOWSKI, Resp't.,

v.

PFISTER & VOGEL LEATHER COMPANY, Appt.

(— Wis. —, 135 N. W. 839.)

Release — joint tort feorsors — covenant not to sue — partial satisfaction — effect.

A release of, and covenant for a valuable consideration not to sue, one of several joint tort feorsors, which expressly states that the sum received is merely a part satisfaction of the claim, will not prevent a suit against the other wrongdoer.

(April 23, 1912.)

39 L.R.A. (N.S.)

APPEAL by defendant from an order of the Circuit Court for Milwaukee County sustaining a demurrer to an answer setting up a release, in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Barnes, J.:

The complaint in this action alleged that on or about April 23, 1910, plaintiff was employed by the Herman Zohrlaut Leather Company in its factory, and that the defendant herein delivered to said company certain carboys of acid; that plaintiff, in the performance of his duties was required to remove the carboys from the yard to the store-room; that the stopper in the neck of one of the carboys was defective, in that it was improperly placed therein, and that while plaintiff was handling the carboy the stopper blew out, the acid coming in contact with his eyes, as a result of which he lost the sight of one and sustained injuries to the other. The answer denied generally the allegations of the complaint, and as a second defense pleaded the following release as a bar to recovery against defendant:

Received from Herman Zohrlaut Leather Company the sum of one thousand dollars (\$1,000), and the payment of medical and hospital bills due Dr. George Mason and St. Mary's Hospital, amounting to \$58 and \$32.59, respectively, both for services rendered me on account of the below-mentioned accident, and in consideration of said sums so paid I hereby release and forever discharge said Herman Zohrlaut Leather Com-

Note.—The decisions upon the effect of a covenant not to sue one joint tort feor as a release of another are collected in notes to *Abb v. Northern P. R. Co.* 58 L.R.A. 299, and *Musolf v. Duluth Edison Electric Co.* 24 L.R.A. (N.S.) 451.

As to the effect in a release of one joint tort feor of a reservation of the right as against others, see *Eden v. Fletcher*, 10 L.R.A. (N.S.) 618, and note.

As to the right to show by extrinsic evidence that the payment of a judgment against, or consideration for the release of, an alleged joint tort feor, was not a satisfaction of the claim, see notes to *Ryan v. Becker*, 14 L.R.A. (N.S.) 330, and *Fitzgerald v. Union Stock Yards Co.* 33 L.R.A. (N.S.) 983.

As to the effect of the release of one person from liability for a tort to release another, where the former was not in fact or law liable, see note to *Snyder v. Mutual Teleph. Co.* 14 L.R.A. (N.S.) 321.

As to the effect of obtaining judgment against one joint tort feor upon the liability of the other, see note to *Blackman v. Simpson*, 58 L.R.A. 410.

pany, its successors and assigns, of and from any and all actions, claims, and demands against said Herman Zohrlaut Leather Company, for, upon, or by reason of any damage, loss, injury, or suffering which heretofore has been or which may hereafter be sustained by me in consequence of an accident and injury suffered by me on or about the 23d day of April, 1910, while in the employ of said Herman Zohrlaut Leather Company; and I hereby covenant and agree with said Herman Zohrlaut Leather Company that, in consideration of the payment of said sums, I will not begin or prosecute any action against said Herman Zohrlaut Leather Company on account of said accident or injuries. It is expressly understood, however, that said sums are received, not as an accord and satisfaction for the whole injury suffered, but only as part satisfaction thereof. In witness whereof I have hereunto set my hand and seal at Milwaukee, Wisconsin, this 19th day of December, 1910.

[Signed] Joseph Kropidowski. [Seal.]

Plaintiff demurred to defendant's second defense, on the ground that it did not state facts sufficient to constitute a defense, which demurrer was sustained; and from an order sustaining the demurrer this appeal is taken.

Messrs. Lines, Spooner, Ellis, & Quarles, for appellant:

The agreement in question is a technical release, and as such operates to extinguish the right of action, and does not merely affect the remedy.

2 Co. Litt. 232a; Re E. W. A. [1901] 2 K. B. 648, 70 L. J. K. B. N. S. 810, 49 Week. Rep. 642, 85 L. T. N. S. 31, 8 Manson, 250; Millett v. Hayford, 1 Wis. 412.

It is not essential to the validity of a release that it be based upon an accord and satisfaction.

1 Tidd, Pr. 696, 699, 702; 34 Cyc. 1086; 2 Pollock & M. History of English Law, 90.

A release of one, or satisfaction received from one, joint trespasser, may be pleaded in an action to recover damages for trespass.

18 Enc. Pl. & Pr. 94; 24 Am. & Eng. Enc. Law, 283; Middleditch v. Sharland, 5 Ves. Jr. 87; Abb v. Northern P. R. Co. 28 Wash. 428, 58 L.R.A. 293, 92 Am. St. Rep. 864, 68 Pac. 954; Ellis v. Esson, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518; Bishop v. McGillis, 82 Wis. 126, 51 N. W. 1075.

Recitals in the instrument about the payment of money to the plaintiff as not being in full satisfaction of the injury are mere 39 L.R.A. (N.S.)

surplusage, and are void as being repugnant to the grant.

McBride v. Scott, 132 Mich. 176, 61 L.R.A. 445, 102 Am. St. Rep. 416, 93 N. W. 243, 1 Ann. Cas. 61; 34 Cyc. 1087; Gunther v. Lee, 45 Md. 60, 24 Am. Rep. 504; 4 Lawson, Rights, Rem. & Pr. p. 1775; Benjamin v. McConnell, 9 Ill. 536, 46 Am. Dec. 474; O'Shea v. New York, C. & St. L. R. Co. 44 C. C. A. 601, 105 Fed. 559; Abb v. Northern P. R. Co. 28 Wash. 428, 58 L.R.A. 293, 92 Am. St. Rep. 864, 68 Pac. 954.

Even though the agreement be considered a covenant not to sue, it is a bar to an action of the sort set forth in the complaint.

Pogel v. Meilke, 60 Wis. 248, 18 N. W. 927; Abb v. Northern P. R. Co. 28 Wash. 428, 58 L.R.A. 303, 92 Am. St. Rep. 864, 68 Pac. 954; Burke v. Noble, 48 Pa. 175.

Messrs. Kronshage, Fritz, & Hannan, for respondent:

The intention of the parties is to govern.

Ellis v. Esson, 50 Wis. 148, 36 Am. Rep. 830, 6 N. W. 518; Pogel v. Meilke, 60 Wis. 250, 18 N. W. 927; Bishop v. McGillis, 82 Wis. 126, 51 N. W. 1075; Fitzgerald v. Union Stockyards Co. 89 Neb. 393, 33 L.R.A. (N.S.) 983, 131 N. W. 612; Cooley, Torts, 2d ed. 161, 162.

The document is not a technical release under seal, but merely a covenant not to sue, and therefore does not discharge defendant's liability.

Chicago & A. R. Co. v. Averill, 224 Ill. 516, 79 N. E. 654; Robertson v. Trammell, 98 Tex. 364, 83 S. W. 1098; Chicago v. Smith, 95 Ill. App. 340; Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271; Irvine v. Milbank, 15 Abb. Pr. N. S. 378; Bishop v. McGillis, 82 Wis. 126, 51 N. W. 1075.

Barnes, J., delivered the opinion of the court:

The appellant maintains that the instrument set forth in the statement of facts is a release, under seal, of one of two joint wrongdoers, and that the legal effect of the document is to release and discharge both. The respondent contends that the so-called release should be construed as a covenant not to sue the Herman Zohrlaut Leather Company, and not as a technical release and that, so construed, it does not bar a recovery from the appellant for the difference between the amount of damages sustained and the sum already paid by the Zohrlaut Company. The question is an interesting one; and it may be fairly said at the outset that, while the decided cases preponderate in favor of the contention of the appellant, the reasoning which supports them seems to be technical, artificial, and unsatisfactory.

The general rule that a release of one joint wrongdoer releases all is elementary.

The same is true where the party who is wronged receives a valuable consideration from one of two or more joint wrongdoers as an accord and satisfaction of the whole injury. While the cases may differ to some extent as to the reason for the rule stated, most courts base it on the assumption that the injured party has received full satisfaction, or what is, in law, equivalent to full satisfaction, for the damages sustained, and that recovery should not go beyond this.

The alleged release here involved recites that the sums paid were not received "as an accord and satisfaction for the whole injury suffered, but only as part satisfaction thereof," and clearly indicates an intention on the part of the respondent to reserve the right to collect the balance of his damages from the other wrongdoer.

The appellant contends that this portion of the document is contrary to the terms of the grant, and should be rejected as mere surplusage, and that, inasmuch as one of the wrongdoers was released, there is a conclusive presumption of law that there was full compensation for the injury, and the cause of action is wholly extinguished. Judge Cooley states the rule to be that the release of one joint tortfeasor releases all, "although the release expressly stipulates that the other defendants shall not be released." 1 Cooley, Torts, 3d ed. 235, 236, and cases cited in note 81. The author continues: "And this rule is held to apply, even though the one released was not in fact liable." Page 236, and cases cited in note 82. Additional cases to the proposition covered by the first of the above quotations will be found in note to *Abb v. Northern P. R. Co.* 58 L.R.A. 297, and further citations will be found in the comprehensive notes to the late case of *McBride v. Scott*, 1 Ann. Cas. 62, 63.

Some of our own cases bear upon the subject under discussion, but do not cover the precise point involved. *Ellis v. Esson*, 50 Wis. 138, 147, 36 Am. Rep. 830, 6 N. W. 518, is a leading case on the proposition that, where there is partial satisfaction by one of two or more joint wrongdoers, coupled with a covenant not to sue the party making the payment, and the right is reserved to prosecute the other wrongdoer for the unpaid balance of the demand, there is only a satisfaction *pro tanto*, and there is neither a release nor an accord and satisfaction of the entire damage, and recovery of the unpaid portion of the damage may be had from the other wrongdoers. The opinion also states that all the authorities hold that a technical release of one of two or more joint wrongdoers, under seal, discharges them all, and is a bar to an action against any or all of them. The general doctrine

of this case is approved in *Pogel v. Meilke*, 60 Wis. 248, 250, 18 N. W. 927, and again in *Bishop v. McGillis*, 82 Wis. 120, 126, 51 N. W. 1075, where it is said: "The plaintiff might also agree, for a consideration, not to sue one, and could still maintain an action or actions against the others, unless he had executed a technical discharge under seal, or received some consideration as an accord and satisfaction of the whole injury." None of these cases deal with a situation where the alleged instrument of release showed on its face that it was given in partial satisfaction only of the claim; and neither do they help us in determining whether such a document is in fact a release or something else. The doctrine of *Ellis v. Esson* had some support in the books when the case was decided; and it may now be said that it is the general rule.

A fair construction of the instrument involved in this case is that the respondent intended to absolve the Zohrlaut Company from further liability, in consideration of the partial satisfaction by that company of the damages claimed, and that respondent intended to collect the remainder of the damages from the appellant. This the latter claims cannot be done, because a release of one was a release of all. If a release implies full satisfaction, then it is apparent that no such satisfaction was received, and that to call the instrument a full release is a misnomer.

The rule contended for by the appellant originated with the English courts, and at a time when an instrument under seal was surrounded by a strong odor of sanctity. These courts seem to have abandoned the rule, and to have substituted therefor a more logical and humane one, by which the whole intention of the parties is carried out. To avoid the effect of one firmly established fiction, they adopted another, and construed documents such as the one before us as covenants not to sue, instead of releases. *Price v. Barker*, 4 El. & Bl. 760, 3 C. L. R. 927, 24 L. J. Q. B. N. S. 130, 1 Jur. N. S. 775; *Solly v. Forbes*, 2 Brod. & B. 38, 4 J. B. Moore, 448, 22 Revised Rep. 641; *Thompson v. Lack*, 3 C. B. 540, 16 L. J. C. P. N. S. 75; *Payler v. Homersham*, 4 Maule & S. 423, 16 Revised Rep. 516; 22 Eng. Rul. Cas. 905; *Bateson v. Gosling*, L. R. 7 C. P. 9, 41 L. J. C. P. N. S. 53, 25 L. T. N. S. 570, 20 Week. Rep. 98. Some of these cases involved releases from joint and several contract obligations; but the rule is the same in tort actions, as will appear from *Duck v. Mayeu* [1892], 2 Q. B. 511, 513, 62 L. J. Q. B. N. S. 69, 4 Reports, 38, 67 L. T. N. S. 547, 41 Week. Rep. 56, 57 J. P. 23. The Vermont court has held that the release of one joint tortfeasor in part

satisfaction for the tort, when the release states that the sum paid is received in partial satisfaction only, does not release the other tortfeasors as to the unsatisfied portion of the damages. *Sloan v. Herrick*, 49 Vt. 327. Decisions from the New York courts can be found on both sides of the question; but the final words, as expressed in *Gilbert v. Finch*, 173 N. Y. 455, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133, is that an instrument which is in form a release of one joint tortfeasor, and which recites that it is given in partial satisfaction only of the damages, and that the releasor intends to pursue his remedy against the other tortfeasors for the balance of the compensation to which he is entitled, will be held to be merely a covenant not to sue, and will not defeat the right of action against those who are not released. The authorities are reviewed in this case, and the court, in substance, says that the conclusion reached is not only in conflict with the majority of the decisions of other courts, but is also in conflict with a number of decisions of the New York courts. There are other cases to the effect that an instrument such as we are considering, should be treated as a covenant not to sue. *Parmelee v. Lawrence*, 44 Ill. 405, 412, 413; *Edens v. Fletcher*, 79 Kan. 139, 19 L.R.A. (N.S.) 618, 98 Pac. 784; *Berry v. Gillis*, 17 N. H. 10, 43 Am. Dec. 584; *El Paso & S. R. Co. v. Darr*, — Tex. Civ. App. —, 93 S. W. 166, 169; *McCrillis v. Hawes*, 38 Me. 566; 1 *Parsons*. Contr. 9th ed. 28. Referring to the general rule that a release of one joint tortfeasor releases all, it is said in 34 Cyc. 1087: "The logical and legal soundness of this rule, however harsh its application may be in the particular case, is undoubted, provided the sealed instrument is once construed to be a release; but to escape the application of this principle where it would work injustice and defeat the evident intention of the parties, the modern tendency of the courts is to construe, if possible, such instruments as covenants not to sue, which accordingly do not release the co-obligors."

What has been stated as the general rule seems to be not only illogical, but arbitrary, as applied to such a document as the one before us. It entirely overrides the manifest intention of the party who executes the release. Contrary to the general rule applicable to the construction of writings, it gives an effect to the instrument which is at variance with the meaning of the words used. All joint tortfeasors are severally liable for the entire damage inflicted. The respondent here might pursue the appellant and collect his entire damages from it, if he were able to establish a legal liability. 39 L.R.A. (N.S.)

Since a settlement was made with one joint tortfeasor, it may well result in a benefit to the appellant, instead of an injury, because there has been partial compensation, and the sum paid as such compensation cannot be again recovered. There are some cases which recognize the right of contribution between wrongdoers. 1 *Cooley, Torts*, 3d ed. 254 et seq. But if this case should be brought within the principle of the decisions there cited, the respondent's cause of action would still remain, and at most the right of contribution could only affect the amount of recovery. We do not think that a construction of the so-called release should be adopted which would operate to defeat the intention of the parties, instead of effectuating that intent. Neither do we think that what is at best manifestly intended to be a partial release should be held to be a complete one, because the word "release," which has a technical meaning in the law, happens to be used. If a release implies full satisfaction, then it is apparent that there has not been full satisfaction, and consequently there has been no release in the technical sense, and that the intention of the parties will be best carried out by treating the agreement as a covenant not to sue. It follows that the order of the circuit court was right.

Order affirmed.

TEXAS SUPREME COURT.

ATCHISON, TOPEKA, & SANTA FE
RAILWAY COMPANY et al., Appts.,
v.

MRS. R. A. LUCAS.

(— Tex. —, 144 S. W. 1126.)

Carrier — expulsion of passenger — gaining access to train by a subterfuge.

One holding a return trip railroad ticket which must be validated at the intermediate terminal to be good for return, who applies to the proper officer for validation, and is referred to another official in another city, who refuses to validate the ticket because of alleged want of authority, informing the ticket holder that the ticket will not be honored, is not deprived of the right to hold the railroad company liable for his ejection from the train by presenting a local ticket to pass the gate keeper, who refuses to pass him on his invalidated ticket; and it is immaterial that the gate-

Note. — No case other than *ATCHISON, T. & S. F. R. Co. v. LUCAS* seems to have passed upon the question of the effect of gaining access to a train by subterfuge upon the right of the holder of valid transportation to recover for ejection.

keeper's refusal to honor the ticket was a breach of the carriage contract giving a right of action.

(March 27, 1912.)

CERTIFICATION by the Court of Civil Appeals for the First Supreme Judicial District of questions arising upon appeal by defendants from a judgment of the County Court for Harris County in plaintiff's favor in an action brought to recover damages for the alleged wrongful ejection of plaintiff from defendants' train. Answers favorable to plaintiff returned.

The facts are stated in the opinion.

Messrs. Baker, Botts, Parker & Garwood, Lane, Wolters, & Storey, and William A. Vinson, for Texas & New Orleans Railroad Company, appellant:

At the time plaintiff presented the ticket to the conductor it had not been validated at Oklahoma City, as required, and plaintiff was not entitled to be transported thereon, so that the employees of said company were justified in ejecting her from the train.

Gulf, C. & S. F. R. Co. v. Looney, 85 Tex. 159, 16 L.R.A. 471, 34 Am. St. Rep. 787, 19 S. W. 1039; Landers v. Missouri, K. & T. R. Co. — Tex. Civ. App. —, 50 S. W. 528; Boling v. St. Louis & S. F. R. Co. 189 Mo. 219, 88 S. W. 39; Mosher v. St. Louis, I. M. & S. R. Co. 127 U. S. 393, 32 L. ed. 250, 8 Sup. Ct. Rep. 1324.

Plaintiff was guilty of contributory negligence in boarding its train after being informed that her ticket had not been validated and would not be honored.

Russell v. Missouri, K. & T. R. Co. 12 Tex. Civ. App. 627, 35 S. W. 724; Texas & P. R. Co. v. Cole, 66 Tex. 562, 1 S. W. 629; Gulf, C. & S. F. R. Co. v. Cleveland, — Tex. Civ. App. —, 33 S. W. 687; Butler v. Holmes, 29 Tex. Civ. App. 48, 68 S. W. 52; Diamond Mill Co. v. Groesbeck Nat. Bank, 9 Tex. Civ. App. 31, 29 S. W. 169; McCarty v. Houston & T. C. R. Co. 21 Tex. Civ. App. 568, 54 S. W. 421.

Messrs. Terry, Cavin, & Mills, A. H. Culwell, and Rodman S. Cosby, for Atchison, Topeka, & Santa Fé Railway Company, appellee:

The defendant, the Atchison, Topeka & Santa Fé Railway Company, was responsible to plaintiff only while she was traveling on its line.

Gulf, C. & S. F. R. Co. v. Baird, 75 Tex. 263, 12 S. W. 530; Gulf, C. & S. F. R. Co. v. Looney, 85 Tex. 166, 16 L.R.A. 471, 34 Am. St. Rep. 787, 19 S. W. 1039; Boling v. St. Louis & S. F. R. Co. 189 Mo. 219, 88 S. W. 35; Landers v. Missouri, K. & T. R. Co. — Tex. Civ. App. —, 50 S. W. 528. 39 L.R.A. (N.S.)

The ticket is the sole evidence of a passenger's right to transportation. The plaintiff not possessing a valid ticket, and refusing to pay her fare, cannot complain of her ejection.

28 Am. & Eng. Enc. Law, 156, 158; Hall v. Memphis & C. R. Co. 15 Fed. 67; New York, L. E. & W. R. Co. v. Bennett, 1 C. C. A. 544, 6 U. S. App. 95, 50 Fed. 496; Russell v. Missouri, K. & T. R. Co. 12 Tex. Civ. App. 627, 35 S. W. 724.

Messrs. L. E. Blankenbecker and Norman Atkinson, for appellee:

Plaintiff gave every agent having anything to do with completing her evidence of a right to transportation an opportunity so to complete it. Therefore her invalidated home seeker's ticket, when it was presented to the gateman and to the trainman, was absolutely good, and entitled her to transportation.

Texas & P. R. Co. v. Payne, 99 Tex. 46, 70 L.R.A. 946, 122 Am. St. Rep. 603, 87 S. W. 330; Gulf, C. & S. F. R. Co. v. Holbrook, 12 Tex. Civ. App. 475, 33 S. W. 1028; Southern R. Co. v. Barlow, 104 Ga. 213, 69 Am. St. Rep. 166, 30 S. E. 732; Gulf, C. & S. F. R. Co. v. St. John, 13 Tex. Civ. App. 257, 35 S. W. 501; St. Louis, A. & T. R. Co. v. Mackie, 71 Tex. 491, 1 L.R.A. 667, 10 Am. St. Rep. 766, 9 S. W. 451.

Plaintiff exercised her lawful right to act upon and keep the contract in full force until the time for performance arrived.

Greenwall Theatrical Circuit Co. v. Markowitz, 97 Tex. 479, 65 L.R.A. 302, 79 S. W. 1069; Kilgore v. Northwest Texas Baptist Educational Asso. 90 Tex. 139, 37 S. W. 599; Texas & P. R. Co. v. Payne, 99 Tex. 46, 70 L.R.A. 946, 122 Am. St. Rep. 603, 87 S. W. 330; Gulf, C. & S. F. R. Co. v. St. John, 13 Tex. Civ. App. 257, 35 S. W. 501; Ft. Worth & R. G. R. Co. v. Jones, 38 Tex. Civ. App. 129, 85 S. W. 37; Texas & P. R. Co. v. Lynch, 43 Tex. Civ. App. 121, 94 S. W. 1093, — Tex. Civ. App. —, 73 S. W. 67; Houston & T. C. R. Co. v. Lee, — Tex. Civ. App. —, 123 S. W. 154; Cincinnati, N. O. & T. P. R. Co. v. Harris, 115 Tenn. 501, 5 L.R.A. (N.S.) 779, 91 S. W. 211.

The agent's failure and refusal to act is the act of each company as to its line.

Gulf, C. & S. F. R. Co. v. St. John, 13 Tex. Civ. App. 257, 35 S. W. 501; Head v. Georgia P. R. Co. 79 Ga. 358, 11 Am. St. Rep. 434, 7 S. E. 217; Bethea v. Northeastern R. Co. 26 S. C. 91, 1 S. E. 372; Milnor v. New York & N. H. R. Co. 53 N. Y. 306; Young v. Pennsylvania R. Co. 115 Pa. 112, 7 Atl. 741.

The ticket is not the sole evidence of a passenger's right to transportation.

Missouri P. R. Co. v. Martino, 2 Tex. Civ.

App. 634, 18 S. W. 1066, 21 S. W. 781; St. Louis, A. & T. R. Co. v. Mackie, 71 Tex. 491, 1 L.R.A. 667, 10 Am. St. Rep. 766, 9 S. W. 451; Gulf, C. & S. F. R. Co. v. Copeland, 17 Tex. Civ. App. 55, 42 S. W. 239.

Dibrell, J., delivered the opinion of the court:

Certified question from the court of civil appeals of the first supreme judicial district. The statement and question are as follows:

"This is a suit instituted in the county court by Mrs. R. A. Lucas against the Atchison, Topeka, & Santa Fé Railway Company and the Texas & New Orleans Railroad Company to recover damages for her ejection from one of the passenger trains of the latter company. A trial resulted in a verdict and judgment for plaintiff for \$500. Upon motion for a new trial, the court suggested a remittitur of \$100, which was filed, and thereupon the judgment was finally entered for \$400. From the judgment, their motion for a new trial having been overruled, the defendants appeal.

"On December 3, 1907, appellee purchased at Atlanta, Georgia, from the Atlanta & West Point Railway Company a ticket to Oklahoma City and return over the issuing road and several connecting lines, including the Texas & New Orleans Railroad and the Atchison, Topeka, & Santa Fé Railroad; the latter road being the terminal line in her route. The ticket was issued with the following conditions printed thereon:

"First. In selling this reduced rate ticket for passage over other lines, and in checking baggage on it, this company acts only as agent, and is not responsible beyond its own line."

"Fourth. This ticket shall not be good for return passage unless the holder identifies him or herself by signature on the back thereof, and otherwise, as original purchaser, to the satisfaction of the agent of the terminal line at destination of ticket; and when officially signed and stamped by said agent, this ticket shall then be good for return passage of the original purchaser only, leaving destination only on date so stamped and canceled on back, provided return passage is made to original starting point within the number of days indicated under head of return transit limit."

"Ninth. That no agent or employee of any line over which the purchaser is entitled to travel by the terms of this ticket has any power to alter, modify, or waive in and manner any of the conditions named in this contract."

"In consideration of the reduced rate at which this ticket is sold, I, the original purchaser, hereby agree to be governed by all 39 L.R.A. (N.S.)

the conditions, as stated above, and by all other reasonable rules and regulations of any of the companies over whose line it reads, constituting part of this contract, and that I will not seek to hold any of such companies liable for damage resulting to me from any statement of any employee thereof not in accordance with the terms of this contract, as expressed upon this ticket.

"To Purchaser: Read the contract, and take notice that the return part of the ticket must be stamped and your signature witnessed in the manner prescribed before it will be honored for passage."

"Upon this ticket, appellee was carried over the several lines to Oklahoma City. On or about the 17th of December, desiring to return to her home at Atlanta, it is alleged in the petition and testified by appellee that she presented this ticket to the agent of the Atchison road, at Oklahoma City, in order that she might be identified and the ticket validated by such agent for her return trip; that she called upon the agent to stamp the ticket, and insisted that he do so, in accordance with the conditions thereof, but the agent declined to sign and stamp the ticket, and assured appellee that the proper place to have this done was at Houston, where she was going to stop over. Appellee then proceeded over the Atchison, Topeka, & Santa Fé and the Gulf, Colorado, & Santa Fé lines to Houston; no objection being made on either line to the ticket. When she presented her ticket to the agent of the Texas & New Orleans Company at Houston to be validated by signing and stamping, the agent refused to do this, telling her that he had no authority to do so; but it should have been done at Oklahoma City by the agent of the Atchison road. Appellee explained to him that she had tried to have this done, telling him of the circumstances stated above; but the agent at Houston persisted in his refusal, on the ground of his want of authority. Appellee then boarded the train of the Texas & New Orleans Railroad, and when the conductor called for her ticket produced the invalidated return trip ticket referred to. The conductor refused to accept it for passage, although she explained to him her efforts and failure to get it validated, and told her he would have to put her off, unless she paid fare. This she refused to do, as she had not the money, and the conductor accordingly put her off at Dayton, a station a short way out of Houston, using no more force than was necessary, and acting without any harshness, as expressly found by the jury. Appellee remained at Dayton, according to her testimony, about two hours (according to the testimony of

trainmen, about twenty minutes), when she caught a train for Houston and returned to that point. She remained there a day or two, and, her ticket having been fixed by the general passenger agent of the Texas & New Orleans Company, she left for her home. Appellee testified that the weather was bad when she was put off; that she was unwell, and when she returned to Houston she had to send for a doctor; that she had to borrow money to pay her expenses there, etc. She also testified that she was very harshly treated by the conductor in ejecting her from the train at Dayton, but by special finding the verdict of the jury negated this. Testimony was introduced by appellants, which, if true, showed that appellee was assured by the ticket agent at Houston that she could not be allowed to ride on this invalidated ticket; that she tried to pass through the gate to the train shed, which was necessary to gain access to the train, where she was required to exhibit her ticket; that she showed to the gateman her return trip ticket, which he refused to accept, and refused to let her pass through the gate; that she then bought a ticket to Liberty, a station on the line of the Texas & New Orleans Company a few miles beyond Dayton, where she was put off, and upon this ticket she was allowed to pass through the gate, and board the train.

"In reversing the judgment and remanding the cause, as one of the grounds therefor, it was held by this court that if the evidence above referred to, that appellee presented her invalidated ticket to the agent of the Texas & New Orleans Railway Company at the gate, for the purpose of gaining admittance to the train, and was refused as stated, and afterwards gained access through the gate to the train by means of a local ticket to Liberty, purchased by her for that purpose, such facts would be a bar to her recovery of damages for her ejection from the train, no more force having been used than necessary by the conductor for that purpose; and that proper charges, requested by appellants, presenting this issue should have been given. Such charges were refused, and the issue was not covered by the court's charge. Upon motion for rehearing, it is insisted by appellee that such ruling is in conflict with the opinion of the supreme court, in *Texas & P. R. Co. v. Payne*, 99 Tex. 46, 70 L.R.A. 946, 122 Am. St. Rep. 603, 87 S. W. 330. We are in some doubt as to the correctness of our ruling in view of what is said in the opinion referred to; and, inasmuch as our judgment is final, we deem it proper to certify to your honorable court the following question:

"Question. Would the facts referred to 39 L.R.A. (N.S.)

bar the right of appellee to recover damages for her ejection from the train in a proper manner by the conductor, upon her failure to pay fare, or to present any other ticket than the invalidated ticket upon which she had been refused admission to the train through the gate?"

It is the settled law of this state that the passenger who complies with his contract does not lose his right to transportation because of the neglect or refusal of the agent of the carrier to do something that is necessary to evidence the passenger's right to use such transportation. Under such circumstances, the passenger is not required to procure other transportation, but may rely solely upon the contract made with the carrier.

Making a practical application of the law to the facts of this case, as made by the certificate of the court of civil appeals, the appellee, having purchased a return ticket in Atlanta, Georgia, to Oklahoma City and return over the issuing road and several connecting lines, including the Texas & New Orleans Railroad and the Atchison, Topeka, & Santa Fé Railroad, presented herself to the proper agent at Oklahoma City for identification, and applied to such agent to have her ticket validated in compliance with the provisions of her contract with the railroad companies. The agent at Oklahoma City refused to make the validation required of him, without any legal excuse, telling appellee that the proper place to have her ticket validated was Houston, Texas. She was carried on her ticket, invalidated, without objection, from Oklahoma City to Houston, over the Atchison, Topeka & Santa Fé and Gulf Colorado and Santa Fé roads. At Houston she presented her ticket to the proper agent and requested its validation, relating what had taken place at Oklahoma City in an effort to secure such validation; but the agent at Houston refused the validation, denying his authority to do so. Under these circumstances, the law gave appellee the right to be transported over the railroads of appellants without having her ticket validated. She had done all that was required of her under the contract, and was without fault. *Missouri P. R. Co. v. Martino*, 2 Tex. Civ. App. 634, 18 S. W. 1069, 21 S. W. 781; *Gulf, C. & S. F. R. Co. v. St. John*, 13 Tex. Civ. App. 257, 35 S. W. 501; *Ft. Worth & R. G. R. Co. v. Jones*, 38 Tex. Civ. App. 129, 85 S. W. 37; *St. Louis, A. & T. R. Co. v. Mackie*, 71 Tex. 491, 1 L.R.A. 667, 10 Am. St. Rep. 766, 9 S. W. 451; *Texas & P. R. Co. v. Payne*, 99 Tex. 46, 70 L.R.A. 946, 122 Am. St. Rep. 603, 87 S. W. 330.

This brings us nearer the question to be

answered. Appellee was assured by the ticket agent at Houston that she would not be permitted to ride on her invalidated ticket, and she exhibited the ticket to the gateman, who refused to accept it, and to let her pass through the gate to gain access to the train. She then purchased a ticket to Liberty, and was permitted to pass through the gate by virtue of this ticket, by which means she gained access to the train from which she was afterwards ejected. Did these facts present a valid defense to appellee's action for damages resulting from her ejection under such state of case? We think they clearly did not present any defense to appellee's cause of action. The certificate does not disclose the authority of the gateman, who, in the first instance, refused appellee passage through the gate to the train; and we are left to infer that his business was to pass such persons as possessed tickets *prima facie* valid and entitling such person to transportation on the train to which access was sought.

We think it immaterial in what manner appellee gained access to appellant's train. If she had valid transportation she had the right to enter the train and demand a fulfillment of the contract upon the part of the carrier. From the facts found, it is clear appellee had a valid ticket which entitled her to be carried over appellant's roads and their connecting lines from Houston to Atlanta, Georgia. We are unable to discern any valid reason why the device resorted to by appellee to gain entrance to the train could in any manner affect her right to recover damages for her wrongful expulsion therefrom. The question of good faith does not arise where the transportation is valid, and the entrance to the cars is for the bona fide purpose of being carried to destination. This rule is stated by Mr. Hutchinson on Carriers, 3d ed. vol. 2, p. 1102, § 963, as follows: "And when a person has paid, or tendered the proper compensation to the carrier, and the carrier has accommodations, and there is no legal objection to receiving him as a passenger, the right to enter the car is not merely one of private contract, but is also one of public law; and the duty will rest upon the carrier to admit him as a passenger. If, after having secured his right to enter, he is refused admittance, he may make reasonable effort to exercise his right to enter; and if his conduct does not transgress the limit of reasonable effort, and is not *mala fide* for the purpose of provoking resistance or insult, any tort against his person by the agents of the carrier, resulting from a refusal to admit him to the cars, will be actionable," 39 L.R.A. (N.S.)

and the accompanying indignity will be a legitimate element of compensatory damages."

The text above quoted seems to rest upon the case of Runyan v. Central R. Co. 65 N. J. L. 228, 47 Atl. 422, which furnishes a precedent for our ruling in the case at bar. We desire to state an extract from the New Jersey case, from which the facts of the case, as well as the principle announced therein, appear as follows: "The last point to be noticed relates to the measure of damages. The objections urged are that the judge permitted the jury to give the plaintiff damages for the indignity which he suffered by being excluded from the cars in the presence of many onlookers, and refused to charge that damages could not be awarded for the resistance made to plaintiff's efforts to board the train, after notice that he could not enter. The testimony tended to prove that the plaintiff had a ticket entitling him to ride from New York to Elizabeth; that with this he crossed the ferry to the Jersey City station, and then was forbidden by the defendant's agents to enter the cars with his packages; that nevertheless he attempted to walk through the gate to the cars, but found his passage blocked by the men, and then desisted. Shortly afterwards he walked to the Communipaw station, and there bought from the company a ticket to Newark, and when a Newark train came along, he quickly got upon the platform of one of the cars, but was knocked by some of the company's employees at the station. He then hurried to another car, where the conductor of the train endeavored to make room for him to board the train, but the others interfered, and the train left without him. He then bought of the company another ticket to Elizabeth; but when the train arrived, two or three policemen appearing, he refrained from further effort, and departed. Under the circumstances, we think the resistance made to the plaintiff and the indignity suffered by him were proper matters for consideration by the jury on the question of damages. The verdict in favor of the plaintiff implies that he had a legal right to enter the company's trains, with the packages in his hand, by virtue of the ticket which he had purchased. This right rested not merely on private contract, but on public law, which bound the defendant as a common carrier. The plaintiff was not necessarily obliged to forego his right, because the company's agent told him to do so. He was entitled to make reasonable efforts to exercise his right; and if the jury determined that his conduct did not transgress the limit of reasonable effort, and was not *mala fide* for the purpose of provoking re-

assistance or insult, then the wrong done could not be attributed to misbehavior on his part. The resistance interposed by the defendant's agents constituted a tort against the plaintiff's person, and therefore was actionable; and in such cases it is settled in this state that the accompanying indignity is a legitimate element of compensatory damages."

The contention that, when the gateman refused to accept or approve the ticket and permit appellee to pass through the gate to enter appellant's car, such refusal was, on the part of appellant, a final breach and repudiation of the entire contract, is, we think, not tenable. The rule, as we understand it, is essentially different from the one contended for by appellant as above set out. In order to determine whether a contract of carriage has been finally and entirely repudiated, it is necessary that the holder of such contract should enter the conveyance of the carrier and present himself for transportation. The time for the performance of the contract has not arrived until this has been done. The matters and things agreed to be performed by the carrier through its agents, in order to have the ticket validated, as well as such implied obligations growing out of an inspection of the ticket by the gateman, were but incidental and subsidiary obligations, the violation of which, while giving a cause of action, are not such as to bar appellee's cause of action for the ejectment and indignity incident thereto, for the reason that the contract was a continuing one, and could not be finally and entirely repudiated until it was presented for fulfillment and by the proper authority denied. It is conceded that a cause of action arose to appellee when she presented a valid ticket to the gateman and was refused access through the gate to the train on which she had the right to ride; but such cause of action, while incident to the contract, was more the violation of a public law than of a private right. The cause of action would not have been for a repudiation of the contract in its entirety, but for a denial of a subsidiary right expressly given or implied from the contract. This being true, it cannot be said that a cause of action growing out of the failure to perform such subsidiary obligations takes the place of and bars the cause of action arising out of a refusal to perform the contract of carriage, when presented to the final arbiter of the validity of such a contract.

Under the facts of the certificate, there is nothing tending to show that the gateman had any authority to repudiate the contract and deny appellee the right of transportation on the invalidated ticket. If the gateman was clothed with such power, it would

seem that the train conductor or auditor would have no power to eject any person for having an invalid ticket, where such ticket had been passed by the gateman. Whatever might be considered the legal effect of such authority in the gateman, the record discloses no such authority, and the question is not properly before us.

The question under consideration is not one of first impression, when considered in its substantive relation to like contracts. The rule, as we have stated it above, is that laid down by the text books. In *Hutchinson on Carriers*, 3d ed. vol. 2, p. 1219, part of § 1054, this doctrine is thus stated: "Cases have often arisen, under 'round trip' passenger tickets in which agents at terminal points have refused, as required by the tickets, to stamp and sign them for the return passage, after the holders had done all required of them; and there is quite a diversity of opinion among the authorities as to the right of the passenger to attempt to return to his destination upon the ticket without this evidence upon it, and to recover damages for being ejected from the train; some holding that he has the right and can thus recover, others holding that the refusal to authenticate, as required, is a breach of the contract of carriage, giving rise to the only cause of action the passenger can have, which is to recover damages for such breach, and not for an ejectment from the train, which he has entered with knowledge that the ticket will not be respected. The weight of authority and better view seems to be that the agreement of the carrier to have his agent perform the designated act is merely incidental and subsidiary to the contract of carriage; and the breach of it is not necessarily a repudiation by the carrier of its entire obligation. It may be true that the holder of the ticket may treat the refusal to authenticate it as a breach of the contract, and claim his damage therefor; but, as the time has not arrived for performance of the contract to carry upon the return trip until the passenger enter the conveyance, the carrier may still perform, and the passenger therefore may elect to insist upon the performance until it is refused when it is due."

We are not able to distinguish the case at bar from the case of *Texas & P. R. Co. v. Payne*, 99 Tex. 46, 70 L.R.A. 946, 122 Am. St. Rep. 603, 87 S. W. 330. The legal questions are practically the same, and there are no facts different in the one from the other that would invoke a different rule of law. In the *Payne Case*, the contract was required to be validated by the indorsement of the freight agent at Ft. Worth, who refused to make such indorsement when presented to him by *Payne*, denying his author-

ity so to do. The holder of this contract, invalidated, took the train at Ft. Worth for Odessa, and was by the agent of the railroad company ejected at Weatherford. In bar of Payne's right to recover damages for his unlawful expulsion, it was urged he could not recover, because his cause of action accrued and his contract was repudiated when the agent refused to indorse it. But, in reply to this contention, Judge Williams, speaking for the court, said: "It is undoubtedly true that by the stipulation in such a ticket the carrier agrees to have its agent perform the designated act, and his refusal to do so is a breach of that stipulation; and it may be that the passenger has the right to treat that as an anticipatory breach of the contract for the return transportation; but this part of the agreement, as it is ordinarily found in such contracts, seems to us to be merely incidental and subsidiary to the contract of carriage; and the breach of it is not necessarily a repudiation by the carrier of its entire obligation. It may still perform its duty to transport. It is not called upon to perform that until the passenger presents himself for transportation; and it is only by a refusal then, it would seem, that there is a breach which the passenger is bound to treat as converting his right into a cause of action for damages. It may be true that the holder of the ticket may treat the refusal to authenticate it as a breach of the contract, and claim his damages therefor; but, as the time has not arrived for performance of the contract to carry upon the return trip until the passenger enters the conveyance, the carrier may still perform, and the passenger therefore may elect to insist upon the performance until it is refused when it is due."

The fact that appellee was notified by the agent at Houston that she could not ride on the invalidated ticket, and the fact that she was denied admission to the yards by the gateman, for the reason that the ticket presented was not validated, takes nothing from the force of the rule laid down in the Payne Case, and adds no strength to the position assumed by appellants.

Ramsey, J., not sitting.

ALABAMA SUPREME COURT.

EVIE JOHNSON, Appt.,

v.

H. J. JOHNSON.

(— Ala. —, 58 So. 418.)

Marriage — annulment — fraud — intention of abandonment.

A marriage cannot be annulled for fraud because the man entered into it to prevent 39 L.R.A.(N.S.)

the woman from appearing against him in a prosecution for seduction, with the intention of abandoning her afterwards.

(February 1, 1912.)

APPEAL by complainant from a decree of the Chancery Court for Clay County in defendant's favor in a suit to annul a marriage because of the alleged fraud of the defendant. Affirmed.

The facts are stated in the opinion.

Messrs. Riddle, Ellis, Riddle, & Pruitt for appellant.

Messrs. Whatley & Cornelius for appellee.

Simpson, J., delivered the opinion of the court:

The bill in this case was filed by the appellant, seeking to have the marriage between herself and the respondent, said H. J. Johnson, annulled, on the ground that he, having seduced her before marriage, married her with the fraudulent purpose of afterwards abandoning her, intending thereby to prevent her from being a witness against him on an indictment or prosecution for seduction, though it is not stated that any such proceedings were in progress. The bill alleges that said H. J. Johnson lived with her for four days after the marriage and then abandoned her.

Appellant contends that the marriage contract, like any other contract, may be declared void and of no effect if procured by fraud; but, even as to any other contract, a court would not declare it null and void because one of the parties did not intend to fulfil his part of the obligations of the contract. Even in the states where fraud is, by statute, made a ground for divorce, it must be "in a matter essential to the validity of the marriage itself." 14 Cyc. 595.

There are cases which hold that fraudulent statements as to a material fact, by which the marriage was obtained, justify the annulment of the marriage, though

Note.—The question decided in *JOHNSON v. JOHNSON*, as to whether the intention not to live with the spouse, which exists at the very time of the marriage, constitutes such fraud as will warrant a divorce or an annulment of the marriage, seems to have been passed upon in but one other case: *Benton v. Benton*, 1 Day, 111, and is sufficiently set out in the *JOHNSON CASE*.

As to right to avoid marriage entered into to escape prosecution for seduction, upon ground of duress, see note to *Griffin v. Griffin*, 16 L.R.A.(N.S.) 937.

And as to what constitutes duress for which marriage may be annulled, see notes to *Collins v. Ryan*, 43 L.R.A. 814, and *Qualey v. Waldron*, 27 L.R.A.(N.S.) 803.

there are cases to the contrary. Nelson, Div. & Sep. pp. 581-583.

But even if we were to admit that doctrine, there was no misrepresentation as to the existence of a material fact in this case. The complaint goes merely to the intention to carry out the obligations of the contract, in good faith, and he did live with her for four days after the marriage. The marriage was legal, and thereby her child was legitimated, and he became liable to the obligations of a husband, and subject to the statutory penalties for failing in such obligations.

The supreme court of Connecticut very maturely considered a case analogous to this at an early day, in which it was alleged that the man had married the woman while proceedings for bastardy were in progress, for the purpose of avoiding said process, with the fraudulent and wicked design of immediately leaving her, and that he did do so. Under the statute of that state, "fraudulent contract" was mentioned as one of the causes for divorce; yet the court said: "It cannot be pretended the contract of marriage in this case was void *ab initio*, though the sole intention of the man in entering into it was to avoid the process under which he lay. He might have become of a better mind, and have faithfully performed the duties of a husband, in which case there could have been no doubt of the validity of the marriage, however apparent his fraud might be at the moment of solemnizing it. A marriage void *ab initio* is a marriage contracted in *fraudem legis*, and cannot be made valid by the volition of either or both of the parties." It was accordingly held that the marriage was not a fraudulent contract, within the meaning of the statute, and the divorce was denied. *Benton v. Benton*, 1 Day, 111, 115, 116.

The decree of the court is affirmed.

All the Justices concur, except Dowdell, Ch. J., not sitting.

Petition for rehearing denied May 1, 1912.

CALIFORNIA SUPREME COURT.

OSCAR L. LEGAULT

v.

BOARD OF TRUSTEES OF CITY OF ROSEVILLE et al., Appts.

(161 Cal. 197, 118 Pac. 706.)

Municipal corporation — power to remove officer.

A municipal corporation has no inherent
30 L.R.A. (N.S.)

power to remove its elective officers, where the legislature has made provision for the removal of such officers by judicial proceedings, and it has been given authority to remove nonelective ones.

(October 17, 1911.)

A PPEAL by defendants from an order of the Superior Court for Placer County overruling a demurrer to a petition for a writ of review to declare the action of the defendant trustees void in removing petitioner from office. Affirmed.

The facts are stated in the opinion.

Messrs. James D. Meredith, J. B. Landis, and P. H. Johnson, for appellants.

Messrs. Harris & Gibson for respondent.

Henshaw, J., delivered the opinion of the court:

The city of Roseville is a city of the sixth class. Oscar L. Legault, petitioner, is or was the duly elected, qualified, and acting marshal of the city. The board of trustees preferred charges against the marshal for dereliction of duty, and cited him to show cause why he should not be removed from office. After a hearing, the board of trustees formally ordered the petitioner to be removed from the office of marshal of the city of Roseville. Legault then petitioned for a writ of review, seeking to have it declared that the action of the board of trustees in the premises was in excess of its powers and jurisdiction, and

Note. — Power of town or municipality to remove officer in absence of statutory authority.

The decisions upon the question whether there is an inherent power of amotion in municipal corporations are collected in a note to Atty. Gen. ex rel. Cole v. Stratton, 9 L.R.A. (N.S.) 572; to which may be added the case of People ex rel. Lathers v. Raymond, 129 App. Div. 477, 114 N. Y. Supp. 365, in which it was held (citing Dill. Mun. Corp. 4th ed. §§ 240, 242) that a municipal corporation has an inherent power to remove its officers, though they have a definite term of office; and that this power is vested in the common council.

And see also Reg. ex rel. Laurence v. Patterson, 33 N. S. 425, in which, after a review of the English decisions, it is stated to be a well-established principle that every corporation has incidental power to remove any of its officers for good cause, but that such power cannot be exercised by any part of the corporation unless vested in that part by prescription or charter.

As to whether power conferred upon a municipality to remove its officers is exclusive, see note to State ex rel. Young v. Robinson, 20 L.R.A. (N.S.) 1128.

E. S. O.

therefore void. The trustees interposed a general demurrer to this petition. This being overruled, the petition admittedly setting forth the facts and the trustees consequently being unable to join issue by denial, they fled no answer, and judgment passed for petitioner as prayed for.

The trustees appeal, and the appeal presents for consideration a single question: Where the charter of a municipality is silent upon the matter, does the corporation, acting through its trustees, possess the power to remove an elective officer of the municipality?

It is not questioned but that the charter in terms confers no such power. But the argument for appellants is that at common law this power was regarded as a necessary incident to the functions of all municipal corporations; that, not having been prohibited to this corporation, it exists, and is to be exercised with other powers by the board of trustees; and that the provisions of the Penal Code (§§ 758-772) must be considered as fixing an alternative, and not an exclusive, method for amotion of municipal officers.

Since the decision of Lord Mansfield in *Rex v. Richardson*, 1 Burr. 539, 2 Ld. Kenyon, 85, it has become an accepted doctrine that this power, based upon necessity, is a common-law incident to the powers of English municipal corporations. Considering the nature of the origin of such corporations, resting in some instances in a royal charter, in others on parliamentary grant, and in others on immemorial custom, with rights wrung through stubborn resistance to oppression, it must at once be recognized that the municipal powers of such corporations stand upon an entirely different plane from those of the state of California where, in every instance they are measured by the express terms of grants issued directly or indirectly by the state. This is pointed out in *Herzo v. San Francisco*, 33 Cal. 143, where it is said: "It should not fail to be noted that there is a clear distinction between most municipal corporations as they exist in Great Britain and those of more recent date in the United States. The former depend upon prescription for their existence and capacity; while the latter find every element of their jurisdiction within their respective charters." Full assent is given to the rule of necessity, upon which the English decisions rest, that rule being that it is necessary that a corporation shall have the power to purge itself of offending officers. But this language was addressed to conditions here nonexistent, to conditions where Parliament had never attempted to pass a law to meet the needs of such cor-

porations, and where, therefore, if the power of amotion did not exist in the corporation itself, it did not exist at all excepting when a municipal officer might be guilty of an indictable crime and could be proceeded against accordingly. It was to this condition that the language of Lord Mansfield was addressed. But if Parliament had passed a law applicable to all municipal corporations, providing in terms a method for the removal of derelict or recalcitrant officials, only then would there have been any sort of parallel between the English condition and the condition of this state, and even in such a case the parallel by no means would have been perfect. Judge Dillon ventures the opinion that the common-law power of English municipal corporations is possessed by American corporations "in the absence of any express or implied restriction in the charter." *Dillon, Mun. Corp.* § 242. While Judge Dillon declares that the question is not judicially settled, support is found for his view in certain jurisdictions, and notably in such cases as *Savannah v. Grayson*, 104 Ga. 114, 30 S. E. 693, and *Richards v. Clarksburg*, 30 W. Va. 491, 4 S. E. 774. These and the cases of their class go to the extent of declaring that such power exists in the corporation as a necessary incident to the objects and purposes for which it is created, in the absence of any prohibition in the law upon the exercise of such powers. But, so far as our investigations have disclosed, in no one of these cases has the state made provision, applicable to all municipal corporations, for the removal of officers by judicial proceeding. We are not in this to be understood as declaring that the removal of a municipal officer by the municipality is such a judicial proceeding as to require the action of formally organized courts of judicature, but indisputably such amotion is the exercise of a judicial function; and the legislature may have thought that it could, therefore, with greater propriety be intrusted exclusively to the judicial branch of the government. Thus says *Mechem (Pub. Offices and Officers, § 455)*: "proceedings for the removal of an officer for cause are judicial in their nature, and must be had before tribunals clothed with judicial powers. The fit and appropriate tribunal, therefore, in ordinary cases is the court of law, but this judicial power may be, and often is expressly conferred upon the governor, mayor, or other officer or board having power of removal." Undoubtedly the legislature of this state has done this precise thing in the sections of the Penal Code above cited. The case presented then is not the case of necessity. It is not the case where a municipality must

be declared to have the power to remove its officers, or it can never clean its house. It is the case where the law has provided general machinery, full and complete, to meet the case of any and all municipal officers, where the necessity for the exercise by the municipality of such power within itself is removed, and where the final question for determination is whether the legislature, in the enactment of laws vesting the general power of amotion in the courts, nevertheless designed (by its mere silence) still to leave the full power of amotion with all municipalities, and by these positive enactments to declare only that the municipality could resort to the courts if it desired.

While the question here stated has never been formally presented for determination, this circumstance itself must be construed as in the nature of an admission that throughout the history of the state the power asserted was not supposed to exist. And indeed, the existence of such power is contrary to the whole trend of judicial decision and legislative enactment. Thus, in *Von Schmidt v. Widber*, 105 Cal. 151, 38 Pac. 682, it is declared by this court in bank, quoting from *Dillon on Municipal Corporations* that "it is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: (1) Those granted in express words. (2) Those necessarily or fairly implied in or incident to the powers expressly granted. (3) Those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied." And to the same effect is *Hyatt v. Williams*, 148 Cal. 585, 84 Pac. 41. The necessary deduction to be drawn from this language is that where the legislature, as in this state, has provided a specific form of proceeding for the amotion of officers, the power of amotion within the corporation ceases to be indispensable to the corporation, and its exercise by the corporation becomes at the most but a convenience.

Moreover, the decisions of this court will be found to rest upon the decided assumption at least that the power of removing municipal officers does not rest within the municipality, unless there be an express grant to this end, either in the charter or by general law. Thus in *Lorbeer v. Hutchinson*, 111 Cal. 273, 43 Pac. 896, where the trustees of the city of Pomona declared the office of city marshal vacant and appointed to fill the vacancy, this court said: "If *Lorbeer* [the petitioner] was lawfully in office, the trustees could not by declaring the

office vacant deprive him of his office. They have no power to remove from office, or by any judicial inquiry to declare a vacancy." In *Re Carter*, 141 Cal. 316, 74 Pac. 997, the whole discussion is based upon the power of removal granted by the charter. The same is true in the case of *Coffey v. Superior Ct.* 147 Cal. 525, 82 Pac. 75; where is found such language as this: "Provisions of the charter seem to apply only to some officers, and the scheme for the removal of delinquent officers is to that extent incomplete. . . . There is nowhere in the charter any provision which in terms confers exclusive jurisdiction upon the board of trustees to proceed against and remove municipal officers, nor is there apparent in any of the charter provisions an intention that its provisions should supersede the provisions of the general law as found in the sections of the penal code relative to the removal of delinquent officials from office. . . . The power conferred under the charter is, strictly speaking, the power of expulsion or amotion of its municipal officers. . . . This power of expulsion, amotion, or quasi impeachment of delinquent municipal officers has generally been considered, both at common law and in this country, as an incident to corporate existence, and is exercised by the municipality as an administrative duty,—springing from its political existence and as vital thereto. . . . It is, strictly speaking, this administrative power which is conferred upon the trustees of the city of Sacramento under the charter." In *Craig v. Superior Ct.* 157 Cal. 482, 108 Pac. 310, the provisions of an express grant of power in the charter to the city of Stockton are considered. The provisions of § 16 of article 20 of the Constitution are quoted, to the effect that "in the case of any officer or employee of any municipality governed under a legally adopted charter the provisions of such charter with reference to the tenure of office or the dismissal from office of any such officer or employee shall control;" and it is held touching the employment, retention, and dismissal of members of the police and fire departments of the city of Stockton, that the charter provisions are controlling and exclusive. In *Dinan v. Superior Ct.* 6 Cal. App. 217, 91 Pac. 806, the same question arose, touching the provisions of the charter of the city and county of San Francisco; and it was there held in conformity with the provision of the Constitution above quoted that the procedure prescribed by the charter was exclusive. In *Croly v. Sacramento*, 119 Cal. 229, 51 Pac. 323, this court considered the provisions of the charter of the city of Sacramento authorizing the board of trustees to try and remove ap-

pointees against whom charges had been preferred. Here the court refused to pass upon the question as to whether or not the city possessed the common-law power of amotion, but placed its decision solely upon the charter provision.

It is inconceivable, if the power of amotion of its officers is inherent in a municipal corporation, even when its charter is silent on the subject, that this court would not long ago have so declared, and thus have done away with a vast amount of the argumentative reasoning in which it has indulged, and which is and was entirely superfluous, if the contention of appellant herein is sound. Moreover, if the power here contended for was inherent in the municipality, there would be little or no import to the language of § 16, art. 20, of the Constitution, which undertakes in express terms to make the provisions of a municipal charter controlling with reference to the tenure of office or the dismissal from office of officers and employees of a municipality; for, if the power exists as is here contended for, this solemn declaration of the Constitution accomplished nothing, and at the most was but the recognition of a power already existent.

And, finally, upon this proposition, the legislative enactments have their significance. Section 4386 of the Political Code empowers the mayor "to suspend and, with the consent of the common council, to remove any nonelected officer, stating in the suspension or removal the cause thereof." Section 852 of the municipal corporation act (Gen. Laws 1910, act 2348), which is the governing charter of the city of Roseville, empowers the board of trustees to appoint an "attorney, poundmaster, superintendent of streets, civil engineer, and such police and such other and subordinate officers as in their judgment may be deemed necessary, and fix their compensation, and each of said officers shall hold office during the pleasure of the board." The significance of these legislative declarations is found in this: First, that they are made applicable to nonelective officers, and not to elective officers; and, second, if the power contended for inherently exists, it would be stultification for the legislature to provide with careful detail for the removal of nonelective officers, when the city itself possesses the inherent power to remove nonelective as well as elective officers.

It is concluded, therefore, that as to municipal corporations within this state the general law touching the removal of its officers creates an implied restriction upon the exercise of what may be thought to be the inherent power of amotion. The necessity for the existence and exercise of that

power being removed, it becomes at the best but a convenience. The power may be, notwithstanding the existence of the general laws, conferred by charter, and, when so conferred, will be construed, depending upon the nature of the language, as being either concurrent as in *Coffey v. Superior Ct. supra*, or exclusive as in *Craig v. Superior Ct. supra*. Const. art. 20, § 16.

The judgment appealed from is therefore affirmed.

Melvin, J., and Lorigan, J. concurred.

INDIANA SUPREME COURT.

BENJAMIN TRIPPEER et al., App'ts.,

JOHN CLIFTON et al.

(— Ind. —, 97 N. E. 791.)

Appeal — parties — mortgagee of property subject to improvement lien.

Although one holding a mortgage on property sought to be subjected to an improvement lien defaulted at the trial, which resulted in defeating the lien, he is a necessary party to an appeal from the judgment, since a reversal of the judgment would re-establish the lien, to his detriment.

(March 5, 1912.)

Note.—While no other case has been found involving the question as to the necessity of making an encumbrancer who defaulted at trial a party to an appeal from a judgment denying a lien asserted by the plaintiff, the decision in *TRIPPEER v. CLIFTON* seems clearly to be correct, under the general rule with regard to parties, "that every person to be directly affected in his interests on rights by a judgment on appeal or writ of error is entitled to be named or described in the application or writ, to have notice thereof, and an opportunity of being heard and of defending his rights." 2 Cyc. 756.

And it seems that, in other cases, the rule that all parties who are interested in having a judgment or decree sustained, or whose interests will necessarily be affected by a reversal or modification of such judgment or decree, should be made appellees, respondents, or defendants in error, has been applied to parties in default, or who have confessed judgment in the court below. 2 Cyc. 764.

But a defendant alleged to claim some inferior interest, unknown to the plaintiff, in land sought to be subjected to a mechanics' lien, who has defaulted, and has been found by the court to have no interest in the land, is not a necessary party to an appeal by the lien claimant from a judgment denying his right to a lien. *Phelps & B. Windmill Co. v. Baker*, 49 Kan. 434, 30 Pac. 472.

A. C. W.

A PPEAL by plaintiffs from a judgment of the Circuit Court for Miami County in defendants' favor in an action brought to foreclose an alleged sidewalk improvement lien upon real estate upon which the defendant bank claimed a mortgage lien. Dismissed.

The facts are stated in the opinion.

Messrs. Cox & Andrews and W. E. Mowbray for appellants.

Messrs. Reasoner & Ward for appellees.

Myers, J., delivered the opinion of the court:

This was an action by appellants against John Clifton and his wife, owners of the property, and the First National Bank of Peru, Indiana, to foreclose an alleged sidewalk improvement lien upon real estate in South Peru, Miami county, Indiana. The allegation in the complaint as to the bank is that on May 9, 1903, the owners of the property executed a mortgage upon it to secure the payment of \$2,000, which on February 27, 1905, was assigned to the bank, was duly recorded, and is unsatisfied of record, "and the said First National Bank of Peru, Indiana, is therefore made a party defendant hereto, to limit its time for redemption, and to answer as to its interest thereunder."

We are confronted at the threshold of the cause by the proposition that this court has no jurisdiction to determine the appeal. Immediately preceding the submission of the cause for trial, the bank was defaulted, and nowhere again appears, or is referred to in the proceeding. Judgment was rendered June 15, 1909, against appellants, that they take nothing, and that the defendants recover their costs. One hundred and twenty days were allowed for filing bill of exceptions, and an appeal was prayed and granted and bond fixed at \$200, to be filed within thirty days, to the approval of the court, and on June 19, 1909, at the same term, the court approved the bond and surety, and on June 23, 1909, the bond was filed, and the transcript was filed October 14, 1909: This was therefore not a term, but a vacation, appeal. *Michigan Mut. L. Ins. Co. v. Frankel* (1898) 151 Ind. 534, 50 N. E. 304.

The bank was not made either appellant or appellee, was not given any notice of the appeal, nor was notice given the clerk or attorneys, nor has it joined in error or assigned error. The rule is that it is only parties to judgments, and not merely parties to the record, who must be made parties to an appeal. *Lowe v. Turpie* (1896) 147 Ind. 652, 37 L.R.A. 233, 44 N. E. 25, 47 N. E. 150; *Hogan v. Robinson*, 94 Ind. 138. 39 L.R.A. (N.S.)

But, when parties to the record will necessarily be affected in their interests by the action or judgment by the appeal, they must be joined as parties, and notice given them as provided by the statute. *Burns's Anno. Stat. 1908*, § 674. This is for the obvious reason that the judgment cannot be appealed from piecemeal, and the parties whose interests may be affected by affirmation or reversal of the judgment must be before the court, to enable it to dispose of the case as an entirety.

In this case no formal judgment was entered against the bank, and, as the judgment in favor of appellees swept away the basis for the lien, and necessarily the lien itself, there was nothing to base a separate judgment on as against the bank, and the judgment in favor of appellees necessarily resulted to its benefit. If the judgment were reversed, the case would stand precisely as it stood before submission for trial, so far as the bank is concerned, for a judgment in foreclosure against it alone would be of no force or value. Or, putting it in another form, suppose a judgment had been entered against the bank, foreclosing the alleged lien; what virtue could it have had over against a judgment for the property owner, sweeping away the alleged lien? The rights of both appellants and the bank as against the property must be derived and devolved through the property.

The defense interposed by the property owners necessarily inured to the benefit of the bank, for that judgment necessarily precluded the foreclosure of the alleged lien, or the fixing of any amount, and nothing was left upon which to predicate a lien. The property could not be sold as against the owner, and hence it could be of no force as against the bank, so that the bank is as necessarily and certainly affected by the judgment as if there were a formal judgment in its favor, for it sweeps away an alleged claim and lien against the property upon which it is a prior lien by statute (*Burns's Anno. Stat. 1908*, § 8714), to the lien of the bank. It might be different if it were alleged that the mortgage debt of the bank had been in fact paid, but that is not the allegation, but it is that it has a mortgage of record, and is made party to limit the time for redemption by it, and most certainly the bank is directly, beneficially, and substantially affected by the judgment, which is sought to be overthrown by the appeal. As was said in *Michigan Mut. L. Ins. Co. v. Frankel*, supra: "The fact that he was defaulted in the lower court does not affect the question, for he was still entitled to his right of appeal, regardless of his default, and on such appeal he could at least challenge the sufficiency of the com-

plaint and the jurisdiction of the court. *Lee v. Mozingo*, 143 Ind. 667, 36 N. E. 901, 41 N. E. 454, and cases there cited. In order, therefore, to give this tribunal complete jurisdiction over the cause, it is clear that appellant ought to have made him a coappellant herein, and notified him as provided by § 647, supra." *Burns's Anno. Stat.* 1908, § 674. The case is not directly in point, for the reason that Frankel, in that case, was a defendant, and his codefendant appealed without joining him, but the principle is the same. If it be said in this case that the bank may have been entirely satisfied not to resist the assessment, and its default admitted the allegation against it, the same thing may be said to be true as to Frankel in the prior case, and that the fact that he did not defend is indicative of such condition, but he would have been affected by a reversal of the judgment just as the bank would here. It was a party in interest, and appellants were seeking the same character of judgment against it as against appellee,—a foreclosure, which was the only judgment which could be rendered. *Burns's Anno. Stat.* 1908, § 8714. The bank was adverse in interest to appellants below, and it is necessarily adverse here, for it is directly and necessarily interested in maintaining the judgment rendered. *Ewbank's Manuel*, § 149; *Polk v. Johnson* (1906) 167 Ind. 548, 78 N. E. 652, 79 N. E. 491; *Moore v. Ferguson* (1904) 163 Ind. 395, 72 N. E. 126; *Whisler v. Whisler* (1903) 162 Ind. 143, 144, 67 N. E. 984, 70 N. E. 152; *Haymaker v. Schneck* (1902) 160 Ind. 443, 67 N. E. 181; *Mellott v. Messmore* (1901) 158 Ind. 297, 63 N. E. 451; *Abshire v. Williamson* (1897) 149 Ind. 248, 48 N. E. 1027; *Hays v. Pugh* (1901) 158 Ind. 500, 64 N. E. 13; *Ex parte Sullivan* (1899) 154 Ind. 440, 56 N. E. 911; *Crist v. Wayne, International Bldg. & L. Asso.* (1898) 151 Ind. 245, 51 N. E. 368; *Elliott*, App. Proc. 160.

The appeal must be dismissed, and it is so ordered.

Cox, J., did not participate in this decision.

Petition for rehearing overruled June 26, 1912.

IOWA SUPREME COURT.

— DAHLSTROM, Appt.,

v.

UNKNOWN CLAIMANTS et al.

(— Iowa —, 135 N. W. 567.)

Mortgage — simultaneous — assignment of one — foreclosure — effect.

The foreclosure of one of two simultaneous L.R.A. (N.S.)

ous mortgages by the same person, to the same mortgagee, to secure different debts, which were recorded at the same instant, and one of which has been assigned to a stranger, without making the latter a party, has no effect upon the lien of the assigned mortgage.

(April 10, 1912.)

A PPEAL by plaintiff from a judgment of the District Court for Mitchell County, dismissing a petition filed to quiet title to certain real estate. **Affirmed.**

Statement by Ladd, J.:

Action was begun to quiet title against unknown owners. M. Ablieter answered by pleading that he held a mortgage by assignment on the land, and prayed that it be established as a lien thereon. The petition was dismissed, and plaintiff appeals.

Messrs. F. T. Van Liew and Stoughton & Brown for appellant.

Messrs. Springer, Clary, & Condon, R. Feyerabend, and George E. Marsh for appellees.

Ladd, J., delivered the opinion of the court:

One Woodward, who owned the 234 acres of land in controversy, executed two mortgages thereon to Shaffer Brothers on the same day, one to secure the payment of two notes of \$1,000 each, dated January 15, 1907, payable five years after date, and the other to secure the payment of a note of \$6,000, dated January 15, 1907, and payable five years after date. These mortgages were filed for record at the same time. On the same day, Woodward executed a deed of conveyance, subject to these mortgages, to the International Land Company. The plaintiff recovered judgment against this company for \$2,400 and costs June 1, 1908, having previously caused the land to be attached, a special execution issued, and the land in controversy was sold thereunder,

Note.—*Effect of foreclosure of one of several simultaneous mortgages upon the others.*

This note does not include cases where one mortgage is given to several persons to secure separate obligations to each, nor the effect of a foreclosure in such a case by the holder of one of those obligations upon the rights of the others.

DAHLSTROM v. UNKNOWN CLAIMANTS holds that when two mortgages are executed upon the same property on the same day, by and to the same parties, and filed for record the same instant, with no agreement, express or implied, as to which shall be superior, and when, after an unrecorded assignment of one to a third party for

and sheriff's deed executed to plaintiff December 14, 1909. Shaffer Brothers instituted foreclosure proceedings on the \$2,000 mortgage, and decree of foreclosure was entered October 14, 1908. Special execution issued, and the land covered thereby was sold by the sheriff December 2d following. The certificate of sale was issued to Shaffer Brothers and by them assigned to plaintiff, to whom the sheriff's deed was executed December 13, 1909. The \$6,000 mortgage was not referred to in the proceedings. It, with the note for that amount, had been assigned in writing to M. Ablieter of Boscobel, Wisconsin, October 11, 1907. The assignment, though acknowledged by Shaffer Brothers was never recorded. This action to quiet title against unknown claimants was begun September 9, 1910. M. Ablieter filed an answer in October following, in which he set up the execution of the \$6,000 note and mortgage, the assignment to him for value, and prayed that the said mortgage be established as a lien against the land, and that as to him the petition be dismissed. The contention of the plain-

tiff is that the transaction as recited had the effect of divesting the \$6,000 mortgage, and that he is entitled to the land with the lien thereof discharged. On the other hand, the defendant says that, inasmuch as this mortgage had been assigned to him long before plaintiff acquired any interest in the land, and prior to the foreclosure of the \$2,000 mortgage, it was not released or discharged by the foreclosure thereof and the redemption by plaintiff, effected by taking an assignment of the sheriff's certificate of sale, and that, in any event, such foreclosure proceedings were void because of a defect in the proceedings.

As both mortgages were executed by the same mortgagor to the same mortgagee, on the same day, this may have been done as part of the same transaction; but from this circumstance alone it is not to be inferred that the notes were given as evidencing portions of the same indebtedness, nor that the mortgages are to be treated as parts of a single instrument. Each mortgage is complete in itself, and is to be regarded as a

value, the other is foreclosed without making the assignee a party to the suit, and he does nothing to mislead the purchaser, such foreclosure does not release or discharge the assigned mortgage.

The rule there announced seems to prevail, that a foreclosure of one of several simultaneous mortgages, without making the other mortgagees parties to the suit, does not affect the liens of the other mortgages nor the rights of the holders thereunder.

Thus, if two mortgages are executed on the same day, by the same mortgagor, upon the same real estate, to different mortgagees, and both mortgages are recorded on time, though on different days, both stand on the same ground, and a foreclosure and sale under one, without notice to the holder of the other, does not affect the other; unless the purchaser at the sale will pay off the other mortgage, the holder of the latter may either foreclose without redeeming, or redeem and foreclose. *Cain v. Hanna*, 63 Ind. 408.

Where property is seized and sold under a first mortgage and under one of several concurrent mortgages, the sale does not extinguish the other mortgages created in the same act and at the same date; if the property does not sell for enough to satisfy all the mortgages of the same rank, the balance over the amount of the older mortgage should be divided *pro rata* among the concurrent mortgagees, the sheriff collecting only the *pro rata* share of the seizing creditor, and the portion coming to the other mortgage creditors remaining in the hands of the purchaser, subject to their call, and secured by their mortgages. *Scott v. Featherston*, 5 La. Ann. 306.

Where two mortgages were executed on 39 L.R.A. (N.S.)

the same day, to different mortgagees, by the same mortgagor, one being acknowledged first and the other recorded first, and there being no agreement concerning a preference, it was held that the foreclosure of one by advertisement would not be effectual to settle the relative rights of the foreclosure purchaser and the holder of the other mortgage, but that a bill in equity was necessary to determine such rights and to marshal the assets, and the court decreed a sale, the money to be applied ratably on both mortgages in case it should not be sufficient to pay both. *Van Aken v. Gleason*, 34 Mich. 477.

Where plaintiff executed two mortgages on the same day, and on the same premises, due at different times, to different parties, but by assignment they both came into the same hands, and the one due first, which by agreement was the prior lien, was foreclosed by statutory foreclosure, and the property sold for more than sufficient to satisfy it, the court held that the mortgagee was entitled to satisfy the other mortgage out of the surplus, although that other mortgage was not yet due. *Barber v. Carey*, 11 Barb. 549.

When two mortgages are executed at the same time, between the same parties, upon the same property, to secure separate debts, if, after judgment of foreclosure upon one, but before sale, action is brought to foreclose the other, and the two suits are consolidated without objection, the lien of the mortgage foreclosed in the second suit is not lost by reason of the first suit, although both should have been foreclosed in one suit. *Thompson v. Skeen*, 14 Utah, 209, 48 Pac. 1103.

The rule, however, seems to be otherwise in Pennsylvania. There it has been held

distinct contract. *McDonald v. Second Nat. Bank*, 106 Iowa, 517, 76 N. W. 1011.

The mortgages having been executed on the same day, by and to the same parties, and filed for record the same instant, were simultaneous and their liens concurrent; and, as there was no agreement, express or to be implied, as to which should be superior, the assignment of the \$6,000 mortgage to Ablieter did not give it priority over the other. *Perry's Appeal*, 22 Pa. 43, 60 Am. Dec. 630; *Vredenburg v. Burnet*, 31 N. J. Eq. 229; *Greene v. Warnick*, 64 N. Y. 220; *Stafford v. Van Rensselaer*, 9 Cow. 316. Even when part of the notes secured by the same mortgage are assigned, priority of the security is not affected thereby; this being determined by the order of maturity of such notes. *Massie v. Sharpe*, 13 Iowa, 542; *Hinds v. Mooers*, 11 Iowa, 211; *Rankin v. Major*, 9 Iowa, 297. Such has always been the rule in this state, though there are authorities to the contrary elsewhere, and there is no sound reason for giving any greater effect to the transfer of one of two simultaneous mortgages. Both mortgages

that if two mortgages are executed by the same mortgagor, to different mortgagees, to secure two sums borrowed, and both are left for record at the same moment, neither has priority, although, as must be, one is recorded in advance of the other in the mortgage book, and a sheriff's sale under one which divests its lien, also divests the lien of the other. *Bonstein v. Schweyer*, 212 Pa. 19, 61 Atl. 447.

In *Dungan v. American L. Ins. & T. Co.* 52 Pa. 253, it is said that the doctrine is unquestionably true that if purchase money be secured by two mortgages, and both are recorded on the same day, and within sixty days of their date, their liens are contemporaneous, and no priority of one over the other can be predicated; and that a sheriff's sale on either divests both. In that case, however, they were not both given for the same purchase money; both were executed simultaneously between the same parties, but one was immediately assigned to a third party and was really for a different transaction, and one was recorded a few hours before the other, with the understanding between the parties that it was to have priority, and the court held that this mortgage was not divested by a sheriff's sale under the other.

And where a grantee of land gave two mortgages amounting to twice the sum of the consideration recited in the grant, although both were executed on the same day, since they were recorded one day apart, it was held that there was nothing on the face of the instruments from which to infer with certainty that both were given for the purchase price, and therefore the mortgage first recorded was not discharged by a subsequent sale under the second. *Norris v. Brady*, 4 Phila. 287.

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rank as equal liens without priority of preference to either, whether in the hands of the mortgagees or of another under an assignment, unless superior equities in favor of the one or the other are otherwise shown. 1 Jones, *Mortg.* §§ 534, 535, 607a; *Riddle v. George*, 58 N. H. 25.

Had Shaffer Brothers retained the \$6,000 mortgage, it might have been necessary to have protected it as well as the owner of the premises in the foreclosure of the \$2,000 mortgage by either bidding enough for the land to satisfy both, or by redeeming from the sheriff's sale on that foreclosure. *Wells v. Ordway*, 108 Iowa, 86, 75 Am. St. Rep. 209, 78 N. W. 806. But they had assigned the larger mortgage to the defendant Ablieter long before foreclosure suit was begun. The latter might well have been made a party defendant. *Wiltsie, Mortg. Foreclosure*, § 184; *Potter v. Crandall, Clarke*, Ch. 119. Had this been done, the relative rights of the respective lien holders in the security, whether or not sufficient to satisfy both, might have been determined. As he was not a party, the extent of his lien has

Where four mortgages were executed and recorded at the same time, upon the same property, and to secure parts of the same debt, payable consecutively, one year apart, and upon failure of payment of the first when due it was foreclosed and the property sold, it was held that the mortgagees or their assignees stood in equal equity in respect to the fund in contest, and that the proceeds of the sale, not being sufficient to satisfy the claims of all, should be distributed to them *pro rata*. *Perry's Appeal*, 22 Pa. 43, 60 Am. Dec. 63.

Where one person executed four mortgages at the same time, to different mortgagees, each having notice of the other mortgages, and mutually agreeing that neither mortgagee should have priority over any other, the fact that two mortgages were recorded before the other two gave no priority either to those mortgagees or to their assignees without notice of the equal equity of the four; but where the assignments were recorded before the other two mortgages were recorded, under statute the assignees thereby gained priority over those unrecorded mortgages, and a foreclosure of the assigned mortgages would extinguish the other mortgages, so that a purchaser at such foreclosure sale acquired valid title. *Decker v. Boice*, 83 N. Y. 215.

When two mortgages are executed at the same time, but one recites that it is junior to the other, and at the time of bringing the foreclosure suit under one they are held by different persons, they are not to be regarded as simultaneous, but as separate instruments, and the sale under the one does not extinguish the lien of the other. *Raymond v. Whitehouse*, 119 Iowa, 132, 93 N. W. 292.

H. C. Sh.

never been adjudicated. The mortgagor in executing the simultaneous mortgages must have done so with the knowledge that either might be assigned, and, after this has happened, there is no just ground for denying the assignee the security his separate mortgage was intended to afford, on the ground that the holder of the other mortgage has foreclosed without making him a party. Had the mortgagor or his grantee or assignee thought it essential to the protection of his interest that he be made a party, he should have insisted thereon by motion or otherwise. In *Van Aken v. Gleason*, 34 Mich. 477, the simultaneous mortgages were to different persons, and, though one had been foreclosed by advertisement, the court held that a bill in equity was necessary to marshal assets. In *Barber v. Cary*, 11 Barb. 549, one of two contemporaneous mortgages was foreclosed, and, as against the mortgagor, the court held the bid above the amount necessary to satisfy the judgment should be applied in satisfaction of the other mortgage. In *Scott v. Featherston*, 5 La. Ann. 306, it was said that the sale there considered "under the concurrent mortgage did not extinguish the other mortgage created in the same act and at the same time."

Had these mortgages been made to different mortgagees at the same time, and filed for record at the same instant, there could be no doubt but that the foreclosure of one without making the owner of the other, whether original mortgagee or assignee, a party, would not have discharged the other. The situation is practically the same where the mortgagee to whom two contemporaneous mortgages have been executed assigns one of them, and there is no good reason for saying that the foreclosure of one of the simultaneous mortgages to different persons shall not satisfy the other mortgage, and that the foreclosure of one of two such mortgages executed to the same person shall work the discharge of the other when assigned to another. 27 Cyc. 303. The courts of but one state so hold, and, as no reason is given therefor in any of the decisions, we are content in saying that we do not care to follow them. See *Magaw v. Garrett*, 25 Pa. 319; *Dungan v. American L. Ins. & T. Co.* 52 Pa. 253; *Bonstein v. Schweyer*, 212 Pa. 19, 61 Atl. 447. In *Moffitt v. Roche*, 76 Ind. 75, one mortgage was executed to secure the payment of promissory notes to several persons, and the court held that the foreclosure by the payee of one did not discharge the security as to others. And that court in *Murdock v. Ford*, 17 Ind. 52, applied the same rule where several instalment notes maturing at different dates were secured by a single

mortgage, declaring that such notes have priority in the order of maturity, and that the rights of one not made a party, to whom a deferred note has been assigned, are not affected by the foreclosure of an earlier note, and may redeem against the purchaser under such a decree. See also *Goodall v. Mopley*, 45 Ind. 355, and *Harris v. Harlan*, 14 Ind. 439. But the rule is otherwise in this state. In *Clayton v. Ellis*, 50 Iowa, 590, it was held that the assignee of a part of the mortgage debt cannot redeem from a sale upon foreclosure, and in *Harms v. Palmer*, 61 Iowa, 483, 16 N. W. 574, where several instalments matured by provision of the mortgage, and some of them had been transferred, the assignee instituted foreclosure proceedings, and, upon decree being entered, caused all the land save the homestead to be sold thereunder, and, a supplemental decree subsequently being entered, the homestead also was sold. At this time, a decree of foreclosure was entered on the instalment notes retained by Palmer, the original payee. The latter undertook to redeem the homestead on the theory that he was a junior lien holder. The owner of the homestead having parted therewith, his wife also applied to redeem the homestead. The court held she was entitled to do so, and that Palmer had no right to redeem, saying that the burdens of the mortgagor might not thus be increased by the transfer of a part of the notes secured, saying that "were the rule such as is insisted upon by defendants, a mortgagee, by splitting up his debt by assignment, could bid upon the land a sum less than its value, and the mortgagor could not redeem under the statute, without paying the whole of the mortgage debt. This would result in gross oppression and injustice to the mortgagor, and would operate so that his land would be sacrificed by a sale for less than its value. It cannot be claimed, if a mortgage be given to more than one mortgagee, that they separately would have the right to redeem from the sale, or that the mortgagor, in order to redeem, must pay the whole debt. This case in no respect is different from that. Here there are in contemplation of law two mortgages, the transfer of a part of the debt conferring upon one party the right of mortgagee. In enforcing their rights, so far as the mortgagor is concerned, they must be regarded as one." See same case, 73 Iowa, 446, 5 Am. St. Rep. 691, 35 N. W. 515. Plainly enough the decision is based on the theory that, as to the mortgagor, there was but one mortgage, and in fairness to him only one suit in foreclosure can be maintained thereon. In this action, however, there were two separate mortgages

securing the payment of distinct debts, and on no tenable theory can the party executing these contend that foreclosing the one without the other involved the splitting up of causes of action or the oppression of the debtor. True, it may be necessary that the equities of the respective mortgages, because of being concurrent, finally must be adjusted, and this may embarrass him in the matter of redemption, but, having executed securities of this character, each distinct and assignable, and which when mature constitute separate causes of action, he is not in a situation to complain, and surely the plaintiff, who acquired title as purchaser by virtue of sheriff's deed, is in no better position. Either, if he so elects, may insist that the holder of the other mortgage be made a party, and that such a decree be entered as shall protect the right of redemption. Not having done so, the assignee of the mortgage not foreclosed may insist upon his lien, though as was held in *Van Aken v. Gleason*, supra, a marshaling of assets may be necessary upon the enforcement of such lien by foreclosure. The defendant's note was not mature, and he was not bound to declare it due because of not having received interest thereon, and, if so, then he was not required to join in the foreclosure proceedings had he known these had been commenced. Nothing was done by the assignee to mislead the plaintiff, nor was there any reference to the defendant's mortgage contained in the foreclosure proceedings. The owner of the land at that time doubtless might have compelled the Shaffer Brothers to have made the defendant a party to that action, but he did not do so, and this was known to plaintiff, as was the existence of the mortgage. He has title under two sheriff's deeds, one under execution sale on a judgment against the International Land Company and the other under foreclosure of the \$2,000 mortgage, and we are of opinion that his equities, though probably equal, are not superior to those of the defendant. The decree so declaring has our approval.

Affirmed.

KANSAS SUPREME COURT.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appt.,

v.

BENJAMIN F. MYERS et al.

(86 Kan. 497, 121 Pac. 500.)

Vendor and purchaser — possession — notice of rights.

1. Among the many facts shown and

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found by the court were the following: Two minor sons rented a farm of their father, adjoining the home place. Later they, with an elder brother, bought it and continued to work it and improve it; they and their mother still living on the home place, the parents having been divorced. The deed was taken in the name of the elder brother, who did not work the land, but went into business in another county. The deed was recorded. He used the land as a basis of credit, and later mortgaged it to secure a mercantile debt. The mortgagee's agent inquired of him as to possession, and was told that no one lived on the place, but that the two brothers rented it. An examination of the records by the agent disclosed the record title in the mortgagor. In the meantime the two brothers had come of age, and had worked and improved the land, asserting that each owned a one-third interest therein, and this was generally understood in the neighborhood. They were ignorant of their brother's use of the land to obtain credit and of his execution of the mortgage. Ordinary diligence by way of inquiry in the neighborhood, or of either of the brothers in possession, would have revealed their claim, but no such inquiry was made. The court adjudged that the brothers, William and Henry, held their interests in the land unaffected by the mortgage of plaintiff. Held, not error.

Evidence — notoriety — possession of realty.

2. When the possession and use of the land by the two brothers had been shown, it was competent to prove the neighborhood notoriety of their claim of ownership.

(February 10, 1912.)

APPEAL by plaintiff from a judgment of the District Court for Mitchell County in defendants' favor in an action brought to foreclose a mortgage on certain real estate. **Affirmed.**

The facts are stated in the opinion.

Messrs. Park B. Pulsifer and Charles L. Hunt for appellant.

Messrs. Frank A. Lutz, A. E. Jordan, and J. E. Tice, for appellees:

Evidence that it was generally known in the vicinity of the land that the claimant or his grantor claimed title thereto is admissible to show notoriety of claim of title, but not to show title itself.

McAuliff v. Parker, 10 Wash. 141, 38 Pac. 744; *Knight v. Knight*, 178 Ill. 553, 53 N. E. 306; *Carter v. Clark*, 92 Me. 225, 42 Atl. 398; *Kennedy v. Wible*, 8 Sadler (Pa.) 209, 11 Atl. 98; *Tennessee Coal, Iron & R. Co. v. Linn*, 123 Ala. 112, 82 Am. St. Rep. 108, 26 So. 245; *Maxwell Land Grant Co.*

Note. — For extensive annotation of the question, "Possession of land as notice of title," see note to *Niles v. Cooper*, 13 L.R.A. (N.S.) 49.

v. Dawson, 151 U. S. 586, 38 L. ed. 279, 14 Sup. Ct. Rep. 458; Sparrow v. Hovey, 44 Mich. 63, 6 N. W. 93.

Actual possession by living in a house on land is not necessary to constitute that sort of possession which the courts deem sufficient to give constructive notice to a purchaser of land occupied by a third person, but it may be shown in many other ways.

Deetjen v. Richter, 33 Kan. 413, 6 Pac. 595; Boyce v. McColloch, 3 Watts & S. 429, 39 Am. Dec. 35; Hodge v. Amerman, 40 N. J. Eq. 99, 2 Atl. 257; Krider v. Lafferty, 1 Whart. 303; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 35 L. ed. 1063, 12 Sup. Ct. Rep. 239; Bright v. Buckman, 39 Fed. 243; Truesdale v. Ford, 37 Ill. 210; Roussain v. Norton, 53 Minn. 560, 55 N. W. 747; Meehan v. Williams, 48 Pa. 238; Horbach v. Porter, 154 U. S. 549, and 18 L. ed. 30, 14 Sup. Ct. Rep. 1164; Rogers v. Turpin, 105 Iowa, 183, 74 N. W. 925; Allison v. Pitkins, 11 Tex. Civ. App. 655, 33 S. W. 293; Tate v. Pensacola Gulf, Land & Development Co. 37 Fla. 439, 53 Am. St. Rep. 251, 20 So. 542; Hottenstein v. Lerch, 104 Pa. 454; Strong v. Shea, 83 Ill. 575; Lyman v. Russell, 45 Ill. 281; Kendall v. Lawrence, 22 Pick. 540; Nolan v. Grant, 51 Iowa, 519, 1 N. W. 709.

Possession constitutes a constructive notice to a subsequent purchaser or encumbrancer, of whatever estate or interest in the land the occupants own therein.

2 Pom. Eq. Jur. 3d ed. § 618; Phelan v. Brady, 119 N. Y. 587, 8 L.R.A. 211, 23 N. E. 1109; Morrison v. Herrick, 130 Ill. 631, 22 N. E. 537; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 35 L. ed. 1063, 12 Sup. Ct. Rep. 239; School Dist. No. 82 v. Taylor, 19 Kan. 287; Kansas City Invest. Co. v. Fulton, 4 Kan. App. 115, 46 Pac. 188; Hommel v. Devinney, 39 Mich. 522; Tarrant v. Swain, 15 Kan. 146; Moore v. Reaves, 15 Kan. 150; Johnson v. Clark, 18 Kan. 164; Beckman v. Richardson, 28 Kan. 648; Tucker v. Vandermark, 21 Kan. 263; Edwards v. Montgomery, 26 Okla. 862, 110 Pac. 779.

The words, "my brothers are on the farm," furnished a "natural clue to the ultimate fact," of appellees' ownership.

Faris v. Finnup, 84 Kan. 124, 113 Pac. 407; 2 Pom. Eq. Jur. 3d ed. § 616; Niles v. Cooper, 98 Minn. 39, 13 L.R.A.(N.S.) 49, 107 N. W. 744; Brinkman v. Jones, 44 Wis. 519; Meier v. Blume, 80 Mo. 179; Johnson v. Clark, 18 Kan. 164; Deetjen v. Richter, 33 Kan. 414, 6 Pac. 595; Manaudas v. Mann, 14 Or. 450, 13 Pac. 449; Williamson v. Brown, 15 N. Y. 359.

The actual possession of a tract of land by a tenant in common is deemed in law to 39 L.R.A.(N.S.)

be just as exclusive as to his own interest, as the possession of one who owns the whole interest in a tract of land.

Kirkham v. Moore, 30 Ind. App. 549, 65 N. E. 1042; Wilcox v. Leominster Nat. Bank, 43 Minn. 541, 19 Am. St. Rep. 259, 45 N. W. 1136; Farmers' Nat. Bank v. Sperling, 113 Ill. 273; Collum v. Sanger Bros. 98 Tex. 162, 82 S. W. 459, 83 S. W. 184; Weisberger v. Wisner, 55 Mich. 246, 21 N. W. 331; Unger v. Mooney, 63 Cal. 580, 40 Am. Rep. 100; Ramirez v. Smith, 94 Tex. 184, 59 S. W. 258; Baldwin v. Johnson, 1 N. J. Eq. 441.

Appellees' equities are much the stronger.

McKinzie v. Perrill, 15 Ohio St. 162; Lestrade v. Barth, 19 Cal. 661; Talbert v. Singleton, 42 Cal. 390; Dickey v. Lyon, 19 Iowa, 544; Simmons v. Church, 31 Iowa, 284; Wickes v. Lake, 25 Wis. 71; Morrison v. Kelly, 22 Ill. 610, 74 Am. Dec. 169; Helms v. May, 29 Ga. 121; Garrett v. Lyle, 27 Ala. 586; Woodward v. Clark, 15 Mich. 104; Boggs v. Anderson, 50 Me. 161.

West, J., delivered the opinion of the court:

This case involves the sole question whether a mortgagee is entitled to a lien upon the land, or whether two brothers of the mortgagor without any record title should prevail. Joseph Myers owned a farm on which was located the family residence, and across the road from which was the land in question. Prior to 1901 Joseph Myers and his wife were divorced, and in the division of the property she became the owner of the home place, and he retained the land across the road. In 1901 a son, Benjamin, then of age, was engaged in business at Beloit. William and Henry, two minor brothers, during that and the following year, farmed the land as tenants of their father, and also farmed the land of their mother, where they lived. In September, 1903, Joseph Myers sold to the three sons, Benjamin, William, and Henry, this land, on which there was a mortgage of \$800, the deed being taken by Benjamin, this being done at the father's instance, thinking that the mortgage could be more easily taken care of than if the deed should run to the three. William and Benjamin learned of this arrangement soon afterwards, and made no objections. When the mortgage fell due, a new one was executed by Benjamin; one of the other brothers then being of age and the other a minor. This mortgage was duly recorded, and the proceeds used to pay off the prior mortgage and for improvements on the land. The three sons were to pay their father for the land in such sums and at such times as he should demand. The deed to Benjamin

was recorded September 18, 1903. William and Henry continued to work the land. In the spring of 1907, Benjamin went into partnership with a man named James, one place of business being at Delphos and another at Minneapolis, buying goods of the International Harvester Company and of Parlin & Orrendoff Company. Benjamin represented that he was the owner of the land, and used it as a basis for obtaining credit, and afterwards, on being pressed for payment, he and his wife executed the mortgage now in question; the plaintiff's credit man having relied on his statements as to owning the land and believing the same to be true. Before executing the mortgage, Benjamin told plaintiff's agent that no one was living on the land, but that his brothers, William and Henry, were renting it. When the mortgage was taken, the records were examined, and nothing found affecting the land except the \$1,000 mortgage already mentioned. Plaintiff's mortgage was executed January 20, 1908, and recorded the following day. William and Henry did not learn of the mortgage until December, 1908, and had not been aware that their brother had been using the land as a basis of credit or claiming to own it or that he had mortgaged it, and had but little knowledge concerning the business and partnership in which he was interested. It was generally understood in the neighborhood that each of the brothers owned one third of the land, but no inquiry was made there by the mortgagee. The mother lived on the home place, as did William and Henry, but improvements were made on the mortgaged land from time to time by way of sheds, corrals, pens and fences, including a hog-tight wire fence around the entire tract. Considerable stock was raised, and there were about 50 acres of alfalfa and 65 or 70 acres of pasture; the remainder being plowed land. By January, 1908, the purchase price of the father had been fully paid. As between the three brothers, there appeared to be no friction or misunderstanding as to the ownership or management of the land or the proceeds therefrom. When the land was purchased from the father, William was nineteen years old and Henry past twenty. Among the fifty-one findings of fact the latter portion of the fifteenth is that "at all times William and Henry have claimed to own each an undivided one-third interest in the land, and their possession of it has been open, notorious, actual, and exclusive, and as such has been well known throughout the neighborhood in which the land is situated ever since the deed was executed by their father, Joseph M. Myers." The forty-eighth is to the effect that there was no visible change in the general character

of the business carried on upon the land, or the occupancy thereof, after the deed to Benjamin by the father, except that, after the deed was made, William and Henry openly exercised full and complete dominion, made lasting and valuable improvements, claimed to be owners with Benjamin, bought and sold stock, increased and transacted the business of the farm as though they were actually owners, until it became a matter of general notoriety all over the neighborhood that they claimed to own the place in common with their brother. The fifty-first finding was: "The occupancy of the land by William and Henry Myers was by farming it as above described, and they never lived on the place." It was also found that the agents of plaintiff made no effort, other than to ask Benjamin, to ascertain the extent of William and Henry's interest; and that the land was continuously listed for taxation in the name of Benjamin, and from 1903 to 1906 the taxes were paid by Benjamin, the mother, or the father, as were the taxes for 1908, and the first half of 1909, those for 1907 and the last half of 1909 being paid by Henry; that, had the agents of plaintiff made inquiry in the neighborhood, they would have learned of William and Henry's claim of ownership, and, if they had exercised ordinary diligence, and made reasonable inquiry, they would have learned of such claim. The plaintiff insists that, having been informed by Benjamin that no one was living on the land, but that his two brothers were renting it, and having examined their records, and finding nothing to indicate that Benjamin was not the full owner, the defendants cannot defeat its mortgage lien, unless their possession was not only open, notorious, and exclusive, but also unambiguous and unequivocal; while the defendants claim that, being told that these brothers were farming the land, it was the mortgagee's duty to ascertain by inquiry whether they were tenants in fact, or had some other or greater rights thereon.

The case has been thoroughly briefed and argued, and many authorities are presented by each side, and almost any possible view which might be taken would find support in numerous decisions found in the books. Narrowed down, the real question is this: Did the law require plaintiff, when advised that William and Henry were working the land as tenants of Benjamin, to inquire into the truth of this statement, and use reasonable diligence to ascertain the real facts? Both parties refer to numerous decisions of this court in support of their contentions, and reference to those most nearly in point will be made. In *Johnson v. Clark*, 18 Kan. 157, an undivided interest

in land which had been held as partnership property was purchased at an administrator's sale, and the equitable interest of the surviving partner was purchased at private sale and the land conveyed by the purchaser by warranty deed, the grantee taking possession and making valuable improvements, the deeds being placed of record. It was held that the purchaser, buying of the sole heir at law of the deceased partner, was charged with notice of whatever claim the possessor asserted up to the date of the purchase, whether legal or equitable. In the opinion (18 Kan. 164) it was said: "It is well established that open, notorious, unequivocal, and exclusive possession of real estate, under an apparent claim of ownership, is notice to the world of whatever claim the possessor asserts, whether such claim is legal or equitable in its nature. Under these circumstances, it was incumbent upon the plaintiff to inquire. Inquiry would inevitable have lead him to knowledge of Clark's possession. This was notorious. Having ascertained the fact of Clark's possession, he was bound to pursue his inquiry until he ascertained the nature of the possessor's claim. Having these means of knowledge at his command, and failing to use them, the law treats the plaintiff precisely as though he had used them and learned all that might have been ascertained therefrom. And therefore the plaintiff, upon the facts in the case, is held by the law to have had at the date of his purchase full knowledge of Boyd's equitable interest in the land at the death of Likins, and to all of which interest Clark succeeded by his purchase from the grantee of Boyd."

In *School Dist. No. 82 v. Taylor*, 19 Kan. 287, it was held that a purchaser of land must take notice of the rights of a school district which had bought 1 acre thereof and built a schoolhouse thereon, which it had occupied without having the deed recorded. In the opinion, it was said: "The defendant was in the possession of said land when the plaintiff's equities were created. And this possession was actual, open, visible, notorious, and exclusive. The plaintiff had to shut his eyes not to see it. If he had looked at the land, he must have known it. If he had inquired of any person in the neighborhood, any man, woman, or even child of school age, he must have been informed concerning it. But it seems he made no such inquiries. He did not inquire of any person concerning adverse claims or interest except of his own mortgagor. We therefore think he cannot claim to be an innocent and bona fide purchaser of his said mortgage interest." p. 292. In *McNeil v. Jordan*, 28 Kan. 7, 16, the rule making open, notorious, unequivocal, and exclusive

possession under an apparent claim of ownership notice to the world was held not to apply to a vendor remaining in possession. It was said: "The object of the law in holding possession constructive notice is to protect the possessor from the acts of others who do not derive their title from him, not to protect him against his own acts, not to protect him against his own deed." To the same effect is *Hockman v. Thuma*, 68 Kan. 519, 75 Pac. 486, and *Dotson v. Atchison*, T. & S. F. R. Co. 81 Kan. 816, 106 Pac. 1045. In *Deetjen v. Richter*, 33 Kan. 410, 6 Pac. 595, the owner of real estate holding under an unrecorded deed, in possession by tenant when a subsequent deed was executed under legal proceedings divesting the vendor of his supposed title, such subsequent purchaser having actual notice from the tenant that he is leasing the land, giving the name of the landlord,—is held entitled to prevail over such subsequent purchaser, who is held not to be a bona fide purchaser without notice. Richter and his daughter had lived together upon the premises until the daughter was declared insane; there being no other members of the family. The plow land was leased to one Stober, who told the subsequent purchaser that he was renting from Richter. It was said: "We do not understand the rule to be that a person must actually reside upon the land to make his possession notice. He may actually improve and cultivate it, and perform open, notorious, and decided acts of ownership over it, without residing upon it. . . . There is some conflict in the authorities whether the possession of a tenant under a lease is notice simply of his tenancy, or of his tenancy and also of his landlord's title. But 'there seems no good reason why, if it be admitted that possession is notice, or evidence of notice, there should be any modification of the rule that the possession by the tenant is the possession of his landlord. If the purchaser has followed up the suggestion which the possession of the premises by a third party implies, he will inquire of the actual occupant, with the probability of learning that he holds as lessee of another. Inquiry cannot safely stop here, for the next step suggested by the circumstances would be to inquire of the landlord.' . . . Information which makes it the duty of a party to inquire, and shows where such an inquiry may be effectual, is notice of all the facts which might be thereby ascertained. No purchaser of real estate is at liberty to remain intentionally ignorant of facts relating to his purchase within his reach, where the property is in the actual, open, visible, notorious, and exclusive possession

of another, and then claim protection as an innocent purchaser. The presumption of law is that upon inquiry he will ascertain the true state of the title.' pp. 414, 415. In *Sanford v. Weeks*, 38 Kan. 319, 5 Am. St. Rep. 748, 16 Pac. 465, a person having an equitable title made improvements on the land, consisting of the breaking of 13 or 14 acres, the fencing of the same, the quarrying and cording up of considerable rock, and the partial construction of a lime-kiln, no dwelling house being on the land and no one living thereon, and it was held that such improvements were not of themselves conclusive that the party making the same had open, notorious, unequivocal, and exclusive possession as against a subsequent purchaser for value. There the purchasers inquired of the agents of the grantor, and were informed that she was the owner of the premises. They also inquired of a responsible banker if they could rely upon the representations of these agents, and were informed that they could. The court said (38 Kan. page 325): "The only question really for our determination is whether there is sufficient evidence in the record to sustain the finding of the trial court that the Weekses had neither actual nor constructive notice before their purchase of the land that Sanford had, or claimed, any interest therein." And it was held that, as the finding had been made upon conflicting evidence, it could not be disturbed. Here the finding well supported is the other way. In *Gray v. Zellmer*, 66 Kan. 514, 72 Pac. 228, the general rule was announced that open and notorious possession of real estate is constructive notice to all the world of the rights of one in possession; that the doctrine of equitable estoppel does not operate in favor of one who has knowledge of another's rights, or who has convenient and available means of obtaining such knowledge. Koch purchased a quarter section of land for \$560, paying \$60 cash and giving a mortgage for \$500. With his consent the land was conveyed to Zellmer, who was to hold the legal title until Koch should pay off the mortgage. Koch took and held open and notorious possession under claim of ownership, and paid to his agent, Zellmer, the interest as it accrued and the principal in full, but Zellmer failed to transmit it all to the mortgagee. When the mortgage fell due, Zellmer remortgaged to Ambler for \$300 to use in paying off the first mortgage. Ambler trusted to the title as shown by the records, and made no inquiry of Koch, who was in possession. Ambler assigned to the plaintiff, Gray, who had personal judgment against Zellmer, but was refused foreclosure against Koch. This was af-

firmed. In the opinion it was said (66 Kan. page 516): "One seeking to be informed as to the title of real estate cannot safely limit his investigations to what is shown in the records of the county in which the land is situated. He must also inquire about, and take notice of, the rights of those who are in open and notorious possession of such real estate. It is a general rule that such possession is constructive notice to all the world of the rights of the one in possession. . . . It must be born in mind that, while Koch was consenting that Zellmer should hold the title, he was at the same time asserting to all the world, by means of his possession, that he was the real owner of the property. . . . Nor does the principle apply that, where one of two equally innocent parties must suffer, he who has put it within the power of the wrongdoer to defraud must be the one to suffer, for here Koch by his possession was proclaiming to all the world his rights, and this notice was as puissant, at least, as was the record." In 13 L.R.A.(N.S.) 49, 98 Minn. 39, 107 N. W. 744, it was held by the supreme court of Minnesota in *Niles v. Cooper*, that actual possession is notice to all the world of the title and rights of the person in possession, and of all facts connected therewith which reasonable inquiry would disclose, and that a purchaser, knowing the possession to be in a third person, is chargeable with notice of such facts, and, if he fails to make proper inquiry to ascertain the state of the title, he is not a purchaser in good faith. To this decision there is an extended footnote covering the doctrine of notice by possession. Among the general rules found therein are the following: "Possession of land is notice, not only of the rights of the possessor, . . . but also of all facts that would be developed if inquiry were made of the one in possession, and a truthful response made." 13 L.R.A.(N.S.) page 73. "The rule would seem to be universal that the occupation by a tenant of lands is notice to subsequent purchasers and encumbrancers of his rights as such. . . . A purchaser of an estate in the possession of a tenant is bound to inquire by what right and under what agreement the tenant holds it. . . . He is not justified in assuming the possession of that person to be the possession of the vendor, but is bound to make inquiry of the occupant." 13 L.R.A.(N.S.) pages 96 and 97. "The rule of the English authorities, and apparently of the majority of the American courts, is that the possession of a tenant is notice to a purchaser of land occupied by the tenant, not only of his interest as tenant, but also of

the whole actual interest he may have therein." 13 L.R.A.(N.S.) page 98. At page 138 of 13 L.R.A.(N.S.) is found the following portion of the "conclusion:" "To buy land knowing that it does not belong to the vendor is fraudulent as against the real owner; and, since possession is a badge of ownership and title, willingness, or an offer, to sell by one not in possession, is a suspicious circumstance, which should lead the proposed purchaser to inquire as to the ownership of the title. This gives rise to the general rule that a purchaser or encumbrancer of land not in the possession of the vendor or the owner of the record title, with whom he is dealing, is charged with notice of all the interests, rights, and equities which the person in possession may have in it, and that he takes it subject to such rights and equities. This rule is based upon the idea that, had the purchaser gone to the occupant and made inquiry as to his rights, he would have obtained the desired information, and therefore he has constructive notice with reference to it; and it is generally deemed to be applicable whether the purchaser had knowledge of the possession of the third person or not; the possession, and not the knowledge of it, furnishing the foundation for the constructive notice." In *Kirby v. Talmadge*, 160 U. S. 379, 40 L. ed. 463, 16 Sup. Ct. Rep. 349, Mrs. Talmadge had purchased the lots in question, paying part cash, through one Miller, who took the title and executed notes secured by deed of trust for the deferred payments. She took possession and occupied them as her own, paying taxes, making improvements, and payments on the debt. Miller afterwards conveyed to Mrs. Talmadge, but, before the deed was recorded, Kirby's grantors contracted with the collateral heirs of Miller to get for them, on a contingent fee, what they could out of Miller's estate. A bill was filed praying for partition. The conveyance to Kirby was held void by the trial court, and this was affirmed by the supreme court. In the opinion it was held (quoting *Landes v. Brant*, 10 How. 348, 13 L. ed. 449) that "open and notorious occupation and adverse holding by the first purchaser when the second deed is taken is in itself sufficient to warrant a jury or court in finding that the purchaser had evidence before him of a character to put him on inquiry as to what title the possession was held under; and that he, the subsequent purchaser, was bound by that title, aside from all other evidence of such possession and holding." p. 384. It was further stated that there are cases of occupation by some other person than the one holding the unrecorded

deed which is no notice, and that the apparent possession by the head of a family is no notice of title in a mere boarder, lodger, or subordinate member of a family. But attention was also called to *Phelan v. Brady*, 119 N. Y. 587, 8 L.R.A. 211, 23 N. E. 1109, holding that as Murphy, before executing the mortgage, had conveyed to Mrs. Brady, who was in possession, and with her husband occupied two rooms in the building on the premises, and leased the others to tenants, claiming to be the owner and collecting the rent, her deed not being recorded, her actual possession was sufficient notice to defeat any claim of the mortgagee. As to Mrs. Talmadge the court said (160 U. S. page 388): "If there be any force at all in the general rule that the possession of another than the grantor puts the purchaser upon inquiry as to the nature of such possession, it applies with peculiar cogency to a case like the present, where the slightest inquiry either of the husband or wife would have revealed the actual facts. . . . It is clear that a purchase made under such circumstances does not clothe the vendee with the rights of a bona fide purchaser without notice." See also *Ramirez v. Smith*, 94 Tex. 184, 59 S. W. 258. The actual ownership had been freely expressed and was fully understood in the neighborhood, and very slight investigation and inquiry there would have disclosed the facts. The defendants' title was secret only so far as the records were concerned, otherwise it was open and known both by act and by assertion. As between the plaintiff and the mortgagor, the former had a perfect right to rely upon the representations of the latter, knowing that the records indicated him as the title holder; but, as between the plaintiff and these defendants, it seems in full accord with reason and fairness to hold that, instead of relying upon the statements of their absent brother, inquiry should have been made of them or their neighbors, which inquiry, according to the findings, involved only the exercise of ordinary diligence, and would have cleared the situation.

Complaint is made that testimony as to reputed ownership of the land by the two brothers was admitted. Their possession having been otherwise established, the neighborhood notoriety of their claim was a proper matter to show. 1 Cyc. 1161; *Maxwell Land Grant Co. v. Dawson*, 151 U. S. 586, 38 L. ed. 279, 14 Sup. Ct. Rep. 458.

In view of the facts and findings, and in accordance with the weight of judicial decision, we hold that the trial court's conclusion of law was correct, that the interest

of William and Henry Myers is by them to be held unaffected by any claims of the plaintiff by virtue of its mortgage.

The judgment is affirmed.

Petition for rehearing denied.

MISSISSIPPI SUPREME COURT.

McCOMB CITY, Appt.,
v.
GEORGE HILL.

(— Miss. —, 56 So. 346.)

Intoxicating liquor — inference of intent to sell from possession.
That one is found on the street early in

Note. — Inference of intent to sell intoxicating liquor from possession.

For a note as to power to prohibit the keeping of intoxicating liquor, irrespective of any intention to sell it in violation of law, see note in 28 L.R.A.(N.S.) 394.

The great weight of opinion is that possession of intoxicating liquors by one unauthorized to sell the same warrants the inference that such possession is for the purpose of making illegal sales, and especially where the liquor is kept in large quantities and is found concealed in unusual places; and the humorous vein which pervades the decision in *McCOMB CITY v. HILL* almost warrants the belief that the judge who wrote the opinion did not think that it took a very violent stretch of imagination for the jury to believe that the possession of 57 bottles of whisky, each supplied with a corkscrew, were intended for purposes of illegal sale, especially when the actions of the defendant and the unexplained possession are taken into consideration. So difficult is it to obtain direct proof of the violation of the liquor statutes where there is almost certainty that it is being violated, that many states have incorporated into the statute provisions to the effect that unexplained possession of large quantities of liquor shall be presumptive evidence of the intention to make illegal sales. (As to the constitutionality of such statutes, see *State v. Barrett*, 1 L.R.A.(N.S.) 626, and note.)

Possession of intoxicating liquor by one unauthorized to sell same is presumptive evidence of the keeping of same with intent to make illegal sales. *Peterson v. State*, 64 Neb. 875, 90 N. W. 964; *Peterson v. State*, 63 Neb. 251, 88 N. W. 549; *Parsons v. State*, 61 Neb. 244, 85 N. W. 65; *Durfee v. State*, 53 Neb. 214, 73 N. W. 676; *Beaty v. State*, 7 Ga. App. 327, 66 S. E. 808; *Rex v. McNutt*, 38 N. S. 339; *State v. Illsley*, 81 Iowa, 49, 46 N. W. 977; *State v. Cunningham*, 25 Conn. 195; *State v. Norton*, 41 Iowa, 430.

The jury may infer that liquor is kept for purposes of unlawful sale, from its pres-

the morning with a suit case in which is found 57 half-pint bottles of whisky, with a corkscrew attached to each one, and appears frightened and attempts to get away when approached by an officer, does not warrant a conviction of having in possession intoxicating liquor with intent to sell or give it away in violation of law.

(November 6, 1911.)

A PPEAL by the city from a judgment of the Circuit Court for Pike County acquitting defendant of the charge of having in possession intoxicating liquors with intent to sell in violation of law after he had been convicted in the city court of *McComb*. Affirmed.

The facts are stated in the opinion.

ence and attempt to conceal it. *Com. v. Locke*, 145 Mass. 401, 14 N. E. 621.

In *State v. Fleming*, 86 Iowa, 294, 53 N. W. 234, it was held that where one makes a public resort of his private dwelling house, the finding of intoxicating liquors there is presumptive evidence that they were kept for illegal sale.

Even if the finding of liquor by an officer is not prima facie evidence of an unlawful intent to sell, it furnishes evidence of probable cause to believe that such is a fact. *Lincoln v. Smith*, 27 Vt. 328.

The finding of 4 quart bottles of whisky in a room, the only entrance to which was through a barber shop, though not conclusive, is sufficient to raise the inference that the proprietor of the barber shop is keeping such liquor with intent to sell. *Lewis v. State*, 6 Ga. App. 205, 64 S. E. 701.

In *State v. Wilson*, — Iowa, —, 132 N. W. 820, under a statute making the finding of intoxicating liquor under certain circumstances presumptive evidence of keeping of same for illegal sale, it was held that proof of possession of intoxicating liquor by one conducting a public eating house, and not legally authorized to sell or use same, is presumptive evidence that such liquors are kept for illegal sale. It was contended that to make the presumption apply the liquor must be found by an officer under search warrant, but the court held that such a limited meaning should not be attached to the word "found," as contained in the statute, but that proof of possession is a substantial fact within its contemplation.

The finding of a large number of filled beer bottles and 2 kegs of whisky on premises used for a billiard hall where sale of such liquors was not authorized is presumptive evidence that they were kept for illegal sale. *State v. Farley*, 87 Iowa, 22, 53 N. W. 1089.

And to the same effect is *State v. Hale*, 91 Iowa, 367, 59 N. W. 281, where liquors were found in the rear part of a room which was partitioned and front part used as a restaurant.

And also in *State v. Arie*, 95 Iowa, 375, 64 N. W. 268, where beer was found in the

Messrs. Quin & Williams for appellant.
Mr. James R. McDowell, Assistant Attorney General, for appellee.

Mayes, Ch. J., delivered the opinion of the court:

The appeal in this case is prosecuted by the city of McComb. The record discloses that on the 12th day of November, 1910, one D. A. Brumfield made an affidavit before F. D. Hewitt, police justice of McComb city, charging George Hill with wilfully and unlawfully having in his possession one suit case of whisky, in the limits of the city, with the intent and purpose of selling same in violation of the ordinance of the city. Hill was placed on trial in the city court and convicted of the offense charged,

and from this conviction prosecuted an appeal to the circuit court; and that court, after hearing the testimony, directed the jury to acquit the defendant, from which instruction on the part of the court the city appeals.

The whole of the testimony offered on the part of the city to establish the guilt of George Hill proved only that one morning about 6:15 he was discovered by the assistant city marshal coming down the street with a suit case. It seems that this unusual conduct on the part of Hill attracted the attention of the marshal, whereupon the marshal started towards Hill to investigate. It appears that up to this time Hill had not seen the marshal, as he was standing under a little shed, and so Hill contin-

basement of a building used as a pop factory and bottling works.

And in *State v. Stevens*, 119 Iowa, 675, 94 N. W. 241, where large amount of beer was found in the cellar under a restaurant, a part of it in a tub of ice water, part in gunny sacks on the floor, and part secreted in a large box sunk into the ground and covered with dirt.

And so the finding of 2 jugs of beer, 1 bottle of rum, 2 of gin, a barrel with 15 gallons of rum, and one with 15 gallons of gin, and also other intoxicating liquor, in a private dwelling house, tends strongly to show that they were kept for illegal sale. *Com. v. Webster*, 6 Allen, 593.

And in *Com. v. Tate*, 178 Mass. 121, 59 N. E. 646, it was held that there was evidence to warrant the finding that intoxicating liquors were kept by a druggist, with intent unlawfully to sell same, where in a closet off one of the rooms was found a washtub with 27 bottles full of beer, a refrigerator in which were 18 bottles of beer, also 51 gallons of beer in 410 bottles, full or partly empty, 260 empty beer bottles, 1½ gallons of whisky in 3 jugs, 30 gallons of whisky in a barrel, 1 quart of wine, 2 gallons of rum, 1 gallon of gin, and 1 pint of sherry.

In *Com. v. McCullow*, 140 Mass. 370, 5 N. E. 165, where a large quantity of liquor was found in a tenement of the mother of one who occupied an adjoining tenement with communicating doors, and who had a store below the tenements, it was said that the fact that a large quantity was found, that the mother kept house by herself, and would not be likely to have so large a supply for her own use, that the defendant had access to the room, joined with the fact that no evidence was offered to show that the liquors belonged to any other person, tended to show that the defendant kept those liquors for the purpose of supplying the bar in his saloon.

In *State v. Schoenthaler*, 63 Kan. 148, 65 Pac. 235, it was held that the finding of 374 quart bottles of liquor labeled "All Hail" and "Malt Meade," which were proved to be light beer, and 9 quarts of 39 L.R.A. (N.S.)

"fine old blackberry cordial," mingled with other goods of a lunch room and restaurant, was presumptive evidence that they were kept for illegal sale. The court said: "Do not men generally know that one who engages in an unlawful enterprise usually makes some effort to conceal the real character of it? Would not the finding of liquors concealed about the premises of one charged with keeping them for unlawful sale be a strong circumstance tending to show guilt, and, if this be true, would not the fact that the nature of the contents of the bottles were hidden by anonymous labels be evidence of equal weight? Is it not generally known that people engaged in business for profit; that beverages which may be lawfully sold have names which serve to identify and distinguish them, and that they will sell better under their real names than under fictitious appellations? Men engaged in a legitimate business advertise their wares. Those who dissemble and suppress information in regard to their goods must have a powerful motive for practising deception. What other inducement than that of concealment could there be for labeling a beverage manufactured by a brewing company, with the unsuggestive title of 'All Hail' By such designation who could imagine what remedial or other qualities the liquor possessed? Might not a jury properly infer that such name was designed and adopted for the purpose of circumventing the curious, and to prevent detection through the efforts of any but the vigilant?"

In *Com. v. Certain Intoxicating Liquors*, 118 Mass. 24, where a barrel of whisky, part full, was found in a bedroom of the dwelling of one who kept a saloon a short distance away, fitted up and furnished as a barroom at which liquors in small quantities, in flasks, had been seized, the court said it was not a violent stretch of credulity for the jury to believe that the liquors were kept at the house, to be sold at the saloon in violation of law.

The jury might reasonably infer that concealed liquors found in a stable and shed adjoining a hotel were being kept for

ued towards the marshal, until he had gotten in about 50 feet of him, when, for the first time, Hill became conscious of the proximity of this officer of the law. At this time the marshal started towards Hill; whereupon, the officer says, Hill wheeled as if he was going to get away. The officer then hailed Hill and told him to stop, and Hill did so. The officer then went up to Hill and opened his suit case, and found in it 57 half pints of whisky, each having a convenient little corkscrew attached, so as to make it thoroughly convenient for the thirsty lover of the drink "that maketh glad the heart" to reach the contents without the provoking delay of searching for

a corkscrew or encountering the danger incident to breaking the neck of the bottle. When the officer found that whisky was in the suit case in such generous quantities, the suit case was seized, together with its contents, and carried to the city hall. At this exciting time Hill was forgotten by the officer, and it was not until 10 o'clock that he was arrested. This is about all the testimony relied upon for the establishment of Hill's guilt.

The statute under which Hill is prosecuted is § 1797 of the Code of 1906, as amended by Laws of 1908, p. 116, chap. 114. The statute referred to above is made an ordinance of the municipality by the ac-

purpose of being sold in a hotel. *Com. v. Doe*, 108 Mass. 418.

And in *Com. v. McCluskey*, 123 Mass. 401, where intoxicating liquor was found concealed in a dwelling, the porch of which was only a few feet from the back door of a building used as a saloon, a search of which had failed to discover any liquors, the court said that they would not say that the jury might not have inferred that the liquors were kept to supply the saloon.

Where the evidence showed that officers in searching a house found a jug partly filled with whisky, and 2 bottle of whisky, and a large number of empty bottles which had contained beer, it was held that the jury were warranted in finding that such liquors were kept for illegal sale. *State v. Baskins*, 82 Iowa, 761, 48 N. W. 809.

And the same was held in *Com. v. Martin*, 162 Mass. 402, 38 N. E. 708, where there was found in a carpenter's shop 37 bottles of lager beer, 73 empty lager beer bottles, a 4-gallon jug full of whisky, another 4-gallon jug containing about a quart of the same liquor, a tunnel, corkscrew, and 3 bottles known as smugglers.

And also in *Com. v. McManus*, 161 Mass. 64, 36 N. E. 676, where in the dwelling house, occupied by defendant and his family only, and in the barn, were found 3 barrels containing a large number of bottles filled with beer, and several flasks filled with rum, and a whisky barrel containing about 2 gallons of whisky.

And the same was held in *Luttrell v. State*, — Okla. —, 120 Pac. 1021, where a search of premises used as a confectionary store disclosed several bottles of whisky concealed, and a lot of empty whisky bottles.

One living in a dry town who has at his home cased whisky and 37 pints of liquor in his trunk, and who received by railroad whisky by the case, billed mineral water, some of whose visitors act a little strange, others depart with wrapped packages, and still others immediately upon leaving retire to secluded places and drink whisky from a flask, has no just cause of complaint when a judge of the police court reaches the conclusion that he is keeping liquor for the purpose of unlawful sale, notwithstanding 39 L.R.A. (N.S.)

his statements that the liquors were kept exclusively for his own use. *Tucker v. Moultrie*, 122 Ga. 160, 50 S. E. 61.

In *Com. v. Lynch*, 164 Mass. 541, 42 N. E. 95, it was said that the conduct of defendant when the officer making search started to open the scuttle into an unfinished place in the roof, in starting downstairs, carrying a lighted lamp with him, and leaving the officer in darkness except for a candle which he then lighted, warranted the inference that the liquors found secreted were kept by them for unlawful sale.

And in *State v. La Rose*, 71 N. H. 435, 52 Atl. 943, the court said that the large amount of liquor on hand, the action of the clerk in endeavoring to prevent the officer from discovering the liquors, and the payment of tax as a retail dealer, which was not required if liquors were kept for use only in compounding medicines, tended to establish that such liquors were not kept merely for personal use or solely for compounding medicine, but were kept for sale.

In *Com. v. Kernan*, 148 Mass. 470, 20 N. E. 101, where the evidence showed that beer in large quantities was found concealed in a cellar which was entered from a barroom, with a contrivance which might be used to prevent surprise, the court said: "We cannot pronounce the inference that the beer was kept for sale so little warranted by the teachings of experience as to be but a mere guess."

And in *Com. v. Fisher*, 138 Mass. 504, where, in the office of one who ran an express between two towns, there was found a large quantity of whisky in jugs, and of beer in bottles, and a barrel containing bottles of beer and several 3-gallon jugs of whisky, the court said: "The fair inference is that the defendant brought into the town the liquors found in his office, and that he did not intend them for his own use. We cannot say as matter of law that, upon all the facts shown, considered in connection with the fact that the defendant made no explanation of them, when such explanation would seem to be in his power, if the liquors were intended for lawful purpose, the jury were not justified in inferring that he had reasonable cause to be-

tion of the municipal authorities, proceeding under § 3410, Code of 1906. The statute is as follows, *vis.*: "It shall be unlawful for any person . . . of this state . . . to have in his possession any intoxicating liquors with the intention, or for the purpose, of selling the same, or giving it away, in violation of law." The facts of this case make it no stronger than the case of *Stransberry v. State*, — Miss. —, 53 So. 783, unless it can be said that the corkscrew attachment is sufficient additional evidence to sustain a conviction, making this case a stronger one than the *Stansberry Case*, in 53 So. 783. But the corkscrew may have been placed there by

the lawful seller of the whisky to Hill. The fact that the corkscrew convenience was attached to each bottle is not evidence of possession for unlawful purposes by Hill. It is a matter of common knowledge that nothing is more provoking and distressing than to have to wait for a corkscrew when a burning and consuming thirst is raging within. It is possible that the lawful dealer in this whisky was something of a philanthropist, and sought to save his impatient and thirsty patrons from the danger of breaking the neck of the bottle. It is possible that the lawful seller of the whisky had suffered the tortures of delay while impatiently searching for the cork-

lieve that they were intended to be sold in violation of the law.

In *State v. Shank*, 74 Iowa, 649, 38 N. W. 523, it was held, in the prosecution of a registered pharmacist for maintaining a liquor nuisance, that an instruction that the finding of intoxicating liquors in any place where merchandise is kept for sale is presumptive evidence that it is kept there for purpose of illegal sale is not error where the instruction also directs that defendant, as a registered pharmacist, had a right to keep intoxicating liquors in his drug store for compounding medicines, and therefore the burden rested upon the state to show that such liquors were kept by defendant for unlawful purposes. But a clause in the same instruction that, if the defense shows that the defendant, during the time covered by this indictment, kept intoxicating liquor in his pharmacy that was in no measure useful in compounding medicine, then the presumption would be that such liquor was kept for an illegal purpose, was subject to an objection, as, during part of the time covered by the indictment, under the statute intoxicating liquors were lawfully kept by pharmacists for medical purposes without restriction imposed by the law in force when the indictment was found. And on a later appeal in 79 Iowa, 47, 44 S. W. 241, a similar instruction with similar modification was upheld.

But in *Com. v. Hayes*, 114 Mas. 282, an instruction that "in and of itself possession of liquor, independent of such associations or surroundings as indicated that it was kept for sale, would authorize no inference of intent to put it to an unlawful use," was upheld.

And in *Com. v. Kane*, 150 Mass. 294, 22 N. E. 903, the ruling that the mere possession of intoxicating liquors in a dwelling house would not authorize the jury to find that it was kept with intent to sell, was held proper.

And also in *State v. Blackman*, 134 N. C. 683, 47 S. E. 16, an instruction on the trial of an indictment for unlawfully keeping liquors for sale, that if defendant had whisky in his possession he would be guilty, was held erroneous.

39 L.R.A. (N.S.)

And in *Com. v. Canny*, 158 Mass. 210, 33 N. E. 340, where large quantities of liquor were found in a cellar under the grocery store of one who previously had a license, which had expired, to sell intoxicating liquors, an instruction in effect that the jury must be satisfied beyond a reasonable doubt, on the evidence, that the liquor was kept by defendant with intent to sell it in violation of law, and that there is no presumption that the liquor found in the store was kept by him with intent to sell it in violation of law, was held to be a correct statement of the law.

But in *Com. v. Foster*, 182 Mass. 276, 65 N. E. 391, it was held that an instruction that "there is no inference of guilt to be drawn from the mere finding of intoxicating liquor in an unlicensed drug store" would be error, where evidence showed that defendant was found in his back shop, drawing whisky from a 5-gallon cask, and that there was in the room another cask full of whisky, containing 4 or 5 gallons; that no prescriptions were found calling for intoxicating liquors of any kind; and that during the morning quite a number of men were seen to go into the store, stay a minute or so, and go out again; the hip pocket of one of them protruding as if there was something in it.

And though the possession of intoxicating liquors, even of various kinds and in large quantities, is not of itself sufficient to justify a verdict of guilty of illegal keeping of intoxicating liquors with intent unlawfully to sell the same, yet where the evidence shows that barrels of beer had been upon the premises, and that one was on tap in the offices entered, and that part of the furniture was appropriate to a place of public resort where intoxicating liquors are kept for sale, it furnished an indication of intent to sell, rather than to apply to the mere domestic use of a single family. *Com. v. Levy*, 126 Mass. 240.

Inference of intent of a druggist to make illegal sales of liquor found in his possession may be overcome by evidence that he had pending an application for a druggist's license. *Com. v. Wellington*, 146 Mass. 566, 16 N. W. 448

J. H. B.

screw, and desired to protect his patrons from like agonies, and hence had attached this simple, but convenient, little appliance as both a convenience and an aid to him in disposing of his "sweet poison." It is true that the facts also show that when Hill saw the officer, and the officer started towards him, Hill "looked as if he was going to run;" but, unfortunately for Hill, he hesitated, and as a result lost his whisky. Hill may have had many reasons for his fright when he saw the officer. Hill does not testify in the case, and so does not state why he was frightened, if such was the fact; but the fright may have been from a cause other than that he had possession of the whisky with guilty purpose. When a man has whisky in his possession in a dry town, and is out on the streets with it so early in the morning, it is natural for him to be a little suspicious; for he does not know whom to trust, nor from what source might come the enemy, bent on the destruction of his goods. The frightened look, under the circumstances, is no proof of guilty possession under the statute. In the case of *Stansberry v. State*, — Miss. —, 53 So. 783, this court ruled that proof of mere quantity was not sufficient to sustain conviction under this statute. The additional fact that a corkscrew attachment is put on each bottle and the person looks frightened is not enough additional proof to authorize a conviction. There must be testimony evidencing a purpose to sell or give away the liquors in violation of law, no matter how large or small may be the quantity in possession of a person at the time the charge is made.

Under the facts of this case and the settled rules of criminal law, nothing goes to prove that the possession of this liquor was with any unlawful intent. We may suspect; but the wisdom of the law is such that it refuses to allow any person to be punished for any crime, however strong and well-founded may be the suspicion. There must be proof. We may be anxious to enforce the liquor laws of the state; but they cannot be allowed to subvert the settled rules of criminal law and destroy all safeguards of liberty. Every person charged with any crime must be proven guilty by facts and circumstances which convince beyond a reasonable doubt. This degree of proof is required just as well when the prosecution is under the statute now under review, as any other prosecution. Statutes of this character must be given such an interpretation as keep them in harmony with the general criminal law of the state, and prevent them from being instruments of tyranny. Such statutes are 59 L.R.A. (N.S.)

not intended to make it possible to send innocent persons to prison, or to convict guilty ones without proof. If it be asked what proof is sufficient in this character of case, our answer is that this question must be determined on the facts of each case.

The action of the lower court was eminently proper, and is hereby approved.

MISSISSIPPI SUPREME COURT.

J. W. HILL et al., Appts.,
v.

E. E. WOODWARD et al.

(— Miss.—, 57 So. 294.)

Railroad — partition of right of way.

1. A railroad company which has secured a deed for its right of way from one only of two tenants in common cannot resist partition of the property at the suit of the other tenant, on the theory that it would be contrary to public policy to permit it.

Constitutional law — interference with property rights — public policy.

2. No public policy of the state can be allowed to override the positive guaranties of the Constitution, or divest persons of their title and property except in the way the law provides.

(December 18, 1911.)

A PPEAL by defendants from a decree of the Chancery Court for Calhoun County in plaintiffs' favor in a suit brought to partition certain real estate. Affirmed.

Note. — Partition of railroad right of way.

Actual adjudications upon the point presented appear to be very few.

Under a statute which excludes the parties from making a voluntary partition between themselves by mutual releases, equity will not, at the suit of one railroad corporation which has purchased the undivided interest in another railroad, compel partition between the cotenants, whereby the usefulness of a part of the road would be impaired. The public has an interest in the use to which the property is perpetually devoted, and equity will recognize and protect that public interest. *Steubenville & I. R. Co. v. Central Ohio R. Co.* 38 Ohio St. 614.

In *Weston v. Foster*, 7 Met. 297, it was held that a railroad company which had laid its road over certain premises then to be partitioned acquired thereby only an easement in the land, and no title to the estate, and that, therefore, the company was not a necessary or proper party to the partition proceeding, for their easement would not be affected by it. H. C. Sh.

In 1871 Joseph W. Drake conveyed certain lands to T. T. Enochs and A. Woodward. Enochs paid taxes on the land for a time and then called upon his cotenant for contribution. This contribution was not made, but in a settlement between the parties it was claimed that an agreement was reached that Enochs should have the property. Woodward having died, and his administrator having refused to contribute towards the taxes, the property was sold and bought in by Enochs. He devised the land to his daughter, who conveyed it to J. W. Hill. Hill conveyed to his co-defendants including the railroad company, and, the land having increased in value, the heirs of Woodward set up a claim to partition as tenants in common of the property. The land is now occupied by the town of Vardaman. The defenses of the individuals having been disposed of by the court as questions of fact, it is not necessary to set them out, but the railway company set up the defense that partition could not be secured against it on grounds of public policy.

Further facts appear in the opinion.

Messrs. Creekmore & Stone, for appellants:

The sales and the surrounding circumstances characterize the possession of Enochs as adverse, and after the lapse of ten years' possession, such as the land was capable of, vested perfect title in T. T. Enochs.

Gardiner v. Hinton, 86 Miss. 604, 109 Am. St. Rep. 726, 38 So. 779; *Breland v. O'Neal*, 88 Miss. 449, 40 So. 865.

Messrs. Haman & Bates and A. T. Stovall also for appellants.

Messrs. Luckett & Guyton and Dunn & Patterson for appellees.

Mayes, Ch. J., delivered the opinion of the court:

The title of appellees to the land in controversy, to the extent claimed by them, is established so clearly as to put it beyond the realm of controversy. The only question in the case which requires discussion is the question raised by the railroad company as to the right of appellees to have partition as against them. It is argued that the railroad company secured deeds granting to it a right of way over the land, and that it has constructed its line of railway on same, and is now using the property in the operation of its road from Okolona, through the town of Vardaman, to Calhoun City, which is the terminus of the road, and is 8 or 10 miles west of the town of Vardaman. The facts show that the railroad company secured by its deeds only a one-half interest in the

property; the other half interest belonging to appellees. On account of the small quantity of land, taken in connection with its charter, and because of the numerous complainants and defendants, the chancellor very properly ordered a sale of the land for partition, which order of sale also included that part occupied by the railroad company. On behalf of the railroad company it is argued that no partition should have been ordered as against it, because such judgment is contrary to public policy. In support of this contention counsel cite many cases. We shall discuss those cases later on in this opinion.

Under § 17 of the Constitution of 1890 it is beyond the power of the state or any corporation to take or damage the property of any person, even for a public use, without due compensation being first made. The railroad company has constructed its roadway on land to which it has not the complete title. It has thus taken private property for a public use without having compensated the owners thereof to the extent of their interest, and has not procured their title, in the face of the fact that the records in the clerk's office fully disclose same. No public policy of the state can be allowed to override the positive guaranties of the Constitution, or deplete persons of their title to property, except in the way which the law provides.

Section 3521 of the Code of 1906 authorizes the partition of land held by joint tenants, tenants in common, etc., and the railroad is of that class of tenantry. The statute makes no exception when one of the tenants in common happens to be a railroad. In support of the contention of counsel that public policy forbids the partition of this land as against the railroad company, our attention is first called to the case of *Weston v. Foster*, 7 Met. 297. But the question involved in the above case was not the same as the one involved in this case. In the *Foster Case*, supra, the court merely held that as the railroad company had only an easement in certain property of which partition was sought, and no title, it was not a necessary or proper party to the proceedings.

Our attention is directed by counsel to 21 Am. & Eng. Enc. Law, p. 1163, and 30 Cyc. p. 178. The text merely states that there are certain kinds of property of which the court will refuse to make a partition on the grounds of public policy; that the courts have refused to decree partition of a railroad, on the ground that any division of the property would impair its usefulness, in which the public has an interest. The notes to the text in both of above volumes cite the case of *Steubenville*

& I. R. Co. v. Central Ohio R. Co. 38 Ohio St. 614. An examination of that case shows that the facts of that case make of it a different case from the one now before the court. It appears from the above case that one railroad corporation purchased from another an undivided interest in the latter's railroad. Before this could be done in the state of Ohio a statute allowing it was necessary, and the legislature of the state passed an act in relation to insolvent railroad companies which authorized the sale and purchase. The act provided that the sale could be made, provided it be done without impairing the usefulness of the selling road. In this way a tenancy in common was created, followed by a subsequent attempt on the part of the purchasing road to partite the road. The Ohio court held that there could be no partition of this property, either under the statute or in equity. The court said: "The statute authorized the sale of an undivided interest in the road between Newark and Columbus by the Central Ohio Company to the Steubenville & Indiana Company, 'if the same could be done without impairing the usefulness thereof' to the Central Ohio Company. This condition was unquestionably inserted in the statute upon consideration of public policy. In the deed of conveyance it was recited that the sale did not impair the usefulness of the section to the vendor company. It was not meant, either by the statute or the deed, that the exclusive use of the section was preserved to the Central Company, but that in the joint use of the section reasonable facilities were and would be afforded the Central Company for conducting its business over this line of the road. In other words, that one half of the capacity of the road was sufficient to supply the necessities of the vendor company. . . . It was the use of an undivided road, not the half of the road when divided, that was thus secured to the vendor; and this, not for a time limited at the pleasure of the purchaser, but for all time. This is inferable from the fact that no further power to alienate existed in either party, save such only as might result from the power to create debts. . . . The legislature did not contemplate or intend that a partition of this property should be made, but, on the other hand, did intend a perpetual joint use of the highway." In the last case the selling road could not make the sale until authorized so to do by the legislature of the state, and when that body authorized the sale it stipulated that it could only be done when the sale did not impair the usefulness of the road. The court held that the partition would impair its usefulness, and that any attempt so to do was in violation of the act, and refused to order it. The above case does not hold that public policy forbids the partition of land on which a railroad is situated, when the railroad company has become a tenant in common with others whose title has never been parted with by them.

In the case of Pittsburgh, C. C. & St. L. R. Co. v. Fish, 158 Ind. 525, 63 N. E. 454, it appears that the town of Winamac, Indiana, undertook to sell a small portion of the roadway of the railroad company for the purpose of satisfying a lien claimed by the town as against the property of the railroad for certain local improvements assessed against same, and which the railway company failed or refused to satisfy, and the court said: "When the public grants a franchise to a railroad corporation, and gives to it the right of eminent domain, it does so upon the theory that benefits will be returned. Hence it is that the public has an interest in the exercise of such a franchise that a court of equity, in the absence of a specific statutory provision, will not suffer disturbed, when private right may find another adequate remedy. Accordingly it has been held that such property of a railroad company as is essential to the operation of the road, and in carrying forward its corporate purpose, will not be ordered sold by piecemeal to satisfy a statutory lien; but in lieu of an order of sale the court will award the plaintiff a personal judgment, to be collected as ordinary judgments at law are collected." The above case was decided as it should have been, but we fail to see that it supports the contention of railroad in this case. No question of the failure of the railway to procure title, in the first instance, to the land on which it had established its line, was involved in the above case. Ample remedy was left the creditor to collect his debt, without destroying the public usefulness of the railroad. The creditor has no vested property rights in the road. He had only the right to pursue such remedies for the collection of his debt as the law allowed, and if ample remedy was afforded him, without disturbing the rights of the public, the creditor had no cause of complaint. But in this case the appellees own an interest in the land itself. They owned it before the road was constructed, and they still own it.

The case of Gooch v. McGee, 83 N. C. 59, 35 Am. Rep. 558, deals with the sale of corporate property under execution. The case merely holds that, when a public corporation acquires real estate for corporate purposes under eminent domain powers, such real estate can only be sold under

execution subject to the performance of the duties and obligations imposed by law on the corporation. The case of *Connor v. Tennessee C. R. Co.* 54 L.R.A. 687, 48 C. C. A. 730, 109 Fed. 931, turns on the same principle of law. Connor attempted to enforce a contractor's lien by selling a specific part of the roadbed of the railway company to which it was claimed the lien attached, and the court held that this could not be done; that the debt must be collected in the ordinary way and by ordinary processes, by the appointment of a receiver, or collected from the toils or income, and, if this should prove insufficient, then the decree should subject the entire property and its franchise to sale as an entirety.

It seems useless to further discuss the authorities relied on by counsel. Not one of them have any application to the facts of this case. All the cases relied on by counsel deal with the collection of a debt after the railroad has acquired title to its roadway in some way known to the law; and when this is once done the railroad acquires the ownership, subject to the burden imposed that it will always be used so as to promote a public use of same.

A railroad corporation does not acquire an absolute title to its roadway. It does not acquire a title that it may sell or dispose of at pleasure, without reference to the right of the public to use same. The ownership of the railroad company of its roadbed is different from that of an individual or a private corporation. The basis on which the grant to it of eminent domain powers rests is the fact that its property is to be used for a public purpose. The right of the public to have it so use its property is imposed on the railroad property the very instant it obtains title, whether the title is obtained by private purchase or through eminent domain proceedings. Because of this fact, and because a judgment creditor can obtain no higher equities in a judgment debtor's property than the debtor himself had, the courts have refused to allow a judgment creditor to destroy the public usefulness of a railroad by levying on a part of its roadway and selling it for the payment of a debt, thus destroying the unity and usefulness of the road. Under the terms of its creation it is bound to run its road for the public use. It cannot rid itself of this burden. It cannot sell its road by piecemeal itself, and no judgment creditor can do so. But no public burden can be imposed on land where the public has never acquired any title, and therefore no right to have it used for the public good. Before the public burden can be imposed on the land, the title must be 39 L.R.A. (N.S.)

acquired. If a railroad locates its roadway on property belonging to an individual, as long as the individual owns the property, the railroad may be dealt with as any other trespasser or tenant in common.

The case of *Beck v. Louisville, N. O. & T. R. Co.* 65 Miss. 172, 3 So. 252, has already settled the question involved in this case so far as this state is concerned. This court, speaking through Judge Campbell, said: "The proposition that a railroad company may build upon the land of one who does not object, and thereby secure the right of way, subject only to liability to his claim for damages, is not maintainable in this state, whatever may be held elsewhere. A parol license may shield from liability for trespass; but it is revocable, and, when revoked, is no longer a protection. The only way to secure the right of way is by grant from the owner, or by condemnation proceedings, or by the statute of limitations. If the road is built without securing the right of way, the owner, who has not precluded himself, may recover damages for the trespass, and may recover the land occupied by ejectment, or may enjoin in chancery the use of the land. The fact that the charter authorizes either the landowner or the company to institute proceedings for condemnation does not in any manner abridge the rights of the landowner. He is not bound to take the initiative as to such proceedings. If a company desires the right of way, it must take steps to secure it. If it does not, it must answer for every invasion of the rights of the landowner."

In the state of Mississippi a fee-simple title to land means absolute and unqualified ownership as against railroads and all persons whomsoever. It means that such land cannot be taken from the owner, except by due process of law and upon due compensation being paid therefor. It means that with this title go all the incidents of the title, one of which is to have it partitioned as against a tenant in common, either in kind or by sale, controlled only by such method of partition as will protect the best interest of all parties; but partition may be had, it matters not who the tenants in common are.

Affirmed.

MISSISSIPPI SUPREME COURT.

R. E. KENNINGTON, Appt.,

v.

T. W. HEMINGWAY et al.

(— Miss. —, 57 So. 809.)

Husband and wife — gift — necessity of record.

A gift of a ring by a solvent man to his

wife does not come within the operation of a statute providing that a transfer or conveyance of goods or chattels between husband and wife shall not be valid as against any third person unless the transfer or conveyance be in writing, properly acknowledged and recorded.

(February 12, 1912.)

APPPEAL by plaintiff from a decree of the Chancery Court for Hinds County in defendants' favor in a suit brought to subject a ring belonging to Mrs. Hemingway to the payment of a debt of her former husband. Affirmed.

While T. W. Hemingway and the woman whom he married were living together as husband and wife he gave to her a diamond ring. The parties were subsequently divorced and she pledged the ring for a loan. Kennington obtained a judgment against Hemingway, and sought to subject the ring to the satisfaction of the judgment, on the theory that not having been registered, the gift was void under the statute.

Further facts appear in the opinion.

Messrs. Mayes & Longstreet for appellant.

Messrs. Watkins & Watkins and John B. Ricketts for appellees.

Smith, J., delivered the opinion of the court:

One of the questions presented by this record, and which, if answered in the affirmative, will dispose of the whole case, is this: Is a gift by a husband to the wife of a personal ornament—in this instance, a diamond ring—"valid as against any third person," when such gift is not evidenced by a written instrument, acknowledged and recorded as provided by § 2294 of the Code of 1892, the same being § 2522 of the Code of 1906? In the case at bar the ring was given to the wife eight years prior to the institution of this suit, at a time when the husband was solvent, and without any intention on his part of defrauding anyone. This section is as follows: "A transfer or conveyance of goods and chattels, or lands or any lease of lands, between husband and wife, shall not be valid as against any third person, unless the transfer or conveyance be in writing and acknowledged and filed for record as

Note.—A diligent search has failed to disclose any other case upon the question presented.

As to gifts of personalty between husband and wife, see note to *Barnum v. LeMaster*, 69 L.R.A. 355; and as to right of man to dispose of wife's ornaments and apparel, see note to *Farrow v. Farrow*, 11 L.R.A. (N.S.) 389.
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a mortgage or deed of trust is required to be; and possession of the property shall not be equivalent to filing the writing for record, but, to affect third persons, the writing must be filed for record." The words "goods and chattels" are ordinarily broad enough to cover all personal property; and if the statute is to be interpreted literally, all gifts of personal property, including necessary wearing apparel and ornaments for the person, made by a husband to the wife, must be by a written instrument, acknowledged and recorded; and in that event the fact that the wearing apparel of every person is exempt from execution or attachment would not aid the wife, for, as against any third person, such wearing apparel would be dealt with as if it remained the property of the husband. If this is the meaning of the statement, its absurdity is manifest, and that the legislature intended such result is inconceivable.

After the enactment of this statute it still remained, as it had always been, the legal and moral duty of the husband to support his wife in a way suitable to her situation and his condition in life. In order to do this he must, among other things, give her necessary wearing apparel, and ought, so far as his means will permit and within the limits of a wise economy, to give her such personal ornaments as good taste and the usage of the society in which she moves demand. If the innumerable gifts which he must make her in discharging this duty, if the transfer of each article of clothing and each personal ornament, must be by a written instrument, acknowledged and recorded, the statute requiring it would not only be an absurd one, but would be unreasonable, and would result in such great inconvenience and expense as to be intolerable. Legislators must be presumed to be reasonable and sane men, "and to intend the natural, direct, and probable consequences of their acts, that these shall not be absurdly or unreasonably construed, and therefore that they intend to avoid absurdities and nonsense." 4 Hughes, *Grounds and Rudiments of the Law*, 1104. If, therefore, wearing apparel and personal ornaments can be, consistent with the rules of construction, excluded from the operation of this statute, it becomes our duty to do so. *New Orleans, J. & G. N. R. Co. v. Hemphill*, 35 Miss. 17; *Ingraham v. Speed*, 30 Miss. 410; *State Bd. of Edu. v. Mobile & O. R. Co.* 72 Miss. 236, 16 So. 489; 2 *Lewis's Sutherland Stat. Constr.* 2d ed. §§488-490, and authorities there cited; 36 Cyc. 1108. At the same time, we must bear in mind that the enactment of a wise or a foolish statute is for the determination, not of the courts, but of the lawmakers; and

* when the intention of the lawmakers is clearly understood, the statute must be enforced as written; it matters not to what absurd results such enforcement may lead.

Human language is not a perfect vehicle for conveying thought, and it frequently happens that words used have a broader or narrower meaning than that intended by the person using them. One of the maxims of the common law, therefore, is *verba intentioni debent inservire*. (Words are to be governed by the intention.) As was said by this court in *State Bd. of Edu. v. Mobile & O. Co.* supra: "It is familiar learning that, in the construction of statutes, courts chiefly desire to reach and know the real intention of the framers of the law; and, reaching and knowing it, then to adopt that interpretation which will meet the real meaning of the legislature, though such interpretation may be beyond or within, wider or narrower than, the mere letter of the enactment." The courts have repeatedly given the words "goods, wares, and merchandise," as they appear in various statutes, a broad or restricted meaning, according to the context and the evident purpose of the statutes. See authorities cited in 20 Cyc. 1272; 14 Am. & Eng. Enc. Law, 1079. The object of the statute was to prevent the perpetration of frauds by means of pretended transfers of property between husband and wife. *Gregory v. Dodds*, 60 Miss. 549. The number of frauds that could be perpetrated by means of pretended gifts by husbands to wives of wearing apparel and personal ornaments is so infinitesimal in comparison with the number of such gifts that must be made by husbands in the discharge of the duty to support their wives, and the inconvenience, expense, and absurdity of evidencing such gifts by a written instrument, acknowledged and recorded, is so great, that the conclusion is irresistible that the legislature did not intend to include such gifts within the meaning of the words used in the statute.

In *Reg. v. Clarence*, L. R. 22 Q. B. Div. 65, it was said by Lord Coleridge that "in such a matter as the construction of a statute, if the apparent logical construction of its language leads to results which it is impossible to believe that those who framed or those who passed the statute contemplated, and from which one's own judgment recoils, there is in my opinion good reason for believing that the construction which leads to such results cannot be the true construction of the statute."

The question propounded in the beginning of this opinion must therefore be answered 39 L.R.A. (N.S.)

in the affirmative, and the decree of the court below must be affirmed.

Suggestion of error overruled, March 11, 1912.

MISSOURI SUPREME COURT.

DES MOINES & MISSISSIPPI LEVEE DISTRICT NO. 1, Resp't.,

v.

CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY, Appt.

(— Mo. —, 145 S. W. 35.)

Action — levee district — suit to include property.

1. Entitling a proceeding to include property in a levee district, in the name of the district, which is a public corporation, is not prevented by a statutory provision that

Note. — Assessment for improvements made before property was included within the improvement district.

While no other case, directly in point has been found, the holding in *DES MOINES & M. LEVEE DIST. NO. 1 v. CHICAGO, B. & Q. R. Co.* seems to be clearly correct, that property is not liable to assessment for improvements made and paid for before it was included within the improvement district. As said in *DES MOINES & M. LEVEE DIST. NO. 1 v. CHICAGO, B. & Q. R. Co.*, the assessment of property added to an improvement district, for improvements made and paid for before its addition, would be an unauthorized taking of private property.

In *Smith v. Willis*, 78 Miss. 243, 28 So. 878, and *Holder v. Bond*, — Miss. —, 29 So. 769, however, it was held that land which has been transferred by statute from one county to another, the latter of which is afterward put in a certain levee district, is liable to levee taxes, although while it was in the former county it was in no levee district, and was free from levee taxes; and although it is in fact damaged, rather than benefited, by the levee.

And where a city, under its charter, cannot make an assessment for a street improvement until the completion of the improvement and the ascertaining of the cost thereof, property which was outside the city limits when a street improvement was begun, being on one side of the street, along the center of which the city line ran, but which was taken into the city while the improvement was being made, and before its completion, and was in the city at the time the improvement was completed and accepted, is subject to assessment for the improvement. *Re Hollister*, 96 App. Div. 501, 80 N. Y. Supp. 518, affirmed without opinion in 180 N. Y. 518, 72 N. E. 1143; *Hollister v. Rochester*, 41 Misc. 559, 85 N. Y. Supp. 147, affirmed in 96 App. Div. 501, 80 N. Y. Supp. 518. A. C. W.

it shall be filed by the board of supervisors of the county.

Levee district — inclusion of railroad — validity.

2. Including railroad property in a levee district does not violate its charter rights, on the theory that the railroad company was not organized to reclaim overflowed lands.

Tax — improvement district — inclusion of property — liability for prior work.

3. Property taken into a levee district cannot be assessed for work done and paid for by the assessment of property within the district prior to the taking in of the new property.

(February 29, 1912.)

A PPEAL by defendant from a judgment of the Circuit Court for Clark County in plaintiff's favor in a proceeding for the inclusion of defendant's property in the plaintiff levee district. Reversed.

The facts are stated in the opinion.

Messrs. O. M. Spencer, F. T. Hughes, and Palmer Trimble for appellant.

Mr. C. T. Llewellyn for respondent.

Graves, P. J., delivered the opinion of the court:

The plaintiff, the Des Moines & Mississippi Levee District No. 1, under its corporate name, filed its petition in the circuit court of Clark county August 24, 1908, asking that the defendant railway company be summoned into court to show cause, if any it had, why its roadbed and right of way should not be included in and made part of the levee district, and be assessed with such benefits as it had received, or might thereafter receive, by reason of the improvements made and to be made by the said levee district. The petition was filed under the act of 1907, and that portion relating to the course of proceedings reads: "Before the proceedings had in this section shall be had, the board of supervisors shall file in the office of the clerk of the circuit court of the county in which such levee district is, or may be located, a petition reciting the organization of such levee district, the location of such railroad or railroads within its limits, the improvements made or to be made, as shown by the report, maps, plans, and profiles by the topographical survey of the topographical engineer, and that the improvements already made or proposed to be made will be of material benefit to such railroad company or corporation, and asking that such railway corporation or company be summoned into court to show cause why such railroad right of way, roadbed, or track belonging to or owned by such railway company or corpo-

ration should not be included in and made a part of such levee district, and be assessed with such benefits as will or have accrued to it by reason of the improvements made or proposed to be made. Such railway company or corporation, after having been duly summoned, shall, on or before the third day of the term of court to which it may have been summoned to appear, file its objection or objections in writing, if any it may have, why it should not be included in and made a part of such levee district, and be assessed with benefits; and all such objections shall be heard by the court in a summary manner, without any unnecessary delay." Laws of 1907, p. 336. The petition filed follows the language of the statute. The cause, upon the petition of defendant, was removed to the Federal court, but upon motion of the plaintiff was remanded to the state court.

The many points made appear fully in the answer, which reads:

"Now comes the defendant, Chicago, Burlington, & Quincy Railroad Company, a corporation organized and existing under the laws of the state of Illinois, that, for answer and objections to the matters and things stated in plaintiff's petition herein, stated that it has no knowledge or information sufficient to form a belief as to the allegations in plaintiff's petition contained, and therefore denies each and every one of said allegations therein contained.

"For further answer defendant states that heretofore the defendant in this cause filed a petition and bond under the provisions of the act of Congress for the removal of causes from the state to the Federal courts. Said petition prayed to have said cause removed to the circuit court of the United States, northern division of the eastern district of Missouri, and that defendant did file papers in said United States court, as provided in the order of removal, and that thereafter said United States court, upon the allegations of plaintiff and by order of court, remanded said cause to this court, to all of which actions this defendant objected, and excepted to the rulings of said court, and herein renews its exceptions, and avers that the cause was properly removed from this court to said United States circuit court, and that the cause upon said removal vested in said United States court.

"For further answer, this defendant says that the alleged act of the legislature of this state, known as § 8365a of the legislature of Missouri of 1907, is null and void as against the rights of this defendant in the premises herein, in this: That said act attempts to divest this defendant of its vested right in the premises, and to charge

this defendant with a debt of the plaintiff corporation long since created by said corporation upon the property within its jurisdiction, and has been, in whole or in part, paid by the said corporation. That said act deprives this defendant of its rights under the laws of this state existing at the time said drainage and levee district was formed, in this: That defendant had no right to participate in or become a member of said levee district, nor have its property assessed with such equal proportion of alleged benefits as were necessary for the purpose therein, in proportion and equally with all other owners of land in said levee district.

"Answering further, defendant says that said act attempts to make this defendant a part of said district without its consent, and without any right, under the laws when said district was formed, to participate and become a part of said district when the same was being formed.

"Defendant, further answering, says that the laws relative to plaintiff's district give no authority to levy and collect taxes, other than for the construction and maintenance of such levee district, and that, if defendant shall be assessed as prayed for in plaintiff's petition, the money so collected upon said assessment would not be thus collected for the construction or maintenance of said levee district, but for the sole and only use of the plaintiff herein, as profit or excessive money in its hands.

"Further answering, defendant says that said act is special and class legislation, and is void, within the Constitution of this state, and against the defendant in the premises herein. That said act is null and void, within the meaning of the 14th Amendment to the Constitution of the United States, and seeks to take property of this defendant for the use of plaintiff without due process of law.

"Further answering, defendant says that the acts of plaintiff herein seek to deprive this defendant of the equal protection of the laws, within the meaning of the 14th Amendment to the Constitution of the United States.

"Further answering, defendant says that plaintiff seeks, by judgment and order of this court, to assess defendant for benefits which, it is alleged, defendant receives by said levee district, when, in law and in fact, it is the duty of the board of supervisors to appoint commissioners, disinterested freeholders of the county, and assess benefits accruing to each piece of land, in whole or in part, with the name of the owner thereof.

"Having fully answered and stated defendant's objections herein, this defendant

asks to be dismissed, with its costs in this behalf laid out and expended."

Reply was general denial. The cause was tried and decree entered for the plaintiff. The material findings and the decree proper read:

"That the right of way, roadbed, and embankments owned by defendant corporation, occupied and used for railroad purposes, are within the limits of plaintiff levee district. That the board of supervisors of plaintiff levee district have filed in the office of the clerk of this court a petition reciting the organization of plaintiff levee district, the location of defendant's railroad within its limits, the improvement made or to be made, as shown by the report, maps, plans, and profiles by the topographical survey of the topographical engineer, and the improvements already made and proposed to be made will be of material benefit to defendant railroad corporation, and asking that such railway corporation be summoned into court to show cause why such railroad right of way, roadbed, and track owned by defendant corporation should not be included in and made a part of plaintiff levee district, and be assessed with such benefits as have or will accrue to it by reason of the improvements made or proposed to be made. That the improvements already made and to be made are and will be of material benefit to defendant. That all that part of defendant's right of way, roadbed, and track where the same crosses the west line of section thirty-three (33), township sixty-five (65), range six (6) west, in Clark county, Missouri, and running thence southeast, east, and northeast to the east line of section five (5), township sixty-four (64), range five (5) west, and from the crossing of Clay and Pine streets, in the old town of Churchville, now called Alexandria, south and southwest to Gridley street, in Hill's addition to the old town of Churchville, now called Alexandria, all in Clark county, Missouri, is within the limits of plaintiff levee district.

"It is therefore ordered and adjudged by the court that the objections of defendant filed herein be, and they are hereby, overruled, and that the defendant's railroad, right of way, roadbed, track, and embankments owned by defendant railroad company, within the limits of plaintiff levee district, be and the same are included and made a part of plaintiff levee district, and included within said levee district."

From such decree, defendant has appealed, and urges all of the divers matters set out in its answer. The evidence is brief and largely formal, and can best be

taken with the discussion of the points urged for reversal.

1. The question of jurisdiction urged in the answer is not specially urged in the brief here. The Federal court has declined jurisdiction, and the state court has proceeded to judgment. Counsel, in oral argument, stated that the question was injected in the answer, to the end that it might be urged in the United States Supreme Court, should the case reach that court. We shall not discuss the authorities on this question. In our judgment, there was no error upon the part of the state court in proceeding under the facts in this case.

2. The defendant next assails the petition, and urges that the district itself has sued, when the action should have been instituted in the name of the board of supervisors. The act of 1907 (Laws of 1907, p. 336) was an act amending article 7 of chapter 122, Rev. Stats. 1899. The amendment consisted in adding a new section, to be known as § 8365a. This section, so far as it relates to the procedure, we have set out in the statement. To more fully understand the proceedings, the first part of the section had better be set out. That portion reads: "If there is or shall be within the limits of any levee district now, or hereafter organized under this article, any right of way, roadbed, or embankment belonging to or owned by any railway company or corporation, occupied and used for railroad purposes, that is or will be benefited by the construction of a levee or levees, dykes, embankments, ditches, drains, or other improvements, the same shall be assessed with such benefits, and such assessment shall be made in the manner and by the means provided in § 8365 of this article; and the board of supervisors shall appoint an additional board of commissioners, three in number, possessing the same qualifications as prescribed in said § 8365, who shall proceed as therein provided; and such assessment shall be estimated by the mile instead of by the acre."

Following this is the language quoted in the statement. This levee district had been organized some years prior to the institution of the present action. It will be observed that the law reads: "Before the proceedings had in this section shall be had, the board of supervisors shall file in the office of the clerk of the circuit court of the county in which such levee district is or may be located, a petition," etc. The word "proceedings" hereinabove used, evidently refers to what precedes it in this section, which language of the section we have hereinabove just quoted. That proceeding is: "And such assessment shall be made in the manner and by the means provided in § 39 L.R.A. (N.S.)

8365 of this article, and the board of supervisors shall appoint an additional board of commissioners, three in number, possessing the same qualifications as prescribed in said § 8365, who shall proceed as therein provided; and such assessment shall be estimated by the mile instead of by the acre." In other words, taking the whole section, it appears that there first must be action by the circuit court to determine whether or not the railroad property can be assessed for benefits, and, if this be found in the affirmative, then the other proceeding of actual assessment takes place.

Now, with this view of the situation, can the levee district, in its own name, properly present the petition to the circuit court asking that court to determine the fact whether the property of the railroad company is subject to an assessment of benefits? Or must this petition be in the name of the board of supervisors? The law says that the board of supervisors shall file the petition; but it does not say how such petition shall be entitled. By the law, these districts, when organized, are by the court declared and decreed to be public corporations of the state. Rev. Stats. 1899, §§ 8362 and 8253, now Rev. Stats. 1909, §§ 5704 and 5499. It will be seen that the levee act borrows much from the drainage act by express reference thereto. In the case at bar, this public corporation is the real party interested. The board of supervisors are but the agents of the corporation. They are not made trustees for the corporation. We therefore are of the opinion that the suit was instituted properly. But if it were not, this matter was not challenged below either by demurrer or answer. The case proceeded there as if the proper parties were in court, and it should so proceed here. The question is raised here for the first time.

3. It is also urged that it is violative of charter rights to require a railroad company to participate in the reclamation of lands; that to so require a railroad to help maintain a levee district would be to require it to do things not provided for in its charter. As stated in the oral argument, railroads were not organized to reclaim overflow lands. We are not impressed with this contention. The assessments of benefits are justified under the police power of the state, rather than the taxing power. The theory is that the general welfare is promoted by this reclamation of overflow lands. The term "general welfare" includes the public health, as well as other things which are the special wards of the police power of the state. We see no reason why the police power may not reach the corporation the same as the individual, and this, too,

without violating constitutional rights. As to whether the corporation's property will be benefited is a question of fact to be determined; but if such fact is determined, and it is properly held that the corporation's property will be benefited, the assessments of benefits will not deprive it of its property without due process of law, or be violative of any other constitutional provisions. It must be borne in mind that the sole question here involved is whether or not the finding that defendant's property has been or will be benefited is proper. The circuit court does not assess benefits. That is done later. Of course, if the law which authorizes the circuit court to determine that fact is unconstitutional, that would end this controversy; but we are not so impressed. The law, as above indicated, seems to be a just law, and violative of no constitutional provisions. The law simply imposes upon the corporation what it imposes upon the individual. But, as said, this imposed duty has its origin in the police power of the state. Nor do we think this holding in any way contravenes what was said in *Squaw Creek Drainage Dist. v. Turney*, 235 Mo. 80, 138 S. W. 12. This contention is therefore overruled. This, of course, only applies to the general proposition that a law authorizing the property of a railroad company to be brought into a levee district, if its property is in fact benefited, is constitutional. Other points are urged as to this particular law, which we will discuss later.

4. But it is urged that, although it be conceded that the legislature, in the exercise of the police power of the state, could pass a law which would subject the property of railroads to the assessments of benefits in levee and drainage districts, yet this particular law is bad, because it not only authorizes the bringing of the railroad property into the levee district after the district has been formed, but authorizes the assessments of benefits which had theretofore accrued to its property by reason of the work done, as well as the benefits to accrue from work to be thereafter done. This is the serious question in the case. The law speaks of assessing the property with "such benefits as will or have accrued to it by reason of the improvements made or proposed to be made." The judgment in the case says "that the improvements already made and to be made will be of material benefit to defendant." Both under the law and the judgment, the property might be assessed with benefits for work done before the property was included in the district. These benefits are only assessed to pay for the improvements. The closing part of the decree in this case makes

the property of defendant a part of the levee district. In fact, the decree covers but two points: (1) That the property has been benefited by the work already done, and will be benefited by work to be done; and (2) that such property is made a part of the levee district. Now, the question is whether or not that part of the law can stand which authorizes the assessment of benefits for improvements made prior to the time defendant's property became a portion of the levee district. If the law is bad in this regard, the judgment is likewise bad, because it follows the statute, and under it the commissioners appointed would, no doubt, assess for both the benefits by reason of improvements already made, as well as the benefits for improvements to be made.

For the plaintiff, it is urged that the property of the defendant was already in the district, and the new law only changed the method of assessment from the acreage plan to the mileage plan. This contention is not borne out by the record. In the first place, the judgment in this case decrees "that the objections of defendant filed herein be, and they are hereby, overruled, and that the defendant's railroad, right of way, roadbed, track, and embankments owned by defendant railroad company within the limits of plaintiff levee district be and the same are included and made a part of plaintiff's levee district, and included within said levee district." The decree therefore shows that for the first time, by this proceeding, the property of defendant is made a part of the levee district. In oral argument, it was stated that the defendant was originally made a party to the proceeding, and that such fact was shown by the record. The only thing which we find is the judgment above discussed, and a certain admission made of record, which thus reads: "By Mr. Llewellyn: I offer the articles of incorporation of the plaintiff, which is a record of this court. Admitted in evidence in words and figures as follows: 'The respondent herein admits that the articles of incorporation referred to show that the plaintiff, respondent company, was organized as such drainage district in 1904, and that it built its levees and drainage districts in the year 1905, and that appellant makes no issue of law or fact on that question.' The further agreed statement of facts was then made and entered of record in the court below, in words and figures as follows: 'It is agreed that map of the Des Moines & Mississippi River Levees District, showing the location of drainage ditches, is in evidence, which said map is called 'Exhibit 1;' that, the drainage ditch spoken of by the witness Snively starts a

mile and a half northwest of the railroad, and runs southeasterly to the railroad right of way on the north side of the railroad right of way, and then parallel with the right of way east about 2 miles, then turns and crosses the right of way and the railroad track and goes south direct to Fox river; that this drain collects water from the northwest of the railroad, where it starts, and carries it down in said direction to Fox river; that the drain has an average width of 20 feet at the top and 8 feet deep."

This falls far short of showing that the defendant was a party to the original proceeding, if that be a material question in the case. So that, under this record, we are driven to answer the question, Is that portion of this law which purports to authorize the assessments of benefits for work already done valid and binding? If so, the judgment nisi may be right, if right on the facts shown; and, if not so, then it is erroneous. The exact question now confronting us was not discussed in either of our recent cases. *Squaw Creek Drainage Dist. v. Turney*, 235 Mo. 80, 138 S. W. 12, and *Re Little River Drainage Dist.* 236 Mo. 94, 139 S. W. 330.

As said in the preceding paragraph, these drainage and levee districts are organized by the state in the exercise of its police powers. In *Morrison v. Morey*, 146 Mo. loc. cit. 561, 48 S. W. 633, this court said: "It is a public political subdivision of the state, which the state has the power to create, under its police powers, and as such subdivision it exercises the prescribed functions of government in the district." And in the same case (146 Mo. loc. cit. 564), it is said: "But, while it is a public subdivision of the state, and not a private corporation, it does not follow that the money to be raised from the landowners to carry out the objects intended is a tax. It is an assessment which is justified by the benefit, public and private, conferred. The cost of the abatement of nuisances, for the construction of sewers, or for the improvement of a street, may be assessed against the property benefited, notwithstanding the public and the owner are both interested. As a tax it would be unconstitutional, because not uniform (Const. § 3, art. 10), and because not in proportion to the value of the property (Const. § 4, art. 10), and because it is prohibited by the limitations of § 12 of article 10 of our Constitution; but being an assessment of benefits and in no sense a tax, it is a constitutional exercise of the power of the state. *Lockwood v. St. Louis*, 24 Mo. 20; *Garrett v. St. Louis*, 25 Mo. 505, 69 Am. Dec. 475; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495, 72 Am. Dec. 276; *St. Louis, use of Creamer v. Clemens*, 36 Mo. 467; *Uhrig v. St. Louis*, 44 Mo. 458; 39 L.R.A. (N.S.)

Sheehan v. Good Samaritan Hospital, 50 Mo. 155, 11 Am. Rep. 412; *Southern Hotel Co. v. St. Louis County Ct.* 62 Mo. 134; *Farrar v. St. Louis*, 80 Mo. 379; *St. Joseph use of Gibson v. Owen*, 110 Mo. 445, 19 S. W. 713; *Clinton use of Thornton v. Henry County*, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494; *Roosevelt Hospital v. New York*, 84 N. Y. 108; *Duke v. O'Bryan*, 100 Ky. 710, 39 S. W. 444, 824; *Nugent v. Mississippi Levee Comrs.* 58 Miss. 197; *State ex rel. Baltzell v. Stewart*, 74 Wis. 620, 6 L.R.A. 394, 43 N. W. 947; *Dill. Mun. Corp.* 4th ed. § 755. Assessments for the construction of levees to protect from overflow may be and usually are levied on lands bordering on the stream of water from which the danger is anticipated, and are properly benefits, as contradistinguished from taxes; and laws authorizing them are constitutional. *Crowley v. Copley*, 2 La. Ann. 329; *Sessions v. Crunkilton*, 20 Ohio St. 349; *Yeatman v. Crandall*, 11 La. Ann. 220; *Wallace v. Shelton*, 14 La. Ann. 503; *Bishop v. Marks*, 15 La. Ann. 147; *McGehee v. Mathis*, 21 Ark. 40; *Jones v. Boston*, 104 Mass. 461; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495, 72 Am. Dec. 276; *Hagar v. Yolo County*, 47 Cal. 231; *People v. Hagar*, 52 Cal. 183; *People ex rel. Griffin v. Brooklyn*, 4 N. Y. 430, 55 Am. Dec. 266; *Sears v. Cottrell*, 5 Mich. 251; *Emery v. San Francisco Gas Co.* 28 Cal. 345."

This case has been continuously followed by this court, and it is cited even in the late *Turney Case*, supra. But, grant it to be true that we have constitutional power to incorporate levee districts, and constitutional power to include railroad properties therein, and constitutional power to assess benefits as against such railroad properties to pay the costs of the work, does that authorize the legislature to direct the assessment of benefits for work already done and paid for before the property is taken into the district? We think not. It may be that, to the extent that the improvements had not been fully paid for, the benefits could be assessed, on the theory that, as to that unpaid balance, all property legally in the district prior to payment should pay for the benefits accruing by reason of the work done in anticipation of the fund; but we shall not go further. We should, at least, limit the law to benefits to accrue after the lands are brought into the district, or benefits accruing, by reason of work done, at the time the land is taken in, but not yet paid for by an assessment of benefits on the whole district, including the added lands. In this case, the issuance of bonds should not be construed as being payment for the work. The payment of the bonds would be the payment contemplated.

These assessments of benefits are made to pay for improvements as they progress, and not to repay for improvements already made and paid for by other parties. The record does not disclose the exact status of this levee district; but that portion of the law and the judgment which authorizes the assessment of benefits for improvements already made and paid for is beyond the pale of the constitutional power of the legislature. In our judgment, the legislature cannot authorize the bringing in of new lands in a levee district, and say that it must pay benefits for work already done and paid for by the district as formerly constituted. As we have seen, it can authorize the bringing in of new territory, and it can authorize the assessments of benefits to pay for the improvements to be made. But, when it goes to compelling benefits for improvements already paid for, the law goes a step too far. Such act is the unauthorized taking of private property. It is the taking of private property to recompense or repay the district for improvements made. It is not the assessment of benefits for the doing of an advantageous act toward the property, but for the repayment of an expenditure already made. The covering of an existing debt on the district for improvements made before the property is taken in can only be justified on the theory that the improvements are not, in law, considered as made until paid for by assessments. To hold that the assessments of benefits may be in proportion to the outstanding debt and the proposed new improvements is, in our mind, going to the limit, and we will not go further.

From what is said, it follows that the judgment nisi is too broad. Such judgment is therefore reversed, and the cause remanded for further procedure in accordance with the views herein expressed.

All concur.

MISSOURI SUPREME COURT.
(Division No. 1.)

AUGUST BUSSMEYER, Resp't.,
v.
CHARLES JABLONSKY, Appt.

(— Mo. —, 145 S. W. 772.)

Easement — grant with visible easement appurtenant — necessity.

A conveyance by metes and bounds of a lot with buildings thereon does not carry with it by implication the right to the use of a hallway on adjoining property of the grantor, to reach the rear and upper stories of the building conveyed, if the building is

located upon a street with an alley in the rear, so that the use of the hallway is not reasonably necessary to the full enjoyment of the property conveyed, although it had been used for the purpose claimed by the common owners of the property for more than thirty years.

(February 29, 1912.)

A PPEAL by defendant from a judgment of the Circuit Court for the City of St. Louis in plaintiff's favor in a suit brought to enjoin the obstruction of a hall which was alleged to be appurtenant to the plaintiff's property. Reversed.

Statement by Graves, P. J.:

At one time the Connecticut Mutual Life Insurance Company was the owner of all the property discussed and involved in this suit. April 23, 1903, plaintiff acquired from said insurance company property described in the deed thus: "A lot of ground in block No. 1,744 of said city of St. Louis, having a front of one hundred forty (140) feet and five (5) inches on the south side of Salisbury street by a depth of one hundred and twenty-five (125) feet to an alley fifteen (15) feet wide, and known as lots eight (8), nine (9), ten (10), eleven (11), and twelve (12) of Cope's subdivision of said block 1,744; 'together with the improvements on said lot 8. Subject to a lease to said second party, expiring May 1, 1907.'"

Plaintiff at the time of the purchase was a tenant of the insurance company under a written lease which contained an option to purchase. In this lease the lands are described thus: "A lot of ground fronting one hundred and forty feet and five inches (140' 5") on the south line of Salisbury street in block No. 1,744 of the city of St. Louis, Missouri, being lots Nos. 8, 9, 10, 11, and 12 in said block, together with a certain two-story brick building known as Nos. 2,518 and 2,520 Salisbury street, situated on said lot number 8."

In August, 1907, the defendant acquired by deed from the said insurance company lands thus described: "All of lots number five (5), six (6), and seven (7), of Cope's subdivision, in city block No. 1,744 of said city of St. Louis, having an aggregate

Note.—The general question as to whether a grant severing a tract of land with an apparent benefit existing will carry with it an easement by implication is covered by a note to *Rollo v. Nelson*, 26 L.R.A.(N.S.) 315.

As to whether there is a way of necessity where other possible modes of access exist, see notes to *Corea v. Higuera*, 17 L.R.A.(N.S.) 1018, and *Doten v. Bartlett*, 32 L.R.A.(N.S.) 1075.

frontage of seventy-nine (79') feet, six and one-half (6½") inches on the south line of Salisbury street, by a depth southwardly, between parallel lines, of one hundred and twenty-five (125') feet, more or less, to alley, together with all improvements thereon, known as Nos. 2,510, 2,512, 2,514, and 2,516 Salisbury street. Bounded north by Salisbury street, south by alley, east by lot No. 4 of said subdivision and block, and west by property now or formerly, of A. Buismeyer."

The deeds from the insurance company to each of the parties contained the usual covenants of warranty. All the property fronted north on Salisbury street. The insurance company acquired title by a trustee's deed in November, 1877. On lot No. 8, belonging to plaintiff, was a two-story brick building, and there was likewise a two-story building on lot No. 7, belonging to defendant. Lot No. 8 lies to the west of lot No. 7.

Plaintiff by his petition avers: "That the said land of the defendant and the said lot No. 8 belonging to plaintiff are improved by two-story brick store and dwelling buildings. That the said buildings were erected by the predecessor in title of the said life insurance company, and said buildings are all attached. That the building upon plaintiff's said lot is numbered 2,518 and 2,520 Salisbury street. That between plaintiff's said building No. 2,518 Salisbury street and defendant's building No. 2,518, situated upon part of lot No. 7, is a hallway 4 feet in width; the second story of said building No. 2,516 Salisbury street extending over and covering the said hallway, and the joists of said building resting in the east wall of plaintiff's said building No. 2,518 Salisbury street. That for more than thirty years before the conveyance of the lots hereinbefore described to plaintiff, the said hallway between said buildings had been by the said Connecticut Mutual Life Insurance Company and its predecessors in title and by their tenants occupying the said building No. 2,518 Salisbury street always used as an entrance to the rear portion of said lot and the second story of said building. That, during all of said time, the rear yards of the said buildings Nos. 2,516 and 2,518 Salisbury street were divided by a fence upon a line which was a prolongation of the western wall of said building No. 2,516 Salisbury street and the eastern line of said hallway; the said hallway and yard immediately back thereof being thus for more than thirty years before plaintiff acquired said property used in connection with the said building No. 2,518 Salisbury street. That the said hallway is

the only means of ingress and egress to and from Salisbury street to the rear part of plaintiff's said lot and the second story of the said building No. 2,518 Salisbury street, except that the same might be reached by passing through the lower story of said building. That the said entrance to said property of plaintiff is and always has been a valuable adjunct and appurtenance to the said property. That by the manner of construction of said buildings and the use thereof by plaintiff's and defendant's predecessors in title, as aforesaid, the said former owners did impose upon the said lot No. 7, now owned by defendant, to the extent that the same is occupied by said hallway, a servitude in favor of the said lot No. 8 and the building thereon owned by plaintiff for the use of said hallway as an entrance to said lot No. 8, as aforesaid, which easement and servitude passed to plaintiff by the conveyance from said Connecticut Mutual Life Insurance Company to him as aforesaid. That said servitude was in effect at the time of the severance of ownership by the conveyance from the said Connecticut Mutual Life Insurance Company to plaintiff, as aforesaid. That the said use of said property was apparent, and defendant, who had occupied the said property now owned by him, as a tenant for some years before he purchased the same, was familiar therewith and acquiesced therein. That when defendant purchased said lots Nos. 5, 6, and 7 from the said Connecticut Mutual Life Insurance Company as hereinbefore alleged, he took the same subject to the said easement and in all things fully recognized the same until on or about the 2d day of July, 1908, when defendant, against the protests of plaintiff, did forcibly remove the said fence, and did erect a new fence, extending back from the said building, and coincident with the western line of said hallway, but did leave an opening or gateway in the said fence immediately next to plaintiff's rear wall, whereby entrance to defendant's yard from said hallway could be had. That defendant, on the 5th day of September, 1908, did, against the protest of plaintiff, close the said opening by nailing boards across the same, whereby entrance to plaintiff's land from said hallway has been completely cut off, and refused, although requested so to do by plaintiff, to remove the said obstruction and allow plaintiff and his tenants the use of said hallway. That defendant threatens to keep the said fence closed and to wholly and forever deprive plaintiff and his family and tenants from using the said hallway as an entrance as aforesaid."

Prayer was for a mandatory injunction upon defendant to remove said obstruction,

and to thereafter restrain defendant from obstructing said passageway, or denying to plaintiff the use thereof.

The answer makes many admissions, and, as it is not long, had better be made a part of the statement. Such answer reads: "Now comes the defendant in the above-entitled cause and for a return to the order to show cause why an injunction should not be granted as prayed for in plaintiff's petition, issued herein on the 8th day of September, 1908, states: (1) Said petition does not state facts sufficient to constitute a cause of action against this defendant. (2) That petition filed herein does not state facts sufficient to entitle plaintiff to the relief prayed for or for any relief in a court of equity. (3) And for a further return to the order to show cause herein the defendant admits that plaintiff is, and at the times in said petition stated was, the owner of the following described real estate, to wit: Lots Nos. 8, 9, 10, 12, of Cope's subdivision of said city block No. 1,744 in said city and state, but denies that the same has a frontage of 140 feet and 5 inches on the south side of Salisbury street, but, on the contrary, states that it has a frontage of but 139 feet and 10 inches on the south side of said street. Defendant further admits that the property was acquired by purchase from the Connecticut Mutual Life Insurance Company, and under deed and duly recorded as set out in plaintiff's petition. Defendant further admits that he is, as set out, the owner of lots Nos. 5, 6, and 7 of said city block No. 1,744 and fronting 79 feet 6½ inches on Salisbury street, having likewise acquired the same from the said common grantor, the Connecticut Mutual Life Insurance Company, under deed and duly recorded as set out in plaintiff's petition. Defendant further admits that the said land of plaintiff and defendant is improved with a two-story attached brick building, as set out in plaintiff's petition, but denies that there is a hallway between said buildings of plaintiff and defendant, as set out in plaintiff's petition, but, on the contrary, states that whatever hallway there may be on the said property is a hallway through defendant's building, and wholly lying upon defendant's property, and that plaintiff has no interest either by deed or by prescription or by any other title of any nature whatever in any such hallway or passage. Defendant further states that for a period of more than thirty years preceding the time at which plaintiff or defendant acquired title to the above-described property both tracts were owned by the common grantor, the Connecticut Mutual Life Insurance Company, and that any use of said

hallway by any tenants other than those of No. 2,516 Salisbury street, the same being defendant's property, was permitted by the said Connecticut Mutual Life Insurance Company for its own benefit in renting to its tenants, and that during all of said period the same was not used adversely to the said Connecticut Mutual Life Insurance Company. Defendant states that plaintiff holds title to the above-described property by virtue of a warranty deed of the said Connecticut Mutual Life Insurance Company, and that said deed carries with it no rights of any nature whatever in defendant's property, and that defendant's property is likewise secured from the said Connecticut Mutual Life Insurance Company by a warranty deed in fee simple, without any easement of any nature whatever in favor of plaintiff's property or any other property. Defendant further states that in any use of the aforesaid hallway by plaintiff that plaintiff has been a trespasser upon defendant's property, and that said trespassing has become so frequent and of such a nature as to annoy defendant and to constitute itself a nuisance; wherefore defendant closed said passageway; and for the further reason that defendant desired to prevent plaintiff from acquiring a prescriptive right over defendant's property. Defendant further denies that said hallway was plaintiff's only entrance to Salisbury street, but on the contrary alleges that plaintiff has another and better entrance to Salisbury street through lot No. 9 of his own property to the same building. Defendant denies each and every allegation in said petition contained. Wherefore defendant, having made full return to the order to show cause herein, asks to be discharged with his costs."

Reply was general denial. Upon a hearing judgment went for plaintiff, and the defendant has appealed. The evidence will be adverted to in the course of the opinion.

Messrs. August Walz, Jr., and W. G. Carpenter, for appellant:

There must be if not a "strict necessity" to support the easement, at least a "reasonable necessity."

Barrett v. Bell, 82 Mo. 110, 52 Am. Rep. 361; Mulrooney v. Obear, 171 Mo. 613, 71 S. W. 1019; Vossen v. Dautel, 116 Mo. 379, 22 S. W. 734; Peters v. Worth, 164 Mo. 431, 64 S. W. 490; Tiedeman, Real Prop. 3d ed. § 432; Whiting v. Gaylord, 66 Conn. 337, 50 Am. St. Rep. 87, 34 Atl. 85; Mosher v. Hibbs, 24 Ohio C. C. 375; Goodall v. Godfrey, 53 Vt. 219, 38 Am. Rep. 671; Seidel v. Bloeser, 77 Mo. App. 180; Brakely v. Sharp, 9 N. J. Eq. 9; Webber v. Miller,

9 Ohio C. C. 674, 4 Ohio C. D. 483; Miller v. Hoeschler, 126 Wis. 263, 8 L.R.A.(N.S.) 327, 105 N. W. 790; Buss v. Dyer, 125 Mass. 287; Adams v. Marshall, 138 Mass. 228, 52 Am. Rep. 271.

The "necessity" must be a real necessity, not a mere convenience.

Field v. Mark, 125 Mo. 502, 28 S. W. 1004; Vossen v. Dautel, 116 Mo. 385, 22 S. W. 734; Paine v. Chandler, 134 N. Y. 385, 19 L.R.A. 99, 32 N. E. 18; Hyde v. Jamaica, 27 Vt. 460; Valley Falls Co. v. Dolan, 9 R. I. 495; Hall v. Austin, 20 Tex. Civ. App. 63, 48 S. W. 53; Ward v. Robertson, 77 Iowa, 159, 41 N. W. 803; Allen v. Kincaid, 11 Me. 156; Burns v. Gallagher, 62 Md. 462; Murray v. Ealy, — Tenn. —, 57 S. W. 412; Washb. Easements, 107, 4th ed. § 3, pp. 42, 95, 3d ed. 235, 4th ed. 260; Jones, Easements, §§ 315, 317; Schmidt v. Quinn, 136 Mass. 575.

The easement must be long-continued, obvious, and permanent.

Adams's Appeal, 7 W. N. C. 86; Francies's Appeal, 96 Pa. 200; Reiners v. Young, 109 N. Y. 648, 16 N. E. 368, reversing 38 Hun, 335; Kelly v. Dunning, 43 N. J. Eq. 62, 10 Atl. 276; Jobling v. Tuttle, 75 Kan. 351, 9 L.R.A.(N.S.) 960, 89 Pac. 699; Marshall Ice Co. v. La Plant, 136 Iowa, 621, 12 L.R.A.(N.S.) 1073, 111 N. W. 1016.

Messrs. Walther & Muench for respondent.

Graves, P. J., delivered the opinion of the court:

As will be observed by the pleadings, many of the facts are admitted. The passageway or hallway in dispute is on Jablonsky's property. No contention is made to the contrary. The contention of the parties can at once be seen by short excerpts from statements of counsel in their briefs. Defendant's counsel thus outlines the case: "We have nothing to do in this case with easements by prescription, or adverse user; nor with easements by grant; nor with easements made absolutely necessary by reason of no other access to the property. *On the contrary, plaintiff claims an easement by reason of an alleged open, apparent, permanent way constructed by a common grantor, imposing upon one part of his property a burden in favor of another, which alleged open, apparent, and permanent way plaintiff claims has passed to him by a deed of the dominant property, setting forth the dominant property by metes and bounds, not including the way.* The property claimed to be servient in this case was subsequently conveyed to defendant without mentioning the easement, and this action has been commenced against defendant to enjoin defendant from shutting 39 L.R.A.(N.S.)

off plaintiff from passing over the way claimed." We have italicized the portion which states the case at bar.

Counsel for plaintiff concedes this to be a correct outline of the contention. He says: "As the appellant properly states, the easement claimed here was not strictly one of necessity, but rather one rising from implication, because of the location and use of the hallway in controversy with reference to the various parts of the continuous row of buildings fronting on Salisbury street, owned, respectively, by the appellant and respondent, and which had been, previous to the acquisition of the property by them, owned altogether by the Connecticut Mutual Life Insurance Company. For this reason the exact situation and use of the various parts of the property before the present controversy arose is of the greatest importance." Further on, the same counsel says: "It is not claimed by us that, where there had been no prior usage, the easement would attach in favor of one part of property, sold by a common owner, as against another part, sold to some other person, unless there was an absolute necessity for such easement. We do claim, however, that where, as in the case at bar, one part of the common property has been subject for a long time to a benefit or privilege enjoyed by the occupants of another part, and the whole property has been so improved as to indicate clearly that one part was to remain permanently subject to such benefit or privilege, this benefit or privilege becomes appurtenant to the part enjoying it and passes to a purchaser thereof, whether actually mentioned in the conveyance or not."

The evidence shows that the floor of the second story of Jablonsky's house extends over this hallway; the joists resting in the east wall of plaintiff's building. It also shows that originally a fence was run from the east side of this passageway to or toward the alleyway in the rear of all this property; that through this fence was a gateway by which entrance could be made to the rear of Jablonsky's property; that there were two or more sheds on the rear of Jablonsky's property which were reached by going through this alleyway and the gate in this fence; that Bussmeyer had these sheds rented for some years, and he and his tenants thus used this alleyway and this gate. The evidence also shows that this alleyway was used by Bussmeyer's tenants in coming from Salisbury street to the rear of the house on his said lot 8. This use, both as to the Bussmeyer property and the Jablonsky property, had continued for about thirty years. Under the evidence there is no dispute that Buss-

meyer can reach his property through the alley in the rear. The property we speak of is an "L" to the building fronting on Salisbury street. There is no question that the property can likewise be reached from Salisbury street by passing over lot 9, which is a part of the Bussmeyer property. This lot is to the west of the brick building and is vacant. From the evidence Bussmeyer's tenants using the rear portion of his house sometimes entered in this way. There were three doors on the west side of the Bussmeyer building which opened out toward lot 9, which lot was vacant from Salisbury street on the north to the alleyway in the rear of all this property on the south.

In his testimony Bussmeyer said:

Mr. Carpenter: Along the west side of this property, along the west side of your property there. Now, how many doors are there along the west side of your building?

A. One door going from my dining room into the lot, what I call the lot, and then there is another door between them two houses, and then a door from the saloon out. That is three doors.

Q. Then you have three entrances out of your building onto lot 9 on the west?

A. Yes.

Q. And those three entrances could be used if you wanted to open them?

A. I can use them only on account of it is my own ground.

The last answer contains the milk in the cocoanut. He and his tenants could (and sometimes did) come from Salisbury street to his property by going over lot 9. He says that this could be done "only on account of it is my ground." In other words, he seeks to enforce an implied easement over Jablonsky's ground to keep from using his own. So that the question of necessity or even reasonable necessity is out of the case, and, if that is a necessary element in an implied easement, then plaintiff's case must fail. We think the weight of authority requires at least a reasonable necessity to sustain an implied easement. In other words, the facts of this case do not bring it within the generally accepted rule relating to dominant and servient estates. The evidence is at least lacking in the element of necessity or reasonable necessity.

In 14 Cyc. 1168, the rule as to necessity is thus stated: "All easements of whatever class which pass by implication or construction of law must not only be reasonably necessary and apparent, but also permanent in their character. A mere temporary provision or arrangement, made for the convenience of the entire estate, will not constitute that degree of necessity and per-

manency required to burden the property with a continuance of the same when divided or separated by conveyance to different parties. Three things are essential to the creation of an easement in this way: (1) A separation of the title; (2) that before the separation takes place the use which gives rise to the easement shall have been so long continued and so obvious as to show that it was meant to be permanent; and (3) that the easement shall be necessary to the beneficial enjoyment of the land granted or retained." At page 1171, the same author says: "In some cases it is held that easements will not pass by implication except in cases of strict necessity. But the weight of authority sustains a rule less exacting than that of strict and indispensable necessity, namely, that the degree of necessity is such merely as renders the easement necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made, not that it shall be absolutely necessary for the enjoyment of the estate granted." Also bearing upon the question, the same authority, at page 1173, thus speaks: "No implication of a grant of a right of way can arise from proof that the land granted cannot be conveniently occupied without it. Its foundation rests in necessity, not in convenience. It follows that a party cannot have a way of necessity through the land of another when the necessary way to the highway can be obtained through his own land, however convenient and useful another way might be. And the same is true where he has a prescriptive right of way left over the land of another. A way of necessity is derived from the law, and depends solely on the situation and boundaries of the land to which it is claimed to be appurtenant, as they existed at the time of the conveyance."

In 10 Am. & Eng. Enc. Law, 2d ed. p. 423, the rule is thus stated: "In some American jurisdictions, even where the distinction made by the English cases between implied grants and implied reservations is affirmed, the courts maintain that even when the quasi dominant tenement is alienated, the alienee cannot claim an easement against the quasi servient tenement except in a case of strict necessity. Other cases state that an easement by implied grant can arise only in cases of 'real necessity' or 'necessity,' while the great body of authority is, as has been stated, to the effect that a 'reasonable necessity' is the proper standard. In estimating the degree of necessity as well as the presence of the other requisites for an implied grant, much depends upon the nature of the particular easement involved." The English rule,

spoken of above, is stated by the same authority at page 420, thus: "According to the established English doctrine, which is supported by some of the later American authorities, if the owner of both the quasi dominant and quasi servient tenements conveys the former, reserving the latter, all such continuous and apparent quasi easements as are reasonably necessary to the enjoyment of the property granted pass to the grantee, giving rise to easements by implied grant. If, on the other hand, the quasi servient tenement is granted, while the quasi dominant tenement is retained; no easement is reserved by implication, unless it is strictly necessary to the enjoyment of the property retained. These rules are founded on the principle that a grantor shall not derogate from his own grant."

Plaintiff contends for the doctrine announced in *Tooth v. Bryce*, 50 N. J. Eq. 589, 25 Atl. 182, wherein it is argued that the element of necessity is not necessary in an implied grant of an easement; that the easement passes with the dominant tenement as a part of the thing conveyed and without regard to the element of necessity. The chancellor, in the *Tooth Case*, 50 N. J. Eq., at page 608, states his view in this language: "It seems to me that the proper inquiry in such cases is whether the apparent and continuous easement in question forms a part of the tenement, and is beneficial to and adds to its value for use, and will continue to do so in the future. If it is, then the grantee is, upon plain principles, entitled to have it continued. He is entitled to enjoy the thing as it was when he bought it, with all its apparent appurtenances, if those apparent appurtenances are apparently permanent, and are useful and add to its value." The easement under discussion is stated by the chancellor. He says: "The complainant by his bill seeks to establish and protect his right to the benefit of a flow of water to his premises from the defendant's premises, through two several pipes laid underground and forced up by two hydraulic rams, situate, with the spring that drives them, on the defendant's premises." The cases, as well as the textbooks, seem to emphasize the element of necessity in cases involving road or passage ways, more than in cases involving easements of a different character. The learned chancellor in the *Tooth Case*, supra, undertakes to show that the element of necessity in implied easements through grants had its origin in the mistaken intermingling of the necessary elements of implied easements in cases where the dominant estate was not sold. The opinion is full of research and has been followed by 39 L.R.A. (N.S.)

some other cases, but is clearly not in line with the weight of authority.

In *Whiting v. Gaylord*, 66 Conn. loc. cit. 348, 50 Am. St. Rep. 87, 34 Atl. 88, Andrews, C. J., says: "The cases in this country which have referred to *Pyer v. Carter*, 1 Hurlst. & N. 916, 26 L. J. Exch. N. S. 258, 5 Week. Rep. 371, have, none of them, so far as we can learn, ever followed it to its full extent. The American cases have, with almost entire unanimity, limited easements by implied grant to such as were open, visible,—such as would be apparent to an ordinary observer,—continuous, and necessary to the enjoyment of the estate granted or retained. *Carbrey v. Willis*, 7 Allen, 364, 83 Am. Dec. 688; *Randall v. McLaughlin*, 10 Allen, 366; *Philbrick v. Ewing*, 97 Mass. 133; *Lampman v. Milks*, 21 N. Y. 505; *Butterworth v. Crawford*, 46 N. Y. 349, 7 Am. Rep. 352; *Henry v. Koch*, 80 Ky. 394, 44 Am. Rep. 484; *Evans v. Dana*, 7 R. I. 306; *Providence Tool Co. v. Corliss Steam Engine Co.* 9 R. I. 564; *Dunklee v. Wilton R. Co.* 24 N. H. 489; *Warren v. Blake*, 54 Me. 276, 89 Am. Dec. 748; *James v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300; *Ingals v. Plamondon*, 75 Ill. 118; *Fetters v. Humphreys*, 18 N. J. Eq. 263, s. c. 19 N. J. Eq. 471; *Denton v. Leddell*, 23 N. J. Eq. 67; *Parsons v. Johnson*, 68 N. Y. 62, 23 Am. Rep. 49; *Griffiths v. Morrison*, 106 N. Y. 165, 12 N. E. 580; *Root v. Wadhams*, 107 N. Y. 384, 14 N. E. 281. These cases differ considerably as to the degree of necessity which must exist in order to raise the implication that the easement or quasi easement passes; but they all concur in the rule just stated, that it must be one which is open, visible, and necessary. In this state the rule of construction, settled by a series of decisions, is that the subject-matter of a deed is to be ascertained from its premises; that by a deed of land described as such, nothing passes except what is fairly included in the premises; that an easement not naturally and necessarily belonging to the premises will not pass."

The Massachusetts court, in *Buss v. Dyer*, 125 Mass. loc. cit. 290, says: "We are aware that it has been held in some English cases that a deed of premises carries the right to continue to enjoy, as easements, all privileges or conveniences in and upon adjoining lands of the grantor, which were apparent, and had been used by the grantor in connection with the premises before the conveyance; that the conveyance is a conveyance of the premises 'as they are.' A leading case to this effect is *Pyer v. Carter*, 1 Hurlst. & N. 916, 26 L. J. Exch. N. S. 258, 5 Week Rep. 371. Similar doctrine has been held in New York. *Lamp-*

man v. Milks, 21 N. Y. 505. We do not regard this as a correct view of the law. It is a well-established and familiar rule that deeds are to be construed as meaning what the language employed in them imports, and that extrinsic evidence may not be adduced to contradict or affect them. And it would seem that nothing could be clearer in its meaning than a deed of a lot of land, described by metes and bounds, with covenants of warranty against encumbrances. The great exception to the application of this rule to the construction of deeds is in the case of ways of necessity, where, by a fiction of law, there is an implied reservation or grant to meet a special emergency, on grounds of public policy, as it has been said, in order that no land should be left inaccessible for purposes of cultivation. This fiction has been extended to cases of easements of a different character, where the fact has been established that the easement was necessary to the enjoyment of the estate in favor of which it was claimed."

In *Stevens v. Orr*, 69 Me. loc. cit. 324, the court thus speaks: "The court is of the opinion that it must be regarded as the settled law of this state that the conveyance of a specified parcel of real estate, described by metes and bounds, will not carry with it a right of way over the grantor's adjoining land (although such way may be highly convenient, apparent upon the face of the earth, and in actual use at the time of the conveyance, and the deed contains the words 'with all the privileges and appurtenances'), unless such way is clearly necessary to the beneficial use and enjoyment of the state conveyed. So held in *Warren v. Blake*, 54 Me. 276, 89 Am. Dec. 748. And the same rule was applied to a drain in *Dolliff v. Boston & M. R. Co.* 68 Me. 173. We are aware of the conflicting state of the authorities upon this question. We have had occasion to examine them very fully on several occasions within the last few years. The leading cases are cited and commented upon in the case first above cited (*Warren v. Blake*), and it cannot be profitable to go over them again." The rule has been consistently followed in that state. In the later case of *Stillwell v. Foster*, 80 Me. 333, 14 Atl. 731, the syllabus concisely states the case and the rule, and reads: "An owner of a building, containing two stores with partition wall between them, and with stairs on one side leading to second floor, and a door through the partition wall on second floor at head of the stairs, sold the store which had no stairs, and in the conveyance made the center line of the partition wall the dividing line. Held that the conveyance did not

carry with it a right of way of necessity over the flight of stairs." In the course of the opinion, the court says: "The plaintiff claims title to a right of way over the stairs by virtue of an implied grant under the deed, Harlow to Wheelwright. He cannot claim it as a way of strict necessity, for his building fronts upon the highway, and he can make a stairway upon his own premises; but rather as a way of convenience. Having been so built in the beginning and so occupied both before and after the conveyance to Wheelwright, it is claimed that it has become appurtenant to and so far a part of the premises as to pass by the deed, if not by express grant, at least by implication. But there is no obscurity in the language of the deed, no question as to the precise premises covered by it. The stairs are not conveyed, even if considered a part of the premises, and the only question is whether, under the facts, a right of way over the stairs is conveyed by implication. In this state, the rule is now so well established that the test to be applied in such cases is whether the way is one of strict necessity, that it is too late to change it. Nor do we think it desirable, for it seems to be founded not only upon a preponderance of authority, but upon sound principle. It has the recommendation of simplicity and certainty, is easily applied, and works no injustice; for the purchaser knows, or should know, what he is buying before his deed is accepted. In *Warren v. Blake*, 54 Me. 276, 89 Am. Dec. 748, this precise question was exhaustively examined and the rule adopted. In *Dolliff v. Boston & M. R. Co.* supra, and in *Stevens v. Orr*, 69 Me. 323, the question was raised and the rule affirmed."

In *Bonelli Bros. v. Blakemore*, 66 Miss. loc. cit. 143, 14 Am. St. Rep. 550, 5 So. 231, that court said: "The owner of a tract of land, a part of which he afterwards grants of another, has not, of course, any easement in any part of his land while he owns the whole; he deals with it as owner and may subserve any portion to the use of the other, and may change the arrangement at his will; it is only where such arrangement is apparently permanent and intended so to be, and while so remaining the owner grants a part of the premises, that the question of easement or servitude can arise. The condition of the whole when the severance is made, the nature of the easement claimed to be granted or reserved by implication, its obviousness and continuousness, are the tests usually applied to determine the existence or nonexistence of the grant or reservation. The rule seems to be of very general recognition that an easement not of strict necessity does not

pass by implied grant, unless it be apparently permanent, obvious, and continuous."

In *Spaulding v. Abbot*, 55 N. H. loc. cit. 426, the court says: "It is an elementary principle that whoever grants a thing is supposed tacitly to grant that without which the grant itself would be of no effect. *Broom's Maxims*, 362. But this applies only to such things as are incident to the grant, and directly necessary for the enjoyment of the thing granted. *Id.* 366. It is implied that the grantor is the owner of such incidents as are directly necessary to the enjoyment of the grant, and has it in his power to convey them. If they are not his to convey, they cannot, of course, pass as incident to the grant. The right to the use of this aqueduct is not either indispensable or necessary to the enjoyment of the premises conveyed, and the grant does not become ineffectual nor useless without it. It may be a great convenience to have it, and a great inconvenience to be deprived of it; but that can have no legal effect upon the construction of this deed.

The Indiana court has the rule of "reasonable necessity." In *John Hancock Mut. L. Ins. Co. v. Patterson*, 103 Ind. loc. cit. 587, 53 Am. Rep. 550, 2 N. E. 191, that court says: "The application of the rule must depend upon the nature, arrangement, and use of the estate, the relation of the parts to each other, and the existing degree of necessity for giving such construction to the grant as will give effect to what may be supposed to have been, considering the manner of the use, the reasonable intentment of the parties; the underlying principle in such cases being that, included in the grant of the principle, are all such privileges and appurtenances as are obviously incident and reasonably necessary to the fair enjoyment of the thing granted, substantially in the condition in which it is enjoyed by the grantor, unless the contrary is provided."

To the point is *Valley Falls Co. v. Dolan*, 9 R. I. 489. The first syllabus states the ruling in the case and reads: "A right of way of necessity is founded on an implied grant, and created by the necessity of its existence to the enjoyment of the estate granted. Convenience alone is not sufficient to raise the implication of a right of way."

In *Ogden v. Jennings*, 62 N. Y. loc. cit. 531, Allen, J., said: "Easements exist as appurtenant to a grant of lands, and as arising from implication, only by reason of a necessity to the full enjoyment of the property granted. Nothing passes by implication or as incident or appurtenant to the lands granted, except such rights, privileges, and easements as are directly necessary to the proper enjoyment of the granted estate. Upon the grant of a mill, every right necessary to the full and free enjoyment of the mill passes as incident to the grant; and the necessity measures the extent and duration of the right. When the necessity ceases, the rights resulting from it cease. It must be an actual and a direct necessity. A mere convenience is not sufficient to create or convey a right or easement, or impose burthens on lands other than those granted, as incident to the grant. In all cases the question of necessity controls."

In *Hall v. Austin*, 20 Tex. Civ. App. loc. cit. 63, 48 S. W. 55, it is said: "We do not believe that there was any error in the peremptory instruction of the court upon this question. The doctrine of necessity means just what it says. The right to the road must arise by reason of the absolute necessities of the claimant, and the facts upon which this right may be made to depend must establish that the existence of the road is absolutely necessary as a means of ingress and egress to the plaintiff's premises. The right cannot rest upon any ground of convenience. And we believe that, upon this issue, the most that can be said of the evidence is that it established that it would put the plaintiffs to much expense and inconvenience to establish a road leading from their premises, connecting with other public roads, that would give him an outlet; and, as said in *Alley v. Carleton*, 29 Tex. 78, 94 Am. Dec. 280: 'A way of necessity, however, must be more than one of convenience, for if the owner of the land can use another way, he cannot claim by implication the right to pass over that of another to get to his own.'"

The West Virginia court, in *Standiford v. Goudy*, 6 W. Va. loc. cit. 367, thus tersely speaks: "The court in question, however, indirectly alleges or indicates that, while Woods owned the two adjoining tracts of lands, he had, appendant to the one, a way over the other. This is a contradiction. The absolute owner of both tracts cannot have an easement over the one appendant or appurtenant to the other. When the owner of two tracts of land has used a way to and from one, over the other, no matter how long, and he grants the former tract without mention of any way, unless the way is necessary to the enjoyment of the tract granted, the mere grant of the land does not create or confer a way appendant, appurtenant, or in gross."

Washburn on Easements & Servitudes, 4th ed. p. 107, thus states the rule: "It is generally held that an easement, in order to pass by implied grant, must be not only

leges, and easements as are directly necessary to the proper enjoyment of the granted estate. Upon the grant of a mill, every right necessary to the full and free enjoyment of the mill passes as incident to the grant; and the necessity measures the extent and duration of the right. When the necessity ceases, the rights resulting from it cease. It must be an actual and a direct necessity. A mere convenience is not sufficient to create or convey a right or easement, or impose burthens on lands other than those granted, as incident to the grant. In all cases the question of necessity controls."

Washburn on Easements & Servitudes, 4th ed. p. 107, thus states the rule: "It is generally held that an easement, in order to pass by implied grant, must be not only

apparent and continuous, but also necessary to the reasonable use and enjoyment of the granted premises. The test of such necessity is held to be the question whether the grantee might, at a reasonable expense, procure for himself an enjoyment of a similar easement. In some cases the question of necessity seems to be overlooked, and the main stress put upon the question whether the arrangement of dominant and servient tenements is such as to show that at the time of the sale the parties intended to transfer the easement in question."

To summarize the cases, we at least have the rule of "reasonable necessity." So that from the greater number of the cases outside of Missouri "reasonable necessity" at least is an element in an implied easement by grant. But we are not without some rulings in this state. Our cases we take next. We should remember that we are dealing with a case wherein the easement in question is a right of way over the property of another; that in such cases the question of reasonable necessity should plainly appear.

In the case of *Barrett v. Bell*, 82 Mo. loc. cit. 114, 52 Am. Rep. 361, this court adopted the rule announced in *Ogden v. Jennings*, 62 N. Y. 526. We there said: "In a well-considered case in the court of appeals of New York, it was said: 'Easements exist as appurtenant to a grant of lands, and as arising by implication, only by reason of a necessity to the full enjoyment of the property granted. Nothing passes by implication, or as incident or appurtenant to the lands granted, except such rights, privileges, and easements as are directly necessary to the proper enjoyment of the granted estate. Upon the grant of a mill, every right necessary to the full and free enjoyment of the mill passes as incident to the grant; and the necessity measures the extent and duration of the right. . . . When the necessity ceases, the rights resulting from it cease. A mere convenience is not sufficient to create or convey a right or easement, or impose burthens on lands other than those granted, as incident to the grant. In all cases the question of necessity controls.' *Ogden v. Jennings*, 62 N. Y. 526, 531, 532, and cases cited. In a valuable work on *Landlord & Tenant*, the following is deduced as the rule: 'The true test as to whether a thing is an incident or appurtenance seems to be the propriety of relation between the principal and adjunct, which is to be ascertained by considering whether they agree in nature and quality, so as to be capable of union without incongruity, and is actually and directly necessary to the full enjoyment of the property.' *Wood, Land. & T.* § 213, pp. 310, 39 L.R.A. (N.S.)

311, and note on page 312. As the evidence in this case does not show the use of the kettle was a 'necessity,' this fact deprives such use of the chief attributes of an appurtenance. 'It was a matter of ease and convenience only,' which, having arisen by mere consent of the parties, could be destroyed by withdrawing that consent at any time."

We again indorse the doctrine of the *Ogden Case*, supra, in the later case of *Mulrooney v. Obeare*, 171 Mo. loc. cit. 619, 71 S. W. 1021, whereat this court said: "While the doctrine is broadly stated that 'the grant of a thing will include whatever the grantor has power to convey, which is reasonably necessary to the enjoyment of the thing granted,' it is not always easy to determine in a given case whether the thing under consideration is appurtenant or not. This court, in *Barrett v. Bell*, 82 Mo. loc. cit. 114, 52 Am. Rep. 361, quoted with approval the decision of the court of appeals of New York in *Ogden v. Jennings*, supra, in which it is said: 'Easements exist as appurtenant to a grant of lands, and as arising by implication, only by reason of a necessity to the full enjoyment of the property granted. Nothing passes by implication or as incident or appurtenant to the lands granted, except such rights, privileges, and easements as are directly necessary to the proper enjoyment of the granted estate. . . . a mere convenience is not sufficient to create or convey a right or easement, or impose burthens on lands other than those granted, as incident to the grant. In all cases the question of necessity controls.'"

In *Fields v. Mark*, 125 Mo. loc. cit. 515, 28 S. W. 1007, this court thus speaks: "Samuel Wilson conveyed each of these three 20-foot lots facing on Laurel street by metes and bounds, but makes no reference to any alley on the west. It must, then, in the outset be conceded that plaintiff's right to this strip as an alley does not arise out of an express grant, or by necessary implication from the recitals in the deeds under which he claims. Nor do we think plaintiff can seriously claim that he is entitled to this alley as a way of necessity, which is itself an implication from the grant. That it would be a great convenience to these lots of plaintiff to have an alley in the rear is apparent, but it can hardly be said to be a necessity. Certainly it is not a necessity to the blacksmith shop. This 20 feet has a street in front and alley along its whole southern side, and the other two lots abut on the east on Laurel street. It is not enough that this alley would be even a great convenience; in the situation of this property,

it is not, in the legal sense, a way of necessity."

It should be noted that the conveyance in this case is by metes and bounds and by platted lots, which is the same in legal effect. Discussing the difference between conveyances by metes and bounds and conveyances of a different character, in the case of *Warren v. Blake*, 54 Me. loc. cit. 286, 89 Am. Dec. 748, the court said: "It is well settled that an easement or right to use or occupy land, not within the lines given in a deed, may be claimed and held as a right, when the fee of the land does not pass. The question is: When and how far does that right become vested under such a deed? A distinction is made between a deed conveying in terms a particular house, or messuage, or farm, known by a certain name, without defined limits, and a deed conveying a specific piece of land, carved out of a larger piece, held by the grantors, and exactly described by metes and bounds. In the former case, where the grant is by name, and not bounds, many things will pass which have been used with the principal thing, as parcel of the granted premises, which would not pass under a grant of a piece of land by metes and bounds.

In *Grant v. Chase*, 17 Mass. 443, loc. cit. 446, 9 Am. Dec. 161, it is said: "This is a conveyance of a specific piece of land, carved out of a larger piece held by the grantor and described by metes and bounds. In such a case nothing could pass as parcel of the granted premises, but what is included within the boundaries expressed in the deed."

Both of these cases and the doctrine thereof are cited with approval by this court in the case of *Field v. Mark*, 125 Mo. loc. cit. 515, 28 S. W. 1004.

In the case at bar we cannot hold that the right of way in question is one even of reasonable necessity. Lot 8 runs through from Salisbury street on the north to an open alley of 15 feet width on the south. Lot 8 therefore touches two public thoroughfares of the city. This alley way of 15 feet runs east and west through the entire block. In addition to this, all this property on the rear of lot 8 can be and is reached over lot 9, a vacant lot, which lot 9 is a part of the property conveyed to plaintiff by the insurance company. Then, further, this passageway in dispute was, in the first instance, constructed for use in connection with lot 7 as much as it was for lot 8. It was so used for these years. It was a matter of convenience, not necessity or reasonable necessity to either. The rear ends of both lots were touched by this 15-foot alley.

39 L.R.A. (N.S.)

Whether the rule be one of absolute necessity makes no difference under the facts of this case. It is apparent that the plaintiff is seeking to hold this passageway in order to keep from establishing one over lot 9 of his own property.

To our mind the evidence fails to make a case of an implied easement, and the judgment is reversed, and cause remanded, with directions to the trial court to enter judgment for the defendant.

All concur.

Petition for rehearing denied March 29, 1912.

NORTH CAROLINA SUPREME COURT.

MRS. LOU FULGHUM et al., Appt.,
v.

ATLANTIC COAST LINE RAILROAD COMPANY.

(158 N. C. 555, 74 S. E. 584.)

Carrier — obstruction in exit — flag station.

1. A railroad company is not negligent in placing, in the daytime, a few ties necessary for repairing its tracks along the path between the car exit and the highway at a flag station.

Same — stepping on tie — contributory negligence.

2. A passenger, in attempting to reach the highway from a car exit along a path upon which ties have been placed for repair purposes, is negligent in stepping upon one which is wet and slippery, and is lying in an inclined position, when he might have stepped over it, or gone around it in safety, and cannot therefore hold the railroad company liable for a resulting injury.

(Clark, Ch. J., and Hoke, J., dissent.)

(April 10, 1912.)

Note. — Duty of carrier as to condition of place used as flag station.

As to the duty of interurban roads with respect to accommodations for boarding or leaving cars at country crossings, see *McGovern v. Interurban R. Co.* 13 L.R.A. (N.S.) 476, and note.

The duty of a street railway as to the condition of approaches to cars is discussed in a note appended to *Messenger v. Valley City Street & I. R. Co.* 32 L.R.A. (N.S.) 881.

Generally, as to the degree of care required toward a passenger at a station, see *St. Louis, I. M. & S. R. Co. v. Woods*, 33 L.R.A. (N.S.) 856, and note.

APPEAL by plaintiffs from a judgment of the Superior Court for Johnston County granting a nonsuit in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Frederick H. Brooks and Aycock & Winston, for appellants:

Defendant is guilty of negligence *per se* in failing to provide a suitable place for passengers to board and alight from its trains at said station.

Terre Haute & I. R. Co. v. Buck, 96 Ind. 346, 49 Am. Rep. 168; *Louisville, N. A. & C. R. Co. v. Lucas*, 119 Ind. 583, 6 L.R.A. 193, 21 N. E. 968; *Roberts v. Atlantic Coast Line R. Co.* 155 N. C. 84, 70 S. E. 1080; *White, Personal Injuries on Railroads*, § 619; *Moses v. Louisville, N. O. & T. R. Co.* 39 La. Am. 649, 4 Am. St. Rep. 231, 2 So. 567; *Rearden v. St. Louis & S. F. R. Co.* 215 Mo. 105, 114 S. W. 961; *Arkansas Midland R. Co. v. Robinson*, 96 Ark. 32, 130 S. W. 536; *St. Louis & S. F. R. Co. v. Caldwell*, 93 Ark. 286, 124 S. W.

1034; *St. Louis, I. M. & S. R. Co. v. Cantrell*, 37 Ark. 519, 40 Am. Rep. 105; *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 699; *Hulbert v. New York C. R. Co.* 40 N. Y. 146; *Credle v. Norfolk & S. R. Co.* 151 N. C. 50, 65 S. E. 604; *Skow v. Green Bay & W. R. Co.* 141 Wis. 21, 123 N. W. 138.

It was incumbent upon the railroad to keep the space which it required its passengers to use as a walk way clear of obstructions; that is, clear of large and dangerous obstructions like cross-ties, especially considering that the passengers are often women, children, and delicate persons.

Roberts v. Atlantic Coast Line R. Co. 155 N. C. 84, 70 S. E. 1080; *Cleveland, C. C. & St. L. R. Co. v. Reese*, 93 Ill. App. 662; *Ayres v. Delaware, L. & W. R. Co.* 158 N. Y. 257, 53 N. E. 22; *Hutchinson, Carr. § 935*; *Talbert v. Charleston & W. C. R. Co.* 72 S. C. 137, 51 S. E. 564; *Hinshaw v. Raleigh & A. Air Line R. Co.* 118 N. C. 1047, 24 S. E. 426.

Messrs. Abell & Ward for appellee.

There are but few cases which make any distinction as to the duty of a carrier with reference to the condition of stations, on the ground that the place involved was a flag station.

In *Gulf, C. & S. F. R. Co. v. Williams*, 21 Tex. Civ. App. 469, 51 S. W. 653, it was held that the railroad company could not escape liability for injury to plaintiff due to failure to have its depot platform lighted, on the ground that it had abandoned the station at that place, the court saying: "The only difference between this and any other railway station is the fact that it has no agent there, and does not keep the depot building open nor sell tickets there. However, it treats it as a station itself, and invites the public to so regard it, by selling tickets to it, by stopping its passenger trains, and permitting the traveling public to get on and off thereat."

And in *Pineus v. Atlantic Coast Line R. Co.* 140 N. C. 450, 111 Am. St. Rep. 856, 53 S. E. 297, where plaintiff was injured at a flag station by stepping into a hole in the platform, the court says: "It matters not whether Sharpsburg was a regular or a flag station, the defendant owed plaintiff the duty to provide a safe platform, especially as plaintiff entered on it at invitation of defendant's agent for a legitimate purpose."

But in *Alabama & V. R. Co. v. Stacy*, 68 Miss. 463, 9 So. 349, it was held that the railroad company was not liable for injury received by plaintiff in getting her feet wet because no place was provided for her to alight, the place where she alighted being merely a flag station, without depot or accommodations for passengers, where people were allowed to get on and off the train when stopped there.

And in *Burke v. British Columbia Elec.* 39 L.R.A. (N.S.)

tric R. Co. 7 B. C. 85, where plaintiff was injured while using a platform constructed by a third party, at a place not a regular stop, at which the car was stopped for her convenience, the court, in denying the right of plaintiff to recover, said: "I am of opinion that the effect of the custom of stopping at the places referred to, in the manner and under the conditions stated, is merely to give to a passenger lawfully traveling the privilege of using the right of way in the ordinary condition in which it may be, and subject to the company's ordinary right to use it, that he may pass along it to the public highway or other place where he may be going, and not that there is any implied agreement on the part of the company to alter the condition or vary its use of the line because of the privilege."

The courts sometimes recognize the size and importance of a station as factors in determining the precautions which must be taken for the safety of persons using it, without reference to whether it is a flag or regular station.

Thus, in *Abbot v. Oregon R. Co.* 46 Or. 549, 1 L.R.A. (N.S.) 851, 114 Am. St. Rep. 885, 80 Pac. 1012, 7 Ann. Cas. 961, the court says that what constitutes a reasonable time during which such premises must be kept lighted is determined by the circumstances of each particular case, depending upon the size and importance of the station, and the number of persons who lawfully visit it at night for the purpose of transacting business with the company.

And in *St. Louis & S. F. R. Co. v. Marshall*, 71 Kan. 866, 81 Pac. 169, the court recognizes that the degree of illumination of station premises required is dependent upon the character and extent of the business transacted there.

R. L. S.

Brown, J., delivered the opinion of the court:

The defendant offered no evidence, and the following is an accurate statement of that offered by plaintiff:

Plaintiff was a passenger on defendant's train on the morning of January 29, 1909, and left the train at Bagley, North Carolina, a flag station at which there was no regular depot, station house, or platform. Passengers alighted generally in the vicinity of the public crossing. The conductor helped the plaintiff off the car, and placed her safely on the ground about 60 feet north of the crossing on the right side of the track going north, from which point she started towards the crossing. There were several cross-ties distributed along the right of way for use in repairing the road between the point where she alighted and the crossing. The plaintiff stepped on one of the cross-ties, her foot slipped on the tie, and threw her ankle out of joint. Plaintiff testifies she knew that the tie she stepped upon was "wet, muddy, and slippery, and one end in the ditch and the other end towards the railroad, and the end towards the railroad was higher." Plaintiff says she stepped on the tie because she thought it safer to step on it than over it. Plaintiff admits she could easily have stepped over it, and further admits that she could have walked around this cross-tie without stepping on or over it. The other testimony is that of two witnesses introduced by the plaintiff, which tends to prove that the nearest end of the cross-tie was 5 or 6 feet from the car, and that there was ample room for the plaintiff to pass around it. The defendant offered no evidence, and moved to nonsuit, which motion was granted.

Upon a review of these undisputed facts, we conclude that his Honor properly sustained the motion to nonsuit, first, because there is no evidence of negligence; second, because the plaintiff's own negligence was the immediate cause of her injury.

1. Bagley is a flag station, having no depot nor station platform of any kind. Passengers are taken on the train in the vicinity of the crossing. The defendant, for purposes of repairing its track, had placed a few cross-ties at intervals along its right of way. The exact number does not appear. Plaintiff says several; while one of her witnesses says there was only one tie between where she alighted and the crossing. All the evidence shows there was a space, or pass way, 5 or 6 feet wide between the end of the ties nearest the railroad track and the cars. There is nothing in the evidence to indicate that plaintiff could not have walked around the ties

with perfect safety. This occurrence did not happen in a town or city, where a regular station is kept, but at a flag station, where there was no depot or platform required by law. We recognize fully the duty of a common carrier to provide safe means of access to and from its stations for the use of passengers (1 Hutchinson, Carr. § 51), but what may be considered a reasonably safe exit under conditions existing at Bagley would not be so regarded in populous towns and cities. We are not prepared to hold that it was negligence upon the part of the defendant to lay a few cross-ties under such conditions at intervals along its right of way, for the purpose of repairing its track, where they were in plain view of the passengers in broad daylight, and not in the least dangerous to a person exercising ordinary care.

2. It is well settled in this state that, where the plaintiff's own evidence discloses such contributory negligence as bars recovery, a motion to nonsuit should be sustained. We think that is the case here. The plaintiff was assisted from the car by the conductor and landed in a place of safety only 60 feet from the public crossing. It was broad light. She started towards the crossing. She admits that she saw the cross-tie before her. It was in an inclined position, one end elevated some, and the other in a ditch. She admits that she saw that it was muddy and slippery on top. She further states that she could have easily walked around it, or have stepped over it. In fact, a ten-year-old child could have stepped over it. Instead of taking the obviously safe course that the most ordinary prudence would have dictated, and either stepping over or walking around it, the plaintiff, with full knowledge of its condition, stepped upon the inclined tie, muddy and slippery as she knew it to be, and sprained or dislocated her ankle. As much as we may sympathize with the plaintiff in her misfortune, a bare statement of the facts is in our opinion sufficient to demonstrate that it was caused by her thoughtlessness. Suppose she had been on a station platform, and had discovered a hole in front of her in time to avoid it, and had stepped in it, instead of walking around it; or suppose she had seen a grease splotch ahead of her on the platform, and had deliberately walked through it, instead of stepping across or walking around it, could she have recovered damages for consequent injury? It will scarcely be contended that she could.

This is not a case like *Hinshaw v. Raleigh & A. Air Line R. Co.* 118 N. C. 1052, 24 S. E. 426 (cited by plaintiff), where a passenger is placed suddenly in a position

of danger by the carrier's negligence, and required to decide at once what course to pursue. He is not expected to exercise infallible judgment but only ordinary care, and, if he does so, he is not held to the consequences of his act if he makes a mistake. But the plaintiff was not confronted with a sudden danger. She was in a place of absolute safety. The whole situation was open before her. She saw the tie, that it was slanting, muddy, and slippery. She admits she could have stepped over it, or walked around it. She did neither, but deliberately stepped on it. She must bear the unfortunate consequences of her carelessness. The case is very much like that of *Johns v. Georgia R. & Electric Co.* 133 Ga. 525, 66 S. E. 269, where a woman, with full knowledge that a strip of pavement along the car track had been torn up, decided to step across the excavation, and in doing so stepped on a paving stone, and slipped and fell. The court says: "The conductor, who was inside the car, had nothing to do with this decision, or the effort to carry it out. When she attempted to step from the car across the opening in the pavement, she placed her foot on a paving stone, or dirt, which gave way, and she was hurt. She took the chance of being able to make the long step successfully, and she failed to do so in safety. Even if the defendant was not altogether faultless, nevertheless she cannot recover for the results of her own conduct, with full knowledge and in full view of the situation. Her injury was unfortunate, but she has no right to recover from the defendant. The case is not like those involving concealed danger, or dangerous places known to the company, and not to the passenger, or where a passenger was ordered or forced to leave a car, or where there was a defect in a street or sidewalk, which may have been previously known to a passer, but of the proximity or danger of which, by reason of the darkness, or other cause, at the time of the injury, he was not aware." We do not deem it necessary or useful to discuss the cases cited in the brief of the learned counsel for plaintiff. None of them bear even a little resemblance to the case at bar, which is peculiar and unusual in the facts presented.

The judgment of the Superior Court is affirmed.

Clark, Ch. J., dissenting:

When the train stopped at Bagley, the *feme* plaintiff started to the rear door of the coach, which was at or near the crossing, to get out. Had she been permitted to do so, she would not have been injured. The conductor called her to come to the

front door, which was the length of the car, some 60 feet, farther from the crossing. When she got upon the ground, there were several cross-ties lying along the road-bed between her and the railroad crossing. It had been raining, and the walk way around the end of the cross-ties was muddy and slippery, and the 60 feet that she was unnecessarily required to walk to reach the crossing was in a shallow cut. It was negligence in the defendant company to require her to get out at this spot, instead of the other end of the coach, where she would have stepped down upon the crossing. The defendant owed to her a decent and safe landing place, all the more so where, this not being a regular station, there was no platform.

The burden was upon the defendant under the statute to prove contributory negligence. It offered no evidence whatever to that effect, and the only evidence on the point was by the plaintiff herself, who said that it seemed to her safer to step on the cross-ties than on the muddy sloping earth, in getting back to the crossing. It is patent to anyone that this must have been so. If the cross-ties were slanting a little, so was necessarily the ground upon which they lay, and the ground, being soft and muddy, was much more slippery than the cross-ties could have been. If she had fallen by slipping in the mud, as she doubtless would have done, she must have fallen upon the cross-ties and been worse hurt. At any rate the plaintiff had a right, both under the Constitution and the statute, to have a jury, and not the judge, to pass on the facts. It was the duty of the defendant to have given the plaintiff a safe place to dismount. It did not do so, and would not permit her to get off at the other end of the coach, where she would have been safe. The burden was upon the defendant to prove contributory negligence. It did not do so, and the only evidence is that of the plaintiff, that she pursued the safest course in stepping upon the cross-ties instead of upon the slippery mud. The plaintiff was still a passenger when she fell. Being a woman, she was entitled to the attention that the law requires to be paid to women and children, who are less able to take care of themselves than men. *Morarity v. Durham Traction Co.* 154 N. C. 586, 70 S. E. 938. The conduct of the defendant company in preventing the *feme* plaintiff from getting out in a safe place, and causing her to walk 60 feet through mud and slush, was of itself actionable. Certainly the judge had no right to say as a matter of law and in violation of the statute, that the plaintiff was guilty of contributory negligence because she chose what seemed to her, and

what the jury doubtless would have found (if she had been allowed her constitutional right to a jury trial), was the safer method of traversing the 60 feet of the sloping cut.

In *Roberts v. Atlantic Coast Line R. Co.* 155 N. C. 84, 70 S. E. 1080, this court quotes with approval, as it had previously done in *Smith v. North Carolina R. Co.* 147 N. C. 450, 17 L.R.A.(N.S.) 179, 61 S. E. 266, from *Hutchinson on Carriers*, § 928, as follows: "It is the duty of railway companies as carriers of passengers to provide platforms, waiting rooms, and other reasonable accommodations for such passengers at the stations upon such road [and at such places] at which they are in the habit of taking on and putting off passengers. Their public profession as such carriers is an invitation to the public to enter and to alight from their cars at their stations, and it has been held that they must not only provide safe platforms and approaches thereto, but that they are bound to make safe for all persons who may come to such stations in order to become their passengers, or who may be put off there by them, all portions of their station grounds reasonably near to such platforms, and to which such persons may be likely to go; and for not having provided such station accommodations and safeguards, railway companies have frequently been held liable for injuries to such persons." And in *Mangum's Case*, 145 N. C. 153, 13 L.R.A.(N.S.) 589, 122 Am. St. Rep. 437, 58 S. E. 913, Associate Justice Brown, in delivering the opinion, said: "It seems now to be almost elementary that one of the recognized duties of a railway company that undertakes to carry passengers is to keep its station premises in a reasonably safe condition, so that those who patronize it may pass safely to and from the cars. *Pineus v. Atlantic Coast Line R. Co.* 140 N. C. 450, 111 Am. St. Rep. 856, 53 S. E. 297; *Wood, Railways*, 310, 1341, 1349. This duty extends not only to the condition of the platform itself, whereon passengers walk to and from the trains, but also to the manner in which that platform is allowed by the common carrier to be used. *Weston v. New York Elev. R. Co.* 73 N. Y. 595; *Wood, supra*. The defendant owed a duty to plaintiff, and to all other passengers, to keep its depot platforms used by them as a means of ingress and egress free from obstructions and dangerous instrumentalities, especially at a time when its passengers are hurrying to and from its cars,"—citing *Pineus v. Atlantic Coast Line R. Co.* and *Atchison, T. & S. F. R. Co. v. Johns*, 36 Kan. 769, 59 Am. Rep. 609, 14 Pac. 237.

The plaintiff, not having left the carrier's premises, was still a passenger. *Hansley v.* 39 L.R.A.(N.S.)

Jamesville & W. R. Co. 115 N. C. 602, 32 L.R.A. 543, 44 Am. St. Rep. 474, 20 S. E. 528. Being still a passenger, she was entitled to a safe exit. 2 *White, Personal Injuries on Railroads*, § 557. If the railroad offers an egress that is unsafe, it is negligence. 2 *White, Personal Injuries on Railroads*, 619. The railroad should so arrange its station grounds that a passenger who gets off a train at the station, or at places provided to alight, may leave the cars without danger, and a reasonably safe passageway or a bridge should be provided leading to and from the station. *Hulbert v. New York C. R. Co.* 40 N. Y. 152. There a passenger who fell in a cattle guard, going from the car to the station, was injured and recovered damages. "Every spot likely to be visited by passengers . . . departing [from depots] should be made safe and kept so, . . . and passengers . . . injured . . . may have compensation." 1 *Bishop, Noncontr. L.* § 1086, quoted with approval *Louisville, N. A. & C. R. Co. v. Lucas*, 119 Ind. 583, 6 L.R.A. 193, 21 N. E. 968, s. c. 129 Ind. 206, 16 Am. St. Rep. 323, 21 N. E. 972; *Gaynor v. Old Colony & N. R. Co.* 100 Mass. 215, 97 Am. Dec. 96. The passageway to and from a depot must be kept safe, and passengers are entitled to a suitable place of egress. 1 *Fetter, Carr.* 112; 2 *Hutchinson, Carr.* 1060, 1063. The defendant, having required the female passenger to get out not at the crossing, owed it to her to give her a safe, dry path back to the crossing, and, if hurt by any defect in getting to the crossing, the defendant is liable. *Autry v. Atlantic Coast Line R. Co.* 156 N. C. 293, 72 S. E. 380. The defendant was more negligent, not less so, in making the plaintiff get out at an unsafe place, when she could have gotten out at a safe place at the other end of the coach, as she wished to do, because this was a flag station. She has been deprived of a right guaranteed her by the statute and the Constitution, in being arbitrarily refused by the judge the opportunity to have twelve men to pass upon the question whether the railroad was guilty of negligence in causing her to get out of the train not at the crossing place. His Honor was further in error in depriving her of the benefit of the statute which placed upon the defendant the burden of proof to show that the plaintiff was guilty of contributory negligence, and in finding himself, not only without any evidence whatever, but in contradiction of the only evidence before him, that she was guilty of contributory negligence. She testified that she took the safest course. The presumption under the statute is that she did. *Revisal*, § 483. This presumption

should be reversed only by a jury, as the statute requires.

The conduct of the defendant and the action of the court below are without any precedent to sustain them. All passengers, and especially ladies, are entitled to better treatment than this plaintiff has received. Her ankle was broken because the defendant put her off at an unsuitable place, when she could have gotten off at a safe place, and that, too, when it was apparent that for her to get back to the proper point, the road, she would have to traverse a muddy, slippery, sloping bank encumbered with cross-ties. If necessary for her to get out at the front end of the coach, the train should have been run back till she could have landed at a safe spot. The plaintiff testified that the usual place for putting off passengers at Bagley was at the crossing. That the egress they gave her was not a safe exit is conclusively shown by the fact that, in attempting to get back to the crossing, her ankle was dislocated, by reason of which she suffered greatly, and was laid up two months. Her testimony that she chose the safest plan must be taken as true on a nonsuit. *Spruill v. Northwestern Mut. L. Ins. Co.* 120 N. C. 147, 27 S. E. 39; *Powell v. Southern R. Co.* 125 N. C. 372, 34 S. E. 530, and cases there cited. In *Wright v. Southern R. Co.* 127 N. C. 228, 37 S. E. 221, this court said: "The court has heretofore had occasion to condemn the growing tendency to take cases from the jury, or limit their sphere in damage cases. The right of trial by jury is guaranteed by the Constitution, and on all disputed issues of fact the courts cannot be too careful to refrain from invading the province of the constitutional 'triers of fact.'"

Hoke, J., concurs in the dissenting opinion of *Clark, Ch. J.*

NORTH DAKOTA SUPREME COURT.

L. C. WIDMAN, Appt.,

v.

GEORGE A. KELLOGG, Receiver of People's State Bank, et al., Resp'ts.

(— N. D. —, 133 N. W. 1020.)

Appeal — finding — draft to forward collections — purchase.

1. This appeal is before this court on the judgment roll alone. The findings, among other things, are to the effect that appellant was required, as a local agent of the Great Northern Railway Company and an-

other, to transmit his receipts each day to his principals in St. Paul, and that it was his custom to go to the bank and deposit such receipts, and receive therefor, from the bank, drafts payable to the order of his principals, and forthwith to transmit the same. It was also found that on four days named he followed this custom, and that the drafts so procured and forwarded to St. Paul were dishonored because no funds were on deposit with the correspondent of the local bank, with which to pay them; that the officers of the bank knew of his employment and the purpose for which such drafts were obtained. The record contains no findings that he kept any general account or drew any checks on the local bank. Held that, in view of this custom and the findings as a whole, the word "deposit" must be construed as indicating the payment into the bank of each day's receipts in exchange for the drafts; and that he stood in relation to the bank as a purchaser for cash of drafts.

Bank — insolvent — receiving money — trustee.

2. Section 4660, Rev. Codes 1905, prohibits insolvent state banks from receiving any money, bank bills, notes, or currency, bills or drafts; and § 4661 makes any official of an insolvent bank who receives money, etc., guilty of a felony. The defendant bank had been hopelessly insolvent for some time prior to the purchase of the drafts mentioned, and it had no funds with its correspondent bank out of which they could be paid; and such officials had no reason to anticipate their being honored.

Note. — Right to preference for money paid to insolvent bank for draft.

The earlier cases on this question have been collected in the note to *Whitcomb v. Carpenter*, 10 L.R.A.(N.S.) 928. Only one case has been found which was decided since the date of that note. In that case, *Brown v. Sheldon State Bank*, 139 Iowa, 83, 117 N. W. 289, it was held that where a bank received money on a collection sent it by another bank a few hours before it failed, and sent its draft in payment thereof, the fund so received was a trust fund, and being in the hands of the receiver, the sender of the collection was entitled to a preference in respect thereof.

A case of some interest in this connection is that of *Livingstain v. Columbian Bkg. & T. Co.* 81 S. C. 244, 22 L.R.A.(N.S.) 445, 62 S. E. 249, where it was held that a depositor of a bank who withdrew his deposit and immediately purchased a New York draft with the proceeds was entitled to be subrogated to the rights of the correspondent bank to collateral held by it for a note in satisfaction of which it applied the funds against which the draft was drawn; and also the companion case, 77 S. C. 305, 22 L.R.A.(N.S.) 442, 122 Am. St. Rep. 568, 57 S. E. 182, where it was held that a depositor who accepted a draft for his check on his deposit was not so entitled to subrogation.

W. A. E.

Headnotes by SPALDING, Ch. J.
30 L.R.A.(N.S.)

Held that such money was received by the bank without consideration, and, in effect, under false pretenses or representations; that thereby a fraud was perpetrated upon appellant, the effect of which was to make the bank a trustee *ex maleficio* of such funds.

Receiver — insolvent bank — rights.

3. On a receiver being appointed for such bank, in a proceeding under the statute to wind up the affairs of insolvent corporations, he had no greater rights in such funds or moneys than those possessed by the insolvent bank, and succeeded the bank as trustee.

Trust — tracing funds — facts.

4. The fact that the bank closed its doors within four business days after the first of the transactions described, and the next day after the last one, and that money in more than double the amount of the claim of appellant was turned over to the receiver by the bank, and other elements of the findings of the trial court, lead to the conclusion that both the money assets of the bank and those received by the receiver were enhanced by the transactions described.

Same — payments from fund — presumption.

5. When a trustee mingles trust funds with his own, and subsequently pays out a portion of the commingled funds, it will be presumed that he made his payments from that portion of the fund belonging to himself, and retained the funds which did not belong to him; and, except in so far as he may distinguish what is his own, the whole fund will be treated as the trust property.

Same — right to recover — failure of proof.

6. The trusteeship of the bank and of the receiver being established, it being conceded that the moneys of appellant were commingled with the funds of the bank, and respondents having failed to show that moneys paid out in the meantime were the original trust funds, and likewise having failed to show that appellant's money was not included in that turned over to the receiver, appellant is entitled to recover.

Same — tracing funds — cash assets.

7. When such trust funds are not commingled with any of the assets of the bank, except the cash assets, the preference of appellant is limited to the cash funds of which the receiver took possession, when distinguishable from the other assets of the estate going into his hands.

Same — extent of preference.

8. Appellant is entitled to preference to the extent of the moneys turned over to the receiver.

Appeal — questions not before court — suggestions.

9. The rights of other claimants, if any, to preference, not being before this court, appellant's rights relative to them are not determined, but it is suggested that the ends of justice would be promoted by proposed L.R.A. (N.S.)

ceeding on the part of claimants to preference, in such cases, by intervention, rather than by independent action against the receiver.

(November 18, 1911.)

A PPEAL by plaintiff from a judgment of the District Court for Nelson County in defendants' favor in an action brought to recover as a preferred claim certain moneys deposited in the insolvent defendant bank. Reversed.

Statement by Spalding, Ch. J.:

The appellant brought this suit against the defendant Kellogg as receiver of the People's State Bank, and the People's State Bank, a corporation organized under the banking laws of this state, seeking to establish and recover as a preferred claim the sum of \$1,074.95. We take the facts from the findings of the trial court, omitting formal matters.

The People's State Bank referred to was, between November, 1892, and January 26, 1910, engaged in the general banking business, at Lakota. It became insolvent on or prior to August 1, 1909, and so continued until January 26, 1910, when it suspended business, and the state examiner took charge of its assets until March 8, 1910, when the same were turned over to the respondent Kellogg, as receiver, pursuant to an action brought by and through the attorney general to obtain a judgment of dissolution, pursuant to the provisions of chapter 27, Rev. Codes, 1905. The appellant was, at all times material, the agent of the Great Northern Express Company and the Great Northern Railway Company, corporations under the laws of Minnesota, at Lakota. It was his duty to receive the funds of said corporations, and promptly transmit them to his principals in St. Paul, Minnesota; and it was his custom in transmitting such funds to deposit the same in said People's State Bank and "receive therefor" drafts issued, in the name of his respective principals, which he forwarded them by mail. This custom had been continued for some time and was well known to the bank and its officers, as also was his relation to such corporations. Appellant became personally responsible for the funds so remitted, and the drafts received by his principals were charged by them to him, and he is the owner thereof. He did not know, and had no reason to know or believe, prior to January 26, 1910, that said bank was insolvent, but the officers of said bank knew, or in the regular performance of their duties ought to have known, of its insolvency at all times subsequent to August, 1909. The amounts in-

volved in this action are drafts purchased by appellant as follows, omitting names of his principals, which are immaterial here:

January 21, 1910.....	\$ 103 20
January 22, 1910.....	119 82
January 22, 1910.....	470 66
January 24, 1910.....	56 44
January 25, 1910.....	324 83

Total\$1,074 95

All such drafts were drawn on the Security National Bank of Minnesota, and transmitted to appellant's employers forthwith, and immediately presented for payment, and protested for want of funds. At the time they were drawn and presented the People's State Bank did not have on deposit with its correspondent the funds to meet said drafts, or any of them, and the officers of the People's State Bank, and those issuing such drafts, knew, or in the performance of their duties ought to have known, that fact. The drafts have never been paid. The People's State Bank continued to carry on its business in the usual manner, paying out money on checks and otherwise, receiving deposits and making collections and issuing drafts, and receiving money therefor, from the time the first above-mentioned draft was drawn until the night of January 26, 1910. It had on hand in cash on the 21st day of January, 1910, \$14,436.88. At the close of business, January 26, 1910, there was on hand cash in the sum of \$2,774.08. No part of this latter sum can be identified as the identical money paid by appellant to said bank, or as the proceeds thereof, or of any checks or drafts delivered by him to it, for which said drafts on the Security Bank were issued. It received deposits between the morning of the 21st and the closing of its doors, aggregating over \$13,000, and paid out money on checks amounting to over \$17,000. Its certificates of deposits increased about \$800 during such time. At the time this action was brought the receiver had in his possession approximately \$25,000 in money and other assets worth \$15,000 belonging to said People's Bank. It is conceded by respondent that the funds paid for the drafts by appellant were mingled with the general fund of the bank.

Other findings show that the bank at all such times was hopelessly insolvent by reason of the embezzlement of its funds by certain of its officers, and that its true condition had been concealed by them.

Judgment was given against the appellant, to the effect that his claim was not entitled to be preferred, and dismissing his action. From such judgment he appeals.

39 L.R.A.(N.S.)

Messrs. Frich & Kelly for appellant.
Messrs. Bangs & Robbins, for respondent:

The deposit being a general deposit, plaintiff is not entitled to have his claim preferred as to the other creditors. His money went into the common fund, and he must share with the other creditors.

Ober & Sons Co. v. Cochran, 118 Ga. 396, 98 Am. St. Rep. 118, 45 S. E. 382; *Philadelphia Nat. Bank v. Dowd*, 2 L.R.A. 480, 38 Fed. 172; *Merchants' & F. Bank v. Austin*, 49 Fed. 31; *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383; *Kansas State Bank v. First State Bank*, 62 Kan. 788, 64 Pac. 634; *City Bank v. Blackmore*, 21 C. C. A. 514, 43 U. S. App. 617, 75 Fed. 771; *White v. Commercial & F. Bank*, 60 S. C. 122, 38 S. E. 453; *Sayles v. Cox*, 95 Tenn. 579, 32 L.R.A. 719, 49 Am. St. Rep. 940, 32 S. W. 626.

That plaintiff is a trust creditor does not, of itself, entitle him to a preference over other creditors.

Officer v. Officer, 120 Iowa, 389, 98 Am. St. Rep. 365, 94 N. W. 947; *Bradley v. Chesebrough*, 111 Iowa, 126, 82 N. W. 472; *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504; *McAfee v. Bland*, 11 Ky. L. Rep. 1, 11 S. W. 439; *Lincoln v. Morrison* (*Lincoln Sav. Bank & S. D. Co. v. Morrison*) 64 Neb. 822, 57 L.R.A. 885, 90 N. W. 905; *Atkinson v. Rochester Printing Co.* 114 N. Y. 175, 21 N. E. 178; *Hanson v. Roush*, 139 Iowa, 58, 116 N. W. 1061; *Paul v. Draper*, 158 Mo. 197, 81 Am. St. Rep. 296, 59 S. W. 77.

In order to sustain a preference in trust funds, they must be identified in the hands of the receiver either in their original form or in some property in which they have been invested; or they must have in some manner increased the assets of a bank which came into the hands of the receiver.

2 *Perry*, Tr. §§ 835-842; 2 *Story*, Eq. Jur. 1258, 1259; *Northern Dakota Elevator Co. v. Clark*, 3 N. D. 26, 53 N. W. 175; *Lowe v. Jones*, 192 Mass. 94, 6 L.R.A.(N.S.) 487, 116 Am. St. Rep. 225, 78 N. E. 402, 7 Ann. Cas. 551; *Little v. Chadwick*, 151 Mass. 109, 7 L.R.A. 570, 23 N. E. 1005; *Freiberg v. Stoddard*, 161 Pa. 259, 28 Atl. 1111; *Carmany's Appeal*, 166 Pa. 622, 31 Atl. 334; *Cavin v. Gleason*, 105 N. Y. 257, 11 N. E. 504; *Atkinson v. Rochester Printing Co.* 114 N. Y. 168, 21 N. E. 178; *Holmes v. Gilman*, 138 N. Y. 369, 20 L.R.A. 566, 34 Am. St. Rep. 463, 34 N. E. 206; *Willoughby v. Weinberger*, 15 Okla. 226, 79 Pac. 777; *Cherry v. Territory*, 17 Okla. 221, 8 L.R.A.(N.S.) 1254, 89 Pac. 192; *Slater v. Oriental Mills*, 18 R. I. 352, 27 Atl. 443; *Sherwood v. Milford State Bank*, 94

Mich. 78, 53 N. W. 923; *Fire & Water Comrs. v. Wilkinson*, 119 Mich. 655, 44 L.R.A. 493, 78 N. W. 893; *State v. Foster*, 5 Wyo. 199, 29 L.R.A. 226, 63 Am. St. Rep. 47, 38 Pac. 926; *Bank Comrs. v. Security Trust Co.* 70 N. H. 536, 49 Atl. 113; *Ellicott v. Kuhl*, 60 N. J. Eq. 333, 46 Atl. 945; *Bishop v. Mahoney*, 70 Minn. 238, 73 N. W. 6; *Twohy Mercantile Co. v. Melbye*, 78 Minn. 357, 81 N. W. 20; *Robinson v. Woodward*, 20 Ky. L. Rep. 1142, 48 S. W. 1082; *New Farmers' Bank v. Cockrell*, 106 Ky. 578, 51 S. W. 2; *Hill v. Miles*, 83 Ark. 486, 104 S. W. 198; *Union Nat. Bank v. Goetz*, 138 Ill. 127, 32 Am. St. Rep. 119, 27 N. E. 907; *Wetherell v. O'Brien*, 140 Ill. 146, 33 Am. St. Rep. 221, 29 N. E. 904; *Hauk v. Van Ingen*, 196 Ill. 20, 63 N. E. 705; *Woodhouse v. Crandall*, 197 Ill. 104, 58 L.R.A. 385, 64 N. E. 292; *White v. Commercial & F. Bank*, 60 S. C. 122, 38 S. E. 453; *Bank of Florence v. United States Sav. & L. Co.* 104 Ala. 297, 16 So. 110; *Shields v. Thomas*, 71 Miss. 260, 42 Am. St. Rep. 458, 14 So. 84; *Reeves v. State Bank*, 8 Ohio St. 465; *Blake v. State Sav. Bank*, 12 Wash. 619, 41 Pac. 909; *Commercial & F. Nat. Bank v. Davis*, 115 N. C. 226, 20 S. E. 370; *Shute v. Hinman*, 34 Or. 578, 47 L.R.A. 265, 56 Pac. 412, 58 Pac. 882; *Ferchen v. Arndt*, 26 Or. 129, 29 L.R.A. 664, 46 Am. St. Rep. 603, 37 Pac. 161; *Ober & Sons Co. v. Cochran*, 118 Ga. 396, 98 Am. St. Rep. 118, 45 S. E. 382; *McGregor v. Battle*, 128 Ga. 577, 13 L.R.A. (N.S.) 185, 58 S. E. 28; *Portland & H. S. B. Co. v. Locke*, 73 Me. 370; *Cushman v. Goodwin*, 95 Me. 353, 50 Atl. 50; *Sayles v. Cox*, 95 Tenn. 579, 32 L.R.A. 715, 49 Am. St. Rep. 940, 32 N. E. 626; *Bruner v. First Nat. Bank*, 97 Tenn. 540, 34 L.R.A. 532, 37 S. W. 286; *Italian Fruit & Importing Co. v. Penniman*, 100 Md. 698, 1 L.R.A. (N.S.) 252, 61 Atl. 694; *Spokane County v. First Nat. Bank*, 16 C. C. A. 81, 29 U. S. App. 707, 68 Fed. 979; *City Bank v. Blackmore*, 21 C. C. A. 514, 43 U. S. App. 617, 75 Fed. 771; *Beard v. Independent Dist.* 31 C. C. A. 562, 60 U. S. App. 372, 88 Fed. 375; *John Deere Plow Co. v. McDavid*, 70 C. C. A. 422, 137 Fed. 802; *Crawford County v. Strawn*, 15 L.R.A. (N.S.) 1100, 84 C. C. A. 553, 157 Fed. 49; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693; *Peters v. Bain*, 133 U. S. 670, 33 L. ed. 696, 10 Sup. Ct. Rep. 354; *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383; *Henry v. Martin*, 88 Wis. 367, 60 N. W. 263; *Burnham v. Barth*, 89 Wis. 362, 62 N. W. 96; *Bromley v. Cleveland, C. C. & St. L. R. Co.* 103 Wis. 563, 79 N. W. 741; *Hyland v. Roe*, 111 Wis. 361, 87 Am. St. Rep. 873, 87 N. W. 252; *Burrows v. Johntz*, 57 39 L.R.A. (N.S.)

Kan. 778, 48 Pac. 27; *Travelers' Ins. Co. v. Caldwell*, 59 Kan. 156, 52 Pac. 400; *Kansas State Bank v. First State Bank*, 62 Kan. 788, 64 Pac. 634; *Holden v. Piper*, 5 Colo. App. 71, 37 Pac. 34; *McClure v. La Plata County*, 19 Colo. 122, 34 Pac. 763; *Morrison v. Lincoln Sav. Bank & S. D. Co.* 57 Neb. 225, 77 N. W. 655; *Lincoln v. Morrison* (Lincoln Sav. Bank & S. D. Co. v. Morrison), 64 Neb. 822, 57 L.R.A. 885, 90 N. W. 905; *Chamberlain v. Chamberlain Bkg. House*, 4 Neb. (Unof.) 278, 93 N. W. 1021; *Jones v. Chesebrough*, 105 Iowa, 303, 75 N. W. 97; *Bradley v. Chesebrough*, 111 Iowa, 126, 82 N. W. 472.

Spalding, Ch. J., delivered the opinion of the court:

It is claimed by counsel for respondent that the authorities applicable to the facts disclosed in this case are in hopeless conflict; that the ancient rule in equity was that property impressed with a trust, which it is claimed by respondent this is, cannot be reclaimed unless the specific property involved can be fully and specifically identified. It is admitted that several courts have modified this rule in recent years, and permitted recovery for such property in certain instances. A vast number of authorities are cited on the subject, and an attempt is made to trace the course of such determinations; but it is also claimed that the trend of the latest authorities has been toward the ancient rule, and that in several states which at one time departed from it, the courts have overruled such decisions and returned to the old doctrine. Among such is the state of Wisconsin. We shall not follow all the holdings of these courts, nor show wherein they have disagreed, to any considerable extent, but shall pass upon this case with reference to some leading authorities which we think clearly give the better reasons. Many of the authorities cited as sustaining the decision of the trial court relate to collections made by banks which became insolvent before remitting or paying them to the owner. In so far as banks in such cases are in charge of a trust fund, such cases are analogous to the case at bar, but the only authorities we find directly in point—that is to say, upon the purchase of drafts from an insolvent bank—support the contention of the appellant.

We note that the brief of appellant treats the transaction in this case as the purchase of a draft, while that of the respondent is based on the theory that it was a general deposit. The word "deposit," as we have shown, is used in the findings. This, however, must be read in connection with the facts disclosed, and, when so read,

we think it is not used to indicate that the appellant kept a deposit account with the insolvent bank. It rather means that he took his day's receipts for each of his principals to the bank and in exchange therefor procured drafts. They were deposited in the sense that they went into the bank, but not for the purpose of checking against them, or for being placed to his credit.

The findings are clearly to the effect that, when he took his day's receipts to the bank, he procured a draft for the exact amount turned over to the bank, and this draft he immediately transmitted to his principal. The transaction is therefore one of taking a sum of money to the bank and exchanging it for a draft, and we consider the findings to be to that effect, notwithstanding the use of the word "deposit." What we have said in explanation of our interpretation of the word "deposit," as used in the findings of the trial court, is said with a view to making our opinion clear, and to prevent its being extended to cover cases in which the facts are different.

Under § 4660, Rev. Codes 1905, every insolvent bank association is prohibited from receiving any deposit or any money or bank bills or notes or currency or other notes, bills, or drafts. And under § 4661 any official of such bank who knowingly receives or accepts, or who is accessory, or permits or connives at the receiving or accepting, any such deposits, is made guilty of a felony. It is clear that, in taking the money of the appellant in exchange for drafts on the Minnesota bank, when the insolvent bank had no funds out of which such drafts were payable, the insolvent bank and its officers represented to the appellant, in effect, that they had money on deposit with the Security Bank to meet the drafts, when in fact they had no such deposit, and, on the contrary, as shown by the findings, their account in that bank was overdrawn in a great sum. They had no reason to anticipate that their correspondent would honor such drafts. They received money without consideration, and under false pretenses or representations.

They thereby perpetrated a fraud upon appellant, and the bank acquired no title to his money, and, of course, could convey no better title than it possessed to the receiver. His rights in the premises are identically the same as those of the insolvent bank. The effect of this is that the bank became a trustee of the funds of appellant *ex maleficio*, and the receiver succeeded the bank as such trustee. Rev. Codes 1905, § 5711; Anheuser-Busch Brewing Assn. v. Morris, 36 Neb. 31, 53 N. W. 59 L.R.A. (N.S.)

1037; Cady v. South Omaha Nat. Bank, 49 Neb. 125, 68 N. W. 358; Pennell v. Def-fell, 4 De G. M. & G. 372, L. R. 1 Eq. 579, 23 L. J. Ch. N. S. 115, 18 Jur. 273, 1 Week. Rep. 499; Re Hallett, L. R. 13 Ch. Div. 719, 49 L. J. Ch. N. S. 415, 42 L. T. N. S. 421, 28 Week. Rep. 732; Cragie v. Hadley, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537; Furber v. Dane, 204 Mass. 412, 27 L.R.A. (N.S.) 808, 90 N. E. 859; Richardson v. New Orleans Debenture Redemption Co. 52 L.R.A. 67, 42 C. C. A. 619, 102 Fed. 780; Capital Nat. Bank v. Coldwater Nat. Bank, 49 Neb. 786, 59 Am. St. Rep. 572, 69 N. W. 116; People v. City Bank, 96 N. Y. 32; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693; Stoller v. Coates, 88 Mo. 515; St. Louis & S. F. R. Co. v. Johnston, 133 U. S. 566, 33 L. ed. 683, 10 Sup. Ct. Rep. 390; Peak v. Ellicott, 30 Kan. 156, 46 Am. Rep. 90, 1 Pac. 499.

This places this case in the same category on principle as the numerous cases which are found in the books where the fund was originally a trust fund, and renders it unnecessary to determine whether the fact that the funds in question were not the property of the appellant, but were held by him as agent, and so known to be held by the bank, also entitled him to a preference.

The apparent conflict of authorities arises from the ability or inability to trace these funds, and as to the extent of the priority to which the *cestui que trust* is entitled. There can be no doubt of several things; among them, that the cash assets of the insolvent bank were enhanced by the receipt of this money. Neither can there be any doubt that the money turned over to the receiver was more by the amount paid the bank than it would have been had it not been paid the bank. The bank took appellant's money, and the funds in its possession and those turned over to the receiver were to that extent increased. It gave nothing for it; hence there was no increase of liabilities. The time between the issuance of the first draft and the closing of the doors of the bank was only four business days. It is true that the funds in possession of the bank decreased during these four days by the payment of checks drawn on the bank in excess of the deposits, but there was still money on hand to an amount more than double the claim of appellant, and this went into the hands of the receiver. From this it is clear that under both lines of authorities,—those which are to the effect that the assets turned over to the receiver must be enhanced by the appellant's deposit, if it may be called a deposit, as well as those which

are to the effect that the assets of the bank must be enhanced,—he is entitled to recover. *Stoller v. Coates*, 88 Mo. 515; *Richardson v. New Orleans Debenture Redemption Co.* 52 L.R.A. 67, 42 C. C. A. 619, 102 Fed. 780.

It is claimed that the fact that moneys were paid out of the bank between the date of his purchasing the drafts, or at least between the date of the first draft, and the receivership, precludes him from recovering, as such moneys may have been his moneys rather than the bank's. We are only considering this question as between this appellant and the bank, and it is established by many authorities that where a trustee mingles trust funds with funds of his own, and subsequently pays out a portion of the commingled fund, it will not be presumed that he paid out moneys which he had no right to disburse, and which did not belong to him, but that, on the contrary, it will be presumed that he made his payments from that portion of the fund belonging to him, and retained the funds which did not belong to him, and, except so far as he may distinguish what is his own, the whole fund will be treated as the trust property. While there are some authorities holding that the claimant must prove that the payments were not made from his funds, we think the other rule much more equitable and supported by the great weight of authority. *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693; *Plano Mfg. Co. v. Auld*, 14 S. D. 512, 86 Am. St. Rep. 769, 86 N. W. 21; *Pennell v. Deffell*, 4 De G. M. & G. 372, L. R. 1 Eq. 579, 23 L. J. Ch. N. S. 115, 18 Jur. 273, 1 Week. Rep. 499; *Re Hallett*, L. R. 13 Ch. Div. 719, 49 L. J. Ch. N. S. 415, 42 L. T. N. S. 421, 28 Week. Rep. 732; *Burnham v. Barth*, 89 Wis. 362, 62 N. W. 96; *State v. Bank of Commerce*, 61 Neb. 181, 52 L.R.A. 858, 85 N. W. 43; *State v. Bank of Commerce*, 54 Neb. 725, 75 N. W. 28; *Lincoln v. Morrison* (*Lincoln Sav. Bank & T. Co. v. Morrison*) 64 Neb. 822, 57 L.R.A. 885, 90 N. W. 905; *Sherwood v. Central Michigan Sav. Bank*, 103 Mich. 109, 61 N. W. 352; *Whitcomb v. Carpenter*, 134 Iowa, 227, 10 L.R.A. (N.S.) 928, 111 N. W. 825; *Peak v. Ellicott*, 30 Kan. 156, 46 Am. Rep. 90, 1 Pac. 499; *Fire & Water Comrs. v. Wilkinson*, 119 Mich. 655, 44 L.R.A. 493, 73 N. W. 893; *Hyland v. Roe*, 111 Wis. 361, 87 Am. St. Rep. 873, 87 N. W. 252; *Anderson v. Pacific Bank*, 112 Cal. 598, 32 L.R.A. 479, 53 Am. St. Rep. 228, 44 Pac. 1063; *Farmers' & T. Bank v. Kimball Mill. Co.* 1 S. D. 388, 396, 36 Am. St. Rep. 739, 47 N. W. 402; *Hart v. Ten Eyck*, 2 Johns. Ch. 62; *Davis v. Coburn*, 128 Mass. 377; *Bank v. Fulton* 39 L.R.A. (N.S.)

County Bank, 2 Wall. 252, 17 L. ed. 785; *Shute v. Hinman*, 34 Or. 578, 47 L.R.A. 265, 56 Pac. 412, 58 Pac. 882.

And why, we ask, should the bank, or the receiver standing in its stead, be heard to assert, as against the rightful owner of moneys, that in paying creditors of the bank it paid money that belonged to appellant and which it held in a trust capacity, instead of paying its own money? To hold that the bank may take such a position, and maintain it in a court of equity, seeking to do equity, would be to permit the bank to take advantage of its own wrong, to its own benefit, and to the detriment of the innocent party it has injured. One reason of great force for the trustee assuming the burden of proving that he paid out the trust funds instead of his own, and that the trust funds did not pass into the hands of the receiver, is that, in the case of money, the means of knowledge on these subjects would not be possessed by the *cestui que trust*, but that the means of proof of the facts regarding it would ordinarily be wholly within the possession or control of the trustee. This is peculiarly so in the case of a bank. The business of a banking institution is ordinarily done by confidential agents or employees behind a screen and closed doors. Its customers and the public are excluded from its banking room, and have no means of knowing from what fund money is paid or the disposition made of it under any ordinary circumstances. Such knowledge must of necessity be in the sole possession of the trustee. Several of the authorities cited in support of the respondent's position disclose facts rendering the principle materially distinguishable from those governing the case at bar. For instance, in some of them the last payments were made to the bank many months before its failure, and funds were paid out in the meantime greatly in excess of such payments, and in excess of the receipts of the bank, and under such circumstances as to preclude the possibility of the fund belonging to the depositor having enhanced the assets of the bank or the assets which were turned over to the receiver.

The bank and its successor, the receiver, being trustees, and it being conceded by all parties that the moneys of appellant were commingled with the funds of the bank, and the trustees having failed to show that any moneys paid out were the trust funds, and likewise having failed to show that the funds belonging to the appellant were not included in the money turned over to the receiver, it necessarily follows that the judgment of the district court was erroneous.

The foregoing conclusion, however, does not settle the rights of the appellant fully. Much stress has been laid upon the conflict of authorities applicable to this case, and particularly the different rules adopted by the supreme court of Wisconsin and others following the lead of that court. Following the English authority (*Re Hallett*, L. R. 13 Ch. Div. 719, 49 L. J. Ch. N. S. 415, 42 L. T. N. S. 421, 28 Week. Rep. 732), the supreme court of Wisconsin held in *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, 214, and certain other cases immediately following that, that the *cestui que trust* might have his money out of any of the assets of the estate of the insolvent. Subsequently, in *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383, and other cases, the *Evans Cases* were overruled in so far as they permitted recovery from all or any of the assets.

After a careful consideration of authorities on both sides, we are satisfied that the better rule is, in a case like the instant case, where the funds of the appellant were commingled only with the moneys in the bank, and where there is no finding that they went to enhance any part of the assets except the cash on hand, that the recovery should be limited to the cash funds turned over to the receiver. In the case at bar, they are clearly distinguishable from any of the other assets of the estate received by the receiver. This is in accordance with the *Nonotuck Silk Company Case* and many other authorities and seems to be the later rule adopted by most of the courts. It may not be applicable in all cases, because the line between the fund into which the money of the *cestui que trust* went and the other assets may not be clearly distinguished, but it is so in this case. In the *Nonotuck Silk Company Case* the plaintiff was not permitted to recover, principally because no money went into the hands of the assignee, except a few pennies and a \$2.50 gold piece. In the case at bar more than twice as much money went into the hands of the receiver as belonged to the appellant, and this occurred only the day after the last payment by appellant to the bank, and within four banking days after the first payment. *Northern Dakota Elevator Co. v. Clark & Smart*, 3 N. D. 26, 32, 53 N. W. 175, is relied on as holding that appellant should not recover. We do not so consider it. There is a vital distinction between the facts in the two cases. In that case no part of the proceeds of a draft which was involved ever went into the possession of the bank. It was drawn payable to the order of an individual mem-

ber of the firm comprising the bank, and placed to his credit in another bank. The plaintiff was in fact indebted to the defendants, instead of being a creditor, so there were no funds in any form in the hands of the bankers belonging to the plaintiff, and, of course, no question of trust funds could be involved. The additional fact is also disclosed that only \$3.96 of cash was turned over to the assignee of the defendant bankers. What is said therein with reference to the English and Wisconsin authorities is totally irrelevant to the issues before this court at that time, and lastly, in relation to such case, we find that the question now before us was not determined.

Lastly, with reference to this subject, we may say that many authorities cited by respondent are where it is shown that the trust fund has been dissipated altogether, leaving nothing to be the subject of the trust. It was held in *Pennell v. Duffell*, 4 De G. M. & G. 372, L. R. 1 Eq. 579, 23 L. J. Ch. N. S. 115, 18 Jur. 273, 1 Week. Rep. 499, that, if a man mingles trust funds with his own, the whole will be treated as trust property, except so far as he may be able to distinguish what is his own. This holding was followed in *Re Hallett*, supra, and approved. In *Burnham v. Barth*, 89 Wis. 367, 62 N. W. 96, it is said that, where a trustee mingles trust money with his own, any money drawn from the common fund will be deemed to be drawn by the trustee from his own, instead of the trust fund. And in *Cragie v. Hadley*, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537, it was held that the rule that one who has been induced to part with his property by the fraud of another, under guise of a contract, may, upon discovery of the fraud, rescind the contract, and reclaim the property, unless it has come to the possession of a bona fide holder, is well settled, and that permitting plaintiff to make a deposit when the bank was known by its officers to be insolvent, in reliance upon the supposed solvency of the bank was a gross fraud upon the plaintiff, and that the latter was entitled to reclaim such deposit or its proceeds, and that such right was not precluded by provisions of the statute forbidding all preferential payments or transfers by an insolvent bank, and providing for a ratable distribution of its assets, for the reason that the plaintiff did not claim under a transfer from the bank, but under his original title; that his relation as creditor ceased when he elected to rescind the contract of deposit, and that neither the creditors nor receiver of the bank had any equity to have the plaintiff's property ap-

plied in payment of the obligations of the bank. That was an action brought to recover the proceeds of certain drafts deposited by the plaintiff with a bank in Buffalo.

In *Stoller v. Coates*, 88 Mo. 515, it is held that where a bank received a draft on deposit to the credit of the depositors, who thereupon drew their check on the bank with the request that it should place the proceeds to the credit of one E., in another bank, its correspondent, and upon doing so the second bank refused to accept it and charge it to the account of the first bank, that the fund remained in the first-named bank, impressed with a trust, and that the relation of general creditor was not created between the depositors and that bank, and that, while it may be impossible to follow a fund into its diverted use, it is always possible to make it a charge on the estates or assets to the increase or benefit of which it had been appropriated away. In *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693, the Supreme Court of the United States passed upon this question and reviewed a large number of authorities, and held that, if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own. And it is held that these are established doctrines of equity, and that they apply in every case of a trust relation, and to moneys deposited in a bank account, and the debt thereby created. And the court reviewed and followed *Re Hallett*, *supra*.

In *Richardson v. New Orleans Debenture Redemption Co.* 52 L.R.A. 67, 42 C. C. A. 619, 102 Fed. 780, the circuit court of appeals of the fifth circuit held that a deposit obtained by fraud when a bank is hopelessly insolvent creates a trust in favor of the depositor, and can be recovered from a receiver of the company, even if the identical money deposited does not pass into his hands, where the funds received by him are in any event increased by the amount of the deposit. In *State v. Bank of Commerce*, 61 Neb. 181, 52 L.R.A. 858, 85 N. W. 43, it was held that trust funds do not become a part of the assets of the bank, and, if a bank becomes insolvent and a receiver is appointed, the owner of the trust funds is made a preferred creditor; and that the beneficiary is entitled to the funds or the proceeds thereof, so long as he can definitely trace them, until they reach the hands of an innocent holder; and that, when such funds have been wrongfully commingled and payments made by the trustee from the common fund, it will

be presumed that such payments were made out of his own money, and not from the trust money; and that the claim of a beneficiary for trust money may be preferred to the extent of the cash found among the assets of the insolvent trustee at the time of his failure. And several other decisions of that court are cited in the opinion to the same effect.

And in *State v. Bank of Commerce*, 54 Neb. 725, 75 N. W. 28, it was held that, when such funds are wrongfully commingled with those of the bank and payments made from the common fund, it will be presumed that such payments were made out of the trustee's own money, and not the trust money, and that the cash assets on hand when the trustee failed were part of the trust money, but that, if it is shown that the funds were actually dissipated, the beneficiary cannot have his claim allowed as a preferred one. And the claim in that case was allowed to the extent of the cash on hand at the time of the failure. In *St. Louis & S. F. R. Co. v. Johnston*, 133 U. S. 566, 33 L. ed. 683, 10 Sup. Ct. Rep. 390, it was held that the accepting of a deposit of trusts by a bank irretrievably insolvent constitutes such a fraud as entitles the depositor to reclaim his trusts or their proceeds. And the court cites with approval *Cragie v. Hadley*, *supra*, and numerous other authorities. To the same effect, see *Officer v. Officer*, 127 Iowa, 347, 101 N. W. 484, and *Sherwood v. Central Michigan Sav. Bank*, 103 Mich. 109, 61 N. W. 352.

In Iowa many authorities sustain the right of the appellant to recover. The latest to which our attention has been called is *Whitcomb v. Carpenter*, 134 Iowa, 227, 10 L.R.A.(N.S.) 928, 111 N. W. 825, in which the facts are identical with those in the case at bar. It was held that the purchaser of a draft, on the insolvency of the banker, was entitled to a preference for the amount of his claim, and that where the maker of a note had paid money to the bank on the note made payable to the banker, who had failed to make a proper indorsement, but still held the note, or failed to turn the payment over to the person holding it, and mingled the money with the funds of his bank, the bank was a trustee, and that the maker was entitled, on the insolvency of the banker, to a preference for the amount paid; and that the fact that the assets which passed into the hands of the assignee were less than those which the banker had on hand when he wrongfully obtained the money and mingled it with his own funds did not overcome the presumption that the money passed into the hands of the as-

signee. See also *Hanson v. Roush*, 139 Iowa, 58, 116 N. W. 1061. *Anheuser-Busch Brewing Asso. v. Morris*, 36 Neb. 31, 53 N. W. 1037, holds that where a bank collects money for another, it holds it as a trustee of the owner, and that, on the making of an assignment, the trust character still adheres to the fund in the hands of the assignee, and the owner is still entitled to a preference. In *Fire & Water Comrs. v. Wilkinson*, 119 Mich. 655, 44 L.R.A. 493, 78 N. W. 893, it is held that when money on hand at the time the bank closed its doors was greater than the amount received in a certain fund, in the absence of proof to the contrary, it will be presumed that the amount of cash on hand, to the amount deposited in cash from such fund, was the trust fund. See also *Hyland v. Roe*, 111 Wis. 361, 87 Am. St. Rep. 873, 87 N. W. 252, holding that where a deposit was received by an insolvent bank, receipt of which is a penal offense, it does not have to be identified to enable the depositor to recover the fund. In *Anderson v. Pacific Bank*, 112 Cal. 598, 32 L.R.A. 479, 53 Am. St. Rep. 228, 44 Pac. 1063, it was held that money deposited in a bank to secure it from loss for furnishing bail, and commingled with the general funds of the bank, could be recovered; and that the depositor, on the insolvency of the bank, was not limited to the general rights of a creditor, but could recover the entire amount deposited out of the assets of the bank. In *People v. City Bank*, 96 N. Y. 32, we find a case where the bank had discounted notes for a firm, a depositor. Such firm wished to anticipate payment, and gave to the bank checks for the amount of the notes. These checks were charged in the firm account and entries made in the bank books that the notes were paid. The firm, when giving these checks, supposed that the bank held the notes, but they had been previously sold by it. Before the notes fell due, the bank failed, and a receiver was duly appointed of its assets. It was held that the transaction between the bank and the firm was not in their relation of debtor and creditor, nor of bank and depositor, but that a trust was created, the violation of which constituted a fraud by which the bank could not profit; and that an order requiring the receiver to pay the notes out of funds in his hands was proper. See also *Plano Mfg. Co. v. Auld*, 14 S. D. 512, 86 Am. St. Rep. 769, 86 N. W. 21, as directly in point; and *First Nat. Bank v. Hummel*, 14 Colo. 259, 8 L.R.A. 788, 20 Am. St. Rep. 257, 23 Pac. 986.

The judgment of the trial court was erroneous, and we hold that the appellant 39 L.R.A.(N.S.)

in this case is entitled to preference, as indicated, and, if necessary, may participate with general creditors in general assets. See *Kimmel v. Dickson*, 5 S. D. 221, 25 L.R.A. 309, 49 Am. St. Rep. 869, 58 N. W. 561; *Eureka v. Farmers' Bank*, 88 Iowa, 194, 55 N. W. 342; also *Plano Mfg. Co. v. Auld*, supra.

The rights of other claimants to preference are not before us, hence appellant's rights relative to them are not determined. Although the procedure in this case is not questioned, we deem it proper to add that this court is satisfied that the ends of justice would be promoted in matters of this nature by an intervention by the claimant in the main action. In such case the rights of all parties as to each other could be determined and much litigation avoided.

Bruce, J., did not participate.

Petition for rehearing denied December 19, 1911.

NEW JERSEY COURT OF ERRORS AND APPEALS.

PETER SAMKIWICZ

ATLANTIC CITY RAILROAD COMPANY,
Plff. in Err.

(— N. J. —, 81 Atl. 833.)

Railroads — Injury at crossing — inference of defect.

1. It is the duty of every railroad company controlling a right of way, to provide and keep in repair a safe and sufficient passageway over it, where any public highway shall cross the same, of such width and character as shall be suitable to the locality in which the same is situated, as required by "An Act Concerning Railroads" (Revision 1903), act April 14, 1903 (P. L. p. 645), § 26, and when it appears that the edge of a plank used to provide a crossing is so worn as to permit the foot of a person crossing the same to slip between the worn plank and rail, and hold the foot so that it cannot be released, by any reasonable effort, in time to avoid injury to it by a train passing along the rail, an inference may be drawn that the crossing was not in good

Headnotes by BERGEN, J.

Note. — There seem to be no other cases discussing the question as to liability for injury at defective crossing, as affected by fact that gates were closed. Although there are numerous cases where one disregarding closed gates has gone upon tracks, and been injured by a passing engine or train, they do not, like *SAMKIWICZ v. ATLANTIC CITY R. Co.*, involve a defective crossing.

order, and the question whether the company negligently omitted to maintain a safe crossing was one which should be submitted to the jury.

Same — injury at crossing — contributory negligence — presumption.

2. It is not a sound legal proposition that the mere attempt of one on foot to cross over a railroad track at a highway crossing when the gates are down, in doing which he is injured, raises a conclusive presumption that "he took all chances of the injury, and cannot recover." That the gates are closed is a circumstance to be taken into account in determining whether, under all the facts, he was negligent in not observing the warning thereby conveyed, but it does not conclusively convict him of contributory negligence.

(November 20, 1911.)

ERROR to the Circuit Court for Atlantic County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. J. Willard Morgan and C. V. D. Jollne for plaintiff in error.

Mr. Howard Miller for defendant in error.

Bergen, J., delivered the opinion of the court:

The plaintiff's foot was so crushed by defendant's car that an amputation became necessary, for which he brought suit and recovered damages. The case made by him justified the inference that, in attempting to walk over the defendant's railroad at a highway crossing, his foot caught between the planking and the rail of the track, from which he was unable to extricate himself before a freight train, with the motive power at the end of the train farthest from him, was backed against him and his foot cut off; that the planking next to the rail was old, and the edges so worn as to allow plaintiff's foot to slip between the planking and the rail. It also appeared that although there were gates at the crossing, placed there by the defendant to be lowered when an approaching train intended to cross the highway, they were not lowered at the time the plaintiff undertook to cross the tracks; that no whistle was blown or bell rung to indicate the approach of this train; that, when the plaintiff undertook to cross, the train was about a quarter of a mile away from him; that he made every possible effort to loosen his foot as the train was approaching, and in this he was assisted by at least one other person, but their efforts were unavailing, and while the

wheels of the first truck passed over his foot, the car was stopped before the wheels of the second truck reached him. With the record in this condition the defendant moved for a nonsuit which the trial court refused, and an exception was taken, upon which is rested the first assignment of error. While the railroad company has the right, when lawfully authorized, to cross a public highway with its rails, it must so construct its roadbed over the highway as not to unnecessarily interfere with its safe use by the public. *Pennsylvania R. Co. v. Matthews*, 36 N. J. L. 531. Planking, or some other efficient material, must be placed between the rails where they cross a public highway, so as to afford to the public a sufficient method by which it may safely cross its rails.

It is the duty of every railroad company controlling a right of way, to provide and keep in repair a safe and sufficient passageway across it, where any public highway shall cross the same, of such width and character as shall be suitable to the locality in which the same is situated, as required by "An Act Concerning Railroads" (Revision of 1903), P. L. 1903, p. 645, § 26, and this implies that it be maintained in such condition as to be reasonably safe for public use; and when it appears that the edge of a plank, used to provide a crossing, is so worn as to permit the foot of a person crossing the same to slip between the worn plank and the rail, and hold the foot so that it cannot be released, by any reasonable effort, in time to avoid injury to it by a train passing along the rail, an inference may be drawn that the crossing was not in good order, and the question whether the company negligently omitted to maintain a safe crossing was one which should be submitted to the jury, and there was no error in the refusal to nonsuit. At the close of the whole case the defendant moved that a verdict be directed for the defendant, but the plaintiff's case was not so shattered by the testimony offered by the defendant as to justify the allowance of this motion. The utmost that can be said regarding defendant's evidence is that it tended to contradict the testimony of plaintiff's witnesses, and therefore to which side credence should be given was essentially a jury question. The plaintiff in error in its brief, on this branch of the case, urges that there should have been binding instructions for the defendant, because Dickinson, one of its witnesses, a civil engineer, testified that the planking was neither old nor new; that the opening between the planking and the rail was the regulation opening; that there was some wear to it, but that it was nearly square. In this he was corroborated

by two other witnesses. Another witness, Clark, testified that there was a little rounding on the edge of the planking; that it was worn slightly,—that is, it was slightly rounded on the edge, and that there was no danger that a person would get his foot caught if he walked straight ahead. The plaintiff's case showed that his foot was caught sidewise between the rail and the plank, and the defendant urges that this could not have happened if he had walked straight across the track.

We do not think that any conclusive inference of contributory negligence can be drawn from this testimony. The testimony is that the plaintiff was walking straight across, and it is not denied that his foot was caught, and a jury might, we think, fairly find from the evidence that the condition of the planking was such as to throw the foot lengthwise between the defective plank and the rail. We find no error in the refusal to direct a verdict.

The only other assignment of error argued, and that is presented in the supplemental brief for the plaintiff in error, is the seventh. The court was asked to charge "if the jury believe that he went under the gates after the gates were down, he took all chances of the injury and cannot recover."

This request assumes that in all cases where it appears that a person is injured while undertaking to cross a railroad on a public highway, when the crossing gates are down, a conclusive presumption arises that he is guilty of contributory negligence, and that he takes all the chances of being injured, without considering any other fact pertinent to the issue to be determined. In deciding the legal propriety of a request to charge, its relation to the facts proven in the particular case must be considered. The gates when down give warning that a train is approaching; but if one, seeing he has ample time to cross, attempts it, and is prevented by some negligent act of the railroad company from proceeding, so that he cannot escape from the track until he is injured, it could not be said that he was guilty of contributory negligence, for the immediate cause of the injury was the negligent act of the defendant. In the present case the uncontradicted proof is that plaintiff could have safely crossed, but for the alleged negligence of the defendant in not maintaining the crossing in a reasonably safe condition. The request refused eliminates every condition other than that relating to the situation of the gates, and would amount to a direction for defendant if in fact the gates were down when plaintiff undertook to cross the track. In passing upon the question of contributory negligence the jury would have the right to determine

whether the plaintiff had acted as a reasonably prudent man should when, as he testifies, the freight train was about a quarter of a mile away at the time, with the engine at the end of the train farthest from plaintiff, a circumstance which led him to think that it was likely to move the other way, and that he could cross in safety if the crossing had been in good condition. The jury could well have inferred, under these and other conditions shown, that the plaintiff was not guilty of contributory negligence. It is not a sound legal proposition that the mere attempt of one on foot to cross over a railroad track at a highway crossing when the gates are down, in doing which he is injured, raises a conclusive presumption that "he took all chances of the injury, and cannot recover." That the gates are closed is a circumstance to be taken into account in determining whether, under all the facts, he was negligent in not observing the warning thereby conveyed; but it does not conclusively convict him of contributory negligence.

In this case, if we assume that the gates were closed, and the plaintiff attempted to cross by going under them, there was no causal connection between the act of the plaintiff and the cause of his injury, which was a defect in the crossing, if it was defective, for his foot would have caught in the same way even if the gates had been open. "To exonerate defendant from liability for its negligence which also caused plaintiff's injury, it is not sufficient that plaintiff, by his act, contributed thereto, but it must further appear that in doing that act he was at fault, and guilty of what the law calls negligence. . . . In this respect the law exacts such judgment respecting dangers and risks incident to the circumstances as a reasonable man would form, and such vigilance in observing the approach of danger, and such care in avoiding it, as a prudent man, reasonably careful of his safety, would exercise." New York, L. E. & W. R. Co. v. Bell, 53 N. J. L. 283-289, 21 Atl. 1052. But such duty does not extend to dangers from causes *ab extra*. Watson v. Camden & A. R. Co. 55 N. J. L. 125, 19 L.R.A. 487, 39 Am. St. Rep. 624, 26 Atl. 136.

"In the trial of cases of this kind, where it appears that both parties were in fault, the primary consideration is whether the faulty act of the plaintiff was so remote from the injury as not to be regarded in a legal sense as a cause of the accident, or whether the injury was proximately due to the plaintiff's negligence as well as to the negligence of the defendant. If the faulty act of the plaintiff simply presents the condition under which the injury was received,

and was not in a legal sense a contributory cause thereof, then the sole question will be whether, under the circumstances and in the situation in which the injury was received, it was due to the defendant's negligence." *Menger v. Laur*, 55 N. J. L. 205-216, 20 L.R.A. 61, 26 Atl. 180.

The plaintiff in error cites the following cases in support of the request: *Allerton v. Boston & M. R. Co.* 146 Mass. 241, 15 N. E. 621. In this case plaintiff's intestate, on leaving defendant's train, started to cross the railroad on a public street while the gates were down, without looking to see whether any train was approaching on the other track, and she was injured by a train which she could have seen if she had looked. Under these conditions she would be guilty of negligence in not looking, and the court said: "There was no express or implied invitation to her to cross, nor any excuse for her to cross without looking for the coming train." The fact that the gates were down was an incident tending to show negligence on her part, as it was warning that a train was coming, which emphasized her duty to look for a danger of which she was warned, but it was not held to be conclusive.

In *Cleary v. Philadelphia & R. R. Co.* 140 Pa. 19, 21 Atl. 242, the plaintiff's intestate thought that the gates were down for a particular train to pass on one of the tracks, and while standing on one track, he was struck by a train coming from the opposite direction on another track and killed. The court said: "He stepped in front of a moving train in broad daylight." His negligence was apparent, for the place was a dangerous one of which he was warned by the closed gates.

In *Sheehan v. Philadelphia & R. R. Co.* 166 Pa. 354, 31 Atl. 120, it appears that plaintiff went upon the track in front of an approaching train and was injured. The court refused to consider his testimony that he stopped, looked, and listened, and held that he was guilty of contributory negligence in disregarding the warning and going upon the track in front of an approaching train. The opinion is very brief, and the facts meager, but the case was held to be controlled by *Cleary v. Philadelphia & R. R. Co.* supra.

Wyatt v. Great Western R. Co. 6 Best & S. 709, is also relied upon, but this case has no application, for it is based upon the interpretation given to a statute, which required that gates of a certain character should be kept constantly closed at railway crossings, and to be opened when the circumstances justified it, with due regard to safety, and this was held to be a prohibition to the public to pass over the railway except when the gates were open. 39 L.R.A. (N.S.)

The facts in this case showed that the gates were closed, and the plaintiff, desiring to cross, undertook to open them, when one of them of its own weight flew back and struck his horse, which became unmanageable and the plaintiff was thrown out of his carriage and injured. The decision for the defendant was put upon the ground that the law prohibited the plaintiff from crossing when the gates were down, intimating that he might have a remedy against the company if it did not open the gates when it should. None of these cases support the claim that one who attempts to cross a railroad when the crossing gates are down assumes all chances of injury, and cannot recover simply because he attempts to cross when the gates are down. In each case there was another element bearing on the question of negligence. The request was too broad when applied to the evidence in the case, and was properly refused.

The result is that the judgment under review will be affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ROBERT DENNERY, by Next Friend,

v.

GREAT ATLANTIC & PACIFIC TEA COMPANY, Plff. in Err.

(— N. J. —, 81 Atl. 861.)

Highway — runaway horse — presumption of negligence.

1. The unexplained presence upon a public highway of a runaway horse harnessed to a wagon, unattended by the owner or other person, raises a prima facie presumption of negligence on the part of the owner.

Evidence — ownership — inference.

2. Evidence that the wagon which ran over the plaintiff was conspicuously marked with defendant's name was sufficient to justify the inference that defendant was the owner.

Appeal and error — nonsuit — proof afterwards supplied.

3. The refusal of a nonsuit for failure of

Headnotes by WHITE, J.

Note. — May negligence be inferred from mere fact that a horse runs away.

This note is supplemental to the note to *Coller v. Knox*, 23 L.R.A. (N.S.) 171, where the earlier cases are considered.

For the subject of liability, in the absence of negligence, for damage by runaway horse, see the note to *Metropolitan Casualty Ins. Co. v. Clark*, 37 L.R.A. (N.S.) 717.

For the duty of driver of horse that is running away, see the note to *Kimble v. Stackpole*, 35 L.R.A. (N.S.) 148.

proofs is not ground for reversal if said proofs were afterwards supplied by either party in the progress of the trial.

Trial — negligent handling of horse — question for jury.

4. Where there was proof that the driver of a young horse, which he was driving that day for the first time, drove it up to a railroad crossing where the gates were down and upon which a freight train was drilling at the time, and left it a little while with its head toward the gates and with the hitching weight attached, and then returned and took the hitching weight off, put it in the wagon, and, in order to see that all was right with the goods therein, went behind the rear end of the wagon, so that he may have been in such a position that he could not reach the reins in time to control the horse should it take fright at the sounds which might be expected to occur from the drilling train, and which in fact did occur, causing the horse to run away, it was a question for the jury whether or not the driver was guilty of negligence.

(November 20, 1911.)

ERROR to the Circuit Court for Hudson County to review a judgment in plaintiff's favor in an action brought to recover damages for injuries to plaintiff by defendant's runaway horse. Affirmed.

Statement by White, J.:

The writ reviews a judgment on verdict in favor of the plaintiff, who was three years and two months old, for personal in-

juries received by him from being run over on the public highway or street in Jersey City by defendant's runaway horse, attached to its delivery wagon. The errors assigned are to a refusal to nonsuit and to a refusal of a motion for the direction of a verdict in favor of the defendant. The plaintiff's case showed a driverless horse running away, harnessed to a delivery wagon upon which defendant's name appeared, and coming around a corner, (into the street where it ran over plaintiff) from the direction of a railroad crossing a short distance away, where trains were frequently drilling. Upon this evidence the court refused a motion for nonsuit. Defendant then called the driver (Wood), who testified that the team belonged to defendants, and that he, as their employee, was making deliveries for them with it when the accident happened; that this was the first day he had ever driven the horse in question (which was five years old); that he drove up to the railroad crossing where the gates were down and a freight train, consisting of small dirt cars on springs, was drilling at the time, and attaching the hitching weight to the horse's head, left it with its head toward the gates while he made a delivery; that he then returned, removed the hitching weight, put it in the wagon, and went around back of the wagon to see that all was right, and had come up on the side next to where the reins were when the horse became frightened at the starting of

For cases on negligence in leaving horse unhitched in highway, see the notes to *Moulton v. Lewiston, B. & B. Street R. Co.* 10 L.R.A. (N.S.) 845, and *Corona Coal & I. Co. v. White*, 20 L.R.A. (N.S.) 958.

The decision in *DENNERY v. GREAT ATLANTIC & P. TEA CO.* upon the affirmative side of the question which is the subject of this note follows the doctrine of the New Jersey cases of *Kokoll v. Brohm & B. Lumber Co.* 77 N. J. L. 169, 71 Atl. 120, and *Francois v. Hanff*, 77 N. J. L. 364, 71 Atl. 1128, cited in the aforesaid note to *Coller v. Knox*.

In *Kimble v. Stackpole*, 60 Wash. 35, 35 L.R.A. (N.S.) 148, 110 Pac. 677, the court, in approving the direction of a verdict for the defendant, said: "In this case there is no evidence showing negligence, or from which negligence could be reasonably inferred. What caused the team to run away is not made to appear with any degree of certainty."

Similarly it is intimated in *Keaveny v. Moran*, 208 Mass. 277, 94 N. E. 274, that if the horse was beyond the control of his driver, that might have excused running over the plaintiff.

In some jurisdictions the question is affected by statute. Thus, in *Trenchard v. New Orleans R. & Light Co.* 123 La. 36, 48 So. 576, the court, in affirming a judgment against the owner of the horse, quoted the 39 L.R.A. (N.S.)

statute providing that "the owner of an animal is answerable for the damage he has caused," and said: "Conceding, for the argument, that this article is not to be taken literally, but merely as establishing a presumption of fault on the part of the owner of the animal, such as he may rebut by proof of entire absence of negligence on his part, the defendant in this case, who left his horse unhitched and unattended in the street, is not entirely blameless, no matter how much the animal may have been accustomed theretofore to stand when left in that way."

In *Birmingham v. Gallery*, Rap. Jud. Quebec, 36 C. S. 481, the court referred to the statute declaring the proprietor of an animal responsible for damage caused by it, as founded on a presumption "de faute, de negligence, ou d'imprudence," but reversed a judgment against the defendant, on the ground that he had proved that there was no fault on his part.

It may be noted that in *Jones v. Lee*, 28 Times L. R. 92 (a case not strictly within the scope of this note, as the horse which had escaped from a field into the highway while apparently fractious was not "running away"), it was held that there was no common-law duty of an owner whose land adjoined the highway to keep his animals off the highway.

B. B. B.

the freight cars or the puffing of the engine, both of which the driver heard start up at that moment, and swerving sharply around started to run; that the driver grabbed at the reins, but missed them and fell down, and the horse ran around the corner, and up the street, where the plaintiff was injured.

Messrs. Griggs & Harding for plaintiff in error.

Messrs. Tumulty & Cutley for defendant in error.

White, J., delivered the opinion of the court:

By reason of their nature and training, horses can be safely utilized to draw vehicles upon public streets only when controlled by reasonably competent drivers. This fact is in such complete accord with universal experience that the legal duty to supply such a driver exists, and consequently it is prima facie evidence of negligence for a person to permit his horse attached to a wagon to go out upon a public street without any driver or other person in charge. If, therefore, a horse and wagon are found passing along a street with no one in charge, the absence of the driver gives rise to a prima facie presumption of negligence on the part of the owner. The fact that the horse is running does not negative this presumption. That a horse under such circumstances, finding itself without anyone's guidance or control, should soon commence running, is the result both of its nature and of its training. Its nature is to frighten at unusual sights and sounds and to run away from them. It has been trained, however, to confide in and rely upon its driver's guidance and protection, instead of resorting to its natural instincts. When, therefore, it realizes the unaccustomed absence of this guidance and sense of protection, it becomes doubly confused and timid, and sights and sounds which seemed to it harmless in the presence of its driver now seem strange and terrifying, and to be avoided only by flight. We think, therefore, that, as stated by the supreme court in *Kokoll v. Brohm & B. Lumber Co.* 77 N. J. L. 169, 71 Atl. 120, and in *Francois v. Hanff*, 77 N. J. L. 364, 71 Atl. 1128, the unexplained presence upon a public highway of a team of runaway horses harnessed to a wagon, unattached by the owner or other person, raises a prima facie presumption of negligence on the part of the owner.

The other point raised by the refusal of nonsuit assignment of error, viz., that ownership in the defendant was not proved in 30 L.R.A. (N.S.)

the plaintiff's case, is without merit, for two reasons:

First. It was proved that the defendant's name appeared conspicuously on the wagon, and we approve the doctrine as laid down by the supreme court in *Edgeworth v. Wood*, 58 N. J. L. 463, 33 Atl. 940, following Lord Denman's ruling in *Joyce v. Capel*, 8 Car. & P. 370, that evidence that the wagon which ran over plaintiff was marked with defendant's name was sufficient to justify the inference that defendant was its owner, and that such inference established prima facie that defendant was in possession and control of the wagon by the driver, its servant.

Second. The proof of defendant's ownership was clearly established in defendant's own case. This court has held that the refusal of a nonsuit for failure of proofs is not ground for reversal if the defect was afterwards supplied by evidence taken in the progress of the trial. *Delaware, L. & W. R. Co. v. Dailey*, 37 N. J. L. 526; *Hibernia Mut. F. Ins. Co. v. Meyer*, 39 N. J. L. 482. The history of this practice is fully stated in the opinion of the supreme court in *Bostwick v. Willett*, 72 N. J. L. 21, 60 Atl. 398.

Coming now to the explanation, as offered by defendant's driver and its other witnesses, of how the runaway occurred, we do not think it presented such a clear negation of negligence on the part of the driver as to justify the court in directing a verdict for the defendant. The horse was young, and this driver was driving it that day for the first time. He drove it up to the gates at the railroad crossing where a dirt car freight train was drilling at the time immediately in front of the horse. When such a train started or stopped in the process of drilling, the attendant noises from the jerking link couplings and clashing bumpers are well calculated to frighten any ordinary horse standing with its head in close proximity to the track. The shifting or other engine itself, with its puffing and escaping steam, running first one way and then the other in drilling the cars upon the different switches and sidings, may be even more startling than a locomotive pulling an ordinary train. When, then, with all these circumstances before him, the driver removed the hitching weight from this strange young horse's head before going back to the rear end of the wagon to see if everything was all right, instead of afterward, it was clearly a question for a jury to decide whether he was or was not negligent in taking a chance of the horse becoming frightened (as it did) by a sudden starting of the freight train or of its shifting engine or both, with their natur-

ally attendant noises, at a time when he (the driver) neither had hold of the reins nor was in a position to catch them up in time to control the horse, and prevent an accident. It is true the driver said he was at the side of the wagon just ready to get in, and with the reins within reach, when the horse started. But the facts are that the horse took fright at the starting of the train or the puffing of the engine, that it turned and ran away, and that the driver did not get his hands upon the reins, although he tried to do so. The jury might well have concluded from these circumstances that the driver was not as near the reins when the horse started as he thought he was, and that the accident in reality happened by reason of his unhitching the horse and then going so far away from it that it was beyond his power of control in case it became frightened, as it did, at the noises which the driver had every reason to expect would occur, and also good reason to expect might scare the horse which he had thus placed in a position of such close proximity to the alarming sounds. Under all the circumstances, we think there was no error in the refusal to direct a verdict.

The judgment of the Hudson Circuit is affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

MAYOR AND ALDERMEN OF JERSEY
CITY FOR THE USE OF STEWART H.
ELLIOTT, Plff. in Err.,

v.

GEORGE J. SCHOPPE et al.

(— N. J. —, 82 Atl. 913.)

Bonds — constable — forfeiture.

Where a constable was directed by a writ of attachment to attach the goods of the de-

Headnote by MINTURN, J.

Note. — Liability of officer's bond for failure to return money deposited to avoid execution of writ.

The commentator in 25 Am. & Eng. Enc. Law, 724, says that to charge the sureties in the officer's bond, the act complained of must either have been one that he might rightfully have done as such officer, or one which was actually done by him as an officer under a claim of right to do so as such; and that when the officer is under no legal duty to perform the act, and goes outside the line of his duties and acts without the scope of his authority, the sureties cannot be held liable. In some cases the courts have drawn a distinction between acts done

defendant named therein, and accepted from defendant the amount of the plaintiff's claim and costs, and paid the same to the plaintiff's attorneys, and thereafter the defendant in the writ succeeded upon the trial of the action, and the constable failed to return to him the money deposited, held, in a suit upon the constable's bond for a forfeiture thereof, that the acts of the constable were not performed in furtherance of his duty, as prescribed by law, but were performed by him unofficially or *colore officii*, and as such could not subject his sureties to liability on the bond.

(March 4, 1912.)

ERROR to the Circuit Court for Hudson County to review a judgment in defendant's favor in a suit on a constable's bond. Affirmed.

The facts are stated in the opinion.

Mr. Pierre F. Cook for plaintiff in error.

Mr. Marshall Van Winkle for defendants in error.

Minturn, J., delivered the opinion of the court:

While about to sail for Europe from Hoboken, the baggage of Stewart H. Elliott was attached by Constable George J. Schoppe on a writ of attachment issued out of the first district court of Jersey City, at the suit of one Wallace H. Owen. When the object of the constable's writ was announced, Elliott protested the correctness of the claim, but finally paid the amount with costs of suit to the constable, who gave Elliott a receipt and thereupon released the goods. Instead of paying the money into court, the constable turned it over to the attorney for the plaintiff in the writ, who gave him a receipt for it, and, upon the same day, the constable returned the writ into court indorsed fully satisfied. Elliott entered his appearance to the suit in due course, and a trial took place which resulted in a judgment in his favor. He then instituted this suit through the mu-

by virtue of office and those done under color of office, holding the sureties liable for the former but not for the latter. But this distinction is now disregarded in most jurisdictions, and the sureties are held liable for both the nonfeasances and the misfeasances of the officer, while assuming to act officially, irrespective of whether the act is done *virtute officii* or *colore officii*. These principles govern the few decisions which fall within the foregoing title.

In circumstances somewhat like those involved in JERSEY CITY USE OF ELLIOTT v. SCHOPPE, it was held in an early North Carolina case that the sheriff was but the private agent of the party to pay the debt, and that he alone was responsible in his

municipality, as the obligee named in the constable's bond, to have the same declared forfeited against the constable and his sureties. The insistent made is that the payment of the money by the constable to the plaintiff's attorneys, instead of turning it into court, was a breach of the condition of the bond, and legally worked its forfeiture. The Hudson circuit court, sitting without a jury, resolved this contention against the plaintiff, and the legality of that adjudication is before us for review upon writ of error.

The constable's bond to the municipality contained the usual condition that, "if the said George J. Schoppe shall well and truly

perform the duties of his said office of constable of Jersey City, then the above obligation to be void," etc.

The seventy-first section of the district court act (2 Comp. Stat. 1910, p. 1978) provides that the defendant in attachment may secure the release of the goods attached by giving bond "in double the value of the property attached conditioned for the due and safe return of the goods . . . in case judgment shall . . . [go against him]."

The 18th section of the act provides that, instead of furnishing a bond, he "may deposit a sum of money equal to the amount of the penalty of such bond or recognizance,

private capacity for his breach of trust. State ex rel. Ellis v. Long, 30 N. C. (8 Ired. L.) 513. In this case, it appeared that the defendant, in a writ of *capias ad respondendum* placed in the hands of the sheriff a sum of money to discharge the debt for which he was sued, but the sheriff neglected to apply it for that purpose, and the defendant in the writ was compelled to pay the debt out of the other funds. The court said that the precept, commanded the sheriff to take the body of the relator, and to keep him safely to answer the action, but it gave him no authority to receive the relator's money; and that therefore there was no right of action upon the sheriff's bond.

And in another action upon the same bond, it was held that the sureties were not liable where the sheriff, instead of taking a bail bond, accepted from the defendant in the *capias*, a deposit of money, and failed to return it although the defendant in the *capias* offered to surrender himself and demanded the money. State v. Long, 30 N. C. (8 Ired. L.) 415. In this case the court said: "The latter [the sureties] are liable upon a contract expressed in definite terms, and their liability cannot be carried beyond the fair meaning of those terms. Those required by the statute and contained in this bond are, that the sheriff will execute and due return make of all process to him directed; that he will pay and satisfy all fees and sums of money, by him received, or levied by virtue of any process, into the proper office, into which the same, by the tenor thereof, ought to be paid, or to the person to whom the same shall be due; and in all other things will truly and faithfully execute the office of sheriff. It seems to us quite clear upon the terms *per se* and upon previous adjudications on them, that the present case does not come within any of them. There has been no failure to execute and return process here. The clause, for the payment of money received or levied, is obviously restricted to money thus received or levied under, and by virtue of process commanding the sheriff to make the money, because it requires that he shall pay it into the office or to the person to whom, by the tenor thereof, that is, of the writ, it ought to be paid or may be due. Here he

had no such writ or process, and the money was received wholly without authority of law, except the authority which was derived from the contract of the parties. The remaining provision only binds the officer affirmatively to the faithful execution of the duties of his office. It is thus seen that there is no clause to cover the case of an abuse or usurpation of power. There are no negative words that the sheriff will commit no wrong by color of his office, nor do anything not authorized by law. In many cases, therefore, it has been held that the sheriff's sureties were not liable for the sheriff, when he undoubtedly would be for his deputy."

So, in Kero v. Powell, 25 U. C. C. P. 448, it was held that since the sheriff was without power to accept a deposit and release the defendant in a writ of *capias*, his sureties could not be held liable for his failure to return the money. In this case, the plaintiff deposited a certain sum in lieu of a bail bond to secure the release of a defendant in a writ of *capias*, but the plaintiff subsequently rendered the defendant in a writ to the sheriff, and he was again placed in jail, where he remained until he was discharged on an order of insolvency. The principle which seemed to govern the court in this case was that the statute which made the sureties liable for the sheriff's failure to pay "over the moneys received by him" must of necessity be confined to such moneys as, in the words of the covenant, "he shall receive by virtue of his said office as sheriff," thus giving the action upon the covenant only to the party to any legal proceeding in respect of any omission or default of the sheriff not paying to such party any moneys received for him, by the sheriff by virtue of his office.

In Feller v. Gates, 40 Or. 543, 56 L.R.A. 630, 91 Am. St. Rep. 492, 67 Pac. 416, holding that the sureties on a constable's bond are not liable for the return of money taken by him from an execution defendant to save the execution and give time to perfect an appeal, under a promise to return it in case the appeal is perfected, since such act is not within the constable's authority,—the court said that the promise of the constable to retrieve the money upon the performance of the stipulated condition

which sum shall be paid to the clerk of the court," etc.

It is the conspicuous fact in this case that, instead of complying with either of these alternatives, the defendant in the writ paid to the constable the exact amount of the plaintiff's demand, with costs. It will be observed, therefore, that, in accepting and receipting for this sum, the constable was not acting *virtute officii*, but unofficially, and not in the due execution of the writ. The act prescribes the limitations of his duty, and the condition of the bond is limited to the faithful performance of such duty. The act performed by him, therefore, in accepting payment or satisfaction of the

claim, was performed *colore officii* and clearly not *virtute officii*.

Liability of sureties upon a bond of this character, it may be said in passing, can attach only as a matter *strictissimi juris*, and so it has been held that "sureties for an officer are liable only in the event of his failure to perform his duty. If in the line of his duty he make a contract as agent for another, his sureties are not liable for the breach of that contract, as the contract is not the officer's. *Brown v. Phipps*, 6 Smedes & M. 51; *Com. v. Swope*, 45 Pa. 535, 84 Am. Dec. 518; *Parks v. Ross*, 11 How. 362, 13 L. ed. 730.

These considerations have presented the

necessarily showed that it was not received under color of office, since to render the payment a collection *colore officii*, the party making it must part with the title to the money, relying upon the right of the officer to receive it in trust for the adverse party; and that therefore the receipt conclusively showed that the plaintiff did not intend to part with the title to the money, or expect the constable would pay any part of it to the judgment creditor, so that the constable received it in his private character in trust for the plaintiff, and not by virtue or even color of his office. This being the case, said the court, the sureties were entitled to invoke the rule of *strictissimi juris*, which rendered them liable only for the official act of their principal.

An analogous situation is presented in cases like *De Sisto v. Stimmel*, 58 App. Div. 486, 69 N. Y. Supp. 431, holding that where a city marshal, instead of exacting an indemnity bond from an attachment plaintiff as authorized by statute, receives from such plaintiff a deposit as security against damage from the levy, his act is not an official one, but purely individual; and that therefore his failure to return the money upon the attachment defendant's failure to institute an action against him cannot constitute the foundation of an action against the surety upon his official bond, which was conditioned upon the faithful execution of the duties of the office of marshal, without fraud, deceit, or oppression. In this case the court said: "In the cases in which the surety has been held liable for acts of a principal done under color of office, there was present an element of trespass or wrongdoing as against third parties. There was no such element in the receipt of the money by the marshal in this case: He and the plaintiff entered into an agreement by which the former deposited with him a certain sum of money as indemnity. The marshal had no power to exact it. He had no authority to demand any other indemnity than that provided by the statute, namely, a bond. But it was not a wrongful act on his part to accept other indemnity if it were tendered or furnished him by the plaintiff. The furnishing of that indemnity, how-

ever, was a matter resting in contract between himself and the plaintiff. The liability of a surety upon a marshal's bond does not extend to making good defaults of the marshal upon special contracts which may be made by him with persons for whose benefit he is charged with the execution of legal process. Those contracts are not made officially, and, while the officer may be liable personally upon them, they are not within the obligation of an official bond, such as that upon which this action was brought. The condition of that bond related to the marshal well and faithfully executing the duties of his office. It did not apply to any act of his that was not really or ostensibly connected with that duty. The making of a special private contract with a particular plaintiff in an execution is no part of the marshal's duty. There does not appear to have been any fraud, deceit, oppression, or coercion on the part of the marshal in taking the deposit, but the entire arrangement was one of a private contract, a liability for which could not have been within the contemplation of the surety, either actually or by intentment, at the time he became a party to the official bond."

As to the liability of a bond of a public officer for interest received on public money, see the note in 30 L.R.A. (N.S.) 855.

As to liability of bondsmen for peace officer for acts of latter in respect of property taken from prisoner, see the note in 37 L.R.A. (N.S.) 873.

As to the liability of sureties on the bond of a public officer for default of the principal during a prior term, see the note in 23 L.R.A. (N.S.) 131.

As to the right of sureties who have made good a loss occasioned by their principal's default or misconduct to be subrogated to the rights of the obligee or beneficiary of the bond against a third person, see the note in 14 L.R.A. (N.S.) 155.

As to the liability of a public officer to the sureties of another public officer for loss sustained by them through the former's neglect to require proper settlement of accounts, see the note in 28 L.R.A. (N.S.) 115.

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test of liability in this state since the adjudication by the supreme court in 1860 of *State, Allen, Prosecutor, v. Conover*, 28 N. J. L. 228, 78 Am. Dec. 54. In that case Chief Justice Green, speaking for the court, referring to liability for acts done *colore officii*, or of an unofficial character, said: "In such case the officer is guilty of a tort, for which he is liable as an individual to the party injured, but it does not entitle the party to prosecute the officer on his official bond." Mr. Justice Haines, in the same case, defined acts done *colore officii* as "unofficial acts . . . committed under color of the office, such as cannot be lawfully done and cannot be justified by the official character of the sheriff, or by any process in his hands," citing *Seeley v. Birdsall*, 15 Johns. 267; *Alcock v. Andrews*, 2 Esp. 542, note; *People ex rel. Kellogg v. Schuyler*, 4 N. Y. 187.

Since its deliverance this adjudication has stood unquestioned in this state, and, although not followed by the Federal Supreme Court in *Lammon v. Feusier*, 111 U. S. 17, 28 L. ed. 337, 4 Sup. Ct. Rep. 286, it has quite properly been followed by the trial court in this instance, and has furnished *ratio decidendi* for its determination.

Having served as a precedent for over one half a century of our legal history, unquestioned by our courts, and unassailed by criticism, we are not disposed at this period, upon mere disputable considerations of abstract reasoning and expediency, to question its legal accuracy.

The judgment under review will therefore be affirmed.

TENNESSEE SUPREME COURT.

UNION PLANTERS BANK & TRUST COMPANY

v.

MEMPHIS HOTEL COMPANY et al., Apts.

(124 Tenn. 649, 139 S. W. 715.)

Injunction — against smoke nuisance — elevation of chimneys.

1. Injunction will not lie to prevent a property owner in a densely populated portion of the city, from causing smoke to is-

sue from the chimneys of his building at an elevation lower than the roofs of neighboring buildings, although permitting it to issue at a lower level constitutes a nuisance to the occupants of such buildings.

Equity — retaining case to assess damages.

2. Where equity is by statute denied jurisdiction of claims for injury to property involving unliquidated damages, it cannot retain a suit for injunction and damages for the maintenance of a nuisance, in order to assess the damages, if the right to the injunction fails.

(June 10, 1911.)

A PPEAL by defendants from a decree of the Chancery Court for Shelby County in complainant's favor in a suit brought to enjoin a smoke nuisance. Reversed.

The facts are stated in the opinion.

Messrs. Caruthers Ewing and Wright & Wright for appellants.

Messrs. Sam Holloway and Robert Goodwin for appellees.

Green, J., delivered the opinion of the court:

The Union Planters' Bank & Trust Company, hereafter called the complainant, is the owner of a fifteen-story building in the city of Memphis, known as the "Tennessee Trust Building." The ground floor and the half story above are used for the quarters of the bank, and the upper stories are devoted to office purposes. This building is located on the south side of Madison, between Main and Front streets, and runs back toward Monroe street on the south.

On the corner of Main and Monroe streets is located the Peabody Hotel, of which Mrs. Annie B. Snowden and the Memphis Hotel Company are respectively the owner and lessee. The front of the hotel is on the northwest corner of Main street and Monroe street, and is a building five stories high, known as the "old building." Just west of this old building is a new one, ten stories high, known as the "Peabody Annex." The annex is almost due south from the Tennessee Trust Building; the nearest walls of these two buildings being about 97 feet apart.

In the annex is located a battery of boilers to supply heat, light, and power for the

Note. — Doctrine of comparative injury in suit to enjoin nuisance.

This is the subject of a note in 31 L.R.A. (N.S.) 881, to which this note is supplemental.

As to the doctrine of comparative injury in a suit to enjoin an infringement of patent, or an infringement suit, see note to *Kryptok Co. v. Stead Lens Co.* ante, 1. 39 L.R.A. (N.S.)

Preliminary injunction.

Where, on an application for a preliminary injunction to restrain a nuisance, the right to the injunction is seriously disputed, and there is no claim that defendant is not and will not be responsible for any damage caused by the nuisance, it cannot be said that the plaintiff will be irreparably damaged by the refusal of the injunc-

operation of the Peabody Hotel. The power thus generated is used to run the laundry machinery, dynamos, elevators, and for other ordinary purposes around the hotel. The boilers referred to are steam boilers, soft or bituminous coal being used in firing them, and for the escape of the smoke there is provided a smokestack running up on the western side of the annex building. This smokestack is made of cast-iron tiles, and runs up a few feet above the top of the annex building. As before stated, the annex is a ten-story building, and the Tennessee Trust Building is a fifteen-story building. The top of the smokestack of the annex is therefore about on a level with the twelfth floor of the Tennessee Trust Building, and the smokestack itself is about 140 feet distant from the south wall of the latter building.

The allegations of the bill are that in firing the boilers in the annex a large amount of dense black smoke is generated, which, when the wind is in a southerly direction, is blown directly against the south wall of the Tennessee Trust Building, soiling and blackening its walls, entering the windows, and blackening and ruining the inner walls and decorations; and it is averred by the complainant that this smoke is driven into its building in such quantities as to very

seriously discommode its tenants, and that they are threatening to leave and are retained with difficulty. Other injuries are stated as the result of this smoke, and the complainant avers that it has suffered a large financial loss, and is threatened with an even greater one, on this account; and it charges the emission of this smoke, soot, etc., to constitute a continuing nuisance, and seeks an injunction to prevent or restrain it.

The defendants answered, and admitted the location of complainant's property and their property as charged in the bill, and admitted the location of the smokestack as stated, and that it did discharge smoke at intervals; but they insisted that no more smoke was thus made than was absolutely necessary in the proper operation of their plant, and they further stated that their appliances and equipment were up-to-date in every respect, and that skilled and competent engineers and firemen were in charge of their boilers and fires, with instructions to keep down the smoke as much as possible. They also stated that, as the result of a conference with the managers of complainant's building, a smoke consumer or device had been installed in their engine room, and that it had been given a faithful trial, and, in short, that they had earnestly sought to

tion, and hence it will be refused where the issuance might be of grave hardship, attended with great loss, to the defendant. *Maloney v. Katzenstein*, 135 App. Div. 224, 120 N. Y. Supp. 418 (denying injunction to restrain continued operation of business carried on for about nineteen years).

And it has been held that such an injunction will not be granted unless plaintiff's right to relief is clear and practically beyond dispute, especially where there is no doubt suggested as to the ability of the defendant to respond in damages; hence it is error to issue a mandatory injunction *pendente lite*, requiring the defendant to make important structural changes in its building, or to discontinue business altogether. *Newbold v. Childs Co.* 132 N. Y. Supp. 366.

Final injunction.

Applications for final or permanent injunctions to restrain the operation of a business in towns, villages, or cities, generally involve a consideration of the benefits and injuries to the parties therefrom, considered with reference to the locality. Generally, the right of inhabitants of towns or cities, to relief, necessarily depends upon the degree of injury arising from the alleged annoyance. The injury and resulting damage flowing therefrom may be great, or they may be slight; hence the determination of the rights of the complaining party and his remedy must necessarily depend upon the varying circumstances of the case. The 39 L.R.A. (N.S.)

rule has been thus stated: "It is well settled that the injury must not be fanciful or imaginary, nor such as to result in a trifling annoyance, inconvenience, or discomfort which may affect those who possess too sensitive a nature or too fastidious a taste. The law is applied only to the normal man, the man of ordinary habits and ordinary sensibilities. The law only takes cognizance of sensible and substantial discomforts and inconvenience. The necessities of the life and growth of towns and cities require the establishment and continuance of certain occupations, business enterprises, and works, in the conduct of which some degree of annoyance and discomfort is necessarily incident. The jurisdiction of a court of equity to afford relief by interfering with a private nuisance, by way of injunction, is based upon the ground of preventing irreparable injury or the multiplicity of suits. The mere diminution in the value of property or of the business by the nuisance, without irreparable injury, will not furnish sufficient cause for equitable relief. The nuisance must be of a constantly recurring and permanent nature; and from such nuisance there must flow injuries causing substantial, tangible, and material discomforts and inconvenience, which result in a loss of health, loss of trade, partial but substantial destruction of business, or the ruin of property, and the deprivation of its use and enjoyment to a material and substantial extent, before a court of equity will interfere by in-

remedy the evil complained of with all reasonable means in their power. Defendants averred also that complainant did itself operate boilers and had a smokestack upon its building, and that this smokestack gave out at times large quantities of dense smoke, and that, when the wind was in the north, and the atmosphere was damp and humid, and the smoke inclined to settle, said smoke coming from complainant's stack entered into the hotel building and blackened and injured its furnishings and incommoded its guests, and, in general, inflicted the same sort of damage upon defendants' property that complainant alleged it suffered from the hotel smokestack.

A great deal of proof was taken by both parties to this controversy, which we cannot undertake to review in this opinion, but all of which has been carefully considered. Upon the proof heard, the chancellor gave a decree in favor of the complainant, granting the relief sought by it in a somewhat modified form.

The prayer of complainant's bill was as follows:

"The complainant prays the court to cause to be issued its writ of injunction, enjoining the defendants and their servants and employees, and the servants and employees of either of them, from causing

dense smoke, soot, cinders, unconsumed gases, or noxious vapors to issue from the chimneys or stacks of the buildings known as the Peabody Hotel and Peabody Annex."

The chancellor decreed that defendants be perpetually enjoined from causing dense smoke, cinders, soot, unconsumed gases, or noxious vapors to issue from the chimneys or stacks of the building known as the Peabody Hotel Annex, described in the pleadings, "at an elevation lower than the level of the roof of the Tennessee Trust Building."

The injunction awarded by the chancellor, while not so in form, is in reality a mandatory injunction. Its effect is to require the defendants to extend their smokestack some 50 feet higher into the air, in order to bring it on a level with the roof of the Tennessee Trust Building.

The question before us is as to the policy and propriety of the chancery court thus undertaking to regulate the smoke nuisance in the business districts of our large cities.

As a matter of course, there are only two ways in which the defendants can comply with the chancellor's decree and operate their plant. They must either cease creating and releasing from their stack dense smoke, soot, cinders, unconsumed gases, or noxious vapors, or, if such smoke and gases

junction to restrain the maintenance of or to abate the alleged evil." *Gus Blass Dry Goods Co. v. Reinman & Wolfort*, — Ark. —, 143 S. W. 1087.

As to enjoining the operation of a lawful business alleged to constitute a nuisance, the rule has been asserted that, even after a full hearing on the merits, the court is not inclined to enjoin petty annoyances, but looks to the whole circumstances and what is fair, just, and equitable between the public at large and the defendant, and will only grant an injunction when the evils complained of are substantial and cannot be otherwise remedied, and when the business may be conveniently carried on elsewhere. *Kenesaw v. Chicago, B. & Q. R. Co.* — Neb. —, 136 N. W. 990 (railroad company enjoined from maintaining stock yards at a certain place, at the instance of village).

After a hearing on the merits, neither the convenience nor the inconvenience of the public can affect plaintiff's right to have a nuisance abated, where it is found to exist, if he is damaged thereby, since his private property cannot be destroyed because of public convenience without first compensating him therefor. *Stark v. Coe*, — Tex. Civ. App. —, 134 S. W. 373 (holding the fact of public convenience or necessity of surrounding country no defense to an action to abate a corn sheller which is a nuisance to adjoining landowners).

Compare with *Bliss v. Washoe Copper Co.* 109 C. C. A. 133, 186 Fed. 789, holding

that a person injured in his property by the operation of a large smelter will be denied relief in equity, and remitted to his action at law for damages, where, on a comparison of injuries, the injury to the plaintiff, although substantial, is slight as compared with the injury to the defendant and the public which would result from the issuance of an injunction.

And where defendant's plant represents an investment of hundreds of thousands of dollars, and in comparison the plaintiff's farm is of insignificant value, the court will deny an injunction restraining the defendant from polluting a stream flowing through plaintiff's farm, such pollution arising in part from the operation of defendant's factory, where the pollution is also in part caused by the operation of other factories, the owners or operators of which are not parties to the proceeding. *Whalen v. Union Bag & Paper Co.* 145 App. Div. 1, 129 N. Y. Supp. 391. In this case, however, the court allowed the plaintiff damages for the pollution of the stream, and further provided that the plaintiff might at any time apply at the foot of a judgment for an injunction, upon showing that otherwise the stream of water was reasonably pure, or that the other parties illegally contaminating it are properly enjoined, or have ceased to pollute it, and further provided that, upon showing such facts and making it appear that the ends of justice so required, an injunction would issue.

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are created and released by them, they must run their chimney or smokestack up to the level of the roof of the Tennessee Trust Building. As to the first alternative, it is not insisted that the defendants should be restrained from operating the hotel, nor is it insisted that they have not a right to use their boilers in connection with the operation of their hotel. It is not even urged that they should be required to use any fuel different from the kind which they now use. Complainant could make no such insistence as this, for the proof shows that in its own plant it uses the same character of fuel that defendants use, namely, bituminous or soft coal. Complainant does insist that defendants install some device to abate their smoke, or else do so by more careful firing.

After a careful examination of this record, we are in grave doubt as to whether there is any device which could be attached to or used in connection with defendants' boilers which would consume and do away with the smoke, cinders, and gases there generated to any beneficial extent. In other words, we are not convinced, from the proof before us, that any such thing as a practical smoke consumer has yet been constructed and put into use. There is some evidence indicating that devices of this character have been installed and used successfully for a time; but there is no satisfactory showing that there is anything on the market or to be had which, for a considerable length of time, when used in connection with boilers burning soft coal, to any extent continues to eradicate and do away with the resulting smoke, soot, cinders, etc. In fact, it is not pretended that there is anything of the kind which attempts or proposes to eliminate the gases or vapors released by the combustion of soft coal, and the prayer of the bill and the decree of the chancellor are directed alike against smoke, soot, cinders, and unconsumed gases or vapors. There is no satisfactory proof that defendants are negligent, or use other than ordinary and careful methods, in firing their boilers, and we are of opinion that the court would not be warranted in making an order upon defendants to adopt any particular plan or system of keeping up their fires.

We are also of opinion that the court would not be justified in ordering the defendants to install or adopt any particular kind of smoke consumer or like device. There is no sufficient showing that with any of them the proper result could be obtained for any length of time. The chancellor evidently reached the same conclusion as we do as to these matters, and therefore, believing that complainant was entitled to relief, he 39 L.R.A. (N.S.)

sought to give it by pronouncing the decree heretofore set out.

In view of what we have said, it is plainly apparent that the decree below is just what we have heretofore indicated—a mandatory injunction, requiring the defendants to extend their smokestack 50 feet higher into the air.

This court has said: "The rule is that a mandatory injunction, such as is asked for in this case, will not be granted, except in extreme cases and when courts of law are unable to afford adequate redress, or when the injury complained of cannot be compensated in damages." *Post v. Southern R. Co.* 103 Tenn. 184, 216, 55 L.R.A. 481, 52 S. W. 301, 309, citing *Gibson, Suit in Ch.* pp. 784-806; 1 High, Inj. p. 3; 3 Pom. Eq. Jur. p. 1359; *Hall v. Chesapeake, O. & S. W. R. Co.* (Tenn.) 12 Am. & Eng. R. Cas. 41.

There can be no doubt, upon the proof before us, that complainant has sustained injury by reason of the operation of the plant of the defendants. Nevertheless it does not appear that defendants have conducted these operations in an unusual or negligent manner. The proof indicates that they have employed skilled help in their boiler room, and that they have manifested at all times a disposition to reduce the quantity of smoke emitted from their stacks by installing a smoke consumer and by instructions and warning to their fireman. It is also in evidence that smoke, being the result of imperfect combustion, is a dead loss of fuel, and that therefore it is to the interest of all persons operating boilers of this character, to secure as far as possible perfect combustion, and thereby utilize all their fuel. Self-interest, therefore, would prompt these defendants, and all others so situated, to reduce their smoke as much as possible, since their fuel bill is reduced accordingly.

On the question of running up this stack 50 feet higher, we could not rest easy in the conclusion that it was safe and practical to make the attempt, on the evidence before us. Leaving out of consideration all question of the expense to the defendant thereby involved, we doubt the wisdom of such an effort in this case. This stack, as before stated, runs up along the west wall of the Peabody Annex. If we concede that the stack as it exists at present is of sufficient strength to support the downward crush weight of the extension, it is still manifest that there is no feasible way of supplying lateral support to resist the wind pressure for this additional stack. Certain methods are suggested by complainant's counsel, but they do not seem practical.

The extension of this stack would be about 50 feet high. If made of metal corresponding with the other portion of the

stack, it would weigh about 5 tons. It would be out of the question for a chancery court to order the erection of such a structure, high up in the air, in the heart of a city like this, with thousands of people passing nearby daily, unless it was entirely manifest that this superstructure could be erected and maintained with entire safety. To say the least of it, the evidence in the record is conflicting on this proposition.

We cannot feel sure but that, if adopted, the chancellor's plan for remedying this particular nuisance might result in the creation of a much greater nuisance, that would be a greater menace to a greater number of people.

We prefer, however, to put our decision on a broader ground than the particular facts of this case which we have stated.

The annoyance and damage which complainant sustains from this smokestack is no doubt serious, but, in undertaking to find a remedy, we must consider the effects and results of that remedy. The situation existing between complainant's property and the defendants' property is by no means uncommon in any city. Such conditions are the rule rather than the exception. The buildings in none of our cities are of uniform height. All buildings in this day, which house any establishments of any considerable importance, are equipped with boilers, use coal, and make smoke. This smoke has to escape, and there must be smokestacks, and wherever one building is higher than another, it will suffer from the smoke issuing from the stacks of the lower, unless some means could be devised whereby all stacks could be made a uniform height; and even this would not obviate the trouble, because of the tendency of smoke to descend in damp weather, and because of downward eddies in the air currents, which exist in the neighborhood of all high buildings.

The complainant in this case seems to suffer more than is ordinary. The difference between its damage, however, and the damage of any of its neighbors who have buildings higher than those adjoining, is only one of degree.

If the chancellor's decree were followed, it would commit the courts of this state to a policy that would prove embarrassing in the extreme. Any owner of a higher building could compel the adjacent owner of a lower building to run a smokestack up to a point on a level with the first owner's roof. The height of the extension demanded in this case is 50 feet, and we doubt if that could be safely accomplished. Suppose that, instead of being a fifteen-story building, the Tennessee Trust Building was thirty stories high. Upon the same principle, it

could compel the extension of this Peabody stack up to the level of a thirty-story roof. Furthermore, both of these buildings are located in the heart of the city of Memphis, as has been stated. A fifteen-story building is hardly the limit of the architectural development of this section of the city. There will in time doubtless be buildings erected in this immediate neighborhood much higher than the Tennessee Trust Building or the Peabody Hotel. Upon the principle of the chancellor's decree, if it were adopted, when these new buildings were erected, they could compel the defendants to again extend their smokestack into the air, and could compel the Tennessee Trust Building to extend its smokestack, and so this process might be repeated indefinitely. Under modern conditions, and with the use of steel and modern methods, there seems to be no limit to the height which buildings may reach, and it would be extremely unwise for the courts of chancery of this state to inaugurate a policy of requiring the smokestacks of our cities to be put on a level.

We have stated the case strongly in the illustrations above used, but we have not gone beyond the legitimate result that follows the chancellor's decree. We are unwilling to affirm this decree and make a precedent of this kind.

If such a policy of extending smokestacks should be attempted, the results would be unsightly as well as a menace to the community. There is no end to an undertaking of this sort, if once begun, and the evils resulting would be much greater than those sought to be remedied.

This court recently, in discussing the right to obtain an injunction against a nuisance, has said: "But there is one other principle which is of controlling influence in this department of the law, and in the light of which the foregoing principle must be weighed and applied. This is that the granting of an injunction is not a matter of absolute right, but rests in the sound discretion of the court, to be determined on a consideration of all the special circumstances of each case and the situation and surroundings of the parties, with a view to effect the ends of justice." *Madison v. Ducktown Sulphur, Copper & I. Co.* 113 Tenn. 331-358, 83 S. W. 658, 664.

To this we think must be added the observation that the rights, not only of the parties to the suit, but of the public generally, must be considered in all cases of this character. With reference to an application made for an order restraining the operation of a mill, which was alleged to be a nuisance by a neighbor resident, Judge Cooley said: "We cannot shut our eyes to the obvious truth that, if the running of this

mill can be enjoined, almost any manufactory, in any of our cities, can be enjoined upon similar reasons. Some residents must be incommoded or annoyed by almost any of them. In the heaviest business quarters, and among the most offensive trades of every city, will be found persons who, from motives of convenience, economy, or necessity, have taken up their abode; but, in the administration of equitable policy, the greater and more general interest must be regarded, rather than the inferior and special. The welfare of community cannot be otherwise subverted and its necessities provided for. Minor inconveniences must be remedied by actions for the recovery of damages, rather than the severe process of injunction." *Gilbert v. Showerman*, 23 Mich. 448.

"The interests of the public are to be taken into consideration by the court, and when the issuance of an injunction will cause serious public inconvenience or loss, without a correspondingly great advantage to the complainant, no injunction will be granted. If the injunction would have the effect of greatly injuring or inconveniencing the public, it may be refused, even though as against defendant, the complainant would be entitled to its issuance." 22 Cyc. 784.

As we have heretofore pointed out, the difference in complainant's injury from the injuries suffered by many other property owners in the business sections of our cities is only one of degree, and, if the extension or elevation of this smokestack could be ordered, numbers of other smokestacks could be likewise dealt with at the suit of adjacent property owners.

While every application for an injunction is acted upon with reference to the facts of the particular case, still the facts of this case are identical with the facts of numerous other cases existing in all our cities, and, were the chancellor's decree affirmed, there would be no consistent way to deny like relief in these other cases. The result would prove dangerous to the community in many cases, if, indeed, it did not in this case. The precedent would be intolerable.

The smoke nuisance is one of the most serious problems with which our cities have to contend. What its solution is we do not know, but we are clearly of opinion that in congested quarters of our cities, where everybody is more or less an offender, courts of equity should not endeavor to solve this problem by the writ of injunction. None of the parties are innocent, and their rights are too doubtful, the solution of the problem is too obscure, and the interests too extensive, to justify the chancery court in making experiments with injunctions.

It is insisted by the complainant that, if

not allowed an injunction in this case, it should at least be allowed a recovery for damages already suffered by its property. In addition to the injunction sought, the complainant, in its bill, prayed for a reference to ascertain damages previously sustained, and for a decree for the amount thereof.

Chapter 97 of the Acts of 1877 excepts from the jurisdiction of the chancery court cases of injury to property involving unliquidated damages. The chancery court obviously would have had no jurisdiction to determine this claim for damages, had it been presented alone. Such jurisdiction could have been acquired only as an incident to the main relief sought, to wit, the injunction. Taking jurisdiction for the purpose of injunction, the chancery court could have determined the entire controversy. *Richi v. Chattanooga Brewing Co.* 105 Tenn. 651, 58 S. W. 646, and cases cited.

The weight of authority, however, is that even though "the bill states matter within the equity jurisdiction, but plaintiff fails to establish such equity, the rule is that the bill must be dismissed, and cannot be retained for the purpose of allowing legal relief to which plaintiff has shown himself entitled." 16 Cyc. 111. See cases in note 80.

The Supreme Court of the United States has observed: "The rule is that where a cause of action cognizable at law is entertained in equity, on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill and remit the cause to a court of law." *Mitchell v. Dowell*, 105 U. S. 430, 26 L. ed. 1142, citing authorities.

This statement of the rule is approved in *Kramer v. Cohn*, 119 U. S. 356, 30 L. ed. 440, 7 Sup. Ct. Rep. 277. See also *Gamage v. Harris*, 79 Me. 536, 11 Atl. 422, and *Cherokee Nation v. Southern Kansas R. Co.* (D. C.) 33 Fed. 915. In the case last cited the court dismissed the suit upon the failure of the prayer for injunction.

This court has observed: "When the jurisdiction fails, all the power of the court also fails, except to give judgment for costs." *Marsh v. Haywood*, 6 Humph. 210-213.

The inability of equity to afford such incidental relief, where the sole ground of equitable jurisdiction fails, is recognized by Code, § 4292 (*Shannon's Compilation*, § 6101), providing that in a creditors' suit to set aside a fraudulent conveyance, the chancery court may render judgment on a claim, even though complainant fails to establish the fraud.

In the absence of this statute, the chancery court, prior to the act of 1877, would have had no jurisdiction in such a case to render judgment for the debt, in a suit where fraud, the ground of equitable cognizance, was not established.

We think for a stronger reason, since the act of 1877, a chancery court cannot proceed in matters, jurisdiction of which is expressly denied it, except where such matters arise in a suit that, for other matters therein contained and established, may be entertained in chancery.

There is nothing contrary to the view here expressed in the case of *Madison v. Ducktown Sulphur, Copper & I. Co.* 113 Tenn. 331, 83 S. W. 658. In that case an injunction and damages were sought against the Copper Company, the operation of whose plant had been adjudged by a previous decision of this court to be a nuisance.

The court declined to grant the injunction sued for; but there was another distinct ground of equitable cognizance, upon which the jurisdiction of the court rested. It appeared that the properties of the Copper Company were covered by a mortgage, and consequently could not be reached except through the aid of a court of equity, and it further appeared that the court did not altogether deny the injunctive relief prayed for. The court retained the case, allowing the defendant the alternative of executing bond to cover any damage for which it might be adjudged to be liable, in default of which bond the injunction was ordered to be issued as prayed. Having sustained its jurisdiction upon the equitable grounds named, it was, of course, proper in that case for the chancery court to administer the incidental relief of determining and assessing damages.

As seen before, however, the only ground for equitable interference in this case has completely failed, and the chancery court has no jurisdiction under such circumstances, to determine mere matters of unliquidated damage to property.

Although in this opinion we have recognized the fact that the complainant's property has been damaged, we did not mean to express the opinion that the injury, under the circumstances of the case, was one for which a recovery could be had. That question is left open.

The complainant's remedy at law is unembarrassed, and it may there obtain all the compensation to which it is entitled.

We therefore must remit this complainant to its suit at law for the recovery of any damages to which it may be adjudged to be entitled, and we must disapprove the experiment which the chancellor attempted in its behalf by injunction in this case.

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The decree of the chancellor will be reversed, and the bill dismissed, at complainant's cost.

A petition for rehearing having been filed, the following response was handed down by Green, J.:

In response to a very forceful and courteous petition to rehear, we may observe that the former opinion filed herein was perhaps not so full on the questions raised in the petition as it should have been. We have therefore made some additions to the original draft of the opinion herein, which cover the questions of law raised in the petition to rehear. Upon the facts, with all due deference to learned counsel, we must adhere to our original conclusions.

We did not undertake to say in the opinion filed that there was no evidence indicating that smoke consumers existed and had been used with success; but we expressed the belief that such devices had not passed the experimental stage, according to the lights before us. In other words, while a smoke consumer might be installed which would prove successful for a time, we doubted if any had yet been devised which would continue after considerable use to accomplish its purpose.

We reviewed the facts of this case fully in our former opinion, and a reconsideration does not shake our confidence in the justice of our conclusions.

The petition to rehear must therefore be dismissed.

TENNESSEE SUPREME COURT.

PAUL E. DIVINE, Admr., etc., of Thomas Brown, Deceased,

v.

UNAKA NATIONAL BANK.

(—Tenn. —, 140 S. W. 747.)

Courts — probate jurisdiction — soldiers' home.

1. The proper court of the county in which is located land ceded by a state to the Federal government for a soldiers' home has jurisdiction to grant an administration

Note. — Jurisdiction of estate of inmate of Federal home or institution.

The decision in *DIVINE v. UNAKA NAT. BANK*, holding that the proper court of the county in which land is located which was ceded to the Federal government for a soldiers' home has jurisdiction to grant an administration on the estate of a soldier dying in the home, seems to be one of first impression and is therefore of particular value.

tion on the estate of a soldier dying in the home.

Executor — right to recover possession of soldier's effects.

2. One appointed by a state court to administer the estate of one who died in a soldier's home, land for which had been ceded by the state to the Federal government, may maintain an action against the officers of the home to recover possession of securities left by decedent.

Same — duty of bank to pay over money.

3. A bank is not bound to pay over to an administrator money deposited by a person since deceased, until the certificate of deposit executed by it is surrendered or impossibility of surrender is shown.

(November 22, 1911.)

CERTIORARI to the Court of Civil Appeals to review a decree reversing a decree of the Chancery Court of Johnson City sustaining a demurrer to and dismissing a bill filed to recover possession of money deposited in the defendant bank by plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Mr. Samuel C. Williams, for defendant:

Only the holder of a negotiable instrument can sue, and a holder is one in possession of the instrument.

Wells v. Schoonover, 9 Heisk. 805; Sawyer v. Moran, 3 Tenn. Ch. 35.

The bank had a right to insist that the

instrument be produced and delivered for cancellation on payment.

Benjamin's Chalmers Dig. Neg. Instr. §§ 1228, 1230, 1707; City Nat. Bank v. Mahan, 21 La. Ann. 752; Smilie v. Stevens, 39 Vt. 315; Cottle v. Marine Bank, 166 N. Y. 53, 59 N. E. 736; Read v. Marine Bank, 59 Hun, 578, 13 N. Y. Supp. 855, s. c. on appeal 136 N. Y. 454, 32 Am. St. Rep. 758, 32 N. E. 1083; Pardee v. Fish, 60 N. Y. 265, 19 Am. Rep. 176; 5 Cyc. 521.

The administrator was not without remedy to replevin the withheld instrument from officials of the National Home within the ceded territory.

Chicago, R. I. & P. R. Co. v. McGlinn, 114 U. S. 542, 29 L. ed. 270, 5 Sup. Ct. Rep. 1005; Downes v. Bidwell, 182 U. S. 298, 45 L. ed. 1110, 21 Sup. Ct. Rep. 770; Barrett v. Palmer, 135 N. Y. 336, 17 L.R.A. 720, 31 Am. St. Rep. 835, 31 N. E. 1017.

Mr. Paul E. Divine for complainant.

Neill, J., delivered the opinion of the court:

The bill contains the following allegations:

"That Thomas Brown died intestate in Washington county, Tennessee, on the 12th day of November, 1908, within the limits of the reservation of the Mountain Branch of the National Home for Disabled Volunteer Soldiers, and as a member thereof; that the complainant was duly appointed as his administrator by the county court of Washing-

in the administration of their trust. That court certainly has jurisdiction of the controversy in any suit that may arise between the executors in regard to the will. If this court, by reason of citizenship, has jurisdiction also of such controversy, the jurisdiction of the two courts is concurrent; and the jurisdiction of one or the other court, in order to become exclusive, must be exercised before that of the other becomes established. It is to me equally clear that, within the territory belonging to the United States at Fortress Monroe, jurisdiction is exclusively in the United States, whether exercised by its Executive, its Congress, or its Judiciary. Therefore, as to any jurisdiction operating *in rem* directly upon property within the lands of the United States at that place, and requiring an actual, corporeal, personal exercise *in situ* by an officer present in person in his official character, on the premises, in the performance of official duty and functions, the jurisdiction of the United States, and of each of its departments, is exclusive of that of the state of Virginia, except in respect of such service of process as was reserved in her act of cession, passed March, 1821. The proper court of Virginia, by virtue of its jurisdiction of controversies respecting property at Fortress Monroe, may, by decrees and process *in per-*

A case has been disclosed passing upon the jurisdiction of the Federal courts over property of a testator located at Fortress Monroe, within territory ceded to the United States, and is included for the purpose of showing the attitude of the Federal courts under such circumstances.

In the case referred to, Woodfin v. Phœbus, 30 Fed. 289, an argument had arisen between executors as to the disposition of certain of the testator's property located at Fortress Monroe, on land sold and ceded to the United States by Virginia, with full jurisdiction, and a bill was brought by one of the executors for a sale of the property and for the appointment of a receiver. It was held that the Federal court had exclusive jurisdiction of suits operating *in rem* directly upon such property, although the state court might dispose of rights therein by decrees *in personam*. The court said: "No question of probate is before this court. The competency of the county court of Elizabeth City county, which admitted this will to probate, to do so, is conceded by the bill; is certainly not denied by it. I do not think it a debatable question whether the circuit court of Elizabeth City county, as a court of equity, has jurisdiction of controversies which may arise between the executors of the will mentioned in the bill 39 L.R.A. (N.S.)

ton county, on November 30, 1909, and qualified and gave bond as such. Letters of administration issued in pursuance thereof, and the original or duly certified copies thereof will be filed on or before the hearing, if required.

"The complainant would further show that his intestate was a soldier of fortune, a wanderer over the face of the earth, without family or home. He was born in India, came to America in time to participate as a soldier of the United States in the war between the states from 1861 to 1865, and later drifted southward to some of the Spanish-speaking countries, where he remained for some time. Later said intestate returned to the United States, and after wandering from place to place, without any fixed place of residence, habitation, home or domicile, and without any purpose or intention on his part so to do, or to permanently establish himself theretofore, he came to the said Mountain Branch of the National Home for Disabled Volunteer Soldiers, in Washington county, Tennessee, and became a member thereof, by reason of his military service as aforesaid, where he died.

"Complainant would further show that his intestate at the time of his death left two small open accounts or deposits in some of the local banks here in Johnson City, Tennessee, which have been paid over to and received by him in virtue of his said appointment as administrator, and that in addition his said intestate had the following

estate, rights, and credits at the time of his death, to wit:

"(1) A deposit in the defendant, the Unaka National Bank, here in Johnson City, Tennessee, in the sum of \$312, made by said intestate voluntarily and of his own volition and motion after he became a member of said Mountain Branch, and which said deposit is represented by a certificate issued to said intestate by the defendant therefor, No. 9,630.

"(2) Another deposit made in like manner and under like conditions and circumstances with the defendant for \$25; the certificate representing same being No. 9,640.

"Complainant would show that these said certificates of deposit were in the possession of said intestate at the time of his death, the property of said intestate, undorsed, untransferred, and undisposed of in any way, and in no wise hypothecated. Complainant would show that said intestate died within said Mountain Branch reservation limits, and the authorities thereof in the discharge of their duties gathered up the same as bailees, trustees, and agents of and for those rightfully entitled thereto, and your complainant has been unable to secure the same, or obtain the possession thereof, as he verily believes he is entitled to do. Complainant charges that said authorities have no title or ownership, claim, or beneficial interest in said certificates, no property rights in the same, and no right, power, or authority to sell, transfer, con-

sonam directed against parties to any suit pending in it, control and dispose of their rights in such property; but I think it is pretty certain, in a case like the present one, if pending in a state court in which the appointment of a receiver to exercise corporeal custody of the Hygeia Hotel on the premises should become necessary, that the state court could not install such an agent there for that purpose. While this is so, I repeat that I am willing to concede that a state court, having power to determine controversies between parties concerning property in litigation before it, would have power, in a proper case, to order a sale of the Hygeia Hotel, which would have power, in a proper case, to order such a controversy." And, in further considering a plea to the jurisdiction, the court said: "Can there be any doubt that in this case the court is called upon to say whether the Constitution and laws of the United States have not segregated Fortress Monroe from the state of Virginia; have not devastated that territory of all state jurisdiction; whether the jurisdiction there, whether executive, legislative, or judicial, is not foreign to the state of Virginia; whether letters testamentary, issuing from a Virginia court, are competent to vest property fixed to the soil of Fortress Monroe, in a jurisdiction foreign to the state; 39 L.R.A. (N.S.)

whether, if property can be thus vested, it be by comity or how, and to what extent, and for what purpose; whether any court but this is competent to make an officer of the United States at Fortress Monroe a party to a suit concerning the Hygeia Hotel, so as to aid or advise or control him in the exercise of that discretion in passing title to a purchaser of the hotel at its judicial sale to which the deed to Mr. Phœbus empowers him to assent or not, at his discretion? It is apparent to me that the bill, and the exhibits accompanying it, do show that such questions as these and similar ones must arise in the conduct of this case, requiring a construction by the court of jurisdictional clauses of the Constitution, and the effect of laws of Congress relating to Fortress Monroe to any property fixed to its soil, and to the Hygeia Hotel especially. In point of fact, questions of this character have constituted the burden of the extended arguments that we have already had in this case, lasting through several days. Nor do I perceive how a state court could entertain and conduct a suit relating to the same matters which we are dealing with in this case, without passing upon questions of the character I have indicated,—questions which it has not been the policy of the United States to relegate from the Federal to the state courts." J. T. W.

vey, indorse, collect, or make any assignment thereof in law, equity, or in fact. And complainant further charges on information and belief that no such attempt has been made.

"Complainant would further show that said authorities also hold another item or asset, gathered up in the same way, the property of said intestate; that is, an original and duplicate check, issued to said intestate by the defendant Unaka Bank, on Lloyd's Bank, Limited, of London, England, for about £1 and 7d, which was unassigned, and which was the property of the decedent at the time of his death, and which now constitutes an asset of his said estate, due, owing, and collectable from said defendant bank.

"Complainant would further show that as administrator of the estate of the said Thomas Brown, under and by virtue of the appointment and letters of administration aforesaid, he has requested of said authorities of the said Mountain Branch the possession and delivery of said certificates and assets as above mentioned and shown, but that said authorities, for one captious reason or another, among them the asserted contention that said authorities were not in the reach or subject to process of the courts of Tennessee, or were exempt therefrom in this behalf, though without any claim of interest, right, or title or benefit therein, have failed, neglected, and refused to make the delivery demanded, or to turn over the same to your complainant as such administrator on demand. Complainant would further show that as such administrator he has made the said Unaka National Bank acquainted with the said failure on the part of the said home authorities, and said bank has failed and refused to pay over the amount of said certificates on demand without a surrender of said certificates concurrently, which condition your complainant has been unable to comply with for the reasons above shown.

"Your complainant would further show that said amounts hereinbefore set forth and shown are bona fide assets of the estate of his intestate, and that he is advised that he has a right to come into your honor's court and compel the defendant by proper order and decree to pay over the same, with full interest and the costs of the cause. Said amounts are due, owing, and unpaid, and said defendant bank is responsible and liable therefor to your complainant. Said home authorities in law have no claim of right, title, or beneficial interest in the said certificates and checks, could not lawfully make such claim, and do not so attempt to do. Said home or its authorities are without power to collect,

sell, transfer, or assign the same, and there is no law or authority whereby they can be constituted or nominated as administrator as against your complainant, or exercise in the least or in any wise any probate jurisdiction whatever. Complainant further charges that no other jurisdiction or forum than the county court of Washington county, Tennessee, can appoint an administrator, and your complainant can lawfully receive said amounts from the said defendant, or compel it to pay over or turn over the same."

The bank demurred on several grounds, the substance of which is that it was entitled to have the certificates surrendered before payment, and that the bill did not allege that any demand had been made, accompanied by such offer of surrender of the certificates of deposit, and contained no sufficient excuse for such failure.

The chancellor sustained the demurrer and dismissed the bill, and the complainant appealed to the court of civil appeals, and in that court the decree of the chancellor was reversed. Thereupon the cause was brought to this court by the writ of certiorari, and is here for consideration.

The ground embracing the home was ceded by this state to the United States by an act passed in the year 1901 (Acts 1901, chap. 98), which contained the following provisions:

"That the consent of the general assembly be, and is hereby, given to the acquisition by the National Home for Disabled Volunteer Soldiers by purchase, condemnation, or donation of lands not exceeding 2,000 acres, in Washington county, for the establishment and maintenance of a branch of said home within 5 miles of Johnson City; that jurisdiction of the lands aforesaid, and their appurtenances, which may be acquired by the managers of the National Home for Disabled Volunteer Soldiers for the uses and purposes of said home, be, and is hereby, ceded to the United States of America: Provided, however, that all civil or criminal process issued under the authority of the state of Tennessee, or any officer thereof, may be executed on said lands and in the buildings which may be located thereon, in the same manner as if jurisdiction had not been ceded, as aforesaid," etc. State ex rel. Lyle v. Willett, 117 Tenn. 341, 342, 97 S. W. 301.

The law is that when the United States merely buy land within a state for their use, or when it is condemned for such purpose, the jurisdiction of the state wherein the land lies remains the same as before, just as if any other owner had acquired the land, with the qualification, of course, that the state cannot interfere with the full,

free, and perfect use for which it was acquired, or in any way embarrass that use. *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. Rep. 995; *Ohio v. Thomas*, 173 U. S. 276, 43 L. ed. 699, 19 Sup. Ct. Rep. 453. But where land within a state is acquired by the United States, with the consent of a state, then under article 1, § 8, subs. 17, of the Federal Constitution, the jurisdiction of the United States is complete and exclusive; and the reservation contained in such grants, to the effect that the state shall have the right to serve civil and criminal process with in the territory ceded, is limited to causes of action arising outside of the ceded territory; the purpose of such reservation being to prevent the territory's becoming an asylum for fugitives from justice. This must be understood and applied, however, in the light of the principle of public law that, when the new sovereign has not provided legislation for the territory so acquired, the laws of the former sovereign continue in force so far as needed for the protection and enforcement of the municipal or private rights of individuals residing within the territory. *Ft. Leavenworth R. Co. v. Lowe*, *supra*; *Chicago, R. I. & P. R. Co. v. McGlinn*, 114 U. S. 542, 29 L. ed. 270, 5 Sup. Ct. Rep. 1005; *Downes v. Bidwell*, 182 U. S. 244, 298, 45 L. ed. 1088, 1110, 1111, 21 Sup. Ct. Rep. 770. It is said that court jurisdiction is necessarily dependent upon the legislative power of the sovereign under whose authority the court was constituted, and that when the latter ceases the former must fail with it. This is in general true, but an exception must be recognized when the new sovereign, out of deference to the principle of public law above referred to, recognizes the continued existence within the particular territory of the laws of the former sovereign. Those laws cannot be made effective, except through the aid of a court. The Federal courts have no jurisdiction, except that conferred by the Constitution or by an act of the Congress. *United States v. Hudson*, 7 Cranch, 32, 3 L. ed. 259; *Turner v. Bank of North America*, 4 Dall. 8, 1 L. ed. 718; *United States v. Bevans*, 3 Wheat. 337, 4 L. ed. 404. And where they have jurisdiction over controversies arising out of the nature of the questions involved, there is a limitation upon that jurisdiction, measured by an amount of value in excess of that involved in the present controversy, except those in which the Federal government is itself a party. If jurisdiction is not given by Federal law to Federal courts to assert and protect the private rights conceded to exist within the newly acquired territory, they must remain outside the pale of law 39 L.R.A. (N.S.)

unless they can be asserted in the courts of the states. The Federal government and the governments of the several states are not foreign to each other, but together constitute one complete system, the Federal government performing its functions within its apportioned limits, and the states performing theirs. The courts of the states have concurrent jurisdiction with the courts of the United States in all cases wherein the jurisdiction of the former is not made exclusive, either by direct legislation, or by necessary implication, or by such incompatibility with the existence of state authority as that it could not be supposed the state courts should undertake the matter. *Clafin v. Houseman*, 93 U. S. 130, 23 L. ed. 833; *Defiance water Co. v. Defiance*, 191 U. S. 194, 48 L. ed. 144, 24 Sup. Ct. Rep. 63. If the state courts can exercise such jurisdiction in the enforcement of causes of action growing out of Federal laws, we can see no reason why they cannot enforce causes of action recognized by Federal law as continuing to exist in territory ceded by the states, but which the Federal government has provided no means of enforcing through its own courts. If there be any person, holding Federal office within such territory, who assumes to exercise powers not appertaining to his office, or not conferred upon him by law, such person is so far forth not a Federal officer, and not protected by his office, and may be sued in a state court of the state embracing such territory, just as if he were a private citizen, by persons injured through such unlawful acts. *Teal v. Felton*, 12 How. 284, 13 L. ed. 990; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; *Slocum v. Mayberry*, 2 Wheat. 1, 4 L. ed. 169; *Scranton v. Wheeler*, 179 U. S. 141, 151, 45 L. ed. 126, 133, 21 Sup. Ct. Rep. 48.

To apply these principles to the facts of the present case: The Federal courts have been given no probate powers, by the Congress, or authority to appoint an administrator of a decedent. *Yonley v. Lavender*, 21 Wall. 276, 22 L. ed. 536; *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; *O'Callaghan v. O'Brien*, 199 U. S. 89, 109, 50 L. ed. 101, 111, 25 Sup. Ct. Rep. 727. And see cases collected in note to *Bedford Quarries Co. v. Thomlinson*, 36 C. C. A. 276, 277. Therefore this power remains with the state courts; and the county court of Washington county acted in accordance with law when it appointed an administrator of Brown's estate,—he having died in Washington county, leaving there the certificates of deposit on the defendant bank, also located within the county. *Shannon's Code*, § 3935. As in-

cident to the administratorship, Major Divine became at once entitled to the possession of the evidences of indebtedness above referred to. Under the facts stated in the bill, the officers of the home are without legal justification in detaining these papers from him, and he is entitled to bring his suit against them therefor. No Federal court can entertain jurisdiction of the controversy, because, even laying out of view all other reasons, the amount involved is not sufficiently large. The complainant could have replevined the papers referred to, in the circuit or chancery court of Washington county, prior and preparatory to the present action, or he could have brought before the chancery court in this action both the bank and the persons residing within the home assuming to withhold these papers from him, and there had the question of the right of possession as between the two settled, and at the same time could have caused the money to be paid into court by the defendant bank, or on its refusal to pay could in due course have had judgment against it, on final hearing, with execution to enforce it. In either event the bank would have been protected. The bank is entitled to have the certificates surrendered when it makes payment, or in case they cannot be surrendered because of loss, or other impossibility of production, then to have a bond of indemnity given to protect it. In the present case we think no such impossibility exists. We have concluded, therefore, to direct the entry of the following decree:

Let the demurrer be overruled, and the cause remanded to the chancery court of Washington county, with leave to the complainant to file an amended bill, bringing in the persons who have possession of the certificates and check referred to and contesting their right to hold the same. In default of the filing of such amended bill within a time to be fixed by the chancellor, the defendant bank will have leave to renew its demurrer.

The costs of the appeal will be paid by the complainant.

TEXAS SUPREME COURT.

J. A. GRAVES, Plff. in Err.,

v.

ALLERT & FUESS.

(— Tex. —, 142 S. W. 869.)

Damages — defect in building construction — measure.

The measure of damages for defects in the construction work of buildings sub-
39 L.R.A. (N.S.)

stantially completed according to the plans and specifications is the cost of repairing the defects, and not the difference in value of the building as constructed and what it would have been if constructed strictly according to the plans and specifications

(January 24, 1912.)

ERROR to the Court of Civil Appeals to review a judgment affirming a judgment of the District Court for Dewitt County in defendants' favor in an action brought

Note. — Measure of damages for defects or omissions in the performance of a building contract.

As the sole object of inquiry in this note is the rule of damages to be applied, cases as to when consequential damages are recoverable are not included therein. Nor does it include decisions as to the proper measure of damages where performance of the contract has been abandoned before initiation or completion of the work.

The fundamental principle which underlies the decisions comprised in this note is that a party is entitled to have what he contracts for, or its equivalent. What that equivalent is depends upon the circumstances of the case. Where the defects are such that they may be remedied without the destruction of any substantial part of the benefit which the owner's property has received by reason of the contractor's work, the equivalent to which the owner is entitled is the cost of making the work conform to the contract. But where, in order to conform the work to contract requirements, a substantial part of what has been done must be undone, and the contractor has acted in good faith, or the owner has taken possession, he is not permitted to recover the cost of making the change, but may recover the difference in value. An attempt has therefore been made, wherever the report of the decision has made it possible to do so, to state the character of the defects or omissions constituting the defective performance, in order to show the circumstances under which one or the other of the rules above stated is properly applicable.

It should be noted that, as the statement as to the measure of the owner's damages is often incorporated with a statement as to what the contractor may recover, its form depends upon whether the amount of the contractor's compensation, from which the deduction is to be made, is the contract price, or the sum which his work may be actually worth. That is, where the contract price is taken as the basis, the contractor is properly compensated for his work, and the owner for his damage, by deducting from the contract price the difference in value between the work as done and as contracted to be done: where the value of the work done is taken as a basis, such a deduction would give the owner more than the amount of his damage, which, in such a case, is properly stated to be the

to recover damages for breach of a certain building contract. Affirmed.

The facts are stated in the opinion.

Messrs. Sam C. Lackey and Proctor, Vandenberg, Crain, & Lewright, for plaintiff in error:

The measure of damages is the difference between the value of plaintiff's buildings as actually repaired and constructed, and what their value would be if repaired and constructed in strict accordance with the contract, plans, and specifications.

Sherman v. Connor, 88 Tex. 35, 29 S. W. 1053; Jennings v. Willer, — Tex. Civ. App. —, 32 S. W. 24; Larrimore v. Comanche County, — Tex. Civ. App. —, 32 S. W. 367; Watson v. DeWitt County, 19 Tex. Civ. App. 150, 46 S. W. 1068; Fagan v.

Whitcomb, 4 Tex. App. Civ. Cas. (Willson) 47, 14 S. W. 1018; Short v. Moore, 19 Ky. L. Rep. 1225, 43 S. W. 211; Hartford Mill Co. v. Hartford Tobacco Warehouse Co. — Ky. —, 121 S. W. 477; Elwood Planing Mills Co. v. Harting, 21 Ind. App. 408, 52 N. E. 621; Ashland Lime, Salt & Cement Co. v. Shores, 105 Wis. 122, 81 N. W. 136; Foeller v. Heintz, 137 Wis. 169, 24 L.R.A. (N.S.) 327, 118 N. W. 543.

Messrs. Davidson & Bailey and Price & Green for defendants in error.

Ramsey, J., delivered the opinion of the court:

On the 9th day of April, 1907, plaintiff in error entered into a contract with Allert & Fuess, whereby the latter undertook to

difference between the contract price and the value of the work if completed in accordance with contract requirements. The practical result in either case is, of course, the same. It may also be stated in this connection that the form in which the rule as to the damages recoverable by the owner is stated is not necessarily determined by whether the action is for the contract price or *quantum meruit*, as even in the latter case the contract price is often taken as the basis of computation.

But where the deviation from the terms of the contract is so gross as to indicate an intentional substitution (as in Morgan v. Gamble, 230 Pa. 165, 79 Atl. 410, where the contractor substituted an iron pipe for the lead water pipe required by the contract), it seems that the owner may recover the cost of conforming the work to the contract.

Cost of conforming work to specifications.

As to when not proper mode of ascertaining damages, see cases under heading "Difference in value," *infra*.

In determining the damages sustained by the owner from the defective performance of a building contract, different elements are proper for consideration in different cases, according to the nature of the defect. Sometimes the measure of damages is the necessary cost of making the work according to the specifications. White v. McLaren, 151 Mass. 553, 24 N. E. 911.

Where the omission, as a failure to complete the work, is capable of being remedied by additional labor or materials, there must be deducted from the contract price such sum as will be necessary to complete the work according to the contract. Veazie v. Hosmer, 11 Gray, 396.

The owner is entitled to the cost of correcting any bad work done by the contractor so far as it can reasonably be corrected, and to the fair value of the damage done to him where it cannot be reasonably replaced. Danforth v. Freeman, 69 N. H. 466, 43 Atl. 621.

In Kelly v. Bradford, 33 Vt. 35, it was 39 L.R.A. (N.S.)

held that the amount of the contractor's recovery where the contract has been substantially performed is to be determined by deducting from the contract price such a sum as will enable the other party to get the contract completed according to its terms; or where that is impossible or unreasonable, such a sum as will fully compensate him for the imperfection in the work, and the insufficiency of the materials, so that he shall in this respect be made as good pecuniarily as if the contract had been strictly performed.

The proper rule for measuring the recoverable difference between substantial and complete performance of a building contract is not necessarily the cost of tearing down the defective work and rebuilding it so as to conform to the contract. It is the reasonable cost of remedying defects so far as that can be done practicably, and the diminished value of the building so completed, because of defects not so remediable. Ashland Lime, Salt & Cement Co. v. Shores, 105 Wis. 122, 81 N. W. 136. A sentence used by the court in connection with the foregoing statement of the rule of damages: "As to any defect that may be suggested, if the cost of remedying it will exceed the diminished value of the structure in a material degree, the latter is the true measure of liability of the builders,"—which, read literally and without reference to the context, would violate the general principle running through all the cases, that the proprietor is entitled to the very thing contracted for, or its equivalent,—is explained in Foeller v. Heintz, 137 Wis. 169, 24 L.R.A. (N.S.) 327, 118 N. W. 543, as referring only to imperfections requiring substantial destruction of the material parts of a building created according to contract, and a beginning over again, in order to remedy the defects.

And in Sherry v. Madler, 123 Wis. 621, 101 N. W. 1095, it was held that if there was a substantial compliance in good faith with the plans and specifications for a building, then the rule by which proper deductions were to be ascertained was as follows: In case of entire neglect to furnish

furnish the material and construct for him a building, and to make certain changes in other buildings then located on certain ground situated in the city of Cuero, for the sum of \$7,700, to be paid under the directions of one Jul Leffland, and in accordance with certain specifications in said contract contained. The work proceeded for some time, and seems to have been somewhat delayed, so that, on the 29th of July thereafter, the parties entered into another agreement, in which it was stipulated that Graves should waive none of his rights under his contract for said building, by entering and placing shelving and goods in same, except as to the time limit under which Allert & Fuess would complete same, which was waived with the stipulation

that such waiver should not cause the contractors to be any the less diligent in completing same. Thereafter the contractors proceeded with the building, and, as the court below found, substantially complied with the terms of the contract in respect thereto. This finding by the district court as well as by the court of civil appeals is assailed by the plaintiff in error, but we think it is fairly supported by the testimony. The architect, Mr. Leffland, was introduced on the trial of the case by plaintiff in error, and at the conclusion of his testimony, by agreement of all parties, it was arranged that he should inspect the buildings at once and make a careful investigation of the alleged defects in them, and afterwards testify upon the trial as to

an item of labor or material, or in case of a defect which might be easily remedied without taking down and reconstructing a substantial portion of the building, this allowance should equal the reasonable expense of supplying or correcting the defect. In case of a defect which could be remedied only by taking down and reconstructing some substantial portion of the building, the allowance should be the amount which the building is worth less, by reason of the defect, than the contract price.

So, also, in *Manning v. School Dist. No. 6*, 124 Wis. 84, 102 N. W. 356, it is said that so far as imperfections can be remedied without any great sacrifice of work and material wrought into the subject of the contract and the proprietor's property, the contract price is to be reduced by so much as will measure the reasonable cost of applying such remedy; and otherwise the contract price is to be rebated to the extent of the diminished value of the subject of the contract by reason of the defects. And see also to the same effect, *Foeller v. Heintz*, supra.

In *Thornton v. Place*, 1 Moody & R. 218, a demand for slating some buildings of the defendants, Parke, J., in charging the jury, said that when a party engaged to do certain work on certain specified terms and in a certain specified manner, but in fact did not perform the work so as to correspond with the specifications, he was not, of course, entitled to recover the price agreed upon in the specifications, nor could he recover according to the actual value of the work, as if there had been no special contract. What the plaintiff was entitled to recover was the price agreed upon in the specifications, subject to a deduction; and the measure of that deduction was the sum which it would take to alter the work so as to make it correspond with the specifications.

In *American Surety Co. v. Lyons*, 44 Tex. Civ. App. 151, 97 S. W. 1080, it was held that where the owner was damaged by the contractor's putting into a building work and material inferior to that called for in

the contract, the measure of damages was not the difference between the value of the building as contracted and its value if it had been constructed according to the contract, but the amount which it will cost over the above the contract price to have the defects remedied and the building completed in accordance with the contract.

In several other cases involving the right of the contractor to recover where the contract has been substantially performed, the court has stated that the owner is entitled to a deduction from the contract price of a sum requisite to indemnify him for the expense of conforming the work to that for which he contracted. See *Keeler v. Herr*, 157 Ill. 57, 41 N. E. 750; *Palmer v. Meriden Britannia Co.* 188 Ill. 508, 59 N. E. 247; *School Directors v. Roberson*, 65 Ill. App. 298; *Shepard v. Mills*, 70 Ill. App. 72, affirmed in 173 Ill. 223, 50 N. E. 709; *Cook v. American Luxfer Prism Co.* 93 Ill. App. 299; *Crouch v. Gutmann*, 134 N. Y. 45, 30 Am. St. Rep. 608, 31 N. E. 271; *Holl v. Long*, 34 Misc. 1, 68 N. Y. Supp. 522; *Gove v. Island City Mercantile & Mill Co.* 16 Or. 93, 17 Pac. 740; *Edmunds v. Welling*, 57 Or. 103, 110 Pac. 533; *Moore v. Carter*, 146 Pa. 492, 23 Atl. 243.

But where a counterclaim set up in an action upon a building contract is based not upon the lack of certain particular items in order to complete the building, but upon the unskillful manner in which the work was performed, it is not error to refuse to instruct the jury that the measure of the owner's damages will be what it will cost to procure to be done the work necessary to make the building conform to the terms of the contract. *Smith v. Bristol*, 33 Iowa, 24.

Although recovery cannot be had upon a contract to do mason work which has not been properly performed, yet, the owner having availed himself of the contractor's work and labor, the contractor should be permitted to recover the contract price less the sum it would cost to complete the work as agreed to be done. *Blakeslee v. Holt*, 42 Conn. 226.

same, and make an estimate of what, in his judgment as a supervisory architect, would be a proper sum to charge to repair same, so as to put the buildings in shape in accordance with the plans and specifications as agreed upon. After such investigation, he did testify and pointed out some defects in the building. He said, in substance, that there were certain cracks in the wall between buildings 1 and 2, upstairs as well as in the 8 foot section downstairs, but that these did not materially affect the strength or durability of the walls, and that they should be repaired by cleaning out the cracks and filling them with mortar, which could be done at a cost of not over \$90. He also testified to certain cracks in the front of the building No. 3,

which he said amounted to nothing. There were some other matters somewhat more serious, particularly with reference to the ceiling and floors upstairs as well as the roof. However, after testifying to all the matters, he says: "In my judgment as supervising architect, according to whose plans and specifications these buildings were to be erected and altered, they are, as I have said, substantially in accordance with the plans and specifications now, and the defects complained of can be remedied, in so far as they have not been remedied, so as to completely comply with the original plans and specifications at a cost of not exceeding \$425. This in my judgment is a very liberal estimate, and it might be done even at a less expense." However, the trial

The measure of damages for failure to construct a foundation wall in accordance with the terms of the contract is the sum which it would reasonably take to make the wall conform to contract requirements. *Wright v. Sanderson*, 20 Mo. App. 534.

Other decisions relating to defective mason work are *Taulbee v. Moore*, 106 Ky. 749, 51 S. W. 564, and *Bush v. Jones*, 2 Shannon Cas. 224, under heading "Difference in value," *infra*.

The measure of damages for putting in a defective granolithic floor is the amount that it would reasonably take to make the floor conform to the contract. *Lambert v. Jenkins*, — Va. —, 71 S. E. 718. Compare *Norcross Bros. Co. v. Vose*, 199 Mass. 81, 85 N. E. 468, under heading "Difference in value," *infra*.

Where an entire contract for the laying of a concrete sidewalk has been substantially performed, even though not completed in a workmanlike manner, the contract price may be recovered, less a fair allowance to make good the defects, although the work has not been accepted. *Dyer v. Lintz*, 76 N. J. L. 204, 68 Atl. 908. Compare *Culbertson v. Ashland Cement & Constr. Co.* 144 Ky. 614, 139 S. W. 792, under heading "Difference in value," *infra*.

Where a contract to install heating apparatus is substantially performed, the owner may deduct from the contract price the sum necessary to make it complete. *Cutler v. Close*, 5 Car. & P. 337.

Where one contracts with the owner of a house to install therein a heating plant of a certain character and quality, and the plant actually installed is inferior to that contracted for, the measure of the owner's damage is the sum required to make the plant conform to the specifications fixed by the contract. This rule is not in a particular case varied by reason of the fact that the contractor offers to make the necessary changes for a specified sum and to give bond for the faithful performance of the work. *Dornblatt v. Carlton*, 10 Ga. App. 741, 73 S. E. 1085.

Where a comparative small expenditure is necessary to remedy defects in the performance of a contract for plumbing and 39 L.R.A. (N.S.)

heating work, the reasonable expense of doing so in a workmanlike manner, and of complying with the contract in this respect, is the correct measure of damages. *McLullough v. S. J. Hayde Contracting Co.* 82 Kan. 734, 109 Pac. 176.

Another case in which heating apparatus was involved is *Mack v. Sloteman*, 21 Fed. 109, under heading, "Difference in value," *infra*.

Where the contract for plumbing has been substantially performed, the measure of damages is what it would cost to put it in the condition contracted for. *Sticker v. Overpeck*, 127 Pa. 446, 17 Atl. 1100.

Where a building contract has been substantially performed, the measure of damages to be allowed to the owner by reason of the contractor's failure to conform to specifications as to quality of lumber and manner of nailing in constructing a staircase is merely the amount of detriment suffered by the owner by reason of breaches of the contract, and not the cost of building a new staircase,—especially where the payment was to be made before the commencement of the work, and is therefore to be regarded as an independent promise. *Carpenter v. Ibbetson*, 1 Cal. App. 272, 81 Pac. 1114.

The measure of the damages for failure to put up a cornice, which the owner of a building may set up as a counterclaim in an action for the contract price of putting on a metal ceiling, is the difference in the amount which the owner would have been obliged to pay the contractor for the cornice, and the fair cost to the owner of putting up the cornice under existing conditions. *New York Metal Ceiling Co. v. City Homes Improv. Co.* 88 N. Y. Supp. 233.

The rule of damages for the improper construction of machinery erected in a mill is to deduct from the contract price the cost of altering the construction of the machinery so as to make it conform to the contract. *Stillwell & B. Mfg. Co. v. Phelps*, 120 U. S. 520, 32 L. ed. 1035, 9 Sup. Ct. Rep. 601; *Williams v. Island City Mill Co.* 25 Or. 573, 37 Pac. 49; *Wade v. Haycock*, 25 Pa. 382; *Clifford v. Richardson*, 18 Vt. 620.

The measure of damages recoverable by

court, evidently considering in this connection other testimony, found that the sum of \$900 was a sufficient amount to remedy such incomplete conditions, so as to make said construction of said buildings conform substantially to the terms and stipulations of the contract in appearance and durability.

The trial court filed the following conclusions of law as to the measure of damages: "I am of the opinion from the facts in this case that the true measure of plaintiff's damage in this case is the difference in the value of the contract price of construction of the building in substantial conformity to the contract, plans, and specifications, and the value of such construction as it now stands in its present condition,

the owner of a steamboat against the builder, for imperfect caulking and improper setting of the wheels, is the amount of the reasonable cost incurred to remedy the defects, and to place the boat in a proper condition as contemplated by the contract. *Leathers v. Sweeney*, 41 La. Ann. 287, 5 So. 662.

The measure of damages for the defective performance of a contract to build an automobile body and place it upon a chassis furnished by the owner is not the difference in value of the automobile as completed and what it would have been had the work been properly done, but the cost and expense reasonably necessary to make the work and materials conform to the requirements of the contract. *Anthony v. Moore & M. Co.* 135 App. Div. 203, 120 N. Y. Supp. 402.

The measure of damages recoverable from an architect for negligent and unskillful construction of a building may be the cost of remedying the defects (*Lord v. Comstock*, 20 Jones & S. 548; *Schwartz v. Kuhn*, 71 Misc. 149, 126 N. Y. Supp. 568), or the difference in value between the product of the architect's negligent and unskillful work and of the house as it should have been (*Lord v. Comstock*, supra).

The measure of damages sustained by reason of the failure of a contractor to build a roof according to the contract is not the cost of making a good, tight, and durable roof, but a roof according to the specifications. *White v. Sisters of Charity*, 79 Ill. App. 646.

Difference in value.

Where an action brought by a contractor to recover for extras not included in a building contract was litigated upon the theory that the sum otherwise demanded could be tolled, if not absorbed, by the deduction of counterclaim, being the difference in value of the failure, unexcused, of the contractor to perform in certain particulars, proof of the market value of the building was properly admitted, the measure of damages claimable by the owner, in the nature of counterclaim, being the difference in value of the building constructed and that stipu-

lated for in the contract. *Fleming v. Lunsford*, 163 Ala. 540, 50 So. 921.

which I have found as a matter of fact is the sum of \$900, for which plaintiff is entitled to recover as such damages." This was construed, and properly construed, by the court of civil appeals, to mean that the court held "that the measure of damages was the difference between the balance unpaid on the contract price and what it would take to complete the building." It is contended by plaintiff in error, however, that the true measure of damages is the difference between the value of the plaintiff in error's buildings as actually repaired and constructed, and their value if they had been repaired and constructed according to plans and specifications.

We think it clear that under the authorities in this state, and based on sound

In *Morford v. Ambrose*, 3 J. J. Marsh. 690, it was held that the measure of the contractor's recovery was the contract price less the difference in value between the work as it was done and as it should have been done.

In *Gleason v. Smith*, 9 Cush. 484, 57 Am. Dec. 62, it was held that an instruction that a builder of a dam has substantially performed, so as to recover so much as his work and labor were worth to the owners, would be erroneous if standing alone, but was correct where the jury was directed to arrive at the result by deducting from the contract price so much as the dam built was worth less than the dam contracted for. The court said that the rule for making the deduction from the contract price for the deficiency in the work had been sometimes sought in another form; that the jury should take as the basis of the calculation the contract price, and deduct from that sum such amount as would be required to be paid to complete the work according to the contract; that probably the result would be much the same under either of these rules. In many cases the latter rule would not be adapted to the case, as where the building was wholly finished, but there was some small departure from the contract in some of the details; there the rule must be to deduct so much from the contract price as the work was worth less to the owner.

An instruction to the jury that, if a house was not built pursuant to contract, they should consider what the house was worth to the owner, and to give that sum in damages, is incorrect, since they should be instructed to deduct so much from the contract price as the house is worth less on account of the departures. *Hayward v. Leonard*, 7 Pick. 181, 19 Am. Dec. 269.

In *Cullen v. Sears*, 112 Mass. 299, it was held that the measure of the contractor's recovery where the contract has been substantially performed is the contract price, deducting what the building is worth less to the owner by reason of the deviations from the contract.

legal reason, that the judgment of the court of civil appeals is manifestly correct. This is in accordance with the ruling of this court in *Linch v. Paris Lumber & Grain Elevator Co.* 80 Tex. 23, 15 S. W. 208, where Judge Henry in a well-considered opinion adopts the following language of the supreme court of New York in the case of *Smith v. Gugerty*, 4 Barb. 620: "If there is an honest effort to perform the contract

according to the letter, and it is substantially fulfilled, the builder should be entitled to receive the reward of his labor, although he may not (as the architect employed in this case has certified) have in every instance complied with its terms literally in every punctilio. A substantial compliance without any intentional variation should in all cases be considered as a full performance of a condition, whether pre-

The defect may be of such a character as to diminish the value of the house but little, while to make the work conform literally to the contract would involve reconstruction at unreasonable and disproportionate expense. The question ordinarily is how much less is the building fairly worth than it would have been if the contract had been performed. *White v. McLaren*, 151 Mass. 553, 24 N. E. 911; *Danforth v. Freeman*, 69 N. H. 466, 43 Atl. 621.

In *Wagner v. Allen*, 174 Mass. 563, 55 N. E. 320, an instruction that a contractor substantially performing can recover the contract price less such sum as will compensate the owner for the difference in value between the work as it is and the work as it would have been if the contract had been properly performed was approved.

In *Norwood v. Lathrop*, 178 Mass. 208, 59 N. E. 650, it is said that the amount of the contractor's recovery in case of substantial performance may, in many cases, be ascertained by deducting from the contract price what the building is worth less to the owner by reason of the deviations from the contract.

Where the contract price is a fair valuation for the work, and it has been completed in general conformity to the requirements of the contract, though defectively executed in some particulars, and the suit is for the contract price, the measure of the owner's damages is the difference between the value of the building agreed to be done and the building actually done; but when the building has been completed and differs in plan of construction or in materials employed from that which the builder contracted to erect, the true rule of estimating the damages sustained by the owner, whether the action is for the contract price or for the value of labor and materials, is to ascertain what it would cost to make the building conform to what the builder contracted it should be. *Haysler v. Owen*, 61 Mo. 270.

The measure of damages where a building is substantially and yet defectively completed is the difference between the value of the building and the reasonable cost or value of the building completed in accordance with the requirement of the contract. *Simons v. Wittmann*, 113 Mo. App. 357, 88 S. W. 791.

The measure of damages recoverable in an action brought by the owner for defects in performance of a building contract, where the buildings have been finished and delivered as completed, and accepted by the owner as such, is not what it would cost to re-

place the defective buildings by new buildings, but is the difference between what would have been the value of the buildings if finished according to the contract, and the value of those actually finished. *Walter v. Hangen*, 71 App. Div. 40, 75 N. Y. Supp. 683.

Where the changing of the building to conform to specifications would involve the destruction of so much work already done, and the doing of so much work not originally contemplated by the parties, that such an inquiry could not be any reliable aid to the jury in ascertaining the difference in value between the building in its defective condition and what would have been its value if no defect had existed, there is no error in a refusal to charge the jury that if they found the contract to have been substantially performed, they must allow the owner such an amount as would be necessary to make the building conform to the specifications; but the true rule of damages is the difference in value between the building as in fact finished and as it would have been had the provisions of the contract been accurately carried out. *Morton v. Harrison*, 20 Jones & S. 305.

In *Jennings v. Willer*, — Tex. Civ. App. —, 32 S. W. 24, it is said to be the rule that where the owner accepts the building, the contractor is entitled to recover its value as constructed, though not in all respects as contracted for,—the amount of recovery in no event to exceed the contract price; and that the owner is entitled to recover as damages the difference between the value of the house as built and as contracted for.

In *Ekstrand v. Barth*, 41 Wash. 321, 81 Pac. 305, the court quotes as stating the correct rule for the measurement of damages the following statement from 13 Cyc. 158: "Where a contract has been defectively performed and damages are claimed for such reason, the damages should be measured by the difference between the value of the property in its defective condition, and its value if it had been completed in compliance with the contract; and this rule obtains even where the property as delivered has no market value. The measure of damages in such cases has been held to be the costs and expenses reasonably necessary to make the work conform to the requirements to the contract, on the principle that plaintiff is entitled to work such as he contracted for."

In an action to recover for work and materials furnished in the erection of a church edifice, where it appears that the

cedent or subsequent." The same rule is thus stated in *Woodruff v. Hough*, 91 U. S. 602, 23 L. ed. 335, where the court says: "The court repeated the details of the contract on the points where the failure was alleged, and then told the jury that, unless the contractors had complied substantially with these specifications, or a strict compliance therewith had been waived, they could not recover." The same rule was also

laid down by Judge Denman in the case of *Sherman v. Connor*, 88 Tex. 35, 29 S. W. 1053, where he, speaking for the court, uses this language: "For the reason that the record does not disclose the facts more fully, we do not feel warranted in attempting to determine the measure of damages on another trial; but will suggest that, if the works actually constructed [waterworks] were, to the extent of their construction, in

ceiling is 2 feet lower than the contract calls for; that the windows are shorter and narrower, that the seats are narrower, than the specifications call for; and that there are other variations and omissions; that the mistake in the height of the ceiling is due to the combined error of the plaintiff and the defendant's architect, and that the other changes are due to the omissions of the plaintiff and his workmen; that the plaintiff, in doing the work and furnishing the materials, acted in good faith, and that the building as completed is reasonably adapted to the wants and requirements of the defendants, and its use beneficial to them, and that it would be practically impossible to make the building conform to the contract without taking it partially down and rebuilding it, the defendants are not entitled to deduct from the contract price as damages the sum it would cost to make the building conform to the contract, but it is proper to deduct only the amount of the diminution in the value of the building by reason of the plaintiff's deviation from the contract. *Pinches v. Swedish Evangelical Luthern Church*, 55 Conn. 183, 10 Atl. 264.

In *Mercantile Trust Co. v. Hensley*, 27 App. D. C. 210, affirmed on other grounds in 205 U. S. 298, 51 L. ed. 811, 27 Sup. Ct. Rep. 535, 10 Ann. Cas. 572, it was held that, where the contractor deviated from the contract plans, the court correctly stated the measure of the owner's damages to be the difference between what the houses were worth when completed and what they would have been worth had they been completed as required by the contract.

In *Small v. Lee*, 4 Ga. App. 395, 61 S. W. 831, the court said that where the defects in a house as constructed might be remedied at a reasonable expense, it would be proper to deduct from the contract price the sum which it would cost to complete it according to the requirements of the plans and specifications. If the contractor had built a structure substantially adapted to the purpose for which it was built, and of which the owner was in the use and enjoyment, but the defects of the structure could not be made to conform strictly to the requirements of the contract, except by an expenditure which would deprive the contractor of adequate compensation for his labor and materials, justice and equity would require the adoption of another measure of damages. In the case at bar, the builder, owing to the misconstruction of the plans, built the rooms and veranda smaller than he should

have done. The court declared that, in such a case, the true measure of damages would be the difference between the value of the house as finished, and the house as it ought to have been finished. To require that the house should be rebuilt, and that the contractor should pay the cost of rebuilding, or that the estimated cost of making the house conform to the contract should be allowed as damages, would be to give an unconscionable advantage to the owner, and would deprive the contractor of adequate compensation for his work and materials.

Where a bridge collapsed in consequence of defects in construction, the measure of damages which may be set off against the indebtedness to the contractor is the difference between the value of the bridge constructed as it was and its value if it had been constructed in accordance with the contract. *Converse Bridge Co. v. Geneva County*, 168 Ala. 432, 53 So. 196.

The measure of damages recoverable by an owner who has paid the contract price, for alleged defects in materials and workmanship in a building, is the difference between its value as constructed and what its value would have been had it been constructed in accordance with the contract, with reasonably sound materials and reasonably skillful workmanship. *Hartford Mill Co. v. Hartford Tobacco Warehouse Co.* — Ky. —, 121 S. W. 477.

So, also, in *Elwood Planing Mills Co. v. Harting*, 21 Ind. App. 408, 52 N. E. 621, it was held that the measure of damages for breach of contract in furnishing improperly seasoned lumber to be used in the construction of a house was the difference between the actual value of the house, and the value of such a house as must be regarded as in contemplation of the parties when they made the contract.

The measure of damages for the failure to furnish for the finishing of a house, wood of the quality contracted for, is the difference between the value of the house with the inferior wood in it, and its value with wood of the quality contracted for, which, of course, cannot exceed the cost of replacing the inferior wood with material of the quality called for by the contract. *Wheaton v. Lund*, 61 Minn. 94, 63 N. W. 251.

In *Wood v. Stringer*, 20 Ont. Rep. 148, it was held that the difference in value of the material used for pews by a contractor for the erection of a church, and that of the better material which should have been put in, was not an adequate measure of the set-off or deduction to which the proprietors

substantial compliance with the contract, then, if the amount it would take to complete the works according to contract, added to the amount paid, would not exceed the contract price, the city could not recover on its claim for damages; but, if the amount paid and the sum necessary to completion

exceed the contract price, then the city would be entitled to recover the excess, unless the amount paid and the sum necessary to completion exceed the value of the works completed according to contract, in which event the difference in the value, if they had been completed according to contract, and

were entitled; the court, however, failing to state what the proper measure of damages was.

Where a house built is of the size and form contracted for, though not up to contract requirements in materials and workmanship, the owner's measure of damages is the difference between the value of the house built and of that contracted to be built. *Twitty v. McGuire*, 7 N. C. (3 Murph.) 501.

The measure of damages for failure to use the required grade of mortar for plastering is the difference in value between the class of work contracted for and that which was furnished. *Chamberlain v. Hibbard*, 26 Or. 428, 38 Pac. 437.

In *Norway Plains Sav. Bank v. Moors*, 134 Mass. 129, it was held that the measure of damages recoverable upon a guaranty that houses on which security is given to a bank shall be built in a good workmanlike manner is the difference between the value of the houses as they were in fact built, and the value they would have had if built in conformity to the agreement, or so much of this difference as would have been necessary, with the value of the houses as built, to have paid the mortgage debt and interest then due.

The owner of property for whom a cellar has been constructed not in accordance with the specifications is entitled to offset against the contract price an amount equal to the difference in the value between the work actually done and the work which, by the terms of the contract, should have been done. *Moulton v. McOwen*, 103 Mass. 587.

In *Taulbee v. Moore*, 106 Ky. 749, 51 S. W. 564, it was held that where the defect complained of was the contractor's failure to execute brickwork so that the inside of a wall should be as smooth as the outside, the proper measure of damages which might be set off against the contract price was the difference, if any, between the value of the building as constructed, and what it would have been if it had been constructed according to the contract, and not the cost of taking away the wall and replacing it by a wall conforming to the contract requirements, the court saying: "We do not think the measure of damages contended for by appellant is a sound or just one. . . . If appellant is right in his theory, appellee might be mulcted in damages in a sum equal to the entire contract price agreed to be paid to him for the job of work, on account of a comparatively inconsequential failure to literally comply therewith, and which did not affect the real value of the work done by him. Whilst it may be true that if a contractor should disregard the plans and specifications under which a 39 L.R.A. (N.S.)

building was to be erected, and erect one substantially dissimilar, the owner might refuse to receive or pay for the property, but where there has been, as in this case, a substantial compliance, it seems to us that the true criterion of damages is that laid down by the court."

The owner may deduct from the contract price of doing the brickwork on a house the difference in value between the work as done and as contracted to be done. *Bush v. Jones*, 2 Shannon Cas. 224. Other decisions relating to defective mason work are *Blakeslee v. Holt*, 42 Conn. 226; *Wright v. Sanderson*, 20 Mo. App. 534, under heading "Cost of conforming work to specifications," supra.

If the roof of a building is not up to contract requirements, the owner may recoup from the contract price as damages the difference between the value of the building as constructed, and what it would have been if the house had been built according to contract. *White v. McLaren*, 151 Mass. 553, 24 N. E. 911.

On a contractor's failure to comply with specifications as to concrete floors, the owner may recoup as damages the difference between the value of the floors if they had been built as designed, and their value as built and left by the contractor. *Norcross Bros. Co. v. Vose*, 199 Mass. 81, 85 N. E. 468. Compare *Lambert v. Jenkins*, — Va. —, 71 S. E. 718, under heading "Cost of conforming work to specifications," supra.

The measure of damages for failure to construct a cement walk in accordance with the specifications, which the owner may counterclaim in an action for the contract price, is the difference between its value as built and its value if built as required by the contract. *Culbertson v. Ashland Cement & Constr. Co.* 144 Ky. 614, 139 S. W. 792. Compare *Dyer v. Lintz*, 76 N. J. L. 204, 68 Atl. 908, under heading "Cost of conforming work to specifications," supra.

The measure of the owner's damages for defective performance of a contract for installing heating apparatus is the difference between the value of the apparatus in its defective condition, and what its value would have been had it met the requirements of the contract. *Mack v. Sloteman*, 21 Fed. 109.

For other instances where contract relating to heating apparatus was defectively performed, see *Cutler v. Close*, 5 Car. & P. 337; *Dornblatt v. Carlton*, 10 Ga. App. 741, 73 S. E. 1085; *McCullough v. S. J. Hayde Contracting Co.* 82 Kan. 734, 109 Pac. 176, under heading "Cost of conforming work to specifications," supra.

The measure of damages recoverable for

the contract price, would be the measure of the city's recovery on its claim for damages." The rule applied by the trial court and here laid down is in accordance with, as we believe, and supported by, the following authorities: *American Surety Co. v. Lyons*, 44 Tex. Civ. App. 151, 97 S. W. 1080; *Wat-*

son v. De Witt County, 19 Tex. Civ. App. 162, 46 S. W. 1061; *Gonzales College v. McHugh*, 21 Tex. 259; *Hillyard v. Crabtree*, 11 Tex. 267, 62 Am. Dec. 475; *Carroll v. Welch*, 26 Tex. 149; *Mills v. Paul*, — Tex. Civ. App. —, 30 S. W. 561; *Stark v. Alford*, 49 Tex. 275; *Wright v. Daven-*

defects in a steam boiler constructed and installed in a vessel under a special contract is not the difference between the actual value of the boiler and the contract price, but the difference in value between the boiler as it is with the defects, and the boiler as it would have been if completed in compliance with the contract, since a boiler so completed was exactly what the owner was entitled to. *White v. Brockway*, 40 Mich. 209.

Where a mill is not constructed in accordance with a contract, the owner's measure of damages is the difference between the actual value of the mill as constructed and what its value would have been had it been constructed as provided by the contract. *Gove v. Island City Mercantile & Mill Co.* 16 Or. 93, 17 Pac. 740.

Where the action was on a contract for the building of a water tower and tank, it was held that the proper finding was not the amount of money it would take to make such tower and tank conform to the specifications, but the diminished value of said tower and tank by reason of the failure to conform to the specifications. *Madisonville v. Rosser*, 8 Ohio C. C. N. S. 387, 28 Ohio C. C. 834.

The difference in the market value of the entire premises with the house as constructed, and their value with the house as it should have been constructed, applies only where the house has been located on a different part of the lot than it should have been according to the contract. *Small v. Lee*, 4 Ga. App. 395, 61 S. E. 831.

Where a house is not located as required by the plan, being about 1 foot out of place, the owner's measure of damages is not the expense of moving the house to the line shown in the plan, but the difference in value of the property as it is and as it would have been if the house had been set according to the plan. *Olsen v. Henderson*, 113 App. Div. 676, 99 N. Y. Supp. 917.

Cost of doing work over.

As to when not properly recoverable, see cases under headings, "Cost of conforming work to specifications" and "Difference in value," supra.

Where the contractor has substituted other materials or altered the plan of construction, in arriving at the difference in value of the house as built and as it should have been built under the contract, the cost of taking out all the work and material which was not done according to the contract, and having it done over, should be ascertained. *Kiel v. Kline*, 16 Ky. L. Rep. 158.

In *Spink v. Mueller*, 77 Mo. App. 85, a majority of the court held that the measure of damages recoverable for the substi-

tution of inferior varnish in finishing a house was the sum necessarily expended by the owner in removing the varnish and re-varnishing; the dissenting member of the court taking the position that the house having been used by the owner, the true measure of his damages was the difference between the work as done and as it ought to have been done.

In *Walter v. Huggins*, — Mo. App. —, 148 S. W. 148, it is held that the measure of damages for defective workmanship in the performance of a contract to plaster a building, (the surface having been left uneven and wavy) was not the difference in the value of the plastering as done and the value of the work had it been done in accordance with the contract, but the cost of making the work conform to the contract by removing the finishing coat and replacing it, even though the owner, without waiving the contract or acquiescing in its defective performance, had taken possession of the building and by continued use evinced an intention to use the plastering so long as it may be used. The court said: "The defendant owner has suffered no diminution of rental value of the building, and for aught disclosed the plastering will last as long as plastering put on with an even surface would last. If the owner chooses to use the work as long as it will last, it will not suffer any pecuniary loss, and, as it does not intend to occupy the building except by tenants, the work will be just as valuable to it as work properly done. Must we say then that, having a work just as valuable as that specified in the contract would have been, the owner has no remedy, no right to a performance of the contract, or the just equivalent of such performance? We think we are not constrained to pronounce a rule so emasculatory of one of the most fundamental principles of contract law. The substitution by the contractor of poor workmanship for good was a breach of his contract, and as the poor workmanship was of a character to affect the whole job—to leave its entire surface uneven, wavy, and lumpy, a standing offense to the eye and taste—the defect was as much a variance from the general plan and specifications as was the substitution of stock brick for pressed brick in the case of *Marsh v. Richards*, 29 Mo. 99, where Judge Scott said that, if one pays for the gratification of his taste, he has a right to have it gratified, and the delinquent contractor will not be heard to say that the house built of cheap material is as valuable as one built of more costly material. So an owner is entitled to good workmanship when he pays for it and stipulates for it."

port, 44 Tex. 167; Weis v. Devlin, 67 Tex. 512, 60 Am. Rep. 38, 3 S. W. 726.

The plaintiff in error cites and relies upon the case of Foeller v. Heintz, 137 Wis. 169, 24 L.R.A. (N.S.) 327, 118 N. W. 543. There is some language in that case which we think would institute too strict a rule

in a case of this sort, but, in substance, the decision is not out of harmony with the rule laid down here. It will be noted that in the decision of that case the contractor is credited with the sums unpaid upon the contracts, and charged with the reasonable cost of completing the structure

Where the contractor substituted an iron pipe for a strong lead water pipe required by the contract, he must pay the owner not the difference between the iron and lead pipes, but the cost of laying a lead pipe as provided for in the agreement. Morgan v. Gamble, 230 Pa. 165, 79 Atl. 410.

Difference between contract price and value of building contracted for.

As stated in the introductory portion of this note, where the measure of the contractor's recovery on *quantum meruit* for what he has done is not arrived at by making a deduction from the contract price, it is not necessary to frame a rule of damages which will include the amount so to be deducted, but the measure of the owners' damages is the benefit of his bargain, i. e., the difference between the contract price and the value of the work contracted to be done. Such is the rule laid down in the following cases:

Where a building cannot be made to conform to the contract requirements without its entire demolition, the measure of the contractor's recovery is not the value of the building as it is, not exceeding the contract price, less the difference in its value as constructed and as it would be were it such a building as contracted for, since in that case the owner would receive double damages; but the true measure of recovery is the value of the building as so completed, not exceeding the contract price, less the damages sustained by the owner by reason of the contractor's failure to perform the contract, which is the difference between the house contracted for, if worth more than the price agreed to be paid, and such price. Eaton v. Gladwell, 121 Mich. 444, 80 N. W. 292.

Where the contractor undertaking the construction of a system of waterworks of a capacity of 250,000 gallons per day completed a system capable of furnishing only 50,000 gallons, of which the city has taken possession, the city is entitled to recoup against the reasonable value of the system actually constructed the difference between the contract price and what the works would have been worth if completed according to contract. Sherman v. Connor, 88 Tex. 35, 29 S. W. 1053.

Miscellaneous.

It will be perceived that the damages the recovery of which is permitted in the cases under the respective headings, "Cost of conforming work to specifications" and "Difference in value," are in the first instance not damages at all, but only the portion of the contract price which the owner is not

compelled to pay, and in the second instance are made up of two elements, the portion of the contract price which he is not compelled to pay and the benefit of his contract, of which he is deprived by the defective performance, and which is measurable by the difference between the value of the work if it had been completed in accordance with the specifications, and what he would have had to pay for it. The necessity of distinguishing between these two components of the owner's right of recovery is occasioned by the need for showing that cases in which one is dissociated from the other are not at variance with the general rules above set forth. Under the heading, "Difference between contract price and value of building contracted for," may be found cases in which the measure of the owner's right is the loss of the benefit of his bargain. In the cases which follow, only the right to a deduction from the contract price seems to have been considered:

Where the building is in use and the principal defect shown was in the walls spreading, which had been remedied in such a manner as to prevent all further damage and render the building safe, the measure of damages is not the cost of removing all defective work, and rebuilding, but the contractor may recover the value of the building as constructed less the difference in its value and the contract price. Short v. Moore, 19 Ky. L. Rep. 1225, 43 S. W. 211.

In fixing the damages sustained by the owner, the jury should take into consideration the price of the work as declared by the contract, and then determine, if the work when done in pursuance to the contract is worth that sum, what it is worth done as it is. Marsh v. Richards, 29 Mo. 99.

If a contractor fails to construct a building in substantial compliance with the terms of the contract, and his employer refuses to accept it in its incomplete state, and by reason of the contractor's default the employer is damaged, he may recover as damages the difference between the value of the building and the price agreed to be paid by the contract; but if there has been a delivery and acceptance of the building in an incomplete condition, then the measure of damages will be the difference in value of the plant actually constructed, and the value of the plant if constructed in accordance with the terms of the contract. A. J. Anderson Electric Co. v. Cleburne Water Ice & Lighting Co. — Tex. Civ. App. —, 44 S. W. 929.

See also in this connection, Sherry v. Madler, 123 Wis. 621, 101 N. W. 1095, under heading, "Cost of conforming work to specifications," supra.

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as agreed upon. Again, the court there quotes with approval the statement of the law contained in *Woodward v. Fuller*, 80 N. Y. 312, where the builder had in good faith intended to comply with the contract, and had substantially complied with it. Although there may have been slight defects caused by inadvertence or unintentional omission, he may recover the contract price less the damage on account of such defects. The defects must not run to the whole, nor be so essential as that the object of the parties to have a specified amount of work done in a particular way is not accomplished.

While there is a wide divergence of opinion expressed by the several witnesses appearing in the case, a careful inspection of the entire record has convinced us that the conclusions of the trial court are well sustained by the testimony, and that there is no such departure by the contractors from the true intent and purpose of their undertaking, or such failure on their part as involved such structural or basic defects, as should deny them the right to recover the fruits of their labor, when in the same judgment provision could be made, as was made, to protect the plaintiff in error against any loss or damage whatever. This having been done, the judgment of the court below well meets the settled rule of law in this state, and at the same time seems to work out and accomplish the justice of the case. Finding no error in the judgment of the court below, it is ordered that the same be, and it is hereby, in all things, affirmed.

TEXAS SUPREME COURT.

S. C. CRABB et al., Plffs. in Err.,
v.

CELESTE INDEPENDENT SCHOOL DISTRICT.

(— Tex. —, 146 S. W. 528.)

School — action to annul district — right to maintain.

1. A resident taxpayer cannot maintain an action to annul an independent school

district for irregularity in organization, if the proceedings purported to be under color of law.

Same — addition to district — extension of tax.

2. A tax voted by the taxpayers of the school district in the manner provided by the Constitution cannot be extended over territory added to the district after the vote was taken, without giving the taxpayers of such addition an opportunity to adopt or reject it in the manner provided by the Constitution, if the proceedings for the addition of the territory did not meet the constitutional requirements for the adoption of the tax.

(May 1, 1912.)

ERROR to the Court of Civil Appeals for the Fifth Supreme Judicial District to review a judgment affirming a judgment of the District Court for Hunt County in defendant's favor in a proceeding to annul the incorporation of plaintiffs' lands in the defendant district, and enjoin the collection of taxes which had been levied upon them. Reversed in part.

The facts are stated in the opinion.

Messrs. Thompson & Mead, for plaintiffs in error:

Where a tax has been voted upon the property within the limits of a school district, other territory cannot be thereafter added, and the property within such added territory thereby made subject to such tax.

Tex. Const. art. 7, § 3; *Snyder v. Baird* Independent School Dist. 102 Tex. 4, 111 S. W. 723, 113 S. W. 521; *Brewer v. Hall*, — Tex. Civ. App. —, 111 S. W. 788; *Parks v. West*, 102 Tex. 11, 111 S. W. 726; *Jenkins v. De Witt*, — Tex. Civ. App. —, 115 S. W. 610; *Patching v. Hutchison*, — Tex. Civ. App. —, 118 S. W. 878; *Cummins v. Gaston*, — Tex. Civ. App. —, 109 S. W. 476.

When a school board attempts illegally to assume jurisdiction over territory that has never been incorporated into the school district of which they are the representatives, and attempts to levy and collect a tax upon the property situated in such territory, the owners of such property may restrain such school district and its officers

Note. — Right to extend tax over territory added to taxing district after tax voted.

This note does not cover the question generally as to the liability of territory annexed to a city or other taxing district, for debts contracted by the city or district prior to such annexation.

The case of *CRABB v. CELESTE INDEPENDENT SCHOOL DIST.* was decided under a constitutional provision limiting the mode of levying and collecting school taxes to a

vote of two thirds of the qualified taxpaying voters of the district, and it accordingly holds that a tax voted cannot be extended over territory added to the district after the vote, without giving the taxpayers therein an opportunity to vote on the question.

Under the same constitutional provision, it has been held that no property can be annexed to a city for school purposes, and subjected to a tax voted by the city prior to the annexation, without giving the added territory an opportunity to vote upon the

and representatives from such illegal procedure.

Parks v. West, 102 Tex. 11, 111 S. W. 726; *Snyder v. Baird Independent School Dist.* 102 Tex. 4, 111 S. W. 723, 113 S. W. 521; *Cummins v. Gaston*, — Tex. Civ. App. —, 109 S. W. 476.

In order to subject the property in the added territory to an existing tax, the matter must be submitted to the qualified voters of the said school district so increased, and two thirds of the qualified property taxpaying voters of such enlarged district must vote in favor of such tax.

Tex. Const. art. 7, § 3; *Snyder v. Baird Independent School Dist.* 102 Tex. 4, 111 S. W. 723, 113 S. W. 521; *Brewer v. Hall*, — Tex. Civ. App. —, 111 S. W. 788; *Parks v. West*, 102 Tex. 11, 111 S. W. 726; *Patching v. Hutchison*, — Tex. Civ. App. —, 118 S. W. 878; *Cummins v. Gaston*, — Tex. Civ. App. —, 109 S. W. 476; *Eagle Lake v. Lakeside Sugar Ref. Co.* — Tex. Civ. App. —, 144 S. W. 709.

Messrs. Looney & Clark, for defendant in error:

The tax applies to property as incorporated.

White v. Atlanta, 134 Ga. 532, 68 S. E. 103; *Hughes v. Ewing*, 93 Cal. 414, 28 Pac. 1067; *Madry v. Cox*, 73 Tex. 541, 11 S. W. 541; *Norris v. Waco*, 57 Tex. 635; *Laramie County v. Albany County*, 92 U. S. 307, 23 L. ed. 552, Tex. Const. art. 7, § 3, art. 11, §§ 7, 10; *Grout v. Illingworth*, 131 Iowa, 281, 108 N. W. 528; *Layton v. New Orleans*, 12 La. Ann. 515; *Fitzpatrick v. Mt. Sterling Public Graded Schools*, 87 Ky. 132, 7 S. W. 896; *Fifield v. Swett*, 56 N. H. 432; *Seattle School Dist. No. 1 v. King County*, 3 Wash. 154, 28 Pac. 376; *Pence v. Frankfort*, 101 Ky. 534, 41 S. W. 1011; *True v. Davis*, 133 Ill. 522, 6 L.R.A. 266, 22 N. E. 410; *Dill. Mun. Corp.* 4th ed. 795; *Van Hook v. Selma*, 70 Ala. 361,

45 Am. Rep. 85; *Boesch v. Byrom*, 37 Tex. Civ. App. 35, 83 S. W. 18.

The fact that the taxpayers brought in had had no vote to determine whether the tax should be levied and collected is immaterial.

Norris v. Waco, 57 Tex. 635; *Laramie County v. Albany County*, 92 U. S. 307, 23 L. ed. 552; *Grout v. Illingworth*, 131 Iowa, 281, 108 N. W. 528; *Layton v. New Orleans*, 12 La. Ann. 515; *Fitzpatrick v. Mt. Sterling Public Graded Schools*, 87 Ky. 132, 7 S. W. 896.

Dibrell, J., delivered the opinion of the court:

Long prior to January 1, 1907, the Celeste independent school district, in Hunt county, was duly incorporated in accordance with law; and, while Celeste was an incorporated town, it had never assumed charge or control of the public free schools within its limits as such. Several years prior to January, 1907, the exact time not appearing from the record, the property tax paying voters of this independent school district voted a tax of 20 cents on the \$100 valuation of the property subject to taxation therein, and for some years had annually levied and collected such tax for the support and maintenance of its public schools.

On May 24, 1907, upon the petition of a majority of the inhabitants qualified to vote for members of the legislature, certain new and additional territory was annexed to said independent school district as originally formed. The plaintiffs, who reside in this additional territory, brought this suit against the defendant, Celeste independent school district, for the twofold purpose of declaring void the action of the board of trustees of defendant in annexing the territory in which plaintiffs reside to such independent school district, and to enjoin the collection of the special

proposition; and that this requirement of the Constitution is not satisfied by the fact that a majority of the taxpayers in the annexed territory petitioned the city to take them in for school purposes after the tax had been voted by the city. *Eagle Lake v. Lakeside Sugar Ref. Co.* — Tex. Civ. App. —, 144 S. W. 709.

Under a territorial statute authorizing a county to tax property within an attached Indian reservation, the county cannot collect taxes upon such property for time prior to the enactment of the statute. *Wagoner v. Evans*, 170 U. S. 588, 42 L. ed. 1154, 18 Sup. Ct. Rep. 730.

But where, after a school tax has been voted, but before it is assessed, the lines of a school district are so changed as to include the residence of one not theretofore

within the district, the tax may be legally assessed upon the property so included. No constitutional provision seemed to affect this case. *Fifield v. Swett*, 56 N. H. 432.

And under a statute providing that the board of education shall fix the amount required for school purposes, and that the board of county commissioners shall collect such amount, where the boundaries of a school district are legally extended after the assessment for the year has been made and returned by the assessor, the fund should be raised from the whole district as enlarged, by equal taxation, no matter whether the assessment period commenced before or after the enlargement. *Seattle School Dist. No. 1 v. King County*, 3 Wash. 154, 28 Pac. 376.

H. C. Sh.

tax of 20 cents on the \$100 valuation of their property subject to taxation in such territory, which had been assessed by the proper authority for the year 1908.

It will be sufficient, for the purpose of this opinion, to state in a general way that the grounds upon which plaintiffs seek to rid the territory of their residence from its connection with the Celeste independent school district were certain irregularities in the method of annexation. This subject was fully discussed, and we think properly disposed of, by the court of civil appeals in its holding that, under the pleadings and upon the evidence, the additional territory was lawfully annexed. *Crabb v. Celeste Independent School Dist.* — *Tex. Civ. App.* —, 132 S. W. 890. By reason of this view, it will not be necessary to discuss that feature of the case further than to suggest that, since the Celeste independent school district, a quasi municipal corporation, was acting under color of law, its legality could only be determined by a suit brought for that purpose in the name of the state, or by someone under the authority of the state, who has a special interest affected by the existence of such corporation. Plaintiffs, in the capacity in which they sued, could not maintain a cause of action for the purpose of annulling the independent school district. *Brennan v. Weatherford*, 53 *Tex.* 337, 37 *Am. Rep.* 758; *Graham v. Greenville*, 67 *Tex.* 62, 2 S. W. 742; *El Paso v. Ruckman*, 92 *Tex.* 89, 46 S. W. 25.

The only question raised by the pleadings and evidence, which this court can properly adjudicate, relates to the authority of said independent school district to levy and collect the tax of 20 cents on the \$100 valuation of the property subject to taxation within the annexed territory.

It is conceded by all parties that the tax sought to be collected by plaintiffs was voted by a two-thirds majority of the taxpaying voters of the Celeste independent school district before the territory in question was annexed, and that after the annexation no vote was had authorizing the tax. The proposition presenting this issue is stated by plaintiffs' counsel as follows: "Where territory has been added to a school district, pursuant to chapter 124, § 153, of the Acts of Twenty-Ninth Legislature, and where, before such addition is made, such district has voted a tax of 20 cents on the \$100 worth of property situated in such district, in order to subject the property in the added territory to such tax, the matter must be submitted to the qualified voters of the said school district so increased, and two thirds of the qualified taxpaying voters 39 L.R.A. (N.S.)

of such district, as enlarged, must vote in favor of such tax."

The tax sought to be collected of plaintiffs was by virtue of § 3, art. 7, of the state Constitution, as follows: "One fourth of the revenue derived from the state occupation taxes, and a poll tax of \$1 on every male inhabitant of this state between the ages of twenty-one and sixty years, shall be set apart annually for the benefit of the public free schools, and, in addition thereto, there shall be levied and collected an annual ad valorem state tax of such an amount, not to exceed 20 cents on the \$100 valuation, as, with the available school fund arising from all other sources, will be sufficient to maintain and support the public free schools of this state for a period of not less than six months in each year; and the legislature may also provide for the formation of school districts within all or any of the counties of this state, by general or special law, without the local notice required in other cases of special legislation, and may authorize an additional annual ad valorem tax to be levied and collected within such school districts for the further maintenance of public free schools and the erection of school buildings therein; provided, that two thirds of the qualified property taxpaying voters of the district, voting at an election to be held for that purpose, shall vote such tax not to exceed in any one year 20 cents on the \$100 valuation of the property subject to taxation in such district; but the limitation upon the amount of district tax herein authorized shall not apply to incorporated cities or towns constituting separate and independent school districts."

It is an accepted rule of construction that, where a power is expressly given by the Constitution, and the mode of its exercise is prescribed, such mode is exclusive of all others. *Parks v. West*, 102 *Tex.* 11, 111 S. W. 726.

By the terms of § 3, art. 7, of the Constitution, above quoted, the power is given independent school districts to levy and collect a tax of 20 cents on the \$100 valuation of all the property subject to taxation situated within its limits; and the mode of levying and collecting such tax is limited to a vote of two thirds of the qualified property taxpaying voters of the district, voting at an election held for that purpose. The mode thus prescribed excludes all others; and it may be said that, not only is no authority conferred by the Constitution to otherwise levy and collect such special tax, but that any other method of so doing is positively prohibited. Making a practical application of this rule, where an independent school district is in-

incorporated with a fixed area, and as thus formed votes the tax, and afterwards takes in additional territory and levies a tax on the property in such territory, it seeks in effect to collect a special tax by the method of territorial extension. This is clearly in violation of the Constitution; and hence cannot be done. The language of the Constitution is clear that independent school districts are permitted to levy the tax of 20 cents on the \$100 valuation of property within its limits by submitting the proposition to the qualified taxpaying voters of such district, and then only upon a vote of two thirds of such qualified voters. If the tax may be levied and collected on the property subject to taxation within the new territory without submitting the proposition to a vote of the qualified taxpaying voters of the district as altered and enlarged, then that which may not be done directly may be done indirectly. This is true, for the reason that, under the law, additional territory may be taken in by the independent school district by a petition signed by a bare majority of the inhabitants of such new territory qualified to vote for members of the legislature. Sayles's Supp. to Texas Civ. Stat. 1906, p. 441.

It is no answer to this objection to say that two thirds of such qualified voters have signed such petition (although such was not shown to be the fact in this case), for the reason citizens residing in such district are entitled, under the Constitution, to have this issue determined by the ballot, with its safeguard of ascertaining the qualification of the electors, its secrecy, so essential to a free and untrammelled expression of opinion, freedom from intimidation and persuasion at the time of voting, and many other substantial rights growing out of the regulation of the polls. This principle was approved in the case of *Re House Roll 284*, 31 Neb. 505, 48 N. W. 275, in construing a constitutional provision of that state to the effect that county authorities shall never assess taxes beyond a certain maximum amount, unless authorized by a vote of the people. As a substitute, for this provision of the organic law, the legislature undertook to authorize the county authorities to assess the additional tax upon a petition signed by a majority of the electors of the county, which was made by such legislative act equivalent to the popular vote required by the Constitution. The supreme court of that state held, in effect, that such act was a subterfuge and an abridgement of an essential right given the citizen by the supreme law of the state. The reasons assigned by the chief justice who wrote the opinion in that case, 39 L.R.A. (N.S.)

for so holding, are in part these: "Where an election is duly called and advertised, the reasons for and against the proposition are discussed and considered, and the electors vote upon such proposition as they may deem for their own and that of the county's best interest; the election is open and public; and the friends and opponents of the measure meet upon common ground, and by their votes register their preference for or opposition to the proposition. None of these advantages, however, inure in favor of merely signing the petition. In such case, the petition is presented to a party who frequently, without due consideration, signs the same, or signs it under representations which he afterwards finds do not conform to the facts."

It must be borne in mind that, in cases where the Constitution authorizes the levy of a special tax by the qualified taxpaying voters, such tax is not levied by the municipality or quasi municipality, but by the delegated taxing power of the owners of property. The exercise of such power must alone be by such property owners; and by no subterfuge, indirection, or the exercise of collateral legislative grants can this delegated and restricted power be taken from the property owner. It is safe and proper to say that no special tax authorized by the Constitution to be levied by the vote of the qualified taxpaying voters of any municipality or school district can ever lawfully be levied without offering the opportunity to such property owners resident in such territory of exercising their privilege of the ballot. *Cooley, Tax. 569; Fullilove v. Police Jury*, 51 La. Ann. 359, 25 So. 302.

The question here presented has not heretofore been before this court, and, so far as we are able to ascertain, not before any of our courts, except the present case, which was decided by the fifth court of civil appeals, in which the tax was held valid, and the case *Eagle Lake v. Lakeside Sugar Ref. Co.* 144 S. W. 709, and a companion case, *Eagle Lake v. Lakeside Rice Mill Co.* 144 S. W. 712, by the fourth court of civil appeals, in which the tax was held void. The view of the later decision is clearly correct in its ruling that the tax levied against the property situated within the extension, without a vote, is void. We can see no escape from this conclusion, if the plain language of the Constitution is to be given the meaning it imports.

In deciding the question of constitutional construction under consideration, Judge Bookhout, in the case at bar, disposes of the question as follows: "Where a school district has voted for school purposes a tax of 20 cents, and afterwards other territory

is annexed, there is nothing in the constitution requiring another election in which those in the annexed territory participate, before property in such territory is subject to such tax. The 20 cent tax for school purposes had been legally voted in the district before the territory in question was added. . . . Persons owning property in territory added to an independent school district by the extension of its boundaries must accept conditions as they find them, or bring about an election to vote off the tax, as provided for by statute."

In handling the same question, Chief Justice James, in the case of *Eagle Lake v. Lakeside Sugar Ref. Co.* above, in his characteristic force and direction, makes a different disposition of the question, and says: "It appears from the petition that the vote upon which the tax levied in this case rests is a vote had by the citizens of Eagle Lake several years before September, 1907, which was a vote confined to the corporate limits of the city, and did not concern this outlying territory. We are of opinion that no property could be annexed to the city for school purposes and subjected to the additional tax, without compliance with said condition prescribed by the Constitution in respect to the added territory. The vote taken in the city several years before this annexation was made was not such compliance; and it is apparent from the record and the papers filed in this case that on election or vote has been had on the subject of this outlying territory."

The question now under investigation was discussed by Chief Justice Parsons of the supreme court of Massachusetts, in the case of *Richards v. Dagget*, 4 Mass. 534, in determining whether a property owner in a portion of a school district where a tax had been voted, but not assessed, before such portion of the original district had been segregated, could be made to pay such tax. In that case, the chief justice said: "The case of alteration in districts after the passing of votes to raise money, and before the assessment, is not expressly provided for in the statute, which it is our duty so to construe as will be most convenient and least injurious to the inhabitants of the town. Because it is always to be presumed that the legislature intend the most beneficial construction of their acts, when the design of them is not apparent. It is not just that a man should, by virtue of this act, be assessed to the payment of money, in the raising of which he could have no agency, or from which he could not (without any fault of his own) derive any benefit. Thus, if he was included within a district after the vote to raise the

money had passed, it is admitted that he could not be assessed to the payment of it; for, not being a member of the district when the money was voted, he could have had no voice in the vote."

Learned counsel for defendant have filed in this case an able argument; but nowhere have they presented any proposition on the subject of their contention which can be sustained upon either authority or reason, original or analogous. It is asserted, however, that "substantially the identical question has been passed on in a large number of cases from other jurisdictions, and we are unable to find any authority to the contrary." In connection with this statement, the following citation of authorities as sustaining such position is made: *White v. Atlanta*, 134 Ga. 532, 68 S. E. 103; *Hughes v. Ewing*, 93 Cal. 414, 28 Pac. 1067; *Madry v. Cox*, 73 Tex. 541, 11 S. W. 541; *Norris v. Waco*, 57 Tex. 635; *Laramie County v. Albany County*, 92 U. S. 307, 23 L. ed. 552; *Tex. Const.*, art. 11, § 10; *Grout v. Illingworth*, 131 Iowa, 281, 108 N. W. 528; *Layton v. New Orleans*, 12 La. Ann. 515; *Fitzpatrick v. Mt. Sterling Public Graded Schools*, 87 Ky. 132, 7 S. W. 896; *Fifield v. Swett*, 56 N. H. 432; *Seattle School Dist. No. 1, v. King County*, 3 Wash. 154, 28 Pac. 376; *Pence v. Frankfort*, 101 Ky. 534, 41 S. W. 1011; *True v. Davis*, 133 Ill. 522, 6 L.R.A. 266, 22 N. E. 410; *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *Boesch v. Byrom*, 37 Tex. Civ. App. 35, 83 S. W. 18.

We have taken the time and pains to carefully review each of the authorities cited, and have concluded that no one of the authorities mentioned sustains defendant's position by enunciation of principles or from analogous reasoning. Of those cases in which the pertinent question is discussed, no constitutional provision exists to limit legislative action, and in others the questions presented are not kindred to the one under consideration. We take them seriatim.

White v. Atlanta, supra, was an equitable proceeding by some of the residents and taxpayers of the territory that had previously been outside of the corporate limits of the city of Atlanta, but subsequently brought within its limits by an extension process, to enjoin the officers of said city from putting into effect the act, so as to include such new territory. Collaterally and incidentally the question of taxation was discussed with reference to the power of the city to tax the property in the new territory to pay existing indebtedness of the city. The court held the act of extension valid, and, in addition to such holding, said: "When included within the city

by legislative enactment, they take the advantage of being residents or taxpayers of the municipality; and they become subject to the corresponding proportionate burden, in the absence of lawful provision to the contrary."

It will be observed that the property within the extension was held to be subject to taxation levied by the city under authority of law; but there was involved no question of a tax levied by the property owners as provided for in our Constitution, and which furnishes the gist of the question involved in the case at bar.

In the case of *Hughes v. Ewing*, 93 Cal. 414, 28 Pac. 1067, the board of supervisors of Fresno county, California, changed the boundaries of Fresno city school district by excluding therefrom certain lands and transferring same to other districts. Prior to that time, the electors of the district had voted to raise a certain sum for the purpose of building a schoolhouse; but this fact was not certified to the supervisors until after such lands had been excluded from the district. However, it was sought to collect the tax on the excluded land; and the action was brought by the owners of said land to declare the tax null and void as to those lands, and to restrain the tax collector of the county from collecting same. A statement of the case precludes the possibility that the principle involved in this could have been involved in that case. It is interesting, however, to note the following holding in that case: "For all purposes of corporate power or liability, it [the school district] remained unchanged; and the property upon which the supervisors should have levied the tax is only such property as, at the time when the tax was levied, was within the boundaries of this corporation." If the proposition thus announced is sound, then it is equally sound to say that when a special tax is voted, the same can be levied only on the property that was within its boundaries at the time the tax was voted.

The question involved in *Madry v. Cox*, 73 Tex. 538, 11 S. W. 541, as to the power of taxation, was whether or not the property within annexed territory was subject to taxation for a debt previously incurred by a vote of the people of the city of Bonham, to which such territory had been annexed. Referring to the annexation as a fact, Judge Stayton, in that case, held: "When this is done, the indebtedness of the corporation continues; and persons within territory annexed will become, in the absence of legislation to the contrary, subject to taxation for all municipal indebtedness existing before annexation, as well as that afterward contracted." This 39 L.R.A.(N.S.)

has ever been the law in this state, and, so far as we know, in all other jurisdictions, where there is an absence of legislation controlling the subject; but in what respect it throws light upon the question we are considering we are not able to determine. If, at the time a debt is created by a vote of the people of a city, a tax is likewise voted to pay the interest and create a sinking fund to pay such indebtedness, pursuant to some constitutional provision, a parallel case would be presented, and in such case we would not hesitate to rule the tax void as to property embraced in the subsequent extension of such city. In that case, a debt was created by a vote of the people; but the tax was levied by the municipality, and not by the property owners.

The question presented in the case of *Norris v. Waco*, 57 Tex. 635, was whether rural lands consisting solely of farm and pasture lands, embraced within the city limits of Waco, were subject to city taxes. By no possible construction can that furnish an authority for a ruling on any issue involved in this case.

A statement from the syllabus of the case of *Commissioners of Laramie County v. Albany County*, 92 U. S. 307, 23 L. ed. 552, will demonstrate its impertinence to any question raised in the present case, to wit: "Where the legislature does not prescribe any different regulations, the rule is that the old corporation owns all the public property within its new limits, and is responsible for all debts contracted by it before the act of separation was passed, which debts it must pay, without any claim for contribution from the new subdivision."

The case nearest in point, as sustaining the position of defendant, is that of *Grout v. Illingworth*, 131 Iowa, 281, 108 N. W. 528. In that case, the action was to enjoin the collection of the tax that had been voted in the school district for the purpose of erecting a school building, prior to the time when the property against which the tax was sought to be collected had been taken into the school district. In other words, the district had been extended and certain property taken within its boundaries, and a tax had been levied pursuant to a vote of the qualified electors of the original district; but at that time the property in question was not within the district.

It is clear the Iowa case, above, is not an authority for the position taken by defendant's counsel, from the fact that it is stated in the opinion by the court that the right of the property owner to participate in the proceeding with relation to the levy of the tax on his property is only fixed by the statute, and not by the Constitution. Here lies the important distinction.

tion. If we had no constitutional provision to grapple with, we would be constrained to hold that, where the legislative act gave the property owner the right to participate in the proceeding to determine whether or not the tax should be levied, another legislative act, authorizing an extension of the district where the tax had been voted, would subject the property within the extension to the tax, notwithstanding the nonparticipation of the property owner in the levy of the tax. This, however, is not the status of the case at bar; for here the right to participate in the levy of the tax is given the resident property owner by the Constitution, and the legislature is denied authority to abridge that right. Where there is no constitutional inhibition, the power of the legislature to enact laws is supreme and unlimited. But when the Constitution speaks, either by direction, negation, or necessary implication, its voice must be heeded even by the sovereign power of the legislative branch of government. *State v. Brownson*, 94 Tex. 436, 61 S. W. 114.

The question involved in the case of *Layton v. New Orleans*, 12 La. Ann. 515, was as to the power of the legislature to abolish the incorporation of three municipalities, and incorporate them into one, and authorize the one incorporation to levy a tax to pay the aggregate indebtedness of the three, irrespective of the inequality of the respective amounts due by each. The supreme court of Louisiana held in that case that, the legislature having the power to create, modify, or abolish municipal incorporations, it had the power to provide in what manner the taxes should be levied for their support, and how their debts should be paid upon their dissolution. The questions considered and determined in that case have no relation to the question here involved.

The facts in the Kentucky case of *Fitzpatrick v. Mt. Sterling Public Graded Schools*, 87 Ky. 132, 7 S. W. 896, are similar to those in the Iowa case reviewed above; and the validity of the tax was sustained upon the same ground as that by the Iowa court,—that there was no constitutional provision regulating the creation of the tax. In proof of this position, we take from the opinion in the Kentucky case the following excerpt: "As the question before us is therefore purely legislative, and involves no constitutional right of the taxpayers in the district as it exists under the act of 1886, the court has no power to suspend or interfere with the collection of taxes authorized by that act."

The question in the New Hampshire case (*Fisfield v. Swett*, 56 N. H. 432) was similar L.R.A. (N.S.)

lar to the Iowa and Kentucky cases, above, and was based upon similar facts. While the opinion does not disclose whether the tax was or not provided for by the New Hampshire Constitution, it is clearly inferable that it was pursuant to a legislative act, and the extension authorized by the same authority. It is true the reasoning in that case is dissimilar to that in the other cases, and is such that this court would hesitate to adopt. It is based upon the analogy that, because a citizen who, after a tax has been voted in a school district, voluntarily moves into such district with taxable movable property, is subject to pay such special tax, therefore a citizen who is involuntarily brought into such district is subject to such tax. Whatever may be the provision in that state authorizing the tax, whether legislative or organic, it must be unlike that of our Constitution; for here the tax is only authorized by the qualified taxpaying property owners who reside within the limits of the district. Of course, a citizen who lives beyond the limits of the district, and voluntarily moves within its limits, would be liable to pay the tax upon such property as he took with him or should afterwards acquire, just as the citizen who lives out of the district, but owns property situated within the district, is required to pay the tax. Such citizen is denied the right to vote upon the tax, and is subject to its payment; but he is required to do this for the sole reason it is thus denominated in the Constitution.

In *Seattle School Dist. No. 1 v. King County*, 3 Wash. 154, 28 Pac. 376, the proceeding was to obtain a construction of a clause of the act of March 26, 1890, as follows: "The board of education shall annually, at a meeting next preceding the annual tax levy for state and county purposes, report to the county commissioners an estimate of the amount of funds required for the support of the schools, . . . and the county commissioners are hereby authorized and required to levy and collect said amount the same as other taxes." As stated in the opinion: "It appears that by proper proceedings and in accordance with the law on that subject, the boundaries of the city of Seattle were somewhat enlarged on the 1st day of June, 1891, and the board of education has reported the amount of funds required, and requested that amount to be levied and collected upon the property in the district as enlarged; but the board of commissioners decline to levy upon any property, except such as was within the city limits prior to the enlargement. A mandamus was asked, requiring the commissioners and other county officers to levy, extend, and collect the tax." The court

ordered the peremptory writ of mandamus. It is evident no light is shed by this case upon the issue here.

The case of *Pence v. Frankfort*, 101 Ky. 534, 41 S. W. 1011, is another Kentucky case which involves a question similar to that in the other case above reviewed, and upon the legislative act of that state alone is the decision based. We have heretofore shown its distinguishing feature.

In *True v. Davis*, 133 Ill. 522, 6 L.R.A. 266, 22 N. E. 410, it may be seen the issue here was not in that case from a statement of the question by the court: "Does the prohibition of § 11, art. 9, of the Constitution, prevent the annexation of two or more cities, incorporated towns, or villages to each other, in the manner provided by the provisions of the act entitled 'An Act to Provide for the Annexation of Cities, Incorporated Towns and Villages, or Parts of the Same, to Cities, Incorporated Towns, and Villages,' approved and in force April 25, 1889 (Laws 1889, p. 66), when such cities, incorporated towns, or villages are each indebted, and the indebtedness of one or more of them exceeds the limit named in that section?"

The question in the case of *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85, was as to the validity of an occupation tax for selling merchandise in the limits of the city of Selma; and the question in the present case is not in the remotest degree involved.

The questions raised in *Boesch v. Byrom*, 37 Tex. Civ. App. 35, 83 S. W. 18, relate solely to the authority of school districts to extend their boundaries, the election of school trustees, and the authority of *de facto* officers or school trustees to order the election to determine the question of a tax levy. We can gather nothing from that case to assist in determining the question we are seeking to solve.

A careful review of all the authorities to which we have been cited reveals nothing that would demand or authorize this court to place a different construction upon § 3, article 7, of the Constitution, than that, where an independent school district votes a special tax, pursuant to the authority conferred by said section of the Constitution, and afterwards extends the boundaries of such district, the existing special tax so authorized cannot be levied and collected against the property in such extension, until such assessment is authorized by a vote of the qualified taxpaying voters of the district as extended.

It follows from the construction here placed upon the provision of the Constitution in question the judgments of the District Court and Court of Civil Appeals will 39 L.R.A. (N.S.)

have to be reversed and rendered, in so far as they hold the taxing question valid. It is therefore ordered by this court that the judgments of the District Court and the Court of Civil Appeals be affirmed, in so far as they sustain the validity of the Celeste independent school district, as extended by the petition of May 24, 1907; and, in so far as they sustain the validity of the tax complained of, said judgments are reversed, and judgment is here rendered for plaintiffs in error, enjoining the collection of said taxes as by them prayed for.

WASHINGTON SUPREME COURT.
(Department No. 2.)

WILLIAM J. ELLIOTT, Respt.,

v.

SEATTLE, RENTON, & SOUTHERN
RAILWAY COMPANY, Appt.

(— Wash. —, 122 Pac. 614.)

Carrier — injury to street car passenger
— overcrowding — excessive speed.

1. A street railway company which runs a car at high and dangerous speed without warning, past another which is so overcrowded that the passengers in moving about crowd one of their number, who is standing on the platform, over the line of safety between the two tracks, may be liable for injury to him through collision with the car so operated.

Same — opening platform gate — act of
passenger — liability for injury.

2. A street car company which by ordinance is bound to maintain gates upon the sides of car platforms next to parallel tracks is liable for injury to a passenger crowded off the platform and injured by a passing car, although the gate was opened by a fellow passenger.

Note. — As to duty of street car company to passenger on running board, see note in 18 L.R.A. (N.S.) 160. As to duty to provide and keep gates on street cars or interurban cars closed, see note in 32 L.R.A. (N.S.) 346. Generally as to liability of carrier for injury resulting from negligent or meddlesome act of fellow passenger, see note in 37 L.R.A. (N.S.) 724.

As to contributory negligence of passenger in riding on platform of street car, see notes in 12 L.R.A. (N.S.) 831, and 21 L.R.A. (N.S.) 972. A similar question as to passengers standing on the running board of a street car is treated in the notes in 2 L.R.A. (N.S.) 1191; 10 L.R.A. (N.S.) 352, and 21 L.R.A. (N.S.) 972. As to liability for personal injury to passenger by crowd at station or stopping place, see note in 32 L.R.A. (N.S.) 470; and as to injury by crush in entering car at elevated or subway station, see note in 7 L.R.A. (N.S.) 729.

Same — injury in alighting — effect of riding on platform.

3. That a passenger on a street car rode on the platform when he might have ridden inside the car will not preclude his holding the company liable for an injury inflicted upon him while he was attempting to alight from the car at his destination.

Trial — jury — negligence of street car passenger — alighting on wrong side of car.

4. Whether or not a street car passenger is negligent in attempting to alight on the left side of the car is for the jury, under evidence tending to show that the car was so crowded that he could not reach the right-hand exit.

(April 8, 1912.)

APPEAL by defendant from a judgment of the Superior Court for King County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Will H. Thompson and Morris B. Sachs for appellant.

Mr. Frank E. Green, for respondent:

Appellant was negligent in unreasonably overcrowding its car.

Pray v. Omaha Street R. Co. 44 Neb. 167, 48 Am. St. Rep. 717, 62 N. W. 447; Chicago & A. R. Co. v. Dumser, 161 Ill. 190, 43 N. E. 698; Graham v. Manhattan R. Co. 149 N. Y. 336, 43 N. E. 917; East Omaha Street R. Co. v. Godola, 50 Neb. 906, 70 N. W. 491; Chicago City R. Co. v. Morse, 197 Ill. 327, 64 N. E. 304; Graham v. McNeill, 20 Wash. 466, 43 L.R.A. 300, 72 Am. St. Rep. 121, 55 Pac. 631.

Appellant was guilty of negligence in operating its car, while thus unreasonably overcrowded, in a manner to cause the passengers to lurch.

Halverson v. Seattle Electric Co. 35 Wash. 600, 77 Pac. 1058; Geddes v. Metropolitan R. Co. 103 Mass. 391; North Chicago Street R. Co. v. Polkey, 203 Ill. 225, 67 N. E. 793; Reber v. Pittsburg & B. Traction Co. 179 Pa. 339, 57 Am. St. Rep. 599, 36 Atl. 245; McCaw v. Union Traction Co. 205 Pa. 271, 54 Atl. 893; Hansen v. North Jersey Street R. Co. 64 N. J. L. 686, 46 Atl. 718.

Appellant violated a city ordinance in not providing its car with a guard or gate, making it impossible for passengers to alight from the left side of the car.

Augusta R. Co. v. Glover, 92 Ga. 132, 18 S. E. 406; Stappers v. Interurban Street R. Co. 56 Misc. 337, 106 N. Y. Supp. 854; Aston v. St. Louis Transit Co. 105 Mo. App. 226, 79 S. W. 999; Walters v. Seattle, R. & S. R. Co. 48 Wash. 233, 24 L.R.A. 39 L.R.A. (N.S.)

(N.S.) 788, 93 Pac. 419; Kluska v. Yeomans, 54 Wash. 465, 132 Am. St. Rep. 1121, 103 Pac. 819.

It is not negligence as a matter of law, for a passenger to ride upon the platform of an electric or steam car, when the seats are all occupied by other passengers.

Halverson v. Seattle Electric Co. 35 Wash. 600, 77 Pac. 1058; Muldoon v. Seattle City R. Co. 7 Wash. 528, 22 L.R.A. 794, 38 Am. St. Rep. 901, 35 Pac. 422; Cogswell v. West Street & N. E. Electric R. Co. 5 Wash. 46, 31 Pac. 411; Graham v. McNeill, 20 Wash. 466, 43 L.R.A. 300, 72 Am. St. Rep. 121, 55 Pac. 631.

Whether the plaintiff was negligent in the position which he took and was occupying when he was crowded off the car is fairly a question for the determination of the jury.

Jacobs v. West End Street R. Co. 178 Mass. 116, 59 N. E. 639; Lehr v. Steinway & H. P. R. Co. 118 N. Y. 556, 23 N. E. 889; Trussell v. Morris County Traction Co. 79 N. J. L. 533, 30 L.R.A. (N.S.) 351, 77 Atl. 535; Wilde v. Lynn & B. R. Co. 163 Mass. 533, 40 N. E. 851; Graham v. McNeill, 20 Wash. 466, 43 L.R.A. 300, 72 Am. St. Rep. 121, 55 Pac. 631; McQuillan v. Seattle, 10 Wash. 465, 45 Am. St. Rep. 799, 38 Pac. 1119.

Chadwick, J., delivered the opinion of the court:

This action was brought to recover damages for personal injuries. The plaintiff was a passenger upon an inbound car of the defendant company, which operates a street car line between Renton and Seattle. A part of the way the track is single, but from Hillman City into Seattle there is a double track. When running over the single track, both sides of the back platform are kept open. In running over the double track, the left side, or the one next to the double track, is closed. This was accomplished by means of a collapsible iron gate which was fastened by a catch and bolt. On the morning of the accident the testimony shows to a certainty that the conductor closed and fastened the gate at Hillman City. When plaintiff boarded the car, all of the seats were taken, and he took a position on the back platform, standing near the handle of a wheel brake on the left side. The car was one that was due to arrive in Seattle about 9 o'clock, but before arriving at Ninth street it had become so crowded that the passengers were standing on the platform and in an alcove at the end of the car, so that they were, in the language of a witness, "chest to chest; back to chest." The testimony shows that, while the seating capacity of the car was about 40, there were

approximately 125 passengers on the car. The testimony of the plaintiff tends to show that, as the car approached Ninth street, where plaintiff and others who were regular patrons of the company were accustomed to alight, he crowded his way toward the left side of the car, intending to get off on the side next to the opposite track; that, as he was about to catch the handrail or handles at the side of the entrance, the brakes were set in such a way that the car lurched or jerked, so that all of those standing swayed with the car; that plaintiff was thrown off his balance, and, in attempting to save himself, caught the grab at his right with both hands. The momentum of the car threw him around so that he was facing the entrance; that at this moment a car on the opposite track, going about 20 miles an hour, with no bell sounding, was approaching; that he could not save himself, and was struck by the grabhandle of the opposite car, and received the injury of which he now complains.

The testimony of the defendant tends to show that plaintiff, who made the trip six days in every week, deliberately and to suit his own convenience started to get off the car on the off side; that he backed down the steps, holding the handle on either side of the entrance; that he threw his head back beyond the 19 inches of clearance between the cars; that he was unmindful of his own safety as well as of the fact that the double track was a token of danger, and that if the gate was open it was opened by plaintiff, or, if not by him, by another; in any event, that it was opened without the knowledge or consent of the conductor, who, because of the crowded condition of the car, was riding on one of the steps at the right entrance, and could not see the gate on the other side. We confess that, in the light of the record, the defense seems to have been the better sustained. But, as this court has so often announced, the facts are for the jury, and it having accepted the case of plaintiff as true, and rejected the testimony of the defendant, the judgment must be affirmed unless the law, as applied to the facts as found by the jury, intervenes.

It is first urged that the complaint does not state a cause of action. It is said that this must be so unless it be the law that mere negligence in allowing the car to become overcrowded, and to be carrying an excessive number of passengers, is in itself actionable merely because the passengers, in moving about, push or crowd one of their number off the car; and unless it is shown that the action of the passengers was such that it was apparent to the employees in charge of the car that their action was en-

dangering the passenger. This may be true, but it occurs to us that defendant has overlooked an important element in the case, if indeed it be not the proximate cause of the injury. It is alleged that the accident occurred "also on account of defendant's negligence and carelessness in running another car in the opposite direction on the adjoining street car track . . . at a high and dangerous rate of speed, without giving any signal, sign, or warning of the approach thereof." We think a cause of action is stated.

It is next urged that there is no proof of actionable negligence. The only question which occurs on this assignment is whether the defendant performed its whole duty when the conductor closed the gate at Hillman City, and is not to be charged because plaintiff or someone else opened it before the accident occurred. We are bound to assume, for the jury has so found, that plaintiff did not open the gate. This being so, it would follow that, if the gate was opened by another, the company would be liable to a passenger who was innocent of offense. Being charged with a high degree of care, it is bound to so operate its safeguards that, when they are not, for any reason, under the eye of the conductor, a third person cannot undo, to the prejudice of another, the precautions which have been taken, and which the law imposes for the safety of passengers. It will be remembered that the crowd was such on this car that the conductor could not see the gate. An ordinance of the city was introduced by plaintiff, and by its terms the duty is put upon street car companies operating double track systems to equip their cars "with gates or guards upon the side of such platform of each of said cars which is next to the track of said line other than the one upon which said cars are being run or operated, which gates or guards shall so inclose the platform of said car that it will be impossible for passengers to enter such cars or alight therefrom upon the side of said platform so furnished or provided with gates and guards." This ordinance, the fact that the accident occurred, and the fact that plaintiff did not open the gate, are enough to sustain the finding of negligence. Such ordinances (and it may be questioned whether they do more than affirm a general rule) are intended to protect the absentminded from their inattention, the careless from their want of car, and the foolish from their folly; and if, in spite of such precaution, one of these opens the gate, the fact that it had once been closed would not bar an action by one who was not responsible for the condition existing at the time the accident actually occurred. Defendant has cited many

cases to sustain its position, but we do not conceive them to be in point. They could only be held applicable if we assume that plaintiff was guilty of contributory negligence, or that he opened the gate. This we have no power to do.

It is finally urged that the testimony shows that plaintiff was guilty of contributory negligence as a matter of law. The question is whether plaintiff should have taken his place standing inside the car or on the platform. Under the admitted facts he was making his way out, and was in the act of getting on the step at the time he was hurt. The fact that he might have ridden in the car instead of on the platform thus becomes immaterial.

Whether plaintiff should have gone to the right entrance instead of to the left is also a question for the jury, for his testimony is that the way was so crowded that he could not get to the right entrance. To hold plaintiff guilty of contributory negligence under the testimony in this case would be to hold that the mere act of a passenger in alighting from a crowded car on the off side is contributory negligence as a matter of law. The law will not sustain us in so holding.

Finding no error, the judgment is affirmed.

Dunbar, Ch. J., and Gose, Crow, and Parker, JJ., concur.

Petition for rehearing denied.

WASHINGTON SUPREME COURT. (In Banc.)

STATE OF WASHINGTON

ARTHUR ASH, Appt.

('— Wash. — ,122 Pac. 995.)

Trial — instruction — manslaughter — absence of evidence.

1. If one accused of murder is, on the facts, guilty of that offense unless, by reason of his mental condition, he was not responsible for his acts, an instruction of manslaughter is erroneous.

Criminal law — former jeopardy — reversal after conviction of included offense.

2. The reversal for a new trial upon defendant's appeal of a conviction of man-

Note.—The decisions on the question of former jeopardy in retrial for higher charge after setting aside verdict on lower charge may be found in notes to State v. Gillis, 5 L.R.A.(N.S.) 571, and Brantley v. State, 22 L.R.A.(N.S.) 959.
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slaughter upon a charge of murder, subjects him to a retrial upon the original accusation.

(April 9, 1912.)

APPPEAL by defendant from a judgment of the Superior Court for Spokane County convicting him of manslaughter. Reversed.

The facts are stated in the opinion.

Messrs. Crandell & Crandell for appellant.

Messrs. John L. Wiley and Robert L. McWilliams for the State.

Morris, J., delivered the opinion of the court:

Appellant was tried upon an information charging murder in the first degree, and was convicted of manslaughter, from which he appeals.

The main assignments of error are based upon the instructions of the court submitting the crime of manslaughter to the jury; it being contended that there was no evidence supporting such an instruction, and hence it was error for the court to give it. It will not be necessary to review the evidence to ascertain if there was evidence upon which the instruction submitting manslaughter could be sustained. The state concedes there was none. In referring to the evidence, the state says in its brief: "The evidence in effect was that the defendant was guilty of a cold-blooded, deliberate murder, unless the defense of insanity interposed by the defendant was sufficient to justify the homicide and to warrant an acquittal."

The character of defendant's act, unless excused by his defense of insanity, would seem to be determined from the fact that he hid himself in the bushes near the residence of the deceased, where he lay in ambush all night, all the next day, and up to 9 o'clock P. M., of the second night, awaiting a favorable opportunity to shoot and kill his victim. These undisputed facts contain no element of manslaughter. The defendant was guilty of killing a human being with a premeditated design to effect the death of the person killed, without excuse or justification in law; or else, by reason of his mental condition, he was not subject to the penalties of the law; and the court should so have instructed the jury. It was therefore error to submit the crime of manslaughter, since there was no evidence in the case upon which such an instruction could be predicated. The state contends that, since the greater includes the less, manslaughter is included in murder in the first or second degree. Unquestionably this is true in law, but to be included in law is

not sufficient; it must also be included in fact. We have so held in a number of cases. Reference to the latest two will be sufficient.

In *State v. Kruger*, 60 Wash. 542, 111 Pac. 769, we said: "It is true that the greater includes the less, but the defendant is not guilty of either unless the testimony brings him within the definition of a crime. It was never the intent of the law to submit a possible verdict upon a so-called included crime, because included in law. It must be included in fact, and by the facts of the particular case."

In *State v. Pepoon*, 62 Wash. 635, 114 Pac. 449, it is said: "It is no doubt true that the crime of murder includes the lesser crimes of murder in the second degree and of manslaughter, and it is equally true that the jury has a right to determine the degree of crime which was committed. But that determination must, of course, be based upon evidence. That is all that gives the determination any value. The anxiety of the law is to give the defendant the full benefit of trial by jury on all questions of fact, and it will not give its sanction to a farcical and arbitrary determination of any alleged fact which the jury has had no possible means of determining. If the defendant had been informed against for manslaughter, and the state had failed to produce any evidence tending to show the commission of manslaughter, as it did fail in this case to do, there would have been no duty resting upon the jury; and it would clearly have been the duty of the court to discharge the jury, because there was nothing upon which the function of a jury could take hold, and to discharge the defendant. The legal function of the jury is not at all changed because the question for determination arises upon an information in the first degree. We are, of course, not speaking with reference to weight of testimony, but of a case where there is no testimony whatever to weigh tending to show the commission of the lesser degree."

Answering the rule of these cases, the state contends that inasmuch as it is admitted that manslaughter is included in law in a charge of murder in the first degree, and as under our practice jurors are the sole judges of the facts, the court cannot say as a matter of law there is no testimony to establish any of the lesser or included crimes, but must admit the legal inclusion and submit the inclusion in fact to the jury. This would be required where there was any fact or facts to be determined by the jury. But the court is not required to submit any determination of a fact to a jury when there is no fact, nor to permit a jury to establish by its verdict

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a fact which there is no evidence to sustain. Verdicts must be founded upon facts in evidence; and the court can only submit to the jury such verdicts as may be found from a review of the facts in evidence when there is substantial evidence to establish a fact; the court cannot weigh it nor determine its relative merit. Nor can it convert an inclusion in law into an inclusion in fact, until there is a fact. The inclusion in fact being established, the inclusion in law follows; but the latter cannot exist alone, nor find a place in any criminal trial, until the essential and indispensable facts appear in the evidence. Neither can we accept the argument of the state that appellate courts should not shut their eyes to the fact that jurors sometimes refuse to obey the instructions of the court, when there is no alternative between finding a man guilty of murder in the first degree and finding him not guilty; and oftentimes, under the impulse of sentiment or other motive, acquit rather than subject the accused by their verdict to the penalties of murder in the first degree. That jurors refuse to do their sworn duty in homicide cases, cannot influence judges in not doing theirs; and, if actuated by motives other than their obligation to the state and to themselves, jurors permit guilty men to escape their just dues, the fault must rest with the jurors, and not with the courts, who must ever refuse to commit one legal wrong in order to palliate another. We are therefore of the opinion that it was error for the court to submit an instruction involving the crime of manslaughter.

Having reached this conclusion, we are brought face to face with another grave problem,—the effect of this ruling upon the appellant. It is contended, following the rule laid down in *State v. Robinson*, 12 Wash. 349, 41 Pac. 51, 902; *State v. Murphy*, 13 Wash. 229, 43 Pac. 44; and *State ex rel. Moorehead v. Chapman*, 64 Wash. 140, 116 Pac. 592, that the verdict of manslaughter is in legal effect an acquittal of the higher degree of homicide; and appellant cannot again be tried for those crimes without being twice put in jeopardy for the same offense; and, as there was no evidence upon which to justify conviction of manslaughter, the result must be the discharge of the defendant. One of these rules must be departed from, or else in this case, as in many others where the verdict results from an erroneous view of the law by the court below and the submission of improper verdicts, the appellate court, in correcting the error and thus seeking to do justice as between the state and the defendant, must lay down a rule which results in the greatest injustice, and turns loose murderers and

other violators of the law to prey upon other victims of their criminal lust. We have therefore carefully and conscientiously reviewed these two rules in order to satisfy ourselves which is best founded in reason, and which best serves the justice and purpose of the law. The first of these rules, as found in *State v. Kruger*, and *State v. Pepoon*, *supra*, was first reviewed by the court in *State v. McPhail*, 39 Wash. 199, 81 Pac. 683, where it is said that "the decisions are practically uniform to the effect that a defendant can only be convicted of a lesser degree or of an attempt when there is testimony to sustain such a conviction. . . . A party has no constitutional right to a compromise verdict which is not supported by any testimony." We rest our adherence to that rule, which has become one of universal application, upon the authority and reasoning of the *McPhail*, *Kruger*, and *Pepoon* Cases. It is to-day and ever has been the law without dissent or qualification.

The other rule that a conviction of a lesser degree of a given crime is in legal effect an acquittal of the higher degrees, entitling the defendant to a discharge of the higher degrees upon a new trial, was first noted by this court in *State v. Robinson*, 12 Wash. 349, 41 Pac. 51, 902, although the point was not squarely raised or passed upon until the decision of *State v. Murphy*, 13 Wash. 229, 43 Pac. 44, where it was held that a conviction of murder in the second degree was an acquittal of murder in the first degree, and the defendant could only be again tried for the lesser crime. The only member of the present court who took part in the decision of *State v. Murphy* is the present chief justice, who vigorously dissented from the rule announced. It would be useless to attempt to harmonize the American cases upon this point. They are in as direct conflict as it is possible for opposing opinions to be. The older rule is the one holding that a conviction of a lesser offense is not an acquittal of greater offenses charged in the same information, operating as a bar upon the granting of a new trial. It was first announced in 1819 in *Morris v. State*, 1 Blackf. 37, and has been followed in: *Brantley v. State*, 132 Ga. 573, 22 L.R.A.(N.S.) 959, 131 Am. St. Rep. 218, 64 S. E. 676, 16 Ann. Cas. 1203; *Veatch v. State*, 60 Ind. 291; *State v. McCord*, 8 Kan. 232, 12 Am. Rep. 469; *Re Somers*, 31 Nev. 531, 24 L.R.A.(N.S.) 504, 135 Am. St. Rep. 700, 103 Pac. 1073; *Com. v. Arnold*, 83 Ky. 1, 4 Am. St. Rep. 114, 70 Am. Crim. Rep. 210; *State v. Kessler*, 15 Utah, 142, 62 Am. St. Rep. 911, 49 Pac. 293; *Bohanan v. State*, 18 Neb. 57, 53 Am. Rep. 791, 24 N. W. 390, 6 Am. Crim. Rep. 39 L.R.A.(N.S.)

487; *State v. Behimer*, 20 Ohio St. 572; *Briggs v. Com.* 82 Va. 554; *State v. Bradley*, 67 Vt. 465, 32 Atl. 238; *Turner v. Territory*, 15 Okla. 557, 82 Pac. 650; *State v. Gillis*, 73 S. C. 318, 5 L.R.A.(N.S.) 571, 114 Am. St. Rep. 95, 53 S. E. 487, 6 Ann. Cas. 993; *State v. Matthews*, 142 N. C. 621, 55 S. E. 342; *United States v. Harding*, 1 Wall. Jr. 127, Fed. Cas. No. 15,301; *Trono v. United States*, 199 U. S. 521, 50 L. ed. 292, 26 Sup. Ct. Rep. 121, 4 Ann. Cas. 773, and other cases from the same courts.

The theory of these cases is that, when a conviction for the lesser crime, under an indictment or information charging a greater crime, is reversed upon the voluntary appeal of a defendant, he thereby waives the acquittal upon the higher charge, and, upon the conviction being set aside, he is in the same position as if no trial had been had; the reversal operating upon the acquittal as well as upon the conviction. In some of these states statutes may be found providing, in effect, that a new trial places the parties in the same position as if no trial had been had. In others there is no such statute; while in some states having such a statute the contrary rule is held, as in *Johnson v. State*, 29 Ark. 31, 21 Am. Rep. 154, 2 Am. Crim. Rep. 430. It would therefore seem, as stated in the note to *Com. v. Arnold*, 4 Am. St. Rep. 119, that the existence or nonexistence of the statute has not been a determining factor in the decisions. The contrary line of decisions commences in 1846 with *Slaughter v. State*, 6 Humph. 410, and this rule has been followed in many cases collected in note to dissenting opinion in *Trono v. United States*, *supra*, and in *State v. Gillis*, 73 S. C. 318, 5 L.R.A.(N.S.) 571, 114 Am. St. Rep. 95, 53 S. E. 487, 6 Ann. Cas. 993, and *Brantley v. State*, 132 Ga. 573, 22 L.R.A.(N.S.) 959, 131 Am. St. Rep. 218, 64 S. E. 676, 16 Ann. Cas. 1203. They rest upon the theory, as stated in *People v. Dowling*, 84 N. Y. 478, that no person shall be twice put in jeopardy for the same offense, and that the application for a correction of the verdict is not to be taken as more extensive than the defendant's needs. He asks for a reversal of so much of the judgment as convicted him of guilt, but does not ask for a correction of so much of it as acquits him of any crime; and that, while waiving his privilege as to one offense, he keeps it as to the other; the waiver being construed to extend to the precise thing as to which relief is sought.

The only statute we have defining a new trial is *Rem. & Bal. Code*, § 398: "A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referees." This statute

adds no particular strength to the position we have taken, as it only announces what would unquestionably be the rule irrespective of any statutory definition, although it would seem that, in using the phrase "a re-examination of an issue," it was meant to re-examine the whole issue as originally presented to the court or jury, and not a part of that issue less than the whole. It will not be denied that, when in an appeal in a criminal case where a single offense only is charged, a verdict of guilty is set aside, and a new trial granted, the effect is to annul the judgment below as effectively as if there had been no trial; and the defendant stands before the bar of the court upon his second trial in the identical position in which he stood upon the first trial. None of his rights have been abridged, nor have any additional burdens been cast upon him. The right of appeal is a privilege granted by law, and, when that right is taken advantage of by a defendant convicted of an included offense, he must accept the privilege with all its attendant results; and one of those results, and the one in effect prayed for in all criminal appeals, is to have the appellate court vacate the judgment against him and grant a new trial, because he has not had that fair and impartial trial guaranteed him by the Constitution, or because some rule of law has been improperly announced to his prejudice. And, when his plea for a new trial has been granted, he is no more in jeopardy as to the greater offense, of which it is said he was acquitted, than as to the included offense of which he was convicted; because by his own act he has procured the trial and its attendant judgment to be set aside and held for naught that he may again be permitted to traverse the charge, as in the first instance.

In the Trono Case, it is said in reviewing these conflicting rules: "In our opinion the better doctrine is that which does not limit the court or jury upon a new trial to a consideration of the question of guilt of the lower offense of which the accused was convicted on the first trial, but that the reversal of the judgment of conviction opens up the whole controversy and acts upon the original judgment as if it had never been. The accused by his own action has obtained a reversal of the whole judgment; and we see no reason why he should not, upon a new trial, be proceeded against as if no trial had previously taken place. We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth

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in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but, if he chooses to appeal from it and to ask for its reversal, he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense contained in the judgment which he has himself procured to be reversed. . . . When the first trial is entered upon, he is then put in jeopardy within the meaning of the phrase, and yet it has been held, as late as *United States v. Ball*, 163 U. S. 662, 671, 41 L. ed. 300, 303, 16 Sup. Ct. Rep. 1192 (and nobody now doubts it), that, if the judgment of conviction be reversed on his own appeal, he cannot avail himself of the once-in-jeopardy provision as a bar to a new trial of the offense of which he was convicted. And this is generally put upon the ground that by appeal he waives his right to the plea, and asks the court to award him a new trial, although its effect will be, if granted, that he will be again tried for the offense of which he has been once convicted. This holding shows that there can be a waiver of the defense by reason of the action of the accused, as there is therefore a waiver in any event, and the question is as to its extent (that is, how far the accused by his own action may be deemed to have waived his right). It seems much more rational and in better accord with the proper administration of the criminal law to hold that by appealing the accused waives the right to thereafter plead once in jeopardy, when he has obtained a reversal of the judgment, even as to that part of it which acquitted him of the higher while convicting him of the lower offense. When at his own request he has obtained a new trial, he must take the burden with the benefit, and go back for a new trial of the whole case. It does not appear to us to be a practice founded on solid reason to permit such a limited waiver by an accused party, while himself asking for a reversal of the judgment."

This reasoning is, to our minds, so cogent that we do not deem it profitable to further extend this opinion by enlarging upon it other than to say it preserves all the constitutional and other rights of both parties to a criminal trial,—the state and the accused. The announcement of this rule may disturb the guilty who seek through the intricate mazes of technical and refined subtleties to escape punishment for their evil deeds, as in this case, where to take the contrary view would mean that a murderer who admits his crime, and whose only regret is that he was apprehended before his lust for killing was fully satisfied, as he sought a second victim, would be left free to pursue his criminal intent until he had added other

victims to his score. Courts should give to all persons accused of crime the benefit of all the law that wisdom has created to shield the innocent from false accusation, but they only bring themselves into ridicule when they seek, through meaningless technicalities and hairsplitting distinctions, to build up a protecting wall behind which the guilty may avoid the penalty of their misdeeds. It is to be deplored that juries will sometimes so forget their sworn duty as to refuse to hold up violators of the law to the full measure of their misdeeds. Courts should not aid in this miscarriage of justice by creating technical and subtle distinctions in the law, and thus enable the guilty to altogether escape. We cannot control the verdicts of juries in their failure to make true deliverance between the state and the criminal, but we can refuse to extend the farce so as to make it operate as an absolute discharge. Believing that a new trial to one found guilty of a lesser offense should on his appeal be held a new trial upon all offenses included within the charge that find sustaining facts in the evidence, we so hold, and adopt such rule for our future guidance. It may not be supported by the greater number of adjudicated cases, but it appeals to us as based upon the best reasoning and soundest judgment. It follows that *State v. Murphy*, and other cases expressing contrary views, are hereby overruled.

Because of the error in the improper submission of a verdict for manslaughter, the judgment is reversed, and the cause remanded for a new trial upon the information.

Dunbar, Ch. J., and Ellis, Mount, Crow, Chadwick, and Parker, JJ., concur.

WASHINGTON SUPREME COURT. (Department No. 2.)

STATE OF WASHINGTON, Resp't.,
v.

F. A. POMEROY, Appt.

(— Wash. —, 123 Pac. 514.)

Intoxicating liquor — filling prescription — sale.

A statute making it unlawful to sell intoxicating liquor, with or without a license,

Note. — Sale by others than retail saloon keepers as violation of statute forbidding sale within given distance of school or church.

The decision in *STATE v. POMEROY*, holding that a statute making it unlawful to

within a prescribed distance of a school, applies to a physician, who is a pharmacist, prescribing liquor for a patient, and filling the prescription from his stock, which is located within the prescribed distance of a school.

(May 8, 1912.)

APPEAL by defendant from a judgment of the Superior Court for Spokane County, convicting him of selling intoxicating liquor, contrary to law. Affirmed.

The facts are stated in the opinion.

Messrs. W. T. Stoll and Oscar C. Nelson for appellant.

Messrs. John W. Wiley and M. E. Jessep, for the State.

Statutes prohibiting or regulating the sale of intoxicating liquors are applicable to druggists and physicians, unless exceptions or special provisions are made in their favor. But the statutes usually allow them to dispense liquors for medicinal use, either by way of exception to the general prohibitions of the law, or under a special form of license or permit.

23 Cyc. 166, 188; *Woods v. State*, 36 Ark. 36, 38 Am. Rep. 23; *Brown v. State*, 9 Neb. 189, 2 N. W. 214; *Carl v. State*, 89 Ala. 93, 8 So. 157; *King v. State*, 66 Miss. 502, 6 So. 189; *State v. Fleming*, 32 Kan. 588, 5 Pac. 21, 5 Am. Crim. Rep. 324; *Chipman v. People*, 24 Colo. 520, 52 Pac. 677; *Scanlon v. Denver*, 38 Colo. 401, 88 Pac. 156; *State v. Summers*, 142 Mo. 586, 44 S. W. 797.

Dunbar, Ch. J., delivered the opinion of the court:

This case involves the construction of § 4744, Rem. & Bal. Code, which is as follows: "It shall be unlawful to sell or in any way dispose of any vinous, spirituous, malt, or other intoxicating liquors, with or without a license, within two thousand (2,000) feet of any normal school, agricultural college, reform school, or state school for defective youth, now established or which may hereafter be legally established within the state of Washington: Provided, that nothing in this section shall be construed to effect in any way the provisions of the last two preceding sections." The agreed statement of facts shows that the appellant for many years had been, and at the time of the filing of the information in this case was, a duly licensed practising physician and druggist, and owned a drug

sell intoxicating liquor with or without a license within a prescribed distance of a school is violated where a physician, who is a pharmacist, prescribes liquor for a patient, and fills the prescription from his stock, which is located within the prescribed distance of a school, seems sound, since it

store situated within 2,000 feet of the Cheney normal school. At the date mentioned in the complaint, the defendant, as a physician, prescribed a quart of whiskey for a patient, who took the prescription to the defendant's drug store, where it was filled by a duly licensed pharmacist, who had charge of defendant's drug store, acting under and by his direction and by his authority. Defendant was found guilty of violating the statute. Judgment was entered, and this appeal follows.

The single question involved is: Is the appellant, by reason of his being a physician and pharmacist exempt from the operation of the law? In support of his contention appellant cites the following from 36 Cyc. 1106: "The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature.

would appear that no other conclusion could be reached without judicially adding an exception not created by the legislature.

A conclusion in accord with that in *STATE v. POMEROY* was reached in *Cotton v. Stato*, 62 Ark. 585, 37 S. W. 48, where it was held that an act making it unlawful for any person to sell or give away any liquors except wines for sacramental purposes, within a certain distance of a school building, made it unlawful for manufacturers of liquors to sell in the prohibited territory, since the statute contained no exceptions as to these dealers, and the court could create none.

In *Salmon v. State*, 81 Ark. 56, 98 S. W. 702, where the act regulating the sale of liquor by manufacturers and the act prohibiting the sale of liquors within a certain distance of schools were amended within a few weeks of each other, and the provision in the former, authorizing manufacturers to sell without a license, was left unchanged, while the latter, as amended, prohibited the sale of liquor within a certain distance of schools, except the sale of wine for sacramental purposes, alcoholic stimulants prescribed by a regular physician, and the sale or giving away by manufacturers of wines made from grapes or berries, it was held that manufacturers of whiskey were not privileged to sell whiskey within the prohibited territory.

In *J. W. Kelly & Co. v. State*, 123 Tenn. 516, 132 S. W. 193, it was held that a statute providing, "It shall not hereafter be lawful for any person to sell or tipple any intoxicating liquors, including wine, ale, and beer, as a beverage, within 4 miles of any schoolhouse," was violated by a sale in wholesale quantity by one wholesaler to another wholesale dealer, who purchased to resell at wholesale.

In reaching this conclusion the court held that the word "sale," as used in the title, which prohibited the sale of intoxicating liquors as a beverage near a school, was used in its ordinary sense, and included all sales generally, and was not cut down by the words "as a beverage," and it was fur-

This intention, however, must be the intention as expressed in the statute, and where the meaning of the language used is plain, it must be given effect by the courts, or they would be assuming legislative authority. But where the language of the statute is of doubtful meaning, or where an adherence to the strict letter would lead to injustice, to absurdity, or to contradictory provisions, the duty devolves upon the court of ascertaining the true meaning. If the intention of the legislature cannot be discovered, it is the duty of the court to give the statute a reasonable construction, consistent with the general principles of law. . . . Closely allied to the doctrine of the equitable construction of the statutes, and in pursuance of the general object of enforcing the intention of the legislature, is the rule that the spirit or reason of the law

ther held that the word "tipple," as used in the act, was merely a subdivision of the term "sale," and it was also held that the conjunction "or," used between the words "sell" and "tipple," was used in a disjunctive sense, so that the act prohibited all sales in general.

In *State v. Tarver*, 11 Lea, 658, the statute making it unlawful to sell or tipple any intoxicating beverage within a specific distance of schools contains an exception as to sales by manufacturers selling liquors in wholesale packages or quantities, but this exception was held not to cover a sale by a manufacturer to persons for the purpose of consumption, since such sale constituted him a retailer in the transaction.

Likewise in *Harrison v. State*, 96 Tenn. 548, 35 S. W. 559, where an act prohibiting the selling or tipping of any intoxicating beverage within 4 miles of any incorporated institution of learning contained an exception as to sales by manufacturers of liquor sold in wholesale packages or quantities, the act was held to be violated where a wholesaler sold a barrel of whisky to a combination of persons organized to obtain the liquor to take home, who met with their receptacles and paid their portions of the purchase price, and turned it over to one who paid it to the manufacturer, who then delivered the barrel of whisky, which was immediately divided among the contributors, since such a sale was a retail, and not a wholesale, sale, the distinction between such sales not resting upon the quantity sold, but upon the purpose for which the sale was made.

In *Boyd v. State*, 12 Lea, 687, it was held no defense to a prosecution for violating the act prohibiting the selling of liquor within a specified distance of an incorporated institution of learning that the sale was made by one who had complied with the United States requirements, on a steamboat while under way, where such steamer was within the prohibited distance of such an institution.

J. T. W.

will prevail over its letter. Especially is this rule applicable where the literal meaning is absurd, or, if given effect, would work injustice, or where the provision was inserted through inadvertence. Words may accordingly be rejected and others substituted, even though the effect is to make portions of the statute entirely inoperative. So the meaning of general terms may be restrained by the spirit or reason of the statute, and general language may be construed to admit implied exceptions."

Unquestionably, the first duty of the court is to determine the intention of the legislature. That is the lawmaking power. All of the canons of construction relied upon by appellant are only brought to bear where the language of the statute is of doubtful meaning, and courts should be exceedingly careful in annulling the provisions of a statute by construction when the language is plain and unequivocal, or because in its opinion the enforcement of the law as plainly expressed would lead to injustice; lest, under the claim and guise of construction, it arbitrarily substitutes its judgment for the judgment of the lawmaking power. It is fundamental that, with the wisdom or unwisdom, the policy or impolicy of the enactment, within constitutional limits, the legislature is supreme. The legislature is a representative body; the members are elected with reference to their views on questions of public policy and of local interest. Through their agents, the will of the people crystallizes into law; and, within the limits we have mentioned above, becomes supreme. And whether the enactment or enforcement of a law will lead to injustice or absurdity is for the legislature to determine. There is always a difference of opinion on these questions of public policy, and especially with reference to prohibitory or sumptuary legislation. The language of the act is in no way limited. The theme is the disposing of intoxicating liquors within 2,000 feet of certain designated institutions. The prohibition is as follows: "It shall be unlawful to sell or in any way dispose of any vinous, spirituous, malt or other intoxicating liquors, with or without a license, within two thousand (2,000) feet of any normal school," etc. It is unequivocal, plain, emphatic, without reservation, and evidently represents the legislative idea of suitable laws for the protection of students of these institutions. If, in the judgment of the legislature, an exception should have been made in favor of druggists, the exception would have been expressed, as it is in many other provisions in relation to the sale of intoxicating liquors. We have recently held, in *State v. Robinson*, 67 Wash. 425, 121 Pac. 848, in 39 L.R.A. (N.S.)

construing the local option law, that limitations or provisions were not to be construed into a statute. In the case there under consideration, the law provides that, when a vote has become operative within a dry unit, it shall not be lawful to sell, give away, or in any manner dispose of intoxicating liquors in any quantity whatever within such unit. But special provision is made in the act for selling in such territory by druggists and pharmacists, and appellant's contention in that case was that the prohibition only reaches to sales by retail. We held, however, that, had it been the intention of the legislature to make any exceptions, it would have been expressed in the act; the court saying: "The act is pregnant with but one meaning, and that meaning is that intoxicating liquors shall not be sold in dry units except by druggists and pharmacists. Any other view would take the life blood out of the act. The wholesaler within a dry unit must, like his competitor without that unit, make his sales in wet territory. As we have suggested, had it been the intention of the lawmaking body to permit a unit to prohibit only the sale of intoxicating liquors at retail, that purpose would have been expressly stated in both the title and the body of the act, and it would not have taken 22 sections to state it. To hold that the language in the proviso at § 18 implies the right of a wholesaler in a dry unit to both sell and deliver therein would be to read out of the statute words of clear and certain meaning, and to read into it a privilege which the lawmaking branch of the government deemed it wise to withhold."

The same might with equal propriety be said here. In the law under consideration there, an exception was made in favor of druggists, but none is made in their favor in this statute. It must be concluded that none was intended. It is said by Sutherland on *Statutory Construction*, § 236: "The certainty of the law is next in importance to its justice. And if the legislature has expressed its intention in the law itself with certainty, it is not admissible to depart from that intention on any extraneous consideration or theory of construction." The laws governing the sale of liquor, notwithstanding the meaning of the laws can readily be ascertained by the direct and positive language employed, would indeed become uncertain if they were held susceptible of construction because, in the opinion of someone, the law was unreasonable. Laws will always be regarded as unreasonably affected by such laws; but, as we have intimated, the proper forum for a dis-

cussion and determination of such question is the legislature.

The judgment is affirmed.

Ellis, Mount, Morris, and Fullerton,
J., concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

ARTHUR F. BENNETT et al., Appts.,
v.

F. M. BOOTH.

(— W. Va. —, 73 S. E. 909.)

Easement — reservation — conveyance with visible burden.

1. If an owner of land erect a milldam upon it for the purpose of operating a gristmill, and thereafter convey a portion of the land, including a part of the mill pond, there is an implied reservation of an easement upon the land granted, as appurtenant to the gristmill.

Covenant — warranty — visible easement.

2. A covenant of general warranty of title is not broken by the existence of such an easement.

Judicial sale — privy — burdens.

3. A purchaser of land at a judicial sale is privy in estate with him who owned it at the time of sale, and takes the land subject to its burdens.

Easement — nonuser — loss.

4. An easement appurtenant to land is not lost by failure of the owner to use it for a period less than ten years.

(February 6, 1912.)

A PPEAL by plaintiffs from a decree of the Circuit Court for Barbour County in defendant's favor in a suit to enjoin the maintenance of a milldam. Affirmed.

The facts are stated in the opinion.

Messrs. Ware and Viquesney and William T. George, for appellants:

Injunction is the proper remedy in a case of this character.

6 Pom. Eq. Jur. § 562; 1 Spelling, Inj, § 308; Gardner v. Newburgh, 2 Johns. Ch. 162, 7 Am. Dec. 526; Masonic Temple Asso. v. Banks, 94 Va. 695, 27 S. E. 490; Burwell v. Hobson, 12 Gratt. 322, 65 Am. Dec. 247; Burden v. Stein, 27 Ala. 104, 62 Am. Dec. 758; Powell v. Bentley & G. Furniture Co. 34 W. Va. 808, 12 L.R.A. 53, 12 S. E.

Headnotes by WILLIAMS, J.

Note.—The question involved in the above case is covered by the note to Rollo v. Nelson, 26 L.R.A.(N.S.) 315, on "Easements created by severance of a tract of land with apparent benefit existing." 39 L.R.A.(N.S.)

1085; Amick v. Tharp, 13 Gratt. 564, 67 Am. Dec. 787; Switzer v. McCulloch, 70 Va. 777; Becker v. McGraw, 48 W. Va. 539, 37 S. E. 532; Freer v. Davis, 52 W. Va. 1, 59 L.R.A. 556, 94 Am. St. Rep. 895, 43 S. E. 164; Stephenson v. Burdett, 56 W. Va. 109, 10 L.R.A.(N.S.) 748, 48 S. E. 846; Marcum v. Marcum, 57 W. Va. 285, 50 S. E. 246; Loyd v. Blackburn, 57 W. Va. 217, 50 S. E. 741.

If it is shown that the defendant is wrongfully backing the water on plaintiffs' lands, then he is liable, and may be enjoined.

Neal v. Ohio River R. Co. 47 W. Va. 317, 34 S. E. 914; Jones, Easements, § 706; Ames v. Dorset Marble Co. 64 Vt. 10, 23 Atl. 857; Riverside Cotton Mills v. Lanier, 102 Va. 148, 45 S. E. 875; 28 Am. & Eng. Enc. Law, 959; Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec. 72; Angell, Watercourses, § 330; Heath v. Williams, 25 Me. 209, 43 Am. Dec. 265; Hoy v. Sterrett, 2 Watts, 327, 27 Am. Dec. 313; Stout v. McAdams, 3 Ill. 67, 33 Am. Dec. 441.

A riparian owner is entitled to the accustomed flow of water through his land.

Omelvany v. Jagers, 2 Hill, L. 634, 27 Am. Dec. 417; 2 Farnham, Waters, § 546.

A man cannot have an easement over his own lands.

3 Kent, Com. 528; Tabor v. Bradley, 18 N. Y. 109, 72 Am. Dec. 498.

In order to establish a right by prescription, the use must be adverse, and not by permission.

Coalter v. Hunter, 4 Rand. (Va.) 58, 15 Am. Dec. 726; Stokes v. Upper Appomattox Co. 3 Leigh, 318; Gaines v. Merryman, 95 Va. 660, 29 S. E. 738; Crosier v. Brown, 66 W. Va. 273, 25 L.R.A.(N.S.) 174, 66 S. E. 326.

If Frederick Booth abandoned this mill, either by himself or by his agents, for a moment he abandoned what right, if any, he had to flood the lands above.

Taylor v. Hampton, 4 M'Cord L. 90, 17 Am. Dec. 710; 2 Farnham, Waters, § 562.

William Booth, and the defendant claiming under him, are estopped from now maintaining the dam.

Norfolk & W. R. Co. v. Perdue, 40 W. Va. 443, 21 S. E. 755; 2 Pom. Eq. Jur. 3d ed. §§ 803, 804; McConnell v. Rowland, 48 W. Va. 276, 37 S. E. 586; Greer v. Mitchell, 42 W. Va. 494, 26 S. E. 302; Bates v. Swiger, 40 W. Va. 420, 21 S. E. 874; Hanly v. Watterson, 39 W. Va. 214, 19 S. E. 536; Stone v. Tyree, 30 W. Va. 687; 5 S. E. 878; Brown v. Wheeler, 17 Conn. 345, 44 Am. Dec. 550; Ray v. McMurtry, 20 Ind. 307, 83 Am. Dec. 322; Musselman v. McElhenny, 23 Ind. 4, 85 Am. Dec. 445; Davis v. Davis, 26 Cal. 23, 85 Am. Dec. 157; Chouteau v. Goddin, 39

Mo. 229, 90 Am. Dec. 462; *Simpson v. Pearson*, 31 Ind. 1, 99 Am. Dec. 577; *Hastings v. Allen*, 14 Ohio, 58, 45 Am. Dec. 523; *Com. v. Moltz*, 10 Pa. 527, 51 Am. Dec. 499.

Messrs. Warren B. Kittle and C. M. Murphy, for appellee:

The owner of a fee may create an artificial condition upon his own land, which is bound to be noticed and respected by a subsequent vendee.

3 Farnham, Waters, § 830, p. 2440; *Case v. Hoffman*, 100 Wis. 314, 44 L.R.A. 728, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945; *Ferguson v. Witsell*, 5 Rich. L. 280, 57 Am. Dec. 744.

It is not necessary, in conveying the land by the original owner, that he should expressly reserve an easement over the portion granted away by him, in order to retain that right.

Pyer v. Carter, 26 L. J. Exch. N. S. 258, 1 Hurlst. & N. 916, 5 Week. Rep. 371; *Suffield v. Brown*, 33 L. J. Ch. N. S. 249, 4 De G. J. & S. 185, 3 New Reports, 340, 10 Jur. N. S. 111, 9 L. T. N. S. 627, 12 Week. Rep. 356; 2 Minor, Inst. 4th ed. 26, 27; *Hardy v. McCullough*, 23 Gratt. 259; *Sanderlin v. Baxter*, 76 Va. 304, 44 Am. Rep. 165; *Grace M. E. Church v. Dobbins*, 153 Pa. 294, 34 Am. St. Rep. 706, 25 Atl. 1120; *Denton v. Leddell*, 23 N. J. Eq. 64; *Greer v. Van Meter*, 54 N. J. Eq. 270, 33 Atl. 794; *John Hancock Mut. L. Ins. Co. v. Patterson*, 103 Ind. 582, 53 Am. Rep. 550, 2 N. E. 188; *Dunklee v. Wilton R. Co.* 24 N. H. 489; *Lampman v. Milks*, 21 N. Y. 505; *Watts v. Kelson*, L. R. 6 Ch. 171, 40 L. J. Exch. N. S. 126, 24 L. T. N. S. 209, 19 Week. Rep. 338; *Seibert v. Levan*, 8 Pa. 383, 49 Am. Dec. 525; *Seymour v. Lewis*, 13 N. J. Eq. 439, 78 Am. Dec. 108; *Denton v. Leddell*, 23 N. J. Eq. 64, 24 N. J. Eq. 567; *Roy v. Roy*, 5 La. Ann. 950; *Kilgour v. Ashcom*, 5 Harr. & J. 82; *Scott v. Moore*, 98 Va. 668, 81 Am. St. Rep. 749, 37 S. E. 342.

Abandonment must be shown by establishing an intention to abandon, as well as such acts as will in law amount to an absolute abandonment.

11 Am. & Eng. Enc. Law, 2d ed. 424; *Scott v. Moore*, 98 Va. 668, 81 Am. St. Rep. 749, 37 S. E. 342; *Camden v. Dewing*, 47 W. Va. 310, 81 Am. St. Rep. 797, 34 S. E. 911; *Naughton v. Taylor*, 50 W. Va. 233, 40 S. E. 352; *Reger v. O'Neal*, 33 W. Va. 159, 6 L.R.A. 427, 10 S. E. 375; *First Nat. Bank v. Thompson*, 63 W. Va. 196, 59 S. E. 974; *Shaffer v. Shaffer*, 51 W. Va. 126, 41 S. E. 166.

The doctrine of estoppel is never applied in any of its branches upon an uncertain and speculative state of facts.

Pocahontas Light & Water Co. v. Brown—39 L.R.A. (N.S.)

ing, 53 W. Va. 442, 44 S. E. 267; *Bargamin v. Clarke*, 20 Gratt. 544; 4 Am. & Eng. Dec. in Eq. 263; *Hogg, Eq. Principles*, § 106; *Vanbibber v. Beirne*, 6 W. Va. 168; *Bolling v. Petersburg*, 3 Rand. (Va.) 563.

An estoppel cannot arise from a promise with respect to a right to be acquired, even if it be upon an agreement not yet made.

5 Enc. U. S. Sup. Ct. Rep. 948; 29 Am. & Eng. Enc. Law, 1092; 4 Am. & Eng. Dec. in Eq. 301; *Union Mut. L. Ins. Co. v. Mowry*, 98 U. S. 544, 24 L. ed. 674; *Scott v. Moore*, 98 Va. 668, 81 Am. St. Rep. 749, 37 S. E. 342.

Williams, J., delivered the opinion of the court:

Arthur F. Bennett and Lloyd J. Booth filed their bill in the circuit court of Barbour county, praying for a mandatory injunction to compel defendant to remove a milldam located on his own land, across a stream of water flowing through plaintiffs' land, causing the overflow of plaintiffs' land above. The case was heard upon pleadings and proof, on the 6th of October, 1909, and the temporary injunction which had been previously awarded was dissolved, and plaintiffs' bill dismissed. They have appealed.

Defendant claims the right to flood plaintiffs' land, as a right appurtenant to his own land. Frederick Booth, grandfather of defendant and of one of the plaintiffs, was originally the owner of both tracts of land, and while such owner he erected a gristmill and built a dam on a portion of the tract. Some time thereafter, in the year 1887, he conveyed to his son, Jeremiah Booth, by deed with general warranty of title, 102 acres, which is the land now owned by plaintiffs, and a portion of which is submerged by the millpond. Plaintiffs purchased the land at a judicial sale, made and confirmed, in 1906, in a suit by J. N. B. Crim against Jeremiah Booth and others. About the year 1901 a part of the fore bay washed away, and it was not repaired until six or seven years thereafter, which was a short time prior to the bringing of this suit, and after Frederick Booth had conveyed the land with the mill on it to his son William, who, in turn, conveyed it to his son, the defendant.

One of the plaintiffs is a son, and the other a son-in-law, of Jeremiah Booth, the former owner of the land burdened with the easement, if, indeed, it is so burdened; and notwithstanding the dam was out of repair and the mill not in use, at the time of their purchase, still they took the land subject to whatever burden, if any, existed upon it in the hands of Jeremiah Booth, to whose title they succeeded. By

their purchase they became his privies in estate. 24 Cyc. 62; Hurxthal v. St. Lawrence Boom & Lumber Co. 53 W. Va. 87, 97 Am. St. Rep. 954, 44 S. E. 520; Long v. Weller, 29 Gratt. 347.

When a landowner has created a servitude upon one portion of his land for the benefit of another portion, and conveys the servient part, there is an implied reservation of the easement, if it is essential to the use and enjoyment of the land reserved; and such right passes with the dominant estate, as appurtenant thereto. Nor does the existence of such an easement constitute a breach of the covenant of general warranty, if the easement is so open and apparent that the contracting parties must have known of it. In such case the parties are presumed to have contracted with reference to the condition in which the land then was, and it is not to be supposed that the purchaser agreed to pay any more for the land than he thought it was worth with the burden on it. Such a burden has been held not to constitute a breach of covenant against encumbrances. Kutz v. McCune, 22 Wis. 628, 99 Am. Dec. 85; Devlin, Deeds, § 908; Prescott v. Williams, 5 Met. 429, 39 Am. Dec. 688. If not a breach of covenant against encumbrances, *a fortiori* it is not a breach of a covenant of general warranty, which relates more particularly to the title than it does to encumbrances.

The decisions of other states are not uniform upon the doctrine of an implied reservation in favor of a grantor; but we think the rule, as we have stated it, is supported by the better considered cases, as well as by the more modern textwriters on the subject. See the following: 10 Am. & Eng. Enc. Law, 427; Prescott v. Williams, 5 Met. 429, 39 Am. Dec. 688; Cary v. Daniels, 8 Met. 466, 41 Am. Dec. 532; Seibert v. Levan, 8 Pa. 383, 49 Am. Dec. 525; Kutz v. McCune, 22 Wis. 628, 99 Am. Dec. 85; Jones, Easements, § 136; Lampman v. Milks, 21 N. Y. 505; Mason v. Horton, 67 Vt. 266, 48 Am. St. Rep. 817, 31 Atl. 291.

A milldam is essential to a water power gristmill. Without it the mill, which is a part of the realty on which it stands, would be useless. Plaintiffs' predecessor in title knew that it backed the water upon his land. It had done so for many years before he bought it, and he is presumed to have taken the land subject to a continuation of that condition. Plaintiffs, his privies in estate, took the land subject to the burden upon it as appurtenant to the other tract of land with the mill on it, and the mill, together with the appurtenant easement, passed to defendant.

The fact that the mill and dam were in a dilapidated condition at the time plain-

tiffs purchased does not affect the case. Defendant's right was appurtenant to the dominant land, and passed with it. It was such a right as could be lost only by adverse possession by the owner of the servient land, for such length of time as would bar an action of ejectment. Clark v. Beard, 69 W. Va. 313, 71 S. E. 188.

Appellants contend that defendant, in repairing the dam, raised it higher than it was before, and caused more of his land to be overflowed. This, of course, he could not lawfully do. But their contention, in this regard, is not supported by the evidence. Two or three of their own witnesses testified that the dam was about as high as it was before, and some of defendant's witnesses say that it is no higher than it was at first.

We will affirm the decree.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

GEORGE F. PARLETT et al., Interveners, Appts.,

v.

DANIEL F. BLAKE, Trustee, etc., of Hal-lack-Deamer Carpet Company.

(110 C. C. A. 72, 188 Fed. 200.)

Sale — passing of title — right of bankruptcy trustee.

In a contract by which one undertakes to act as sales agent for another, for a definite period of time, and to buy and pay for at certain prices all stock on hand at the expiration of such period, title to the property passes at such expiration, and a bankruptcy trustee of the agent will be entitled to it as against the claims of the principal.

(May 18, 1911.)

Note. — When does title pass under consignment of goods for sale with provision in effect that consignee purchase balance of consignment.

General rule.

In contracts for the consignment of goods for sale at retail, an attempt has sometimes been made to include therein provisions rendering it possible to interpret the contract either as a contract of sale or agency as the interests of the consignor may dictate. These contracts are usually inconsistent in their provisions, containing clauses both of sale and agency. In construing such provisions, especially where the rights of creditors of the consignee are involved, the courts as a rule have shown no noticeable sympathy with this attempt to be in a position to claim the contract to be either an absolute sale or a mere consignment as

A PPEAL by interveners from an order of the District Court of the United States for the Western District of Missouri dismissing a petition filed by them claiming possession and ownership of certain goods turned over to them by consignors who had become bankrupt. Affirmed.

Statement by Adams, Circuit Judge:

On June 19, 1908, the Hallack-Deamer Carpet Company, the bankrupt, made a written contract with the Coppes, Zook, & Mutschler Company, of Nappanee, Indiana, as follows: "This agreement entered into this 19th day of June, 1908, between the Coppes, Zook, & Mutschler Company of Nappanee, Indiana, party of the first part, and the Hallack-Deamer Carpet Company of

Kansas City, Missouri, party of the second part, witnesseth: That for the period of one year, ending July 1, 1909, said party of the second part hereby agrees to act as the agent of the party of the first part in effecting sales of furniture manufactured by said first party . . . to the furniture trade in the following territories, viz.: The state of Kansas and the western part of Missouri, after the following general manner, to wit: Said second party agrees to maintain a representative line of samples of the furniture manufactured by the said first party on the floor in their store in Kansas City for use in soliciting trade from visiting buyers, also solicit trade from the furniture dealers in the aforesaid territory by means of their traveling salesmen, catalogues, and

the interests of the consignor may dictate, and if the contract contains provisions by which the consignee at some future time is required to take the consigned goods remaining unsold, at specific prices, so that in no event are the goods to be returned to the consignor, the contract will be construed to constitute an absolute sale.

Although the contract is in form one of agency yet it will be construed to be one of sale if it contains provisions by which the consignee agrees to pay for all goods received, whether sold or not. *Conn v. Chambers*, 123 App. Div. 298, 107 N. Y. Supp. 976, affirmed without opinion in 195 N. Y. 538, 88 N. E. 1117.

Referring to a contract by which the consignee guaranteed the sale of the consigned goods and agreed to remit at stated periods for same, and which also contained provisions indicating the contract to be one of agency, rather than sale, in *Snelling v. Arbuckle Bros.* 104 Ga. 362, 30 S. E. 863, the court remarked that the contract appeared to have been drawn for the purpose of enabling the consignors "to 'run with hare' or 'hold with the hounds' according as, in the exigencies of a given case their interest might dictate. On the one hand, to hold . . . [the consignee] absolutely bound in any event, to pay for all goods shipped to him by . . . [the consignors]; on the other hand, in the event of his failure to pay and his insolvency, to enable them to successfully claim all unsold goods in . . . [the consignee's] possession, and the accounts or their proceeds against his customers representing goods which he had sold but for which he had not paid;" and it is said that "the contract must be construed in the light of all of its provisions, and the legal outcome of its several stipulations construed together must control its classification. The mere name which may have been given to it by the parties thereto, cannot change the legal effect of its stipulations." The contract was accordingly held to have been one of sale, rather than one of agency as to creditors of the consignee. The same conclusion is reached as to a similar contract, where the question arose in 39 L.R.A. (N.S.)

much the same way, in *Arbuckle Bros. v. Gates*, 95 Va. 802, 30 S. E. 496. The doctrine is here asserted that "where goods are consigned to a factory for sale, they remain until sold the property of the consignor, and are not subject to the debts of the factor; and no ingenious contract, such as that under consideration, is required to protect them from his creditors. The agreement was an attempt to accomplish that which cannot be done,—to make a sale of personal property, and at the same time constitute the buyer simply an agent of the seller to hold the property until it is paid for. The two things are incompatible and cannot co-exist. The agreement had in it every element of sale. It was in substance and effect a sale, and must be so declared. It does not matter by what name the parties chose to designate it. That does not determine its character. The courts look beyond mere names and within to see the real nature of an agreement, and determine from all its provisions taken together, and not from the name that has been given to it by the parties or from some isolated provision, its legal character and effect." Followed in *Howell v. Boudar*, 95 Va. 815, 30 S. E. 1007, as to contract of consignment termed an agency contract, and which required the agent at a stipulated time in the future to advance to the principal the invoice price of the consigned goods, and without any recourse to the principal for such advance.

The same construction is also placed upon a contract of similar character in *Arbuckle Bros. v. Kirkpatrick*, 98 Tenn. 221, 36 L.R.A. 285, 60 Am. St. Rep. 854, 39 S. W. 3; and it is said that "the contract is certainly a remarkable one partaking in many of its provisions of a contract of agency and in many others of a sale. It is evidently intended as either or both, as might suit the convenience or subserve the purposes of the complainants. It purports to be copyrighted, for what reason is not stated; but the copyright is evidently procured on account of the unusual and extraordinary provisions of the instrument (if there be a copyright).

In construing such a contract, whenever

other usual means of advertising. Said second party further agrees that all sales made under this agreement shall be made at the prices as directed by the party of the first part. . . . Said party of the second part further agrees to make report daily to said first party of all sales effected on account of said first party, together with all terms and agreements relative to said sales. . . . It is further agreed that the said first party shall, for themselves, determine upon the orders to be by them accepted and the amount of credit to be extended, and in the event that sales have been made and goods delivered by said second party before said first party has expressed their approval of said sale, then it shall be at the option of said first party

to charge said sale to the account of the Hallack Deamer Carpet Company, at the regular terms, and so notify them promptly.

"To the end that business may be expedited and goods promptly delivered to the trade in Kansas City and nearby points, the said party of the first part agrees to keep on hand, on consignment with the Hallack-Deamer Carpet Company such goods as may be necessary to supply the needs of the business resulting under this agreement, and to replenish such stock from time to time upon the order of the party, of the second part, and further to make their best endeavor to ship promptly such goods as are ordered to be shipped direct to the trade, or in mixed cars from Napanee, Indiana.

it affects the rights of others, it will be so construed as to protect such rights, and not to enable the complainants to carry out any double purpose. In view of its uncertainty and contradictory provisions, the court will see that third persons are not prejudiced by its construction."

In the foregoing cases the question as to the nature of the contract arose after the termination of the time when, according to the terms of the contract, the consignee was to sell for the consignor. The cases, however, apparently hold that from its inception such a contract is one of sale, rather than of consignment with an agreement to purchase at a future time, since a part of the relief therein sought was to impress as trust funds in the hands of the assignee for the benefit of creditors of the consignee, proceeds of sales made by the latter of the consigned goods during the period of the consignment; and it is denied that such proceeds are of that character, and it is asserted that the relation between the consignor and consignee as to such money was merely that of debtor and creditor.

The doctrine of these cases is also sustained by cases wherein the term of consignment is indefinite, there being a provision by which the consignee warrants or guarantees in effect the sale of all the consigned goods. These cases sustain the title to the consigned goods of an assignee or mortgagee for the benefit of creditors of the consignee, without reference to the time when the question is raised. Indeed by the very terms of the consignment it would seem that it was to continue indefinitely, or at least for a reasonable time since, there being no time mentioned, the consignor could not enforce the warranty until after the lapse of a reasonable time for the consignee to dispose of the goods. In these cases the general doctrine is asserted, that although termed a contract of agency, a contract containing a provision by which the person designated as agent warrants that every shipment shall be paid for in full, constitutes a contract of sale. *Williams v. Drummond Tobacco Co.* 17 Tex. 29 L.R.A. (N.S.)

Civ. App. 635, 44 S. W. 185. Especially where the person designated as agent not only guarantees the payment of the price of all goods shipped under the contract, but in addition is to execute to the consignor notes for the goods consigned. *Mack v. Drummond Tobacco Co.* 48 Neb. 397, 58 Am. St. Rep. 691, 67 N. W. 174. And a similar conclusion is reached in *Conable v. Lynch*, 45 Iowa, 84, in construing a clause in a contract by which the consignee guarantees the sale of all the articles embraced in the agreement.

Compare with a line of cases holding that such a contract is one of agency up to the date when the consignee is to purchase the goods, and that from that date on it is a contract of sale, *infra*, "Title prior to termination of agency or consignment."

But in *Metropolitan Nat. Bank v. Benedict Co.* 20 C. C. A. 377, 36 U. S. App. 604, 74 Fed. 182, an agreement in a consignment contract by the consignee that no part of the consigned goods shall remain unsold or unpaid for at a certain date is held not to render the consignment a sale. The court said that a failure to sell the goods on account therefor at the prices fixed within the time agreed upon would be a breach of the covenant for which the consignor might recover damages, but such breach would not have the legal effect to convert the bailment into a sale; the goods not sold would still remain the property of the consignor.

In *Ludvig v. American Woolen Co.* 110 C. C. A. 180, 188 Fed. 30, a consignment contract by which the consignee guaranteed the payment of all bills and accounts for merchandise possession of which was delivered under the agreement, together with the further agreement to pay the invoice price for any merchandise delivered under the agreement, and not accounted for under a previous clause of the agreement, to the effect that the consignee shall sell the property and pay from the proceeds a certain amount to the consignor, was held not to constitute a sale, but merely a consignment or factorage or at the most a conditional sale which was valid as against the creditors of the con-

"The party of the second part agrees to furnish suitable warehouses in which to store the aforesaid goods, and to keep them insured against loss or damage by fire or water, to the amount of 90 per cent of their value, for and on account of the Coppes, Zook, & Mutschler Company. Also to do all necessary labor in handling, caring for, packing, transferring and shipping said goods, and at the final termination of this agreement to buy and pay for at the then current prices and the regular terms such goods as may be then on hand. . . .

"It is further agreed that the regular terms of sale shall be sixty days net for 2 per cent discount for cash within sixty days, and that in the event that goods are to be shipped to Chicago or other nearby

points for loading in mixed cars, that the freight charges to such points shall be prepaid by the party of the first part. . . . In consideration of the aforesaid agreement, and that the party of the second part shall at all times make their best endeavor to effect said sales, to reliable and responsible trade, and to care for the delivery in a thoroughly satisfactory manner such goods as are carried by them on consignment under this agreement, the party of the first part agrees to pay, and the party of the second part agrees to receive in full payment for all services rendered, a commission fee of 10 per cent of the gross amount of the sales accepted and shipped. Said commission to be due and payable on the 10th day of each month, upon all business

signee. This construction of the contract was influenced in part by another clause, that the agreement should continue for a year, and if for any reason it terminated, all of the merchandise held by the consignee thereunder at the time of the termination should be immediately returned to the consignor.

A contract by which the consignees agree to settle for all the consigned goods as soon as sold, and to keep the same under cover and insured, with the further provision that if any of the articles remain unsold twelve months from invoice they will pay for same and close the consignment, constitutes an absolute sale, and not an agency to sell on commission. *Fish v. Benedict*, 74 N. Y. 613.

In *Re Heckathorn*, 144 Fed. 499, in holding to be a contract of sale a contract in form a consignment contract by which the consignee agreed to settle for all consigned goods received by him at stated periods, either in notes or cash, the court remarked that the transaction "has the appearance on its face of seeking to have the advantage of a sale and at the same time retaining the security of a bailment;" and it is said that "this is a difficult thing to do, and we need not be surprised if the petitioners have not been more successful than have others." This case, however, merely involved the title to the consigned goods remaining at the expiration of the period when they were to be sold under the consignment.

Title prior to termination of agency or consignment.

Some cases make a distinction between the rights of the parties under a consignment contract prior to the time when a settlement is to be made according to the terms of the contract, and subsequently thereto. Thus *Norton v. Fisher*, 113 Iowa, 595, 85 N. W. 801, holds that a contract consigning goods to an agent to be sold and accounted for by him, but with a provision that he should buy at a stipulated price all the goods remaining on hand at a specified time, constitutes a contract of agency and sale, the consignee being the mere agent of the

consignor for the sale of the property up to the stipulated time; but at such time the relation of agent ceases, and he becomes the purchaser of the property remaining, although the title does not pass until payment.

And an ordinary agency contract is not converted into a contract of sale by a provision therein by which the agent agrees that if any of the merchandise covered by the contract is unsold at a certain period of time, he will buy the same at designated prices and pay cash therefor, together with a clause reserving title, ownership, and right of possession in the principal, in so far as concerns the rights of the parties thereto prior to the date designated for the agent to purchase the property remaining unsold; and the loss of the property by fire prior to this date falls upon the principal. *Norton v. Melick*, 97 Iowa, 564, 66 N. W. 780.

So a contract of agency is not converted into a contract of sale by a provision that the goods remaining unsold at a certain time shall be settled for by the notes of the agent, and, if the agency is not continued, the goods shall be returned and the notes surrendered, at least as to the right of the principal to replevin goods sold in bulk by the agent, prior to the stipulated time, to a person having notice of the principal's rights to the property. *Williams v. Davis*, 47 Iowa, 363.

Compare with cases *supra* under heading, "General rule."

Where consignee to purchase at option of consignor.

An agreement by a consignee to sell all of the consigned goods within a stated period of time, or at the option of the consignor to pay cash for goods then on hand at stated prices, or give his note therefor, or store the goods subject to the order of the consignor until settlement thereof as provided, does not constitute a sale, but is rather a *del credere* commission. *Re Galt*, 56 C. C. A. 470, 120 Fed. 64.

The same construction is placed on a very

transacted during the previous calendar month."

On July 3, 1908, the carpet company made a like contract with the Lincoln Upholstering Company, of Lincoln, Nebraska, for a like period ending July 1, 1909. These contracts were not acknowledged or recorded. Under them the Zook Company and the Lincoln Company each shipped goods to the carpet company. Tags were attached to these goods, indicating from whom they were shipped. Separate accounts were kept, showing the sales made from them respectively. After May, 1909, the business of the carpet company became dull and remit-

tances to the consignors became irregular, but business went on as before and continued with no material change until August 3, 1909, when a representative of the Coppes, Zook Company went to Kansas City, examined into the condition of things, and determined to remove the goods then on hand consigned by his company from the carpet company's store; was about to do so when Mr. Deamer, the president of the carpet company, suggested that it would hurt his business if a large amount of goods should be removed, and asked if some arrangement could not be made by which the goods could be left in the store. It

similar contract in *Re Pierce*, 85 C. C. A. 14, 157 Fed. 757. This contract contained a provision that at the option of the consignor, if the consignee failed to sell all the articles received therein, he should either purchase and pay for those unsold at prices fixed, or hold them subject to the order of the consignor for a specified period, or reship or redeliver them free of charge.

The same conclusion is also reached in *Martin v Stratton-White Co.* 1 Ind. Terr. 394, 37 S. W. 833, as to a contract containing a stipulation on the part of the consignee to sell all the goods ordered under the contract within twelve months, and in the event of failure so to do, at the request of the consignor to settle for the goods then remaining, either by his note or by returning the goods in good order.

And in *Lenz v. Harrison*, 148 Ill. 598, 36 N. E. 567, as to a provision in the consignment contract that the consignee, after a designated period from the date of shipment, shall give his note for the balance of the consignment remaining unpaid, if required by the consignor, the court said that if this clause was to be construed alone, there might be force in the claim that the transaction was a sale, but that, considering all of the provisions of the contract together, the conclusion was reached that it did not constitute a sale.

A contrary conclusion is reached in *Re Rabenau*, 118 Fed. 471, involving the right of creditors of the consignee in bankruptcy proceedings to the consigned goods, as against the consignor. Referring to the clause by which the consignee, after a lapse of a certain period agrees at the option of the consignor, to purchase, pay, and settle, for all of the consigned goods remaining unsold, the court said that this was nothing more than a time fixed when the consignor could compel the consignee to take and pay for the goods, and added: "It is entirely optional with the 'party of the first part,'—an unheard-of provision in a contract between principal and factor. Stripped of its names, 'consignment contract,' 'parties to receive,' and sell the same on consignment,' and 'agent,' and reduced to its last analysis, this contract is little different from an ordinary contract of sale. If a country merchant sends in an order to a wholesale

house in Kansas City for goods to be shipped to him according to a price list furnished by the seller, the commission merchant usually delivers the goods f. o. b.; that is, free on the cars for shipment. If they are damaged in transit, burned up by fire, destroyed by the elements, or stolen, it is the loss of the purchaser. He stores them at his risk, and pays taxes and insurance thereon. He may pay for the goods at such times and on such terms as may be agreed upon. If he makes a profit, it is his. If he sustains a loss, it is his. These and like provisions in this contract are nothing more than a greater security for the seller, to insure him in getting his money at the stipulated price." Attention is called to the fact that in the jurisdiction wherein this decision was rendered, had this contract been construed as a conditional sale contract, the vendor would not have been entitled to claim the property in the hands of the trustee in bankruptcy of the vendee.

And in *DeKruif v. Flieman*, 130 Mich. 12, 89 N. W. 558, in an action between the parties thereto, a contract of sale or consignment containing a provision that if any of the articles therein mentioned remain unsold at the time of settlement, the consignor may require the consignee to settle for same by his note, or, if he prefers, such article shall remain his property, is held to constitute a sale.

So a contract, although containing clauses indicating it to be a contract of agency, if it contain a clause by which the consignee agrees to give his note, when requested, to cover the purchase price of the property constitutes a contract of sale, rather than of agency. *Aspinwall Mfg. Co. v. Johnson*, 97 Mich. 531, 56 N. W. 932.

Where optional with consignor to purchase.

Where the consignee of goods has the option to return those remaining on hand at a certain time or to retain same by paying for them, the transaction amounts to a sale, creating the relation of debtor and creditor, and affords no basis for the assertion as against the receiver of the consignee, that the proceeds from the sale of the goods are trust funds. *Baker v. Turner*, 19 App. Div. 223, 46 N. Y. Supp. 25.

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was finally determined that they should be turned over to Mr. George F. Parlett, who was then an employee of the carpet company, to be disposed of for account of the Coppes, Zook Company. A similar arrangement was made by the Lincoln Upholstering Company with respect to goods shipped by it to the carpet company then on hand.

Petition was filed on August 30, 1909, in the court below by the creditors of the carpet company, seeking its adjudication in bankruptcy. The adjudication followed on October 7, 1909. Later Parlett (and his wife, who seems to have become jointly interested with him in his project) filed an intervening petition claiming as against the trustee of the carpet company in bankruptcy the ownership and possession of the goods turned over to them by the two consignor companies. Their claim was denied by the court below, and the case is brought here by appeal.

Argued before Sanborn and Adams, Circuit Judges, and Wm. H. Munger, District Judge.

Messrs. Otto Basye and Charles W. Webster, for appellants.

Mr. Albert R. Strother, for appellee.

Adams, Circuit Judge, delivered the opinion of the court:

In the view we take of this case it is unimportant to dwell upon the arrangement between George F. Parlett and his wife, Anna B. Parlett, interveners here, and the two consignor companies. Suffice it to say the evidence shows that the carpet company was at the time of the transfer insolvent, and that the Parletts paid no consideration to that company for the goods transferred to them. If, therefore, the goods belonged to the carpet company the transfer was without consideration and in fraud of the rights of its creditors. If they belonged to the consignors, the transferees stand in their shoes and acquired their rights of property only.

The question then is whether the title to the goods on hand at the end of the contract period, July 1, 1909, passed to the carpet company or remained in the consignors. If the latter be the case the trustee in bankruptcy had no concern with them. If the former, he is their owner, and the interveners were properly non-suited.

The contracts in question were primarily contracts of agency for the sale of the consignors' goods for a period ending July 1, 1909. Goods were to be intrusted to the agent by them for sale, and any that were actually sold prior to that time were the

goods of the principals, and the proceeds less the commission reserved belonged to them and had to be accounted for. Whether this relation of agency ceased on July 1, 1909, depends upon the true interpretation of this clause of the contract: "The party of the second part [the agent] agrees . . . at the final termination of this agreement to buy and pay for at the then current prices and the regular terms such goods as may be then on hand."

In *Sturm v. Boker*, 150 U. S. 312, 329, 37 L. ed. 1093, 1100, 14 Sup. Ct. Rep. 99, it is said: "The recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title is not changed. On the other hand, when there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the title to the property is changed; the transaction is a sale."

In *Re Columbus Buggy Co.* 74 C. C. A. 611, 143 Fed. 859, 861, this court said: "The power to require the restoration of the subject of the agreement is an indelible incident of a contract of bailment."

The contracts before us, disclosing no obligation or right in the agent to return the undisposed of goods to the consignors, but the contrary and inconsistent obligation "to buy and pay for them," are, therefore, in our opinion, not contracts of bailment. They stand on a different footing from the goods received and sold before the expiration of the contract period. These undoubtedly were bailments, and it is equally clear, we think, that the goods remaining undisposed of on July 1st became, by virtue of the provisions of the contracts, the property of the erstwhile bailees.

It is suggested that the clause of the contracts under consideration is executory, imposing an obligation to do something in the future, rather than constituting a conclusive and final sale of such goods as might remain undisposed of at the end of the contract period.

If the clause had read: "The party of the second part [the agent] agrees . . . at the final termination of this agreement to pay for" (instead of "to buy and pay for") ". . . such goods as may be then on hand," we think it could not be successfully claimed that the obligation to keep and pay for the goods was executory. A written obligation to "buy and pay for" goods in one's possession at a given fixed time does not seem essentially different from an obligation "to pay for" them at that time; and when we are striving to

ascertain the intention of practical men in the language employed in a business contract, it is difficult to imagine that such minds would regard the two obligations thus expressed as at all different. Let us suppose the goods had been destroyed by fire while in the possession of the agent charged, as it was, with the obligation "to buy and pay for them;" can it be doubted that the consignors could have recovered from the agent the price which it had agreed to pay for them? We think not.

The contracts in their main and substantial aspect were, as already stated, agency contracts for a year's period. The object obviously was to dispose of as much merchandise as possible during that period. What would promote that object more than an obligation imposed upon the agent to keep and pay for such goods as it did not sell? It was, we think, in this natural and serviceable sense that the words of the contract in question creating the obligation "to buy and pay for" were employed. By requiring the agent to keep and pay for such goods as it did not sell to the trade during the year, the business would naturally be promoted, and the agency could be at once automatically and effectually wound up at the end of the year. This, in our opinion, was the clear intent and meaning of the parties in using the words "to buy and pay for," and under well-recognized rules of construction we should recognize and enforce it if possible. Moreover, there does not appear to have been any scope for the operation of an executory promise to buy.

Before the end of the year goods had been delivered to the carpet company for two purposes; some to be sold to the trade for account of the consignors, and the remainder to be paid for by the carpet company at current prices. Those that remained undisposed of at the end of the year were the subject of ready identification, and thereby became the definite and certain subject of sale. The consignors had nothing to do but accept the purchase price. They had no option to take the goods or legal right to get them. The carpet company had no legal right to return them. Its right as well as its obligation was to pay for them, and that was all.

In view of these facts, we fail to discover any occasion or opportunity for further bargaining. The contracts as originally made operated *proprio vigore* upon a subject of sale which was to become and had become definite and certain.

It is said in *Mechem on Sales*, vol. 1, § 2: "There may be an agreement whose legal effect is that the title shall not pass until a future time, either because, in the case

of an ascertained chattel, something remains to happen or be performed which the parties have treated as precedent, or because the particular chattel whose title is to be so transferred has not yet been ascertained. This is an agreement to sell, called often, for purposes of further distinction, 'an executory sale.' It does not become a sale until the precedent event has happened or the condition has been performed. It then becomes a sale by force of the present agreement aided or completed by the happening of that event or the performance of that condition."

This is our view of the present case. The original contracts, on July 1, 1909, operated upon the undisposed of goods, and by force of their provisions transferred the title at once and unconditionally to the carpet company, on the terms specified. This, we think, expresses the intention of the contracting parties as manifested by the whole instruments, the objects to be accomplished, and the conduct of the parties.

Counsel for interveners invoke the doctrine of the following cases in support of their claim to the property in question: *Re Galt*, 56 C. C. A. 470, 120 Fed. 64, *John Deere Plow Co. v. McDavid*, 70 C. C. A. 422, 137 Fed. 802, *Re Columbus Buggy Co.* 74 C. C. A. 611, 143 Fed. 859, and *Re Pierce*, 85 C. C. A. 14, 157 Fed. 757, and other like cases, but we fail to see how that doctrine has any application to this case. Those cases decided that the contracts involved in them, when properly construed, were contracts of bailment or agency as distinguished from conditional sales, and as a result that the consignor's title to property which had been delivered to the bailee or agent was good as against the trustee in bankruptcy of the estate of the agent. This case on the contrary concerns property held by the carpet company, with no option or right to return to the consignor, and therefore not as a bailee or agent, but with a duty and obligation to take and pay for it and, therefore, as the owner.

A patient investigation of authorities fails to disclose any adjudication upon the exact facts disclosed in this case. But we think the principles announced in the following cases dealing with very similar state of facts as those now before us lead unerringly to the conclusion we have reached. *Conable v. Lynch*, 45 Iowa, 84; *Norton v. Fisher*, 113 Iowa, 595, 85 N. W. 801; *Fish v. Benedict*, 74 N. Y. 613; *Ætna Powder Co. v. Hildebrand*, 137 Ind. 462, 45 Am. St. Rep. 194, 37 N. E. 136; *Arbuckle Bros. v. Gates*, 95 Va. 802, 30 S. E. 496; *Mack v. Drummond Tobacco Co.* 48 Neb. 397, 58 Am. St. Rep. 691, 67 N. W. 174; *O'Neal v. Stone*, 79 Mo. App. 279; *Potter v. Mt. Ver-*

non Roller Mill Co. 101 Mo. App. 581, 73 S. W. 1005.

The court below rightly held that the interveners were not entitled to the relief sought, and its decree is affirmed.

**UNITED STATES CIRCUIT COURT
OF APPEALS, SIXTH CIRCUIT.**

**NORTH CAROLINA LAND & LUMBER
COMPANY, Plff. in Err.,**

C. F. BOYER, Sheriff.

(112 C. C. A. 162, 191 Fed. 552.)

Evidence — foreign judgment — mortgage foreclosure — attachment proceedings.

1. In a replevin suit to gain possession of mortgaged property attached in a suit against the mortgagor in one state, a record of a judgment of a court in another state where the property was located when mortgaged and from which it had been temporarily removed, strictly foreclosing the mortgage in a proceeding instituted before the attachment was levied, is admissible.

Mortgage — foreclosure — attachment — priority.

2. The declaration of a forfeiture and institution of a proceeding strictly to foreclose a mortgage on chattels vest title in the mortgagee which, when judicially established by judgment, takes precedence of an attachment levied against the property as that of the mortgagor after the foreclosure suit was begun.

Same — property out of state — effect.

3. The fact that a mortgaged chattel is temporarily out of the state when a forfeiture is declared and proceedings for strict foreclosure instituted does not prevent the title from passing to the mortgagee, which he can assert against subsequent attachments of the property in the state where the property is found as that of the mortgagor.

Note. — Foreclosure of chattel mortgage when property is out of state.

The question of the effect of foreclosure of a chattel mortgage upon property situated in another state at the time of foreclosure, as raised in *NORTH CAROLINA LAND & LUMBER CO. v. BOYER*, seems to be somewhat novel.

However, in *Pittsburgh & State Line R. Co. v. Rothschild*, 8 Sadler (Pa.) 83, 4 Atl. 385, the supreme court refused to recognize a decree of foreclosure rendered in New York, covering property situated in Pennsylvania, which grew out of a transaction that was invalid in Pennsylvania though valid in New York, on the ground that the courts of New York had no jurisdiction to pass upon the validity of the mortgage in Pennsylvania.

39 L.R.A. (N.S.)

Attachment — pendente lite — priorities.

4. The attachment of a mortgaged chattel as the property of the mortgagor pending a suit for strict foreclosure of the mortgage is subject to the determination of the foreclosure suit, even though the attachment was levied and the foreclosure suit begun when the property was temporarily in another state.

(October 2, 1911.)

ERROR to the Circuit Court of the United States for the Eastern District of Tennessee to review a judgment in defendant's favor in a replevin action brought to recover from the defendant property alleged to have been wrongfully attached by him. Reversed.

The facts are stated in the opinion.

Argued before Severens and Knappen, Circuit Judges, and Evans, District Judge.

Messrs. A. S. Barnard and W. J. & W. D. McSween, for plaintiff in error.

Messrs. G. W. Pickle, H. N. Cate, and W. O. Mims for defendant in error.

Evans, District Judge, delivered the opinion of the court:

The plaintiff brought this action of replevin in the court below to recover from the defendant, the sheriff of Cocke county, Tennessee, one Climax engine or locomotive of the value of \$2,500, which the sheriff is alleged to have wrongfully attached as the property of the Catalouchee Company in a suit instituted in the chancery court of Cocke county, styled "*Borches & Company v. Catalouchee Company and others*." It is averred in the declaration that the defendant unlawfully retained possession of the engine until August 12, 1905, at which time it was turned over to the plaintiff under a writ issued in this cause. Previous to the issue of the writ the plaintiff executed a replevin bond in due form under date of

And as to the necessity for recording an instrument creating a lien or reserving title to personal property, in the state to which it is subsequently removed, see *Adams v. Fellers*, 35 L.R.A. (N.S.) 385, and note. The effect upon that general question of the mortgagee's consent to the removal is considered in the note to *Jones v. Northern Pacific Fish & Oil Co.* 6 L.R.A. (N.S.) 940.

As to foreclosure of a mortgage upon land in another state, see *Dickson v. Loehr*, 4 L.R.A. (N.S.) 986, and note.

And as to the jurisdiction of equity over suits affecting real property in another state or country, see *Burton-Lingo Co. v. Patton*, 27 L.R.A. (N.S.) 420, and note, and the earlier notes referred to therein.

R. L. S.

August 10, 1905. On March 21, 1910, the defendants filed a petition, in which it was averred that, while the plaintiff was using the engine over its railroad it was derailed, wrecked and destroyed. Under the law of Tennessee applicable to such a situation, they prayed for judgment for the value of the engine. The parties having waived a jury, the court tried the case, and, without making a finding of facts, rendered a judgment against the plaintiff for \$2,500, with interest for several years, the whole amount being \$3,194.70, which it was adjudged, should be paid to Boyer, the sheriff, and be held by him in lieu of the engine attached in the suit pending in the state court, and which we shall call the Borches suit.

The plaintiff has brought the case here, and one of the vital questions involved is whether the trial court erred in sustaining the objections of the defendant to the introduction as evidence of a duly certified copy of the record of the circuit court of the United States for the western district of North Carolina, at Asheville, in the case of the North Carolina Land & Lumber Company against the Catalouchee Company, and which, for brevity, we shall refer to as the North Carolina Case. As stated in the first assignment of error. "This record was offered for the purpose of showing that the plaintiff at the time the defendant levied an attachment upon the locomotive sued for had a prior valid lien upon said locomotive, which lien had been at the time of the commencement of this suit foreclosed in the said circuit court of the United States in the western district of North Carolina, and title to said locomotive had been, by the judgment and decree of said circuit court of the United States for the western district of North Carolina, declared to be in the plaintiff. And further to show that at the time the defendant levied his attachment the plaintiff had declared a forfeiture of all rights of the Catalouchee Company in and to the locomotive sued for.

"The plaintiff is seeking by this action to recover possession of the locomotive which was attached by the defendant as the property of the Catalouchee Company. The error of the court consisted in not receiving and considering this evidence upon the ground that the defendant was not a party to the suit in the circuit court of the United States for the western district of North Carolina and was not bound thereby, whereas, the court should have admitted said evidence, and should have considered the same, because the defendant levied upon said locomotive as the property of the Catalouchee Company, and is claiming it as the property of said Catalouchee Com-

pany, and is therefore bound by any judgment or decree against said company in respect to the title to said property."

The suit thus referred to was instituted on October 10, 1903, and, upon the ground that the conditions therein stipulated had been broken, sought the foreclosure of a mortgage made by the Catalouchee Company to the North Carolina Land & Lumber Company upon a great amount and variety of property in North Carolina, including the Climax engine or locomotive now in question. Soon after the institution of the North Carolina suit, the court appointed receivers therein, who took possession of all the mortgaged property then in North Carolina. The engine, however, had been used by the Catalouchee Company, in hauling its freight over the railroad of another company which extended partly into Tennessee. On October 3, 1903, the Tennessee & North Carolina Railroad Company, S. H. Stanaberry & Sons, and other creditors of the Catalouchee Company, had separately sued the latter company in the state court of Cocke county, Tennessee, and, having obtained attachments, had caused them to be levied upon the engine in question while it was upon a journey into that state. But on October 12, 1903, the receivers, under the orders of the court in the North Carolina case, had made some satisfactory arrangement with those creditors, all their attachments were released, and possession of the engine was given to the receivers. However, before they got it back to North Carolina, it was on October 15, 1903, seized and levied upon under the attachment in the Borches Case. It was in respect in this seizure that this action was brought.

At the outset, it may be remarked that, while the receivers thus got possession of the engine in Tennessee for the purposes of the North Carolina Case, we lay little stress upon their possession of it at the time of the levy of the attachment in the Borches Case, because in the view we take of the case the result must be the same, whether or not any effect be given to such possession by them.

Under the law of North Carolina the right of strict foreclosure exists. This right was sought to be enforced in the North Carolina Case begun on October 10, 1903, and, by the decree in that case rendered July 12, 1904, the complainant therein was afforded that relief, and was adjudged to be the owner of the engine. Did the decree in that case relate back either to the breach of the condition of the mortgage or to the commencement of the action, and did the plaintiffs in the Borches Case, who acquired their attachment lien after both of those events and during the pendency of the

North Carolina Case, take their rights under that lien, subject to having it defeated by the judgment in the previously pending suit for foreclosing the mortgage? In the North Carolina Case the engine appears to have been impleaded as a part of the mortgaged property, although at the time the suit was brought it was actually in Tennessee, having been taken there in the way indicated. Can the latter part have any influence upon the plaintiff's right?

The views of the case held by the learned trial judge can best be stated in his own language. In his opinion it is said: "The engine was attached by the defendants as the property of the Catalouchee Company in their suit in the chancery court of Cocke county on October 15, 1903. Obviously, therefore, there was no wrongful seizure or detention of the engine by the defendants so far as the North Carolina Land & Lumber Company is concerned, unless it held the legal title to the engine at the time of the attachment. And the decree rendered by the United States circuit court at Asheville in the case of North Carolina Land & Lumber Company v. Catalouchee Company, on March 12, 1904,—if the same is to be properly construed as vesting title in the plaintiff to the engine in question on that date, as to which I express no opinion,—would be manifestly unavailing in so far as the rights of the plaintiff in the present suit is concerned, since, if the engine was the property of the Catalouchee Company at the time it was attached, a subsequent decree transferring the title of the Catalouchee Company thereto to the plaintiff, in a suit in which the present defendants were not parties, would clearly only transfer such rights as the Catalouchee Company had, and be subject to whatever prior rights in the engine the defendants had acquired by reason of their prior attachment in the chancery court. In order, therefore, for the plaintiff to succeed, it must show that it had become the owner of the engine on the day of the attachment, October 15, 1903, or otherwise held the legal title thereto on that date. This, I think it has entirely failed to show. The subsequent decree of the chancery court at Asheville obviously does not show this, as it could not in any aspect purport to be a divestiture of title prior to the date of the decree; nor does it recite that the engine had become the property of the Land & Lumber Company on or before October 15, 1903, the decree, which was dated March 12, 1904, merely reciting that the Catalouchee Company should 'from henceforth stand absolutely debarred and foreclosed of and from all right, title,' and interest in the property

described in the decree; and, even if it did so recite, its recitals would, it seems, not be competent as evidence against the present defendants, who were not parties to that cause."

The plaintiff at the trial failed to show its ownership of the engine "on or before October 15, 1903," only because the court refused to permit it to read as evidence the record in the North Carolina Case, and we have reached the conclusion that that ruling was erroneous upon two grounds. The first and most important of these is that upon the breach of the condition of the mortgage the legal title to the mortgaged property, including the engine in question, at once vested in the mortgagee,—namely, the plaintiff in this case,—subject to be divested only by an exercise of the right of redemption, which right the mortgagor in fact failed to exercise. The general doctrine to which we refer was stated in the opinion of the Supreme Court in *Waterman v. Mackenzie*, 138 U. S. 258, 34 L. ed. 926, 11 Sup. Ct. Rep. 336, in this language, viz.: "By a mortgage of personal property, differing in this respect from a pledge, it is not merely the possession or a special property that passes; but, both at law and in equity, the whole title is transferred to the mortgagee as security for the debt, (subject only to be defeated by performance of the condition, or by redemption on bill in equity within a reasonable time; and the right of possession, when there is no express stipulation to the contrary, goes with the right of property."

And that this is the general rule is stated in *Jones on Chattel Mortgages*, § 703. It follows that the decree in the North Carolina Case was a judicial declaration of a pre-existing right.

From the breach of the condition of the mortgage in this instance, it resulted that the plaintiff became the legal owner of the engine previous to the commencement of the foreclosure action in North Carolina on October 10, 1903, which ownership, thus acquired, was judicially established by the judgment in that case. That record thus became the muniment of the plaintiff's title and was clearly admissible as testimony in support of its claim for the recovery of the engine. If this be not so, it would follow that the ownership thus acquired and confirmed could not be shown at all outside of North Carolina in any litigation with a creditor of the Catalouchee Company who might attach the engine as the property of that company after its title had passed to the plaintiff. The attachment of Borches & Company was against the property of the Catalouchee Company, but in fact was levied, not upon its property, but upon that

of the plaintiff; and yet, when the plaintiff sued for the possession of the property thus taken, it was not permitted at the trial to introduce the record which clearly established its right thereto. If the legal title to the engine had passed to the plaintiff before the filing of the bill in the North Carolina Case, it was wholly immaterial that such title passed in North Carolina, instead of Tennessee. The passage of the title was effective wherever it took place. If it passed at all, the creditors of the previous owner, the Catalouchee Company, had no right thereafter to seize it as the property of their debtor, and the seizure neither devested the plaintiff's title nor conferred any right upon Borchess & Company. Some stress is laid upon the fact that the engine was actually in Tennessee when the North Carolina suit was brought; and it is claimed, for that reason, that the circuit court of the United States did not acquire jurisdiction over the engine. We have no doubt that the situs of this piece of property was in North Carolina. We think that situs was not changed by the casual trips the engine made into Tennessee when it was being used in hauling the freight of the Catalouchee Company from North Carolina across the Tennessee state line. There was no intention that the engine should remain in Tennessee, but the intention was that it should, in regular course, return to North Carolina, where it was owned. We think it is inadmissible to hold that the situs of personal property can be changed in that way. Great confusion might result from any other rule as applied to property along the borders of our various states. The situs of personal property is ordinarily in the state of the domicile of its owner. If not there, it is in a state where it is so permanently located as to become part of the mass of the property there. Situs is not acquired nor fixed by mere temporary presence in or passage through another state. In considering this phase of the case, we may discern quite instructive analogy and illustration in what the Supreme Court said in *Louisville & J. Ferry Co. v. Kentucky*, 188 U. S. 396, 47 L. ed. 518, 23 Sup. Ct. Rep. 463, where, after discussing many previous cases, it was remarked that it had theretofore been held in *Hays v. Pacific Mail S. S. Co.* 17 How. 599, 15 L. ed. 255, "that certain steamers engaged in interstate commerce were not subject to taxation in a state where they might be temporarily when prosecuting their business, but were taxable at their home port, which was their situs, and where they belonged, the court saying: 'We are satisfied that the state of California had no jurisdiction over these

vessels for the purpose of taxation. They were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the state. They were there but temporarily engaged in lawful trade and commerce, with their situs at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid.'"

The situs of this piece of property being in North Carolina, the court there had jurisdiction over it as being embraced in the mortgage. This jurisdiction was not destroyed when the engine, being temporarily out of that state for purposes of interstate commerce, was wrongfully seized as the property of another to whom it did not belong.

We come now to the consideration of the second reason for the conclusion that the ruling of the trial court was erroneous. When the holder of the legal title to property or the mortgagee thereof is made a party to an action concerning it, when such action is not collusive and is diligently prosecuted to a final judgment, the general doctrine is that a purchaser, a mortgagee, or an attaching creditor whose rights or liens are acquired *pendente lite*, takes subject to the determination of the pending suit and cannot relitigate the rights settled by the judgment therein. It is also the general rule that the judgment rendered in the pending suit relates back to the date of its commencement. The manifest object and purpose of the North Carolina Case was to obtain a strict foreclosure of the mortgage by a judgment of the court to the effect that, when the breach of the condition occurred, the legal title to the mortgaged property passed at once to the mortgagee. The judgment in the case went accordingly on July 12, 1904. The result was the extinguishment of the mortgagor's equity of redemption and the confirmation of the title of the plaintiff as of the 10th of October, 1903, the date of bringing the suit, if, indeed, it was not as of the previous date when the breach of the condition of the mortgage occurred. That suit, it is true, was pending in North Carolina when the attachment lien was created. But the situs of the engine was then in North Carolina, and there it remained. Can the accidental circumstances that, when the North Carolina foreclosure suit was begun, the engine was in Tennessee, whither it had been sent on one of its regular journeys across the North Carolina state line, defeat the effect of the pendency of the suit to enforce it? We think not. In *Story's Eq. Jur.* 13th ed. § 406, the general doctrine is thus stated: "Ordinarily it is true that

the decree of a court binds only the parties and their privies in representation or estate. But he who purchases during the pendency of a suit is held bound by the decree that may be made against the person from whom he derives title. The litigating parties are exempted from taking any notice of the title so acquired, and such purchaser need not be made a party to the suit. Where there is a real and fair purchase without any notice, the rule may operate very hardly. But it is a rule founded upon a great public policy; for otherwise alienations made during a suit might defeat its whole purpose, and there would be no end to litigation. And hence arises the maxim, *Pendente lite, nihil innovetur*, the effect of which is not to annul the conveyance, but only to render it subservient to the rights of the parties in the litigation. As to the rights of these parties, the conveyance is treated as if it never had any existence, and it does not vary them."

The same views are clearly expressed in Bennett on *Lis Pendens*, pp. 86-90. The authorities also seem to agree, for obvious reasons, that in applying the *lis pendens* doctrine an attaching creditor cannot stand on a better footing than that of an innocent purchaser for value. In the case of Fletcher v. Ferrel, 9 Dana, 372, 35 Am. Dec. 143, the court of appeals of Kentucky dealt with questions very closely related to those involved in this case, and, speaking through Judge Ewing, among other things, said: "Whatever may be the doctrine applicable to purchases made in, and by citizens of, a distinct and independent nation, from that in which the suit is depending, we cannot doubt that within these United States purchases in one state pending a suit in another must be treated as *pendente lite* purchases, and subject to the rule applicable to such purchases."

We have been able to find no case in which the Supreme Court ruled upon the applicability of the *lis pendens* doctrine to personal property (other than negotiable paper and articles of ordinary commerce, as to which all the authorities seem to agree), but the subject of litigation in the Kentucky case was another kind of personal property, *viz.*, slaves. Nevertheless the *lis pendens* doctrine was applied.

In Carr v. Lewis Coal Co. 15 Mo. App. 551, in the course of an elaborate and interesting opinion, the St. Louis court of appeals said: "In Murray v. Lylburn, 2 Johns. Ch. 441, Chancellor Kent doubts whether the doctrine ought to be carried so far as to affect sales of movable property, such as horses, cattle, and grain; and Judge Bradley in Warren County v. Marcy, 97 U. S. 106, 24 L. ed. 981, supra, says that

the doctrine is applicable to personalty, with the two exceptions of negotiable paper and articles of ordinary commerce sold in the usual way. In New Hampshire, however, the courts refuse to apply the doctrine to personalty (Chase v. Searles, 45 N. H. 511); whilst in Mississippi, on the other hand, it is said that the doctrine at this day applies with equal force to contracts in regard to personalty and those concerning real estate. M'Cutchen v. Miller, 31 Miss. 65. In Pennsylvania the doctrine is applied to nonnegotiable securities. Diamond v. Lawrence County, 37 Pa. 353, 78 Am. Dec. 429.

"So far as the reasons on which the rule itself is based go, they seem to apply with equal force to personal property and real estate. The doctrine is an equitable one; but in law the same effect is produced by the rule that the purchaser takes only the title of his vendor. Every man is supposed to be attentive to what passes in the superior courts of the sovereignty where he resides, and some courts have based the doctrine upon the theory of notice. But it would seem that the doctrine really rests upon the public policy which does not allow litigating parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. . . .

"We think that both reason and authority are for the conclusion that the doctrine of *lis pendens* is to be applied to personal property of the character in question in the present case, which is not an article of ordinary commerce, as are cattle and grain."

And it would seem reasonable that this doctrine should be applied in a case where, as here, the property is a distinct article not kept for sale as merchandise. In such case the reasons sometimes urged against the inclusion of personal property under the doctrine of *lis pendens* do not exist; and we have reached the conclusion that the devolution of the legal title upon the breach of the condition of the mortgage, and the pendency of the North Carolina suit at the time the Borches suit was begun, alike extinguished and annulled the attachment lien acquired in the latter, *eo instanti* the judgment in the North Carolina case was rendered.

It results that it was erroneous to exclude the record in the North Carolina Case as evidence in support of the title of the plaintiff. We think it was clearly admissible for that purpose. To hold otherwise and affirm the judgment of the court below obviously would destroy the plaintiff's rights under the mortgage and make paramount those acquired long subsequently by

the levy of the attachment, all because the mortgaged engine in doing the work for which it was designed, and in the regular course of that work from day to day, passed out of one of the states of the Union into another which adjoined it. We think the rights of a mortgagee of such property should not be so easily taken from him.

It is, however, contended by the defendant that it is not shown by the record in the North Carolina Case that the engine was actually embraced in the mortgage enforced in that case, either as property existing when the mortgage was made, or as property acquired thereafter and coming within the terms of that instrument. It is true that the averments of the bill are expressed in somewhat general terms. The engine in question is not particularly described by name, either in the bill or in the mortgage agreement. The latter describes the personal property in this language, namely: "Fourth. The party of the second part agrees that, in the event of their failure to comply with the provisions of this contract, then all the property, both real and personal, belonging to the said party of the second part and situate upon the said land or used in the development of the same, shall become and be the property of the party of the first part, and the party of the second part shall not remove any of said plant or equipment, except through and by the consent of the party of the first part, and party of the second part agrees that all equipment and improvements that they put on the property shall be free and clear of all encumbrances."

By the decree in the North Carolina Case it is "ordered, adjudged, and decreed that the defendant, the Catalouchee Company, do from henceforth stand absolutely debarred and foreclosed of and from all rights, title, interest, estate, and equity of redemption of and in the following described land and premises, to wit," and, after specifically describing the lands, it proceeds: "Together with all and singular the mills, machinery, railroad track, rolling stock, and equipment used in connection with said railroad, and all other improvements and fixtures attached to or located or standing upon said tracts of land or either of them; and all the rights of way which have been acquired by the said defendant, the Catalouchee Company, over and upon the land of any person or persons whatsoever, together with the railroad track and the privileges and appurtenances thereunto belonging, or in anywise appertaining, which has been constructed by the said defendant, and running from the mouth of Big Creek up to and upon the lands here-
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tofore described, said railroad track being in its entire length about 4½ miles.

"And it is further ordered, adjudged, and decreed that the said North Carolina Land & Lumber Company is the owner in fee simple and entitled to immediate possession of all of said tracts of land and the machinery and improvements above described, free from and divested of any claims or liens of the defendant, the Catalouchee Company, for or on account of or by reason of its contract of purchase from the said North Carolina Land & Lumber Company or otherwise, or for any amount which the Catalouchee Company may have paid under the terms and provisions of said contract."

After a most careful consideration we are of opinion that the entire record in the North Carolina Case, as distinguished from the judgment alone, sufficiently shows that the engine was embraced in the mortgage, and that the title thereto passed to the plaintiff, as we have indicated. The record was therefore competent as evidence in behalf of the plaintiff in the deraignment of its title.

We need not notice the other errors assigned, because they may not arise at another trial.

But for the error indicated the judgment must be reversed, with costs, and, upon the return of the case, a new trial must be awarded, and further proceedings taken in accordance with law and the principles announced in this opinion.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

HOWARD HAZLETT, Admr., etc., of Augustus Pollack, Deceased, Appt.,

v.

POLLACK STOGIE COMPANY et al

(— C. C. A. —, 195 Fed. 28.)

Tradename — right of personal representative — misleading public.

The personal representative of one who has established a trade right in the use of his own name in connection with a manufactured product may lose the right of protection in the use of such name in the business continued by him, if he leads the pub-

Note — The effect of false representations extrinsic to a tradename or trademark upon the right to protection against infringement is discussed in notes to *Johnson & Johnson v. Seabury & Johnson*, 12 L.R.A. (N.S.) 1201, and *Nelson v. Winchell*, 23 L.R.A.(N.S.) 1151.

As to the invalidity of deceptive trademarks, see note to *Joseph v. Macewsky*, 19 L.R.A. 53.

lie to believe that the originator of the business is still alive, and his personality was a factor in the creation and retention of the good will which the product enjoyed.

(J. B. McPherson, Dist. J., dissents.)

(March 28, 1912.)

A PPEAL by plaintiff from a decree of the Circuit Court of the United States for the Western District of Pennsylvania dismissing a bill brought to enjoin defendants from an alleged unfair use of a tradename which was alleged to have been developed by plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Argued before Gray, Circuit Judge, and Bradford and J. B. McPherson, District Judges.

Messrs. Thomas S. Brown and Brown & Stewart for appellant.

Messrs. Frank F. Reed and Edward S. Rogers for appellees.

Bradford, District Judge, delivered the opinion of the court:

This is an appeal from a final decree of the circuit court of the United States for the western district of Pennsylvania, dismissing a bill in equity, brought by Howard Hazlett, administrator of Augustus Pollack, deceased, against the Pollack Stogie Company, of Pittsburgh, Pennsylvania, a corporation of Pennsylvania, and C. G. Kiskaddon, M. W. DeWaters, John Benz, Joseph Pollack, stockholders, directors, and officers of said corporation, and Joseph Raubitschek, Rudolph Raubitschek, and Edward Raubitschek, partners doing business under the firm name of Raubitschek Brothers, alleging unfair competition in trade and infringement of trademarks on the part of the defendants, and praying for an account and injunctive relief. The court below, being of opinion upon the proofs that, while the defendants had clearly violated the rights of the complainant, the latter had not come into court with clean hands, decreed the dismissal of the bill, but without costs to the defendants, the respective parties to pay their own costs. It appears that during a period of many years prior to his death in 1906 Augustus Pollack had been engaged in the manufacture and sale of a species of cigars known as stogies, and had established an extensive and lucrative trade in that line. Such was the excellence of his product that in connection with sundry marks, labels, printed statements, and other forms of dress used in the conduct of his business, his stogies became so associated in the public mind with his name as to be generally known as "Pollacks." The learned judge below said:

"The personality of Pollack was a factor in the creation and the retention of the trade good will which his product enjoyed;" and this certainly was true in the sense that his known connection with the manufacture of stogies largely accounted for the good will which attached to his business. Owing to the defective execution of his intended will Augustus Pollack died intestate, and letters of administration on his estate were granted to Howard Hazlett, who by agreement of the widow and children of the decedent continued the business established by him. That the complainant in the conduct of this business, after the death of Augustus Pollack, pursued a course calculated, if not intended, to mislead the public into the belief that the decedent was still living, and engaged in its active management, clearly appears from the evidence. For years after the death of Augustus Pollack, and both before and since the commencement of this suit, the complainant made use of a circular letter which was placed in each box of stogies sent out from the factory. The letter is dated Wheeling, West Virginia, has a circular trademark at its head, bearing the name "Augustus Pollack," and is addressed "To the Trade, Consumers, and Public." It bears a facsimile of Augustus Pollack's signature. The body of the letter is as follows:

Gentlemen:

The Crown Stogies Cigars, originated and manufactured by Augustus Pollack of Wheeling, W. Va. U. S. A., distinguished by national recognition for *perfect purity, absolute naturalness, and uniform excellence*, have achieved their rank and fame by the cultivation under most trying circumstances, *during more than a generation*, of an unceasing devotion to ideal industrial integrity, loyalty to fair wages, elevating conditions of labor, and highest standard of expert workmanship, by the undersigned. The maker of the Crowns honored by the eloquent testimonials from distinguished sources in different sections of our country, conveying the popular impressions created by "The Pollack Crown Stogies," gratefully acknowledges his indebtedness to American encouragement, and, requesting a continuance of approval and favorable consideration, avails himself of this occasion to tender his assurance of appreciation and high esteem.

Yours truly,

Augustus Pollack.

At the foot of the letter was the statement that "the grades of the Crowns under

protection of U. S. Patent Office registration and guarantee of Augustus Pollack" consisted of those shown in a list of Patent Office trademark registrations, therein set forth. This statement was misleading to purchasers, for the registrations were obtained, not by Augustus Pollack, but after his death by the complainant, and the use of the words, "guarantee of Augustus Pollack," in that connection was deceptive, to say the least. But this circular letter carried on its face by necessary implication an averment that Augustus Pollack was still living. No other interpretation can be put upon the clause: "The maker of the Crowns, honored by the eloquent testimonials from distinguished sources in different sections of our country, conveying the popular impressions created by 'the Pollack Crown Stogies,' gratefully acknowledges his indebtedness to American encouragement, and, requesting a continuance of approval and favorable consideration, avails himself of this occasion to tender his assurance of appreciation and high esteem.

"Yours truly,

Augustus Pollack."

It appears from the testimony of the complainant that the circular letter above quoted was used before the death of Augustus Pollack, and it also appears that the latest date on that letter is 1910. But whether it was used in the lifetime of the decedent is in our view immaterial; for after his death its continued use by the complainant without explanation amounted to a false representation that such death had not occurred, and that purchasers would obtain the product, not of the complainant, but of Augustus Pollack. And this misrepresentation was accentuated by the insertion in the circular letter of a date years after Augustus Pollack had died. That the identification of Augustus Pollack in the public mind, with the continued manufacture and sale of crown stogies cigars, was considered by the complainant as an important factor in securing custom, there can be no question; for it is stated that, manufactured by Augustus Pollack, they "have achieved their rank and fame by the cultivation under most trying circumstances, during more than a generation, of an unceasing devotion to ideal industrial integrity . . . and highest standard of expert workmanship by the undersigned," to wit, "Yours truly, Augustus Pollack." The record discloses a number of letters written after the death of Augustus Pollack, which were put in evidence by the complainant for the purpose of showing the high reputation of the Pollack stogies, and it is a significant fact that of twenty-one

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such letters written in the years 1908 and 1909, fourteen were addressed to Augustus Pollack personally. If one, having right by succession to employ a trademark, tradename, label, or other distinguishing mark in the conduct of his business, deliberately makes such use of it as is intended or calculated to deceive or mislead the purchasing public with respect to the origin, manufacture, or ownership of the goods in connection with which it is used, he is not entitled to relief in equity against persons infringing or wrongfully using such trademark, tradename, label, or other distinguishing mark to his detriment in connection with the sale of their own goods. While little can be said by way of justification of the conduct of the defendants, and without discussing the evidence in detail, we agree with the court below that the course of the complainant after succeeding to the business of Augustus Pollack was not such as was demanded by a proper regard for the protection of the public against deception touching the subject-matter as to which protection is sought against the defendants, and that his acts and omissions leave him no standing in a court of equity for relief in the premises. With respect to the contention that the complainant, being a foreign administrator who has not obtained ancillary letters in Pennsylvania, has no title to maintain this suit, it is unnecessary in view of the conclusion reached to express an opinion. For the reasons above given the decree of the court below is affirmed, the costs in this court to be paid by the appellant.

J. B. McPherson, District Judge, dissents, believing that the facts of this case do not call for the application of the doctrine of "clean hands."

ARKANSAS SUPREME COURT.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Appt.,

v.

MRS. W. L. MILLER.

(—Ark. —, 145 S. W. 889.)

Carrier — baggage — articles intended for business.

1. Bed linen and other articles designed for use in his business by one moving from

Note. — Household goods or supplies as baggage.

It is said in 6 Cyc. 666, that "in general, the term 'baggage' (or 'luggage,' which means the same thing) includes such articles of necessity and convenience as are

one locality to another to engage in the hotel business cannot be carried by him as baggage at the risk of the carrier.

Same — notice to carrier.

2. The mere fact that articles tendered by a passenger for transportation as baggage are packed in a basket does not charge the carrier with notice of their character, so as to charge it with liability for their loss as baggage in case they are not properly checked.

On Petition for Rehearing.

Same — collection of freight — liability for loss.

3. A carrier which accepts for transportation as baggage, articles known by it to be freight, assumes the liability of a freight carrier, and may collect the regular trans-

usually carried by passengers for personal use and comfort or protection during the continuance of the journey; and in determining the question, the station in life, circumstances and business of the passenger, and the nature and extent of the contemplated journey, may be taken into account." This general definition of "baggage" seems to exclude household goods or supplies, and in fact the cases, with a few exceptions, have held that such articles cannot be regarded as falling within the generally accepted meaning of the term "personal baggage."

The rules laid down in the respective cases vary slightly, but the variance is one of phraseology rather than of meaning.

Thus, the rule has been stated to be that "baggage" consists of whatever a passenger takes with him for his own personal use and convenience, according to the habits and wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purposes of the journey. *Chicago, R. I. & P. R. Co. v. Whitten*, 90 Ark. 462, 119 S. W. 835, 21 Ann. Cas. 726, holding that quilts, cooking utensils, and groceries taken on a fishing trip constituted baggage; *Glovinsky v. Cu-nard S. S. Co.* 4 Misc. 268, 24 N. Y. Supp. 136, holding that feather beds and coverings were "under the circumstances" (not set out in report of case, but probably consisted of fact that traveler had to furnish own bedding) properly considered as baggage of an immigrant and her small children; *Smith v. Cincinnati, H. & D. R. Co.* 3 Ohio S. & C. P. Dec. 192, 2 Ohio N. P. 29, holding that household supplies for third persons did not constitute baggage; *Bullard v. Delaware, L. & W. R. Co.* 21 Pa. Super. Ct. 586, holding that an embroidered table centerpiece did not constitute baggage; *Missouri P. R. Co. v. York*, 2 Tex. App. Civ. Cas. (Willson) 557, holding that bedding intended for the personal comfort and convenience of immigrants on the journey constituted baggage; *Bruty v. Grand Trunk R. Co.* 32 U. C. Q. B. 66, holding that a concertina and sewing machine are not ordinary personal luggage; *McCaffrey v. Cana-*

portation charge where the statute prohibits all discrimination in rates.

(March 4, 1912.)

APPEAL by defendant from a judgment of the Circuit Court for Nevada County in plaintiff's favor in an action brought to recover the value of property lost while in defendant's possession for transportation. Reversed.

Statement by Wood, J.:

W. L. Miller and wife, the appellee, were engaged in the hotel business at Heber. In the month of September, 1910, they bought tickets from Heber to Little Rock. On their tickets, they checked a trunk, containing

dian P. R. Co. 1 Manitoba L. Rep. 350, holding that window curtains, bedding, cutlery, books, pictures, and parlor ornaments do not constitute ordinary personal luggage; *Macrow v. Great Western R. Co.* L. R. 6 Q. B. 612, 40 L. J. Q. B. N. S. 300, 24 L. T. N. S. 618, 19 Week. Rep. 873, holding that bedding intended for household use when the passenger was settled in a home at the journey's end could not be considered as "ordinary passenger's luggage;" *Belfast & B. R. Co. v. Keys*, 9 H. L. Cas. 573, 8 Jur. N. S. 367, 4 L. T. N. S. 841, 9 Week. Rep. 793, dictum per Lord Wensleydale that furniture and household goods do not constitute baggage. And, under this rule, it has been held that baggage for "the purpose of the journey" does not include household goods such as bedding, table linen, table and dresser covers, curtains, draperies, china ware, silverware, clock, ice cream freezers, etc., where "the purpose of the journey" is to change the place of abode, and the household goods are not intended for use on the journey. *Yazoo & M. Valley R. Co. v. Baldwin*, 113 Tenn. 205, 81 S. W. 599 (also set out in *ST. LOUIS, I. M. & S. R. Co. v. MILLER*). *Texas & P. R. Co. v. Ferguson*, 1 Tex. App. Civ. Cas. (White & W.) 724, which involved a loss of bedding, is to the same effect. But in *Ouimit v. Henshaw*, 35 Vt. 605, 84 Am. Dec. 646, the court, in holding that bedding belonging to a poor man, who was moving with his family, could properly be called baggage, said: "A bed, pillows, bolster, and bed quilts belonging to a poor man, who is moving with his wife and family, may properly be called baggage. It is very common for such persons to take such articles with them as baggage,—their poverty makes it necessary, and such things are frequently about all they have that would make baggage. They are not merchandise, are of small value, may be put in a box or trunk like apparel, are frequently of immediate and necessary personal use to the owners; and both from custom, and from a regard to the poverty of such travelers, are often and properly treated as baggage."

And in *Parmelee v. Fischer*, 22 Ill. 212, 74 Am. Dec. 138, under an instruction to as-

the wearing apparel of the appellee, and a laundry basket, containing articles which are described and values given in a list furnished by appellee, and for which this suit was brought, as follows:

Laundry basket.....	\$ 4 00
Linen sheets, pillow cases, towels, tablecloths, and napkins.....	100 00
Four silver bread trays.....	6 00
Two lamps.....	4 00
Hotel dishes.....	10 00
One gold locket and chain.....	6 00
One hotel register book (acct. unpaid).....	14 00
One burnt-wood box.....	1 00
Three sets glasses.....	1 20
One pair lace curtains.....	5 00
Three celery glasses.....	1 05

They changed cars at Kensett, where they saw the laundry basket, and came on to Little Rock, where they surrendered the checks given by the Missouri & North Arkansas Railroad at Heber, and took new checks for the laundry basket and contents and their trunk to Prescott. The laundry basket, containing the articles specified, was lost, and Miller and his wife brought a joint suit against the appellant for the alleged value of the basket and contents. During the progress of the trial, the suit was dismissed as to certain articles shown to belong to W. L. Miller, and the cause proceeded on behalf of the appellee for the articles set out above. The trial resulted in a verdict and judgment in favor of appellee for the sum of \$100.

sess the damage for "such articles of necessity and convenience as are usually carried by passengers for their personal use, comfort, instruction, amusement, and protection, having regard to the object and length of the journey," a verdict was found for plaintiff on a count for failing to deliver a chest containing, among other things, feather beds and pillows, coverlets, blankets, table covers, dishes, spoons, towels, and a teapot.

So it has been held under the rule that "travelers' baggage" consists of what is customarily known and carried as such, that engravings do not constitute baggage. *Nevins v. Bay State S. B. Co.* 4 Bosw. 225. But under this rule, bedding carried by an immigrant bound to provide her bedding for the voyage has been held to constitute a part of her baggage. *Hirschsohn v. Hamburg American Packet Co.* 2 Jones & S. 521.

In some instances the rule has been stated to be that household goods or supplies not intended for use on the journey do not constitute "baggage," especially if the carrier did not understand, and did not have good reason to understand, the nature of the goods. This rule was applied in the following cases in which the parenthesized household articles were held not to constitute

Messrs. W. E. Hemingway, E. B. Kinsworthy, J. H. Stevenson, and W. V. Tompkins, for appellant:

The articles lost were not baggage.

Yazoo & M. Valley R. Co. v. Baldwin, 113 Tenn. 205, 81 S. W. 599; *Macrow v. Great Western R. Co.* L. R. 6 Q. B. 612, 40 L. J. Q. B. N. S. 300, 24 L. T. N. S. 618, 19 Week. Rep. 873; *Connolly v. Warren*, 106 Mass. 146, 8 Am. Rep. 300; *St. Louis & C. R. Co. v. Hardway*, 17 Ill. App. 321; *Mauritz v. New York, L. E. & W. R. Co.* 23 Fed. 765; *Chicago, R. I. & P. R. Co. v. Boyce*, 73 Ill. 510, 24 Am. Rep. 268; *Church v. Chicago, M. & St. P. R. Co.* 6 S. D. 235, 26 L.R.A. 616, 60 N. W. 854; *Chicago, R. I. & P. R. Co. v. Whitten*, 90 Ark. 462, 119 S. W. 835, 21 Ann. Cas. 726; *Humphreys v. Perry*, 148 U. S. 628, 37 L. ed. 588, 13 Sup. Ct. Rep. 711; *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. 274, 20 L. ed. 429.

The railroad company cannot contract to carry free the freight of one person, when it charges other persons the rates fixed in the schedule for carrying similar freight.

Myar v. St. Louis Southwestern R. Co. 71 Ark. 555, 76 S. W. 557; *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265.

personal baggage: *Mauritz v. New York, L. E. & W. R. Co.* 23 Fed. 765 (bedding, curtains, table cloths and covers, books, pictures, and albums); *Connolly v. Warren*, 106 Mass. 146, 8 Am. Rep. 300 (feather bed). And in *Bell v. Drew*, 4 E. D. Smith, 59, it was held that the carrier was not liable for silverware lost in a trunk checked as ordinary baggage, on the ground that it was not "necessary for traveling." So, perishable articles, such as fruit, packed in a trunk, are not "baggage." *Georgia R. Co. v. Johnson*, 113 Ga. 589, 38 S. E. 954. And see *Pettigrew v. Barnum*, 11 Md. 434, 69 Am. Dec. 212, wherein, in holding that an innkeeper is not liable for table silver carried in a trunk, it was intimated that the term "baggage of a traveler" does not embrace merchandise or other valuables not designed for use or personal convenience on the journey.

But if household goods are accepted as baggage, they will be classed as such in determining the carrier's liability. *Mauritz v. New York, L. E. & W. R. Co.* supra; *Minter v. Pacific R. Co.* 41 Mo. 503, 97 Am. Dec. 288, holding the carrier liable for a carpet received by its agent as baggage and lost in transit; *Missouri P. R. Co. v. Slater*, 3 Tex. App. Civ. Cas. (Willson) 25, hold-

Messrs. Hamby, Haynie, & Hamby, for appellee:

The articles were baggage.

Macrow v. Great Western R. Co. L. R. 6 Q. B. 612, 40 L. J. Q. B. N. S. 300, 24 L. T. N. S. 618, 19 Week. Rep. 873; Kansas City Southern R. Co. v. Skinner, 88 Ark. 191, 21 L.R.A. (N.S.) 850, 113 S. W. 1019; Curtis v. Delaware, L. & W. R. Co. 74 N. Y. 116, 30 Am. Rep. 271; Ouimit v. Henshaw, 35 Vt. 605, 84 Am. Dec. 646; Cadwallader v. Grand Trunk R. Co. 9 Decisions des Tribunaux, 169; Bruty v. Grand Trunk R. Co. 32 U. C. Q. B. 66; International & G. N. R. Co. v. Folliard, 66 Tex. 603, 59 Am. Rep. 632, 1 S. W. 624; Parmelee v. Fischer, 22 Ill. 212, 74 Am. Dec. 138; Hubbard v. Mobile & O. R. Co. 112 Mo. App. 459, 87 S. W. 52; Mexican Nat. R. Co. v. Ware, — Tex. Civ. App. —, 60 S. W. 343; Kast v. Philadelphia & R. R. Co. 28 Pa. Super. Ct. 107; Cooney v. Pullman Palace Car Co. 121 Ala. 368, 53 L.R.A. 690, 25 So. 712; Atwood v. Mohler, 108 Ill. App. 416; 4 Elliott, Railroads, § 1647.

The possession of a baggage check is prima facie evidence of the receipt of the baggage by the carrier.

Davis v. Michigan S. & N. I. R. Co. 22 Ill. 278, 74 Am. Dec. 151; Louisville & N. R. Co. v. Weaver, 9 Lea, 38, 42 Am. Rep. 654; St. Louis, I. M. & S. R. Co. v. Stone, 78 Ark. 318, 95 S. W. 471; Graham & M. Transp. Co. v. Young, 117 Ill. App. 257; Chicago, B. & Q. R. Co. v. Steear, 53 Neb. 95, 73 N. W. 466; Ahlbeck v. St. Paul, M.

ing the carrier liable for framed pictures, a chandelier, and a mirror which it had accepted and had charged and received extra compensation at baggage rates for carrying as baggage, it being said that this was the imperative rule, whether the carrier knew of its character or not, unless inquiry was made of the owner and false and fraudulent answers made; St. Louis, I. M. & S. R. Co. v. Green, 44 Tex. Civ. App. 13, 97 S. W. 531, holding that the carrier's liability for china ware carried as baggage depended upon the carrier's knowledge as to its character, it being said that if the carrier did not know the character of the goods, it would not be liable; but that if it did know that the box contained china ware, and notwithstanding that fact, accepted it as baggage, it would be liable for damages resulting from the loss thereof.

And where the contract of carriage limits the baggage to wearing apparel, it has been held that the carrier is under no obligation to carry packages of groceries. Bullock v. Delaware, L. & W. R. Co. 60 N. J. L. 24, 37 L.R.A. 417, 36 Atl. 773.

In the following cases, which do not state any particular rule, the respective articles were held not to constitute "baggage:" Vasse v. Ball, 2 Dall. 270, 1 L. ed. 377 (fur-

& M. R. Co. 39 Minn. 424, 12 Am. St. Rep. 661, 40 N. W. 364.

If a carrier received merchandise as personal baggage, knowing its true character, it will be liable for it as for baggage.

Rossier v. Wabash R. Co. 115 Mo. App. 515, 91 S. W. 1018; Trimble v. New York C. & H. R. R. Co. 162 N. Y. 84, 48 L.R.A. 115, 56 N. E. 532; 4 Elliott, Railroads, § 1646.

Wood, J., delivered the opinion of the court:

The evidence is sufficient to show that appellant is liable if the articles, for the loss of which judgment was rendered, were baggage. Therefore that is the only question we need consider.

Mr. Hutchinson, in his excellent work on Carriers, says: "When the facts are agreed or undisputed, the question, What is baggage? is one strictly of law, and must be determined by the court. What constitutes baggage, in any given or supposed case, is a question which depends upon principles of law upon which the courts have agreed with great unanimity, whatever discrepancies there may be in decisions; and, although it is said in many of the cases to which reference has been made, that the question is one for a jury, it must be understood that this is the case only when there is uncertainty or dispute as to some fact upon which the whole question may turn." 3 Hutchinson on Carriers, § 1255. In the case at bar, the facts are undisputed.

This court, in the case of Kansas City, Ft. S. & M. R. Co. v. McGahey, 63 Ark. 344,

niture); St. Louis & C. R. Co. v. Hardway, 17 Ill. App. 321 (silk quilt); Chicago, R. I. & P. R. Co. v. Boyce, 73 Ill. 510, 24 Am. Rep. 268 (silver napkin rings); Wheeler v. Oceanic Steam Nav. Co. 52 Hun, 75, 5 N. Y. Supp. 101, reversed on other grounds in 125 N. Y. 155, 21 Am. St. Rep. 729, 26 N. E. 248, (pictures); Davidson v. Cunard S. S. Co. 134 App. Div. 288, 118 N. Y. Supp. 929 (cradle, bedding, and silverware); St. Louis & S. F. R. Co. v. Dickerson, 29 Okla. 386, 118 Pac. 140 (piano or pulpit cover); Mexican C. R. Co. v. DeRosear, — Tex. Civ. App. —, 109 S. W. 949 (drawn-work centerpiece, table linen, and bedding).

Early cases upon the general question of the liability of a passenger carrier in transporting merchandise intrusted to it by a passenger are treated in the note to Kansas City, M. & B. R. Co. v. Higdon, 14 L.R.A. 515. And early cases upon the general question of what constitutes baggage are discussed in the notes to Carpenter v. New York, N. H. & H. R. Co. 11 L.R.A. 759, and Hartwell v. Northern P. Exp. Co. 3 L.R.A. 346.

As to whether articles intended for gifts are baggage for which carrier is responsible, see note to Kansas City Southern R. Co. v. Skinner, 21 L.R.A. (N.S.) 850. G. J. C.

36 L.R.A. 781, 58 Am. St. Rep. 111, 38 S. W. 659, adopted the definition of baggage as given by Lord Chief Justice Cockburn, in *Macrow v. Great Western R. Co.* L. R. 6 Q. B. 612, as follows: "[Baggage] is whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey." Other cases where this definition has since been approved are the following: *Kansas City, P. & G. R. Co. v. State*, 65 Ark. 363, 41 L.R.A. 333, 67 Am. St. Rep. 933, 46 S. W. 421; *Little Rock & H. S. W. R. Co. v. Record*, 74 Ark. 125, 109 Am. St. Rep. 67, 85 S. W. 421; *Kansas City Southern R. Co. v. Skinner*, 88 Ark. 189, 21 L.R.A. (N.S.) 850, 113 S. W. 1019; *Chicago, R. I. & P. R. Co. v. Whitten*, 90 Ark. 462, 119 S. W. 835, 21 Ann. Cas. 726.

To warrant the transportation of articles as baggage, it must appear that they are such articles as are adapted to the traveler's personal use and convenience, "when considered with reference to the immediate necessities or to the ultimate purpose of the journey." Obviously baggage does not include such articles as have no reference whatever to the journey itself, and such as are being transported by the traveler to be used after the purpose of his journey has been consummated. Where a traveler, as in the instant case, is moving from one location to another, for the purpose of settling at the latter location and engaging in some permanent business, he cannot include as baggage such articles as are only useful and necessary for that business, and articles that are being transported to be used in connection with and for the purpose of that business. Here the appellee and her husband were moving from Heber to Prescott. The purpose of their journey was the removal of themselves and their household effects from one location to the other. The purpose of the journey was ended when this removal was effected. The business that they were to engage in as hotel keepers, after the journey came to an end, had no reference to or connection whatever with the journey itself. Under the undisputed evidence, the journey itself ended the moment the removal was effected from Heber to Prescott. The articles contained in the list, except the gold locket and chain, for the loss of which judgment was had, were not adapted to appellee's personal use and convenience while on her journey at all. They were such articles as were fitted for use in her business as hotel keeper, after she had become permanently located at Prescott.

30 L.R.A. (N.S.)

The supreme court of Tennessee, in passing upon whether articles of a similar character were baggage, in *Yazoo & M. Valley R. Co. v. Baldwin*, 113 Tenn. 205, 81 S. W. 599, said: "The items . . . are properly classified as household goods, and do not fall within the designation of baggage, it not appearing that they were intended for use upon the journey, but were being transported simply because the defendants in error were 'moving,'—that is, changing from their former home to a new home or place of abode."

The court erred in submitting to the jury as to whether the articles on the list, except the gold locket and chain, were baggage. The court should have declared as matter of law, under the uncontroverted evidence, that such articles were not baggage, and that the locket and chain were articles of baggage.

2. In the case of *Kansas City, Ft. S. & M. R. Co. v. McGahey*, supra, Mr. Justice Battle, speaking for the court, said: "When a passenger presents to the carrier for transportation his goods and chattels, and makes known what they are, or exposes them to view, or packs them in a way to give anyone concerned good reason to understand and know that they are not usually carried as baggage, and demands transportation of them as his luggage, and the carrier receives and carries them accordingly, he will be responsible for them as baggage, notwithstanding he was not bound to accept and transport them as such."

But it cannot be said, as matter of law, because the articles in suit were packed in a laundry basket, that the appellant company had notice that they were such articles as were not usually carried as baggage. This method of packing would not of itself give the appellant notice of the character of the articles that the laundry basket contained. For aught that appellant knew to the contrary, such basket might have contained only articles of clothing, or such articles as would be classified in law as baggage.

The appellee testified that "the agent at Heber Springs knew we were moving from Heber to Prescott. When we went from Prescott to Heber Springs, we shipped this same basket in the same way, and almost the same identical articles. We had other baggage shipped at the same time this was." But she does not testify that she informed the agent at Heber Springs of what the basket contained, and, as we have stated, there was nothing in the mere manner of the packing of the basket that was calculated to advise the appellant of the kind of articles that the basket contained.

The appellee did not ask that the question of whether appellant had notice or knowledge that the articles were not baggage, and yet received them as such, be submitted to the jury. The question as to whether appellant had such notice was not fully developed and submitted.

The judgment, for the error indicated above, is reversed, and remanded for a new trial on the issue as to whether appellant accepted the articles as baggage, knowing or having notice at the time that they were not baggage. Judgment will be rendered in favor of appellee for the value of the gold locket and chain.

A petition for rehearing having been filed, the following response was handed down on April 8, 1912:

If the appellant accepted the articles to be transported free, as baggage, when it knew or had notice that such articles were freight, it would be liable for their loss as a common carrier of freight. For, under the present statutes, requiring railroad companies to provide printed schedules of tariff charges, and to keep same posted, etc., and prohibiting discriminations in rates, a railroad company cannot accept freight to be carried as baggage, knowing or having notice that same was freight, and escape the liability for its loss. See §§ 6802, 6803, 6804, and 6813, Kirby's Digest. A contract of that kind is void, and the parties to it will be held to the mutual duties and obligations of shipper and carrier imposed by the statutes. The railroad company would be compelled to charge, and the shipper to pay, according to the regular schedule of tariff charges, fixed as the law requires. Sections of the Digest, supra.

The purpose of our law in requiring the schedule of rates and prohibiting discriminations is to guarantee to all shippers, for the same service, and under the same conditions, the same tariff of charges. As was said by Chief Justice White, in speaking of the interstate commerce act (act Feb. 4, 1887, chap. 104, 24 Stat. at L. 379, U. S. Comp. Stat. 1901, p. 3154): "The great purpose of the act, . . . whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all, and to destroy favoritism; these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and prohibiting rebates, preferences, and all other forms of undue discrimination." New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361-391, 50 L. ed. 515-521, 26 Sup. Ct. Rep. 272; Armour Packing Co. v. United States, 209 U. S. 56-72, 52 L. ed. 681-691, 28 Sup. Ct. Rep. 428; Louisville & N. R. Co. v. Mottley, 219 U. S. 39 L.R.A.(N.S.)

467, 476-478, 55 L. ed. 297, 301, 302, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265.

This court, in Myar v. St. Louis S. W. R. Co. 71 Ark. 555, 76 S. W. 557, held that a station agent of a railway company "could not lawfully discriminate in favor of one shipper by charging him for transportation a lower rate than was allowed to others; and such did not come within the apparent scope of his authority."

In the recent case of St. Louis, I. M. & S. R. Co. v. Wolf, — Ark. —, 139 S. W. 536, we held, quoting syllabus (official report): "Where a railway agent, by mistake, inserted in a bill of lading for an interstate shipment a rate less than the published rate, the railroad company is not bound thereby; and it is immaterial in such case that the shipper and the agent were both ignorant of the published rate." See Kansas City Southern R. Co. v. Tonn, — Ark. —, 143 S. W. 577.

It follows that if the articles in controversy had not been lost, appellant could have collected from appellee the regular schedule freight tariff on both articles. If appellant knew or had notice that such articles were freight, as we have stated, it would be liable for their loss, although it shipped them as baggage. But, on the other hand, if appellant did not know, and was not put on notice by appellee, that such articles were freight, and appellant shipped them as baggage, then appellant would not be liable for their loss, unless through gross or wilful negligence, because, in such case, appellant, at most, could sustain no higher relation to appellee than that of a gratuitous bailee. There would be no contract of carriage whatever between appellant and appellee. Appellant would be a mere mandatar, without pay, of the goods for the exclusive benefit of the bailor; and the loss, except for gross or wilful negligence, would have to be borne by appellee. 5 Cyc. 186.

The motion for a rehearing is denied.

Hart, J., concurs for the reasons given in the original opinion.

IOWA SUPREME COURT.

PINE BROTHERS

v.

CHICAGO, BURLINGTON, & QUINCY
RAILWAY COMPANY, Appt.

(— Iowa —, 133 N. W. 128.)

Carrier — animal — illness — duty to hasten shipment.

A railroad company which has taken an animal for transportation on a regular

freight schedule is not liable for its loss because it refuses to attach the car to a passenger train or otherwise hasten the shipment, upon receiving notice that the animal is ill, where the train carrying it is substantially on schedule time, and there is no faster freight train to which it could be attached.

(November 18, 1911.)

APPEAL by defendant from a judgment of the District Court for Ringgold County in plaintiffs' favor in an action brought to recover damages for injury to property while in defendant's possession for transportation. Reversed.

Note.—*Duty of carrier to hasten shipment or take other precaution to prevent loss threatened without any antecedent fault on its part.*

As indicated by its title, this note does not deal with the duty of the carrier to transport freight promptly, nor with the general question of care or negligence on its part; but is confined strictly to the duty of a carrier to take special precautions to avoid a loss which is threatened as the result of some disaster or delay not due to any antecedent fault on its part. The question indicated, so far as it involves the duty of a carrier after an act of God has occurred, is treated in the note to *Armstrong v. Illinois C. R. Co.* 29 L.R.A. (N.S.) 671.

As to the burden of proof of cause of injury to live stock during transportation, see note to *Terre Haute & I. R. Co. v. Sherwood*, 17 L.R.A. 339; as to statutory duties of carriers of live stock with reference to care of stock during transportation, see note to *Chesapeake & O. R. Co. v. American Exch. Bank*, 44 L.R.A. 449; as to liability of carrier for damage to or loss of live stock by contagious disease contracted during transit, see note to *Baltimore & O. R. Co. v. Dever*, 26 L.R.A. (N.S.) 712.

Live stock—general doctrine.

There is an *ex post facto* wisdom, which, after everything has been done without success, can suggest that something else should have been attempted, but this is a sagacity much more astute than ordinary human foresight, and can hardly furnish a fair rule by which to determine the propriety of what has been done in good faith, and with judgment exercised under the best light afforded. *American Exp. Co. v. Smith*, 33 Ohio St. 511, 31 Am. Rep. 561.

When a railroad company accepts stock for shipment, if a delay in transportation shall occur, whatever the cause, it has been said that the company, within the measure of its duty, must take care, by such steps as lie within its power, to protect such stock, to the end that the same shall be fully insured against increased danger of injury on account thereof, and the requirement for commensurate care is equivalent to the highest degree of care possible to the situation. L.R.A. (N.S.)

Statement by Weaver, J.:

Action to recover damages for injury to property in course of transportation over defendant's road. Judgment for plaintiffs, and defendant appeals.

Messrs. Spence & Smith and Miles & Steele for appellant.

Messrs. C. J. Lewis and V. R. McGinnis for appellees.

Weaver, J., delivered the opinion of the court:

The appellees purchased a valuable stallion at Bushnell, Illinois, and delivered it

ation and necessary to safety. *Colsch v. Chicago, M. & St. P. R. Co.* — Iowa, —, 117 N. W. 281.

But on a second appeal, the rule as to degree of care required of the carrier, when a shipment of live stock is delayed *en route* through no fault of the carrier, is modified, the court holding that the degree of care required under such circumstances is not the highest, but only ordinary and reasonable care,—such care as an ordinarily careful person would exercise under the same or similar circumstances,—especially when the owner accompanies his stock; and the expressions found in *Kinnick Bros. v. Chicago, R. I. & P. R. Co.* 69 Iowa, 665, 29 N. W. 772, which lay down a different rule, are declared unnecessary to the decision of that case, and are disapproved. No reference is made to the former appeal in this case. *Colsch v. Chicago, M. & St. P. R. Co.* 149 Iowa, 176, 34 L.R.A. (N.S.) 1013, 127 N. W. 198.

Where the shipper of stock does not agree to furnish a care taker, and some of the animals die or are injured for want of care or protection in transit, the carrier must bear the loss; but where the owner is in charge of live stock in transit, the burden is on him to show a loss caused by the carrier's negligence. *Chicago, B. & Q. R. Co. v. Williams*, 61 Neb. 608, 55 L.R.A. 289, 85 N. W. 832; *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129, 17 L.R.A. 339, 32 Am. St. Rep. 239, 31 N. E. 781, and cases cited.

—cold.

Generally as to carrier's liability for injury to live stock by weather conditions, see note to *Colsch v. Chicago, M. & St. P. R. Co.* 34 L.R.A. (N.S.) 1013.

As to snowstorm as act of God which relieves carrier from liability, see note to *Cormack v. New York, N. H. & H. R. Co.* 24 L.R.A. (N.S.) 1209.

Where a carload of cattle was left standing on a side track in an exposed position in cold weather, and were freezing, and the carrier refused to comply with the shipper's demand that the stock be either forwarded to destination or unloaded and placed in proper shelter, the carrier was held liable for the loss, for, whatever the cause of the

to the appellant at that place to be shipped to their home in Diagonal, Iowa. The horse, which was accompanied by one of its owners, was taken sick during the trip, and died soon after reaching its destination.

The theory of plaintiffs' case, as alleged in the petition and presented upon this appeal, is that the transportation was unreasonably and unnecessarily delayed, and that, by reason of such delay and resulting exposure to inclement weather, the horse contracted the disease of which it died. Appellant insists, on the other hand, that there was in fact no material delay, and that the record discloses no evidence on

which a verdict charging it with negligence as alleged in the petition can be sustained.

After considerable investigation, we are forced to the conclusion that the appellant's contention must be sustained. Bushnell, Illinois, and Diagonal, Iowa, are both stations upon the defendant's railway system. The plaintiffs reside at the place last named, but were personally present at Bushnell when the horse was delivered for shipment. The defendant's freight schedules upon which the road was then being operated were so arranged that a car sent out of Bushnell on the afternoon or evening of May 5, 1908, and making all the connec-

delay, the carrier was said to be bound to use the highest degree of care for the safety of the stock. *Colsch v. Chicago, M. & St. P. R. Co.* — Iowa, —, 117 N. W. 281.

But on a second appeal, it was held that the carrier was bound to use only ordinary and reasonable care, since the delay was not caused by any negligence of the carrier; and especially where, as here, the owner accompanied his stock. 149 Iowa, 176, 34 L.R.A.(N.S.) 1013, 127 N. W. 198.

But where a carload of hogs was snowed in *en route*, and delayed more than a day, and several died from the cold, and it was shown that it was impossible to unload them on account of the drifting snow, that attempts to place doors against the sides of the car failed because of the high wind, and that as soon as possible the yards were shoveled out and the hogs unloaded, fed, and cared for until the next train out, it was held that this action warranted a verdict for the carrier, the court stating that in such cases the carrier is not required to bestow the highest degree of care, but only ordinary or reasonable care and diligence, to secure the property from loss, the delay not being the result of its own negligence. *Black v. Chicago, B. & Q. R. Co.* 30 Neb. 197, 46 N. W. 428.

In *Jones v. Minneapolis & St. L. R. Co.* 91 Minn. 229, 103 Am. St. Rep. 507, 97 N. W. 893, where a train containing two carloads of stock was overtaken by an unusually severe blizzard, and the stock froze to death, the fact that after the train became stalled, the crew did all they could to procure relief, is treated as of weight in holding the carrier not guilty of negligence.

For other cases as to duty of carrier where act of God has occurred or is threatened, see note to *Armstrong v. Illinois C. R. Co.* 29 L.R.A.(N.S.) 671.

—down and dying.

As to liability of carrier in respect of property which it accepts improperly packed or crated, see note to *Atlantic Coast Line R. Co. v. Rice*, 29 L.R.A.(N.S.) 1214.

If a crated animal gets down in the crate and is in danger of dying, and the carrier's agent knows this, but permits it 39 L.R.A.(N.S.)

to remain down, there is negligence; it is the carrier's duty to remedy the situation by putting the animal on its feet, and if no sufficient force is at hand to raise it with, the agent should procure such force. *Pacific Exp. Co. v. Emerson*, 101 Mo. App. 62, 74 S. W. 132.

When, during the transportation of stock, the shipper's agent requests the conductor to set off the car, containing both cattle and hogs, because the cattle are down and dying, it is the duty of the conductor to comply; and he is not excused on the ground that the stock pen at that point would not hold hogs, when the hogs could have been retained upon the car and the suffering cattle unloaded, and especially when the carrier is under duty to make the pens secure. *Johnson v. Alabama & V. R. Co.* 69 Miss. 191, 30 Am. St. Rep. 534, 11 So. 104.

And even if cars of cattle are overloaded by mistake of the shipper, if, while in transit, his agent in charge discovers some of them down and in bad condition, and calls the attention of the conductor to them and requests him to have them unloaded, and he refuses, the carrier will be liable for later damages caused by such refusal, but not for damages already suffered; and it may be that the carrier cannot be held bound to exercise "all possible means," in avoiding future loss. *Gulf, C. & S. F. R. Co. v. Kemp*, — Tex. Civ. App. —, 30 S. W. 714.

But where, because a horse was down in a car and in danger of dying, the owner who accompanied it requested that his car be laid out for twenty-four hours, so that he might rearrange his load and rest his stock, and the carrier's agent refused, it was held that he was justified in refusing, on the ground that there was no custom to lay out cars when only a few horses were shipped (less than a carload), and that the shipper had not contemplated such a privilege when he made the contract nor when he loaded his goods, and that, if there was any obligation founded in common humanity, it was on the shipper to recognize it, and to make a new contract for longer use of the car, or abandon his present contract and lose his payment of freight. *Illinois C. R. Co. v. Peterson*, 68 Miss. 454, 14 L.R.A. 550, 10 So. 43.

tions provided for in said schedules, would not arrive in Diagonal until about noon of May 8th. There is no claim that plaintiffs did not fully understand the time required to make this trip, or that they asked for or received any assurance that the progress of their car could or would be accelerated beyond the rate indicated by the schedules. The shipment was delivered to the defendant about the middle of the afternoon of May 5th. It was accompanied by the plaintiffs, or one of them, and it arrived at

its destination substantially on schedule time.

No fault appears to be found by the plaintiffs with the train schedules, but they say that, after discovering signs of sickness in the horse, they applied to the defendant's agents to hasten the transportation by attaching the car to a passenger train or otherwise, and that such requests were not granted. We think there are obvious reasons why failure to accelerate the movement of freight by attaching freight cars to pas-

—fright.

As to extraordinary unloading of live stock *in transitu*, see note to Illinois C. R. Co. v. Petersen, 14 L.R.A. 550.

When a carrier sees that a crated animal is so frightened as to throw him into an uncontrollable fit of terror, causing him to fall down in the crate so that he cannot get up, the carrier is under a duty to use ordinary care to protect the animal from further injury, and if unloading and recrating is necessary, it should be done at the first practicable place. The carrier ought not to carry him hundreds of miles past many stops until the brute is practically dead, before taking steps for his relief. Kelly v. Adams Exp. Co. 134 Ky. 208, 119 S. W. 747.

If, in the course of transportation, the agents of a carrier are notified by the owner of animals or his agent that the transportation is causing them fright, whereby they are acting badly and are in danger of being killed or hurt by further transportation, and if the carrier is requested by the owner to set the car on a side track at an intermediate station, it is the duty of the carrier to do so, if it can reasonably be done. Coupland v. Housatonic R. Co. 61 Conn. 531, 15 L.R.A. 534, 23 Atl. 870.

But when two out of fourteen horses going from New Jersey to New Orleans became frightened, and were plunging, and were in danger of serious injury, and the owner's agent requested the carrier to be allowed to unload them, the car being attached to a passenger train, and there being no chute for unloading at that place, and where the carrier offered to side track the car so that the horses might be unloaded, and let the whole shipment wait twelve hours until the next train should come, and refused to hold his train for the side tracking and unloading, which would have disarranged the whole time schedule; and where the horses went on and there was a loss,—the court held that the offer and refusal of the carrier were reasonable. Regan v. Adams Exp. Co. 49 La. Ann. 1579, 23 So. 335.

—heat, suffocation, and overcrowding.

As to duty of carrier to shower hogs during shipment, see note to Peck v. Chicago G. W. R. Co. 16 L.R.A. (N.S.) 883.

A carrier's agent who refuses to comply with the request of the owner of crated ani-

mals to aid him in placing them where they can get more air, and so prevent them from dying from overheating, is guilty of neglecting his plain duty, when he could reasonably have complied, and where, after one animal dies, he does comply as to the others; and the carrier is liable for the loss, and cannot avoid such liability by inserting in the contract or bill of lading a provision relieving it from liability for damage or loss from its own negligence. United States Exp. Co. v. Council, 84 Ill. App. 491.

Even where the contract of shipment provides that the shipper is to load and unload the cattle, and he overloads one car, and upon discovery of that fact demands that the cars be reset and the cattle reloaded (once before the shipment moved, and once at an intermediate point), and the carrier refuses to comply, such carrier becomes responsible for the injury done to the cattle by carrying them in the crowded condition. International & G. N. R. Co. v. Pool, 24 Tex. Civ. App. 575, 59 S. W. 911.

Where a train containing a carload of hogs was delayed by an obstruction on the track, it was held that the carrier was bound to use the highest degree of care during the delay for the safety of the property; and if injury to the hogs could have been prevented by unloading them or giving them personal attention while in the car, the carrier was bound to do so; even though the loss came through the natural propensity of the hogs to crowd, or through the overcrowding of the car by the shipper with the knowledge of the carrier. Kinnick Bros. v. Chicago, R. I. & P. R. Co. 69 Iowa, 665, 29 N. W. 772.

Even if the car is not overloaded and the hogs are in good condition at the beginning of the journey, if the weather is very hot, mere showering with water may not be sufficient, and if, in spite of that precaution, they continue to die; the carrier may be negligent in not setting the car off the train, and unloading the stock before the destination is reached. Lindley v. Chicago, M. & St. P. R. Co. 36 Minn. 539, 1 Am. St. Rep. 692, 33 N. W. 7.

But where the owner's agent is negligent in allowing hogs to be overcrowded, and later, on discovering their suffering, asks the carrier to have them transferred to other cars, but, on being told there are none, does not insist on having the car detached and left, but goes on with them to the destination, the carrier is not liable. Squire v.

senger trains should not be held culpable negligence, and there is here no evidence of other or faster freight trains by the aid of which the destination of the plaintiffs' car could have been sooner reached. It is true that the train taking the car west from Galesburg could have taken it to the junction point at Osceola, Iowa, on the evening of May 6th, instead of leaving it to be picked up by succeeding trains, which brought it to said junction the following morning, but the movement of the car south

from Osceola would not thereby have been hastened for the only connecting train did not leave there until about noon of May 7th, nor would it have been sooner forwarded out of Van Wert, the last junction point.

The charge of negligence made by the plaintiffs appears, therefore, to be without evidence to support it, and it follows that the judgment appealed from must be, and it is, reversed.

New York C. R. Co. 98 Mass. 239, 93 Am. Dec. 162.

And where cattle are delayed in transit by storm, and because of the delay there is a loss by heat, suffocation, and crowding, if the owner's agent has full control of the shipment and of loading and unloading, the responsibility is on him; and if, by constructing a temporary platform, they could have been unloaded where the train stood, and the carrier did nothing to prevent the unloading, such carrier is not liable for the loss, even though it refused to comply with the owner's request to unload the stock or furnish facilities for so doing. *Penn. v. Buffalo & E. R. Co.* 49 N. Y. 204, 10 Am. Rep. 355, reversing 3 Lans. 443.

But it is the duty of the carrier in such a case, upon reasonable request, so to place the cars as to be convenient to the usual and accessible means of unloading, if that be practicable. *Bills v. New York C. R. Co.* 84 N. Y. 5, former appeal in 53 N. Y. 608.

—sickness.

A railroad company is not liable for the death of a horse because it refuses, upon information that the animal is sick in transit, to attach the freight car to a passenger train, when the freight train is practically on schedule time. *PINE BROS. v. CHICAGO, B. & Q. R. Co.*

If an animal is sick during transportation, and subsequently dies from the sickness, and if the carrier is not forewarned of the sickness, and does all in its power to protect the animal after the attack comes on and while it has custody of the same, the death will be regarded as inevitable accident. *Klair v. Wilmington S. B. Co.* 4 Penn. (Del.) 51, 54 Atl. 694.

When a carrier, in order to give proper medical and surgical attendance to horses which had been burned in transit, and to avoid the infliction of unnecessary pain upon them, removes them from the car and places them in charge of a veterinary surgeon, such carrier is within his legal rights, and is not liable in conversion, although they die from their injuries or are refused by the consignee when delivered at destination, and although the shipper objects to their removal. *Spokane Grain Co. v. Great Northern Exp. Co.* 55 Wash. 545, 104 Pac. 794.

But where, in effecting a transfer *en route*, a horse was held in a switching yard and

discovered there in a sick condition by the care taker at 11 A. M., and he immediately advised the carrier of the fact, paid the charges to that point, and demanded that the horse be unloaded and that the shipment cease, and, notwithstanding repeated requests, the car was not moved to the unloading platform until 7 in the evening, and in the meantime a storm came on so that the horse had to be unloaded and taken to the veterinary hospital in the midst of it, and later died, the evidence was held sufficient to warrant a verdict holding the carrier liable. *Wente v. Chicago, B. & Q. R. Co.* 79 Neb. 179, 15 L.R.A. (N.S.) 756, 115 N. W. 859, reversing on rehearing the opinion in 79 Neb. 175, 112 N. W. 300.

—starvation.

In a case where a shipment of cattle was delayed by flood, and they were suffering for food, it was held proper to leave to the jury the question whether it was not gross negligence in the carrier to omit to send for assistance, when such help could readily have been obtained, even though this might warrant a finding of negligence in not sending 43 miles for an engine. *Bills v. New York C. R. Co.* 84 N. Y. 5.

But where, in the exercise of due care and diligence, cattle were driven by the carrier from stock yards in order to escape a flood, and confined in overhead viaducts where they were compelled to remain for more than a week without food, and as a result many died and all were injured, it was held that, under the unusual conditions then existing, there was no liability on the part of the carrier for the loss, even for the starvation. *Empire State Cattle Co. v. Atchison, T. & S. F. R. Co.* 135 Fed. 135, affirmed in 77 C. C. A. 601, 147 Fed. 457, and again in 210 U. S. 1, 52 L. ed. 931, 28 Sup. Ct. Rep. 607, 15 Ann. Cas. 70.

—strangulation.

Where a horse died of strangulation by its halter while in transit, the court says it was for the jury to say whether prudence did not require that a servant of the carrier should have been stationed in or about the car so as to observe the conduct and condition of the animals constantly or at short intervals. *Clarke v. Rochester & S. R. Co.* 14 N. Y. 570, 67 Am. Dec. 205.

—disposal of carcass.

Finally, if by inevitable accident upon a railroad, animals are killed in transit, the carrier is under no duty to dress or prepare the animals for market immediately, nor to deliver the carcasses. *Lee v. Marsh*, 28 How. Pr. 275.

Inanimate freight—general doctrine.

Safe custody is as much the duty of the carrier as conveyance and delivery; and when he is unable to carry the goods forward to their place of destination from causes which he did not produce, and over which he has no control, he is still bound by the original obligation to take all possible care of the goods, and is responsible for every loss or injury which might have been prevented by human foresight, skill, and prudence. He is bound to the utmost exertions in his power to save the goods from impending peril. *The Niagara v. Cordes*, 21 How. 7, 16 L. ed. 41.

When goods in the hands of a carrier are placed in danger of flood, the degree of care to be exercised in order to save them from injury is not "all the diligence which human sagacity could suggest," but the carrier is bound to use, actively and energetically, "only such diligence as prudent, skilful men engaged in that kind of business might fairly be expected to use under like circumstances." *Nashville & C. R. Co. v. David*, 6 Heisk. 261, 19 Am. Rep. 594.

In the case of *The Generous*, 2 Dodson, Adm. 324, it was said that the carrier would be protected if, being in peril, he used all practical endeavors to surmount the difficulties which on fair trial he found unsurmountable or such as might reasonably be expected from a fair degree of discretion and an ordinary knowledge of business, and is not bound to use all the endeavors which the wit of man as it exists in actual understanding might suggest.

Whether everything was done which could have been done to save goods from loss in time of accident or disaster is a question for the jury to determine, and not a proper one for a witness to express his opinion upon. *Montgomery & W. P. R. Co. v. Edmonds*, 41 Ala. 667.

When a ship is stranded or wrecked, the duties of a carrier with regard to goods on board, and not perishing with the wreck, are not decreased but still continue, and the carrier is bound to show that no human diligence or skill or care could save the property from being lost as an indirect result of the stranding or shipwreck. Such duty does not end until the property is delivered at the port of destination, or returned to the possession of the owner, or kept safely until the owner can resume it, or until it is otherwise carefully disposed of. *King v. Shepherd*, 3 Story, 349, Fed. Cas. No. 7,804.

This note does not go into the question of the duty of a shipowner generally in cases of accident to the ship, to forward the goods in the ship or to deliver the goods at an in-

termediate point, and accept *pro rata* freight.

—abandonment.

Where a vessel went upon a reef, and the master left a box of gold coin unprotected and unguarded while wreckers employed by him were at work removing the freight, and the gold was stolen either by the crew or by the salvors, the shipowners were held liable for the loss. *King v. Shepherd*, supra.

Where a train was stopped by a flood, but the cars containing packages of whisky were left standing unharmed upon the track, and in daylight and in the presence of the crew, a band of ruffians broke open the car and appropriated a part of the whisky, the carrier in the meantime abandoning it to the crowd, and later, in order to prevent the rest of the whisky from being consumed by undesirable citizens, a self-constituted committee of townsmen destroyed it, the carrier was held liable. *Lang v. Pennsylvania R. Co.* 154 Pa. 342, 20 L.R.A. 360, 35 Am. St. Rep. 846, 26 Atl. 370.

Where a car containing benzine was thrown from the track by a broken axle, and the benzine was left lying where it fell, and two men happening along, in order to satisfy their curiosity as to whether it was oil or whisky, drew a match across it, whereupon their curiosity was immediately satisfied, the jury was instructed, among other things, that they should consider whether, after the cars were thrown from the track, the railway company used such further care, diligence, and caution as was, under the circumstances, necessary to protect the oil from being lost or destroyed. *Lucisco Oil Co. v. Pennsylvania R. Co.* 2 Pittsb. 477.

—delay.

When a carrier is prevented by inevitable accident or by act of God from completing the transportation, he is bound, if possible, to transmit the goods promptly over another line. *Chicago, B. & Q. R. Co. v. Manning*, 23 Neb. 552, 37 N. W. 462.

Where it was customary to ship perishable goods by train to a junction point, and from there to destination by boat, and the water carrier understood his duty, in case of delay of the boat, to be either to forward such goods by some other conveyance without delay, or to take such care of them as to prevent injury by the delay, and after receiving dressed poultry for shipment the boat was delayed before starting two days by fog, and the officials neglected all attempts to preserve the poultry, either by transferring it to the cars as they had done upon previous occasions, or by placing it in a part of the boat the least likely to be affected by the heat of the boiler, and the poultry was injured, the carrier was held liable, although the receipting officer did not actually know the contents of the boxes, and although the carrier's attention was not

called to the danger. *Peck v. Weeks*, 34 Conn. 145.

But where a carrier of perishable goods is not responsible for carriage beyond its own line, only undertaking to forward the same as opportunity may afford, and the usual and contemplated method fails (e. g., by failure of the boat to run), if the carrier exercises due care and prudence in forwarding them by another route, it will not be liable for any loss on the ground of negligence in not giving notice of change of route to consignee, especially where such notice would not have avoided the loss. *Regan v. Grand Trunk R. Co.* 61 N. H. 579.

And where a train was delayed by the washing away of a bridge, and the railway company used all practicable despatch to transport the goods by wagon and boat to another line of railroad, and thence to deliver them to consignee, it was held that this was a resort to all the means which a prudent man would use to expedite the shipment, and was sufficient. *Lipford v. Charlotte & S. C. R. Co.* 7 Rich. L. 409.

A carrier is justified in selling perishable goods at once if the shipment is delayed by inevitable accident, and there is no other route by which they can be transported to destination in time to save them. *American Exp. Co. v. Smith*, 33 Ohio St. 511, 31 Am. Rep. 581.

As to liability of carrier for sale of perishable property when delayed in transportation, or for its destruction by strikes, see note to *Empire Transp. Co. v. Philadelphia & R. Coal & I. Co.* 35 L.R.A. 623.

—fire.

Where an express car containing a package of jewelry was overturned by a furious gale, and was almost immediately burned, and the jewelry was not rescued but lost, the court, although adhering to the rule that if, by proper diligence and attention, the goods could have been rescued, a failure to secure them would have fixed the liability upon the carrier, held that this case did not fall within the rule, for it was almost impossible for men to stand or walk in the gale, the air was full of flying material, the messenger escaped with difficulty, and any attempt to rescue the goods would have been unavailing. *Blythe v. Denver & R. G. R. Co.* 15 Colo. 333, 11 L.R.A. 615, 22 Am. St. Rep. 403, 25 Pac. 702.

In a case of goods burned in transit, the court instructed the jury as follows: "If you should come to the conclusion that the fire was communicated to the cotton without any fault of the servants of the defendant, then you will consider whether, after the fire ignited the cotton, they did all that reasonable men could have done to prevent its entire destruction. After the cotton caught fire, they were bound to exert themselves, as fair and prudent men should, to save as much of the cotton as possible. If they did not put forth the necessary efforts to save the burning cotton, then the defendant is

responsible for so much of the cotton as could have reasonably been saved." *Woodward v. Illinois C. R. Co.* 1 Biss. 407, Fed. Cas. No. 18,006.

The jury disagreeing, upon a retrial the court charged as follows: "If you shall find that the burning was not occasioned by the want of due care and diligence on the part of the defendant, then the next question is, Did the agents of the defendant make all proper and necessary efforts to save the property, and was any of it destroyed in consequence of the want of such efforts? If so, then the defendant ought to be held answerable for all that could have been so saved. . . . It was not, of course, necessary that they should incur actual danger to their persons by fire, but only that they should do all in their power to preserve the property, having reference to the rapidity of the fire and the means at their disposal." *Woodward v. Illinois C. R. Co.* 1 Biss. 449, Fed. Cas. No. 18,007.

—freezing.

When freight in transit is delayed by act of God, a carrier must use reasonable care to protect it from freezing or other injury, and he is not relieved by efforts of the owner to accomplish the same result. *White v. Minneapolis & R. River R. Co.* 111 Minn. 167, 126 N. W. 533.

But when a train is delayed in cold weather by a storm, and only a portion of the train can be taken on, in the absence of any stipulation in the bill of lading, the conductor is not bound to choose cars laden with perishable goods to be moved first, rather than others whose contents he does not know. He is bound to assume that it is important to each owner of freight that his property shall be carried through with all reasonable care and speed. *Swetland v. Boston & A. R. Corp.* 102 Mass. 276.

The duty of the carrier where an act of God has occurred or is threatened is treated in the note to *Armstrong v. Illinois C. R. Co.* 29 L.R.A. (N.S.) 671.

—goods becoming wet.

Where a vessel was stranded and sank in 7 or 8 feet of water within 10 or 15 rods of the beach, and about half a mile from a settlement, and the master, after consultation, left the ship in that position with the hatches down from December to March, and then opened the hatches only at midships, and did not remove the goods until May, although he might have done so, he was held liable for the damage to the goods from the long period of confinement and from heat and discoloration; prompt attention would have saved the property and protected the shipper from loss. *The Niagara v. Cordes*, 21 How. 7, 16 L. ed. 41.

Where goods on board a ship were wet by a flood, and thereafter held boxed up in their wet condition from Monday until Friday, although the owner requested that they be turned over to him, it was held that the carrier should either have opened and dried

them, or given the owner an opportunity to do so for himself. *Pearce v. The Thomas Newton*, 41 Fed. 106.

Where bales of cotton were thrown into the water by the sinking of a flatboat, and the crew immediately rescued them and placed them upon the bank of the river upon their edges and a little distance apart to dry, leaving them for several days, during which time it rained and saturated them, the court held that the carrier was negligent in leaving the cotton exposed to the weather and the almost daily rains common at that season of the year, but that he should have left a tarpaulin to cover the cotton during the rains, or provided other means of shelter. *Blocker v. Whittenburg*, 12 La. Ann. 410.

Where a flood partially submerged a carload of wheat, and it stood thus for ten days, it was held to be the duty of the carrier, if it could have been done by the use of reasonable care and diligence, after the flood had subsided, to save the wheat or as much as possible of it from ruin by removing it. *Baltimore & O. R. Co. v. Keedy*, 75 Md. 320, 23 Atl. 643.

Where a consignment of furs became wet through accident to the boat, it was held that the carrier was bound to use proper diligence and due care after the accident to preserve the goods from damage, and should have had them unpacked and dried. *Chouteaux v. Leech*, 18 Pa. 224, 57 Am. Dec. 602.

Where perishable goods are discharged from a ship upon the proper wharf in a rain, if the consignee, by reason of insufficient notice of their arrival, is unable to remove them in time to save them from damage, the carrier is charged with the duty of caring for them. *McAndrew v. Whitlock*, 52 N. Y. 40, 11 Am. Rep. 657.

A shipowner will be liable for the loss when, at an intermediate point in its course, its cargo is, without negligence on his part, saturated with sea water, and he does nothing to arrest the process of decomposition, and, refusing to deliver it to the owner at that place with a proportional abatement in the freight, carries it on to its appointed destination, and it is greatly deteriorated in value by reason of having remained so long in the saturated condition. *Notara v. Henderson*, L. R. 5 Q. B. 346.

But the court says: "It cannot be contended that, if a vessel happened to ship a heavy sea, and goods on board become wetted and liable to be damaged, but the ship still remained in a fit condition to prosecute the voyage, the master would be bound to put into the nearest port in order to tranship and dry the cargo. Nor would it be more reasonable to hold that, having been compelled to put into port to repair, he is bound, beyond doing all that he reasonably can do during his stay there to improve the condition of the damaged cargo and to mitigate the injury as far as possible, to wait till the cargo is fit to be carried on, though the voyage might be thereby unduly protracted." *Ibid.*

If, by inevitable accident, a cargo of cof-

fee becomes wet, it is the duty of the carrier as bailee to use all means in his power to dry it, even to break open the barrels containing it. This was a case of shipment on the Mississippi river, decided in 1821, *Bird v. Cromwell*, 1 Mo. 81, 13 Am. Dec. 470.

But in *The Lynx v. King*, 12 Mo. 272, 49 Am. Dec. 135, decided in 1848, where wheat shipped upon the Mississippi river became wet by reason of a storm, it was held that the shipowner was not bound to dry the wheat, the court saying that if all the means that skill, science, and labor can bestow are to be required in drying several thousand bushels of wheat, the business of the carrier is lost sight of.

In referring to the case of *Bird v. Cromwell*, supra, the court says that "to impose upon him the burthen of repairing the effects of accidents for which he is not responsible is requiring of him a task he has never undertaken, and for which we may presume he has no special skill. . . . Is the master of the boat to withdraw his crew from their ordinary employments in the prosecution of the voyage, and to employ them in this onerous and tedious business, totally foreign to his general duty, and utterly destructive, it may be, of the interests of the owners, insurers, and other shippers? . . . The facts of the case may have authorized a verdict against the boat or her owners, but the instruction approved by the court in its unqualified sense was certainly imposing an extraordinary duty upon common carriers. . . . The navigation of the Mississippi by keels and barges in 1820 may have been attended with different duties from those devolving on the owners and officers of steamboats at the present day. When it required from six weeks to two months to make the voyage from New Orleans to St. Louis, the officers and the crew of the barge thus slowly impelled by human power, and having no intermediate points of trade, may have been subjected by the custom of the trade to a greater variety of duties than would now be held to devolve upon the class of navigators which have succeeded them." *The Lynx v. King*, supra.

Where a carload of goods delayed by a washout was injured by an overflow of the river, and the carrier used all reasonable diligence consistent with the personal safety of its men, after information of the overflow, to procure a boat in order to reach the goods, and the engineer could not get up steam because the fire box of the locomotive was flooded, it was held that all was done that could be done to save the goods, and that the carrier was exonerated from all liability. *Smith v. Western R. Co.* 91 Ala. 455, 11 L.R.A. 619, 24 Am. St. Rep. 929, 8 So. 754.

In case of damage to good on shipboard by water, the shipper will not be permitted to claim damage because of the failure of the master of the vessel to remove the cargo and have it dried, unless he has alleged that failure in his pleadings. *Soule*

v. Rodocanachi, 1 Newberry, Adm. 504, Fed. Cas. No. 13,178.

—miscellaneous.

A common carrier transporting a cask of brandy, upon being informed that the cask is leaking, is under a duty to have it examined and the leak stopped. *Beck v. Evans*, 16 East, 244, 3 Campb. 267, 14 Revised Rep. 340.

Where a carrier by canal agreed to let the goods remain upon the boat ninety days after arrival at destination without extra charge, and upon their arrival the consignee refused to receive them, it was held that the carrier from then on held the goods only as bailee, and was required to use only ordinary care in their protection, and was not liable for injury to them without fault on his part. *Hathorn v. Ely*, 28 N. Y. 78.

If the owner refuses to accept goods because they have been interfered with by strangers while in the possession of the carrier, the latter is not liable in conversion because it has the box opened for the purpose of ascertaining the character and condition of the contents, and if necessary taking steps to preserve them. *Silverman v. St. Louis, I. M. & S. R. Co.* 51 La. Ann. 1785, 26 So. 447.

No responsibility to stir grain to keep it from heating attaches to a carrier until it takes possession of the grain, although the carrier delays taking possession for reasons of its own after ordered so to do. *Hamilton v. McPherson*, 28 N. Y. 72, 84 Am. Dec. 330.

H. C. Sh.

KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appt.,

v.

MYRTLE BREWER.

(147 Ky. 166, 143 S. W. 1014.)

Carrier — lunatic in car — injury to pregnant woman—liability.

A railroad company is not liable for in-

Note. — Liability of carrier for injury to pregnant woman by seeing lunatic on train.

An extended search discloses no case in addition to *LOUISVILLE & N. R. Co. v. BREWER*, in which the question stated in the title has been answered. The general principles applicable to such a state of facts are well settled, however, text writers and *redacteurs* generally agreeing that "it is the duty of the servants of the carrier to exercise great care and vigilance in preserving order and guarding passengers from violence or insult threatened by fellow passengers" (6 Cyc. 602), and that "whenever a carrier, through its agents or servants, knows or has opportunity to know of a threatened in-

jury to a pregnant woman from sight of a lunatic in the car who was acting strangely, where its employees had no knowledge of her condition, and there was nothing in the conduct of the lunatic to appraise a person of ordinary prudence that danger to other passengers was to be anticipated.

(February 27, 1912.)

APPEAL by defendant from a judgment of the Circuit Court for Muhlenberg County in plaintiff's favor in an action brought to recover damages for injuries sustained by plaintiff through fright because of the presence of a lunatic upon defendant's train upon which plaintiff was riding. Reversed.

The facts are stated in the opinion.

Mr. Benjamin D. Warfield, with Messrs. Browder & Browder, for appellant:

It was the duty of the carrier to accept the insane girl properly attended, for transportation.

4 Elliott, Railroads, § 1577; Hutchinson, Carr. 3d ed. § 983; Louisville & N. R. Co. v. McEwan, 17 Ky. L. Rep. 408, 31 S. W. 465.

No recovery can be had in any event for the alleged damage or injury to the unborn child.

4 Am. & Eng. Enc. Law, 719; Harper v. Archer, 4 Smedes & M. 108, 43 Am. Dec. 472; Thellusson v. Woodford, 4 Ves. Jr. 227, 4 Revised Rep. 205, 1 Eng. Rul. Cas. 498; Walker v. Great Northern R. Co. Ir. L. R. 28 C. L. 69.

Mr. R. Y. Thomas, Jr., for appellee.

Hobson, Ch. J., delivered the opinion of the court:

On May 24, 1908, Mrs. Myrtie Brewer, with five children, the oldest of whom was about ten years old, was a passenger on a train of the Louisville & Nashville Railroad Company, from Cleaton to Drakesboro. When she got off the train at Drakesboro she was white, nervous, and weak. She

jury, . . . and fails or neglects to take the proper precautions or to use proper means to prevent or mitigate such injury, the carrier is liable" (5 Am. & Eng. Enc. Law, 2d ed. 553), but that the carrier is not liable where it had no reason to apprehend that danger existed.

For a clear statement of the general reasoning upon which the carrier's liability is based in case of injury of one passenger by a fellow passenger, see the quotation in *LOUISVILLE & N. R. Co. v. BREWER*, from 2 Hutchinson on Carriers, § 980.

As to duty of carrier to accept insane persons as passengers, see note to *Connors v. Cunard S. S. Co.* 26 L.R.A. (N.S.) 171.

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went to bed on going home and remained in bed about two weeks. Ninety days afterwards she was confined, and continued to have weak spells after her confinement. She brought this suit against the railroad company for the injury to her health, which she charged was due to her being frightened by a lunatic on the train. On the trial of the case she recovered \$500. The railroad company appeals.

The distance from Cleaton to Drakesboro is 4 miles. The running time of the train between the two points is thirteen minutes. When Mrs. Brewer got on the train, a lunatic girl in charge of a lady attendant was sitting about the middle of the coach, facing the door at which Mrs. Brewer entered. Mrs. Brewer took a seat near the front of the coach, facing the lunatic, and rode backwards to Drakesboro; her children being about her. She makes this statement as to the lunatic: "She was talking and laughing, and when the train started she screamed and hallooed like she was in distress. She screamed and hallooed very loud. She would scream and say: 'Take him away. Don't let him to me.' And she would laugh and talk and whistle and then scream again." Another witness, who was introduced for the plaintiff, makes this statement as to the lunatic: "When I first saw her she was sitting by the window, singing and whistling, and then she seemed to be weeping or moaning for someone. It seems she thought someone was coming to her, and she hallooed to them to take him away." Another witness for plaintiff makes this statement as to the lunatic: "She was talking and whistling and kind of giggling, and then she would rail out and say she was George R. Garrett's daughter, or something to that effect. She was talking loud. She really didn't scream any during that time." The lunatic at no time left her seat. She was at all times in charge of her attendant, who was on the seat by her. She at no time was nearer Mrs. Brewer than when Mrs. Brewer took her seat in the car, probably about one fourth of the car away from her. She did not address Mrs. Brewer at any time, or make any effort to hurt her or anyone else. The lunatic was at no time dangerous, boisterous, or disorderly. Mrs. Brewer sat facing the girl, and the trouble that ensued with her seems to have been due to her being pregnant, and to the fact that thus the unnatural appearance and doings of the lunatic made a deep impression upon her mind, as often happens in the case of pregnant women. Mrs. Brewer made no complaint to the conductor or to any officer

of the train. None of them knew that Mrs. Brewer was pregnant, or that the lunatic was giving her any inconvenience.

In 2 Hutchinson on Carriers, § 980, discussing the liability of a carrier to a passenger on account of the conduct of other passengers on the cars, the learned author says: "The negligence for which the carrier is held liable is not the wrong of the fellow passenger or the stranger, but it is the negligent omission of the carrier's servants to prevent the wrong from being committed. In order that such omission may constitute negligence, there is involved the essential element that the carrier or his servants had knowledge, or with proper care could have had knowledge, that the wrong was imminent, and that he had such knowledge, or the opportunity to acquire it, sufficiently long in advance of the infliction of the wrong upon the passenger to have prevented it with the force at his command."

The rule thus stated has often been applied by the courts in cases where fellow passengers were obscene, drunk, disorderly, or of unsound mind; but we have found no case where the carrier has been held liable where the conduct of the passenger was not sufficient to apprise a person of ordinary prudence that danger was to be anticipated. And while peculiar care is due to persons who are sick or infirm, only the care required in the case of persons in ordinary health is demanded of the carrier, where he is not informed of the infirmity of the passenger, and has no reason to apprehend the danger to him. 6 Cyc. 598, 603; Missouri P. R. Co. v. Evans, 71 Tex. 361, 1 L.R.A. 476, 9 S. W. 325; Spohn v. Missouri P. R. Co. 87 Mo. 74; Tall v. Baltimore Steam Packet Co. 90 Md. 248, 47 L.R.A. 120, 44 Atl. 1007; Fritz v. Southern R. Co. 132 N. C. 829, 44 S. E. 613; Felton v. Chicago, R. I. & P. R. Co. 69 Iowa, 577, 29 N. W. 618; Franklin v. Atlanta & C. Air Line R. Co. 74 S. C. 332, 54 S. E. 578; Norris v. Southern R. Co. 84 S. C. 15, 65 S. E. 956. Our own opinions are to the same effect. In Illinois C. R. Co. v. Cruise, 123 Ky. 463, 8 L.R.A.(N.S.) 299, 96 S. W. 821, 13 Ann. Cas. 593, a passenger complained because she was not helped to leave the car at the station. It was held that, as she did not ask assistance, and the company had no notice of her infirmity, she could not recover; the steps and platform being so reasonably lighted that the ordinary traveler could alight from the train in safety. The same rule was laid down in Adams v. Louisville & N. R. Co. 134 Ky. 620, 135 Am. St. Rep.

425, 121 S. W. 419, 21 Ann. Cas. 321, where a passenger was injured by the fall of a valise from the rack overhead; it being held, however, in that case, that the facts were sufficient to apprise a person of ordinary prudence of the danger to the passenger.

A carrier cannot absolutely refuse transportation to insane persons. These people must be carried to the asylums, and they can only be carried on the trains. Justice to them as well as humanity requires that they should be admitted to the trains, unless their presence will endanger others, and, as has been well said, in the case of these unfortunates, who are at best involuntary passengers, and not responsible for their conduct, more allowance must be made than in the case of ordinary passengers. There was nothing in the conduct of this poor girl that would have justified the railroad company in refusing to admit her to the train, or that would have justified the railroad company in expelling her from the train at a station along its road, after she had been admitted to the train. The company had a right to require that she be in charge of an attendant, and it was its duty to see that she did not hurt anybody. But she was not a violent lunatic. There was no danger of physical hurt to the other passengers. It is said the child born afterwards to Mrs. Brewer acts like the lunatic, but the effect on Mrs. Brewer was simply an accident, due, perhaps, more than to any other cause, to the fact that she sat facing the lunatic, and so the lunatic's image became impressed upon her mind.

In *Owens v. Macon & B. R. Co.* 119 Ga. 230, 63 L.R.A. 946, 46 S. E. 87, the lunatic was dangerous and violent, and it was held that the company had sufficient reason for not taking him on the train. In *Meyer v. St. Louis, I. M. & S. R. Co.* 4 C. C. A. 221, 10 U. S. App. 677, 54 Fed. 116, the lunatic on the train killed a fellow passenger, but it was held that the company was not responsible, because it had no reason to apprehend danger from him until he suddenly became insane. We do not see that there is anything in either of these cases not in keeping with the general current of authority.

We therefore conclude that there was no negligence on the part of the defendant, and that the court should have sustained its motion for a peremptory instruction to the jury to find for it for the reasons stated. This conclusion makes it unnecessary for us to consider the other questions raised.

Judgment reversed, and cause remanded for further proceedings consistent herewith. 30 L.R.A. (N.S.)

MISSISSIPPI SUPREME COURT.

CITY OF PASS CHRISTIAN, Appt.,

v.

ERNEST FERNANDEZ, by Next Friend.

(— Miss. —, 56 So. 329.)

Negligence — infant.

1. A four-year-old child is incapable of contributory negligence which will prevent its recovery for injury to it by a vehicle while it is playing in the street.

Municipal corporation—removing trash — governmental function.

2. The driver of a city cart engaged in removing trash or dirt for the city is not engaged in a governmental duty which will relieve the municipality from liability for injuries inflicted by his negligence in managing the outfit.

(October 23, 1911.)

APPEAL by defendant from a judgment of the Circuit Court for Harrison County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servant. Affirmed.

The facts are stated in the opinion.

Messrs. Hardy & Hardy for appellant.

Messrs. McDonald & Marshall for appellee.

Mayes, Ch. J., delivered the opinion of the court:

Ernest Fernandez, a child four years old, while playfully chasing a hoop in the street of the city of Pass Christian, was run over by a city cart and had his leg broken. Through his next friend, he sued the city for damages, and recovered judgment for \$1,000, from which judgment the city prosecutes an appeal.

The facts show that, when the child was struck by the cart, the driver was conversing with two women, and had his head turned in a different direction from that in

Note. — Liability of municipality for injury by employee engaged in removing refuse.

This note is supplemental to the note to *Haley v. Boston*, 5 L.R.A. (N.S.) 1006.

As indicated in the earlier note, there is a conflict in the cases on this question, owing to the difference of opinion as to whether the removal of refuse by a city is a governmental function within the rule that a municipality is not liable for the negligence of its officers and servants while engaged in the performance of governmental duties.

The case of *PASS CHRISTIAN v. FERNANDEZ* is in accord with the opinions of the higher courts of New York, as set out in the earlier note, to the effect that the re-

which the child was approaching. The driver disputes this; but the verdict of the jury fixes the facts this way.

As appears above, the child was only four years of age, and therefore incapable of contributory negligence. The only real defense is that, at the time of the injury, the cart and driver were engaged in a governmental duty, and on account of this no liability attaches on the part of the city. The case of *Alexander v. Vicksburg*, 68 Miss. 564, 10 So. 62, is cited as conclusive of this contention. We shall show that the above case is not in point further on.

It may be true, as an abstract proposition of law, that damage occasioned by the city in the exercise of a purely governmental duty does not render the city liable; but it must be a governmental duty, and the idea that a driver of a city cart engaged in hauling trash and dirt for the city is engaged in a "governmental function," in any sense in which the word is used in the law, requires a stretch of the imagination that is beyond our power to make. It is a matter of no little difficulty to define what are and

what are not purely governmental duties of a city. To a very large extent, these questions can only be settled by the facts of each particular case, so variant are the conditions under which this question arises.

The public or governmental duties of a city are those given by the state to the city as a part of the state's sovereignty, to be exercised by the city for the benefit of the whole public, living both in and out of the corporate limits. All else is private or corporate duty, and for any negligence on the part of the agents or employees of the municipality in the discharge of any of the private duties of the city, the city is liable for all damage just as an individual would be. The use of the cart in hauling dirt or trash for the city is for no governmental purpose, as connected in any way with the sovereign duty of the state. The state does owe the duty to all its citizens of protecting the person from assault and the property from destruction, and all done by the city in furtherance of this duty of the state is done in a governmental capacity. But the hauling of dirt and trash is for the

removal of refuse is not a governmental duty of a municipality, and that the municipality is accordingly liable for injuries negligently inflicted by one of its employees engaged in such removal.

In the later case of *Silverman v. New York*, 114 N. Y. Supp. 59, the city does not seem to have contested liability upon the ground that the negligent workman was engaged in a governmental duty of the city, but on the ground that for other reasons he was not its servant; and it was merely held that where a city foreman in charge of the work of keeping one of the city parks in proper condition has selected the driver of a wagon employed in the removal of rubbish, has power to remove and discharge him from the work, and directs him in the work to be done, and as to how and in what manner it is to be done, the driver is a servant of the city, for whose negligence in driving his wagon over the foot of a person seated upon a public bench in the park, the city is bound to respond in damages, although the driver is in the general employ of a private individual who pays his wages and supplies the wagon, team, and driver to the city foreman, and is, in turn, paid for the use of the team and the driver's services by the city.

In *Young v. Metropolitan Street R. Co.* 126 Mo. App. 1, 103 S. W. 135, where, owing to the negligence of a municipal employee engaged in carting away piles of dirt and rubbish which had been gathered along a street, his cart and mule were struck by a street car and thrown against a pedestrian to his injury, the municipality was held liable for the injury, on the ground that it was not acting, through its employee, in a governmental capacity for the general public good, although the work in which he was 39 L.R.A. (N.S.)

engaged might incidentally be conducive to the public health, or might, in some remote degree, be referable to governmental regulation,—but that the servant was engaged only in removing piles of dirt which, if left remaining, would have rendered the municipality liable, if damage had been caused by them.

On the other hand, in *Louisville v. Carter*, 142 Ky. 443, 32 L.R.A. (N.S.) 637, 134 S. W. 468, the municipality was held not liable for an injury to a pedestrian caused by his being run over by a wagon used for the purpose of removing refuse from the streets, by reason of its being hitched to a sprinkling cart for removal from one part of the city to another, although there may have been a safer or better way of moving it,—as the wagon was employed in a use that was for the general public good, and the function which the municipality exercised in its use was a governmental function, and the municipality was not required to use the safest or best or any particular means in conducting its governmental business.

And in *Johnson v. Somerville*, 195 Mass. 370, 10 L.R.A. (N.S.) 715, 81 N. E. 268, it was held that a municipality is not liable for the flooding of a cellar caused by the dumping of ashes into a water course on the next lot, by one of its employees engaged in removing ashes from private residences, as he was not, in legal contemplation, a servant of the municipality, but was in the performance of a public service from which the municipality derived no private benefit.

As to the liability of a municipality for injuries from its use of a dumping ground, see note to *Denver v. Davis*, 6 L.R.A. (N.S.) 1013.

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use and advantage of the city in its corporate capacity, is a corporate duty, and the city is liable for all damage done by any officer or agent so employed.

The case on trial is different from the case of *Alexander v. Vicksburg*, supra. In the *Alexander Case* the injury was inflicted by the fire department on its way to extinguish a fire in the city of Vicksburg. The fire company was under the control and management of the city, and this court held that in such case the city was not liable. It might be well argued that, when a city undertakes to protect the property of a citizen from destruction by fire, it is acting in a governmental capacity and for the universal good, even though the state does not so undertake to do, and for this reason should be protected from liability in damages while so engaged; but this argument cannot be made as to a trash or garbage cart, used in the furtherance of purely corporate purposes.

Affirmed.

NORTH CAROLINA SUPREME COURT.

J. W. CARMICHAEL, Appt.,
v.

SOUTHERN BELL TELEPHONE AND
TELEGRAPH COMPANY.

(157 N. C. 21, 72 S. E. 619.)

Damages — wrongful removal of telephone.

1. The damages recoverable by a subscriber whose telephone is wrongfully removed after he has paid the rental are not limited, even in an action for breach of contract, to the amount of rent wrongfully exacted, but may include compensation for the inconvenience to which he is put by breach of the contract.

Same — tort — items.

2. The damages to be awarded for wrong-

Note. — Measure of damages for removal of telephone.

The measure of damages for wrongfully disconnecting a telephone because of mistake as to payment of rent is the amount which will compensate the patron for the injuries caused by the breach of contract. *Cumberland Teleph. & Telegr. Co. v. Hendon*, 114 Ky. 501, 60 L.R.A. 849, 102 Am. St. Rep. 290, 71 S. W. 435.

The damages to be awarded for wrongful removal and refusal to reinstall a subscriber's telephone may include compensation for the pecuniary loss, and also for inconvenience and annoyance occasioned by being without the use of the telephone, since the damage sustained by the loss of a telephone in its very nature is largely composed of

ful removal by a telephone company of a subscriber's phone may include compensation for the necessary inconvenience and humiliation fairly attributable to the wrong done, and an allowance may be made for anxiety increased by loss of telephone communication with a relative sick in the hospital, of which fact the telephone company has notice.

Same — punitive — wilfulness — disregard of rights.

3. The malicious or wilful removal of a subscriber's telephone in wanton or reckless disregard of his rights may carry punitive damages.

Evidence — wilfulness — explanation of agent.

4. Upon the question of wilfulness in removing a telephone for nonpayment of rent, although the subscriber claimed that he had paid it and had a receipt, evidence is to be considered both that the phone was removed notwithstanding this claim, and that he had been in arrears before, and that the collecting agent had informed the company that only part of the amount due had been paid.

(November 15, 1911.)

APPEAL by plaintiff from a judgment of the Superior Court for New Hanover County granting him insufficient relief in an action brought to recover damages for wrongfully removing a telephone from premises. Reversed.

Statement by Hoke, J.:

Civil action to recover damages for wrongfully removing a telephone from plaintiff's premises, tried before his Honor, R. B. Peebles, judge, and a jury, at April term, 1911, of the superior court of New Hanover county. There was evidence tending to show that the telephone charges due from plaintiff were at the rate of \$4.50 per quarter, payable in advance, beginning January 1st. The plaintiff, on the 3d of June, 1908, paid defendant the \$4.50 for the

inconvenience and annoyance. *Cumberland Telegr. & Teleph. Co. v. Hobart*, 89 Miss. 252, 119 Am. St. Rep. 702, 42 So. 349.

And a recovery may be had for prospective profits. *Owensboro Harrison Teleph. Co. v. Wisdom*, 23 Ky. L. Rep. 97, 62 S. W. 529.

Accordingly, the wrongful removal of a telephone after several months' service, when it had been installed under a contract to furnish telephone service for a period of three years, will entitle the patron to recover prospective profits for the whole contract period; a verdict of \$300 was said to be warranted by the evidence, where it appeared plaintiff was engaged in the messenger business which was shown to be a growing business. *Ibid*.

In the absence of proof of special loss be-

quarter beginning April 1st, and took a receipt for same. That in the latter part of June plaintiff was notified there was a balance against him of \$3 for said quarter, and, unless same was paid, the telephone would be removed. Plaintiff protested, and informed the agents of defendant company that he had paid the dues, and could produce a receipt. Plaintiff failed to find the receipt readily, as he had given it to his wife, who was temporarily from home in daily attendance on her father, who had been operated upon, and was in the hospital; and thereupon, in afternoon of June 27, 1908, defendant company, while plaintiff was absent, disconnected the phone, and deprived plaintiff and his family of its use from Saturday night until Monday morning, June 29th. That on Monday morning, June 29th, plaintiff went to the offices of the company, paid the \$3 claimed under protest, and the service was thereupon restored. That in July following the plaintiff found the receipt for the \$4.50, the entire price for the quarter, and on failure to adjust matters action was instituted. On the question of damages, plaintiff testified, among other things, that the telephone was used for the purpose of calling up physicians, hospitals, druggists, doing the marketing, grocery business, and other general household uses, and proposed further to show that at this particular time, plaintiff suffered special inconvenience and annoyance by reason of the fact that his father-

in-law had been operated on, and was then at the hospital in a dangerous condition, and plaintiff was unable to communicate with the hospital concerning him, or with his family, which was then at the beach some distance away. There was evidence from which knowledge of these special conditions on the part of the company might be inferred. The proposed evidence, was excluded, and plaintiff excepted. There was testimony on the part of defendant to the effect that plaintiff was not prompt in payment of his telephone dues, and that on two or three occasions before this it had been necessary to disconnect his telephone for nonpayment of dues. That while plaintiff produced a receipt for the \$4.50, the dues for the quarter ending June 30, 1908, as a matter of fact, he had only paid \$1.50, and it was so reported to the company by the collecting agent. That the receipt for \$4.50 was signed by mistake to a printed form, in which the amount was so stated; the agent failing to change this to \$1.50, the amount actually paid; and that the books of the company showed the amount due to be \$3, and that in fact such amount was due for said quarter. That defendant had no malicious or improper motive in disconnecting the telephone, or in collecting the \$3, but acted on the honest belief it was enforcing its rights in the premises.

His Honor ruled that plaintiff could not in any event recover damages in excess of \$3, the amount of overcharge as claimed by

cause of the disconnection, the compensatory damages to be awarded are the amount paid for the service for the time during which it was refused. *Cumberland Teleph. & Teleg. Co. v. Hendon*, supra.

It has been held that it is possible for a finding of 30 cents to include both nominal and general damages for the wrongful removal of a telephone, where no special damage is shown; it appearing that the order for removal was due to a misunderstanding that plaintiff desired his telephone removed; and that he did not discover its absence until the next morning, when it was immediately reinstalled. *Jenkins v. Southern Bell Teleph. & Teleg. Co.* 7 Ga. App. 484, 67 S. E. 124.

Removing the telephone from the plaintiff's residence because of his refusal to pay the full rental on the claim of poor service, and requiring him to go to the central office and pay tolls in advance for long-distance service, do not subject the company to liability for exemplary damages, in the absence of evidence that it acted from wanton, oppressive, and malicious motives. *Cumberland Teleph. & Teleg. Co. v. Baker*, 85 Miss. 486, 37 So. 1012.

That a telephone company has not the means to supply service to one applying for it may be shown in mitigation of damages for refusal to comply with its duty in that

regard, but not in justification thereof. *Gwynn v. Citizens' Teleph. Co.* 69 S. C. 434, 67 L.R.A. 111, 104 Am. St. Rep. 819, 48 S. E. 460.

So belief in the existence of a legal right to refuse telephone service to one applying for it, although erroneous, and refusal to furnish service for the purpose of protecting the rights of the telephone company, will prevent the imposition of punitive damages for such act. *Ibid.*

Right to refuse telephone service to coerce payment of bill, see note to *Danaher v. Southwestern Teleph. & Teleg. Co.* 30 L.R.A.(N.S.) 1027.

As to the right of withdrawing telephone service because of the abuse of the privilege by subscribers, see note to *Huffman v. Marcy Mut. Teleph. Co.* 23 L.R.A.(N.S.) 1010.

On the liability of telephone company for failure to make connections for subscriber, see notes to *Lebanon, L. & L. Teleph. Co. v. Lanham Lumber Co.* 21 L.R.A.(N.S.) 115, and *Volquardsen v. Iowa Teleph. Co.* 28 L.R.A.(N.S.) 554.

Right of addressee to recover damages for failure to summon him to receive a long-distance telephone message, see note to *McLeod v. Pacific States Teleph. & Teleg. Co.* 15 L.R.A.(N.S.) 810. A. L. R.

plaintiff, and under such ruling the following verdict was rendered:

"(1) Did the defendant unlawfully cut out plaintiff's telephone, as alleged in the complaint? Answer. Yes.

"(2) If so, what damage is plaintiff entitled to recover therefor? Answer. Three dollars, and interest to date from June 29, 1908."

Judgment on the verdict for \$3, with interest, and plaintiff excepted and appealed, assigning errors.

Messrs. Rountree & Carr, for appellant:

Plaintiff is entitled to recover such reasonable sum as the jury may think just and fair as compensation for the inconvenience, annoyance, and humiliation of being without a telephone.

Williams v. Carolina & W. R. Co. 144 N. C. 498, 12 L.R.A.(N.S.) 191, 57 S. E. 216, 12 A. & E. Ann. Cas. 1000; Cumberland Teleg. & Teleph. Co. v. Hobart, 89 Miss. 252, 119 Am. St. Rep. 702, 42 So. 349; The Mediana [1900] A. C. 113, 69 L. J. Q. B. N. S. 35, 48 Week. Rep. 398, 82 L. T. N. S. 95, 16 Times L. R. 194, 9 Asp. Mar. L. Cas. 41; Harvey v. Atlantic Coast Line R. Co. 153 N. C. 567, 69 S. E. 627; Ives v. Humphreys, 1 E. D. Smith, 201; Hewlett v. George, 68 Miss. 703, 13 L.R.A. 684, 9 So. 885; Cumberland Teleg. & Teleph. Co. v. Hobart, 89 Miss. 252, 119 Am. St. Rep. 702, 42 So. 349.

Plaintiff was entitled to punitive damages.

Jackson v. American Teleph. & Teleg. Co. 139 N. C. 356, 70 L.R.A. 738, 51 S. E. 1015; Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 106, 107, 37 L. ed. 97, 101, 13 Sup. Ct. Rep. 261; Milwaukee & St. P. R. Co. v. Arms, 91 U. S. 489, 23 L. ed. 374; Hansley v. Janesville & W. R. Co. 117 N. C. 565, 32 L.R.A. 551, 53 Am. St. Rep. 600, 23 S. E. 443; Barry v. Edmunds, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501; Emblen v. Myers, 6 Hurlst. & N. 54, 30 L. J. Exch. N. S. 71, 2 L. T. N. S. 774, 8 Week. Rep. 665, 8 Eng. Rul. Cas. 304; Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; Remington v. Kirby, 120 N. C. 320, 26 S. E. 917; 1 Sedgw. Damages, 53; 13 Cyc. 106; Purcell v. Richmond & D. R. Co. 108 N. C. 414, 12 L.R.A. 113, 12 S. E. 954, 956; Stewart v. Cary Lumber Co. 146 N. C. 69, 59 S. E. 545; Kentucky Heating Co. v. Hood, 133 Ky. 383, 22 L.R.A.(N.S.) 588, 134 Am. St. Rep. 457, 118 S. W. 337; Owen v. Western U. Teleg. Co. — S. C. —, 71 S. E. 782; 3 Sutherland, Damages, §§ 935, 937; Hansley v. Janesville & W. R. Co. 117 N. C. 569, 32 L.R.A. 551, 53 Am. St. Rep. 600, 23 S. 39 L.R.A.(N.S.)

E. 443; Brown v. Asheville Electric Co. 138 N. C. 533, 69 L.R.A. 631, 107 Am. St. Rep. 554, 51 S. E. 62; Duncan v. Stalcup, 18 N. C. (1 Dev. & B. L.) 440.

Messrs. H. E. Palmer, B. J. Clay, and J. D. Bellamy for appellee.

Hoke, J., delivered the opinion of the court:

An impression not infrequently exists, and is sometimes acted on, that in the larger number of ordinary causes compensatory damages should be confined to actual pecuniary loss, and that any recovery above actual loss in money or time, having definite pecuniary value, partakes of the nature of punitive damages. Speaking to this question in a concurring opinion in Ammons v. Southern R. Co. 140 N. C. 199, 52 S. E. 733, it was said: "The court below and the parties litigant seem to have considered that the seventh issue on actual damages was confined to pecuniary loss, and that any recovery over and above this must be had, if at all, on the eighth issue, above set out. But this is not at all true. 'Actual,' in the sense of compensatory damages, is not restricted necessarily to the actual loss in time or money. The claimant may be confined to this, if the jury so determine; but more than this is contained in the term, and more than this is covered by the issue. As was said by Clark, Ch. J., in Osborn v. Leach, 135 N. C. 628, 66 L.R.A. 648, 47 S. E. 811: Where the facts and nature of the action so warrant, 'actual damages include pecuniary loss, physical pain, and mental suffering,' etc. And again: 'Compensatory damages include all other damages than punitive, thus embracing not only special damage as direct pecuniary loss, but injury to feelings, mental anguish,' etc.,—citing 18 Am. & Eng. Enc. Law, 2d ed. 1082; Hale, Damages, pp. 99, 106. And this last author says: 'It may be stated as a general rule, in actions of tort, that whenever a wrong is committed which will support an action to recover some damages, compensation for mental suffering may also be recovered, if such suffering follows as a natural and proximate result.' And so here, where a passenger is wrongfully ejected from a railroad train, the demand may be considered as one in tort, and, on an issue as to actual or compensatory damages, he may recover what the jury may decide to be a fair and just compensation for the injury, including his actual loss in time or money, physical inconvenience, and mental suffering, or humiliation endured, and which could be considered as a reasonable and probable result of the wrong done. McNeill v. Durham & C. R. Co. 135 N. C. 683, 67 L.R.A. 230, 47 S. E. 765; Head v.

Georgia P. R. Co. 79 Ga. 358, 11 Am. St. Rep. 434, 7 S. E. 217; Hale, Damages, supra, § 261. As said by Bleckley, J., in Head's Case: 'Wounding a man's feelings is as much actual damages as breaking his limb. The difference is that one is internal and the other external; one mental, the other physical. At common law, compensatory damages include, upon principle, and, I think, upon authority, salve for wounded feelings, and our Code had no purpose to deny such damages where the common law allowed them.' And on the subject of punitive damages it was further said: Exemplary or punitive damages are not given with a view to compensation, but are under certain circumstances awarded in addition to compensation, as a punishment to defendant, and as a warning to other wrongdoers. They are not allowed as a matter of course, but only where there are some features of aggravation, as when the wrong is done wilfully and maliciously, or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of plaintiff's rights." In the view of compensatory damages suggested with approval in this citation, there was error in the ruling which limited plaintiff's recovery, in any aspect of the case, to the \$3, the amount of money wrongfully collected by defendant, whether the action should be considered as one for a breach of contract or for a tort.

It is true that recovery for breach of contract is confined to such damages as were in the reasonable contemplation of the parties at the time same was made, and which are susceptible of ascertainment with a reasonable degree of certainty, and that ordinarily this damage is limited to pecuniary recompense for the loss sustained by the injured party; but this will be found to have its origin and basis in the fact that the vast majority of contracts concern themselves with pecuniary values, and have the pecuniary standard for adjustment alone in contemplation; but, where an agreement clearly has reference to a different standard, damages in case of breach must be awarded according to the standard which the parties have adopted. This is the principle upon which recoveries for mental anguish in a certain class of telegraph cases, and when treated simply as actions for breach of contract, are properly made to rest, as shown in the well-considered opinion by our present chief justice, in *Young v. Western U. Teleg. Co.* 107 N. C. 370, 9 L.R.A. 669, 22 Am. St. Rep. 883, 11 S. E. 1044, a decision since followed and applied by the court in numerous cases; and so in contracts for telephone service for household purposes, pecuniary values are not ordinarily in con-

templation, and on breach, even when the action is simply for breach of contract, a different standard of adjustment must necessarily or may properly be adopted, to wit, a fair compensation for the loss and for the inconvenience and annoyance in being wrongfully deprived of the service stipulated for. *Cumberland Teleg. & Teleph. Co. v. Hobart*, 89 Miss. 252, 119 Am. St. Rep. 702, 42 So. 349; Hale, Damages, p. 102.

On the allegations of the complaint, however, and the facts in evidence, the plaintiff is not confined to a recovery for breach of contract. It appears that defendant is a public service corporation, operating under a public franchise, and for breach of duty in rendering the service it has undertaken to perform, one having contract relations with such company, and suffering special injury by reason of such breach, is entitled to sue in tort, and, in case of recovery, have his damages admeasured as in that character of action. This was held in *Virginia-Carolina Peanut Co. v. Atlantic Coast Line R. Co.* 155 N. C. 148, 71 S. E. 71, citing several other decisions to like effect, and see in that case more especially the concurring opinion of Associate Justice Allen, as to the obligation of diligence imposed by the law upon corporations of this kind, and the character of action available in case of breach causing special damages to persons having contract relations with such companies. Plaintiff, then, having a right to sue in tort, if his cause of action is established, is entitled to recover a compensation for the annoyance and inconvenience and humiliation fairly attributable to the wrong done, and under facts as they existed at the time the same was committed. *Virginia-Carolina Peanut Co. v. Atlantic Coast Line R. Co.* supra.

And in this view the annoyance and inconvenience naturally arising from the fact that plaintiff's father-in-law was at the time in the hospital, and supposed to be in a dangerous condition, if this circumstance was known to the company or its managing officers,—not, of course, the suffering and anxiety caused by the father-in-law's placing and condition, but the annoyance and anxiety occasioned by the loss of the telephone service at such time,—in considering any damages imputable to this source, the obligation on plaintiff to do what he could reasonably do to lessen his anxiety is also a proper subject for consideration. *Bowen v. King*, 146 N. C. 385, 59 S. E. 1044; *Pittsburg, J. E. & E. R. Co. v. Wakefield Hardware Co.* 143 N. C. 54, 55 S. E. 422.

On the question of punitive or exemplary damages, recurring again to the doctrine as stated in the *Ammons Case*, supra, if the jury should find that the wrong complained

of was committed, and that the same was done maliciously, or under such circumstance of wilfulness on part of defendant as to show a wanton or reckless disregard of plaintiff's rights, they may, in addition to compensatory damages, award such additional damages by way of punishment as they may deem right and proper. In this aspect of the matter, the principles and authorities applicable are more fully discussed and referred to in the case of *Williams v. Carolina & W. R. Co.* 144 N. C. 502, 12 L.R.A. (N.S.) 191, 57 S. E. 216, 12 A. & E. Ann. Cas. 1000.

On this question of allowing exemplary damages, as well as the amount, in case the jury should determine to award the same, the fact that plaintiff informed defendant of the payment of the amount due, and that defendant still insisted there was no such payment, and further the fact that plaintiff had several times before made default in payment of his dues, and that this collecting agent had informed the managing officers of the company there was a balance still due, and that the books of the company showed this to be correct, are circumstances relevant to the inquiry.

For the error indicated, plaintiff is entitled to a new trial of this cause, and it is so ordered.

OKLAHOMA SUPREME COURT.

FIRST NATIONAL BANK OF DURANT,
Plff. in Err.,
v.
SCHOOL DISTRICT NUMBER 4, BRYAN
COUNTY.

(— Okla. —, 120 Pac. 614.)

Check — liability on.

1. Checks are but inland bills of exchange, and subject to all the rules applicable to instruments of that character, and impose no obligation upon the drawees until accepted; and, until presented and paid, are revocable by the drawer, who has the legal control of the money to his credit until actual acceptance or payment of the checks.

Headnotes by KANE, J.

Note. — Action by drawee essential to terminate drawer's right to stop payment of check.

This note, assuming the general rule as to the right of the drawer, as against the drawee bank, to stop payment of a check at any time before the bank has paid the check or done anything to commit itself in 39 L.R.A. (N.S.)

Draft — assignment of fund — acceptance.

2. A draft drawn in the ordinary form does not constitute an equitable assignment *pro tanto* of funds in the hands of the drawee to the credit of the drawer before such draft has been accepted or presented for payment.

(January 9, 1912.)

ERROR to the County Court for Bryan County to review a judgment in plaintiff's favor in an action brought to recover a deposit made by plaintiff in the defendant bank. Affirmed.

The facts are stated in the opinion.

Messrs. Utterback & Hayes for plaintiff in error.

Messrs. J. T. McIntosh and C. B. Cochran, for defendant in error:

No acceptance by the bank of said check or order is shown.

Auerbach v. Princhett, 58 Ala. 451; Moeser v. Schneider, 158 Pa. 412, 27 Atl. 1088; Pfaff v. Cummings, 67 Mich. 143, 34 N. W. 281; Shutt Improv. Co. v. Erwin, 66 Kan. 261, 71 Pac. 521; Lynch v. First Nat. Bank, 107 N. Y. 179, 1 Am. St. Rep. 803, 13 N. E. 775; Hall v. Flanders, 83 Me. 243, 22 Atl. 158; Ætna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314; St. Louis Southwestern R. Co. v. James, 78 Ark. 490, 95 S. W. 804, 8 Ann. Cas. 611; Matteson v. Moulson, 11 Hun, 268, 79 N. Y. 627; Dickinson v. Marsh, 57 Mo. App. 566; Sands v. Matthews, 27 Ala. 401; Dunavan v. Flynn, 118 Mass. 537; McEowen v. Scott, 49 Vt. 376; Overman v. Hoboken City Bank, 31 N. J. L. 564; Colorado Nat. Bank v. Boettcher, 5 Colo. 190, 40 Am. Rep. 142, 21 Am. & Eng. Enc. Law, 2d ed. 220; Rousch v. Duff, 35 Mo. 312; Hall v. Steel, 68 Ill. 231; Holbrook v. Payne, 141 Mass. 383, 21 Am. St. Rep. 456, 24 N. E. 210; McPherson v. Walton, 42 N. J. Eq. 282, 11 Atl. 21; Short v. Blount, 99 N. C. 49, 5 S. E. 190; Guthrie Nat. Bank v. Gill, 6 Okla. 560, 54 Pac. 434; Koch v. Howell, 6 Watts & S. 350; Pickle v. Muse (Pickle v. People's Nat. Bank) 88 Tenn. 380, 7 L.R.A. 93, 17 Am. St. Rep. 900, 12 S. W. 919; Bank of Rutland v. Woodruff, 34 Vt. 89; Hough v. Loring, 24 Pick. 254; Briggs v. Sizer, 30 N. Y. 647.

Checks are but inland bills of exchange

any way to its payment (see note to *Canterbury v. Bank of Sparta*, 30 L.R.A. 845), considers only the question as to what action by the drawee, other than actual payment or certification of the check, will terminate the drawer's right, as against the drawee, to stop payment thereof. As to the right of the drawer to stop payment of a certified check, see note to *Blake v. Hamil-*

and subject to all the rules applicable to instruments of that character, and impose no obligation upon the drawees until accepted; and, until presented and paid, are revocable by the drawer, who has the legal control of the money to his credit until actual acceptance or payment of the checks.

Etna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314; *National Bank v. Millard*, 10 Wall. 156, 157, 19 L. ed. 899, 900; *First Nat. Bank v. Whitman*, 94 U. S. 344, 24 L. ed. 230; *Bull v. First Nat. Bank*, 123 U. S. 111, 31 L. ed. 100, 8 Sup. Ct. Rep. 62; *Pullen v. Placer County Bank*, 138 Cal. 169, 94 Am. St. Rep. 19, 66 Pac. 740, 71 Pac. 84; *Florence Min. Co. v. Brown*, 124 U. S. 385, 31 L. ed. 424, 8 Sup. Ct. Rep. 531; *Colorado Nat. Bank v. Boettcher*, 4 Colo. 185, 40 Am. Rep. 142; *Harrison v. Wright*, 100 Ind. 515, 58 Am. Rep. 805; *Carr v. National Secur. Bank*, 107 Mass. 45, 9 Am. Rep. 6; *Van Buskirk v. State Bank*, 35 Colo. 142, 117 Am. St. Rep. 182, 83 Pac. 778; *Cincinnati, H. & D. R. Co. v. Metropolitan Nat. Bank*, 54 Ohio St. 60, 31 L.R.A. 653, 56 Am. St. Rep. 700, 42 N. E. 700; *Atty. Gen. v. Continental-L. Ins. Co.* 71 N. Y. 325, 27 Am. Rep. 55; *Saylor v. Bushong*, 100 Pa. 23, 45 Am. Rep. 353; *Lunt v. Bank of North America*, 49 Barb. 221; *Chapman v. White*, 6 N. Y. 412, 57 Am. Dec. 464; *Duncan v. Berlin*, 60 N. Y. 151; *Byles, Bills* p. 61, note 1; 2 *Parsons, Bills & Notes*, p. 61, note 1; *Bush v. Foote*, 58 Miss. 5, 38

Am. Rep. 310; *First Nat. Bank v. Shoemaker*, 117 Pa. 94, 2 Am. St. Rep. 649, 11 Atl. 304; *Creveling v. Bloomsbury Nat. Bank*, 46 N. J. L. 255, 50 Am. Rep. 417; *Grammel v. Carmer*, 55 Mich. 201, 54 Am. Rep. 363, 21 N. W. 418; *Pease v. State Nat. Bank*, 114 Tenn. 693, 88 S. W. 172; *Kahn v. Walton*, 46 Ohio St. 205, 20 N. E. 203; *Fourth Street Nat. Bank v. Yardley*, 165 U. S. 634, 41 L. ed. 855, 17 Sup. Ct. Rep. 439; *Schneider v. Irving Bank*, 1 Daly, 501; *O'Connor v. Mechanics' Bank*, 124 N. Y. 324, 26 N. E. 816; *Randolph v. Allen*, 19 C. C. A. 353, 41 U. S. App. 117, 73 Fed. 42; *State ex rel. St. Amand v. Bank of Commerce*, 49 La. Ann. 1078, 22 So. 207; *House v. Kountze Bros.* 17 Tex. Civ. App. 402, 43 S. W. 561; *Sunderlin v. Macosta County Sav. Bank*, 116 Mich. 281, 74 N. W. 478; *Chicago Heights Lumber Co. v. Miller*, 219 Ill. 79, 109 Am. St. Rep. 314, 76 N. E. 52; *Guthrie Nat. Bank v. Gill*, 6 Okla. 560, 54 Pac. 434; *National Bank v. Millard*, 10 Wall. 156, 157, 19 L. ed. 899, 900.

Kane, J., delivered the opinion of the court:

This was an action commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, to recover a deposit made by the plaintiff in the defendant, a national bank. After the evidence was in, the court instructed the jury to return a verdict for the plaintiff,

ton Dime Sav. Bank Co. 20 L.R.A.(N.S.) 290.

Where a check, having been presented by a bona fide holder, through the clearing house, where he has received credit upon it, is received in due course by the drawee bank, and the latter "checks" it from the clearing-house file, cancels it as a paid check, and charges it to the account of the drawer, such acts constitute payment and terminate the drawer's right subsequently to recall the check by notifying the bank not to pay it. *Albers v. Commercial Bank*, 85 Mo. 173, 55 Am. Rep. 355, affirming 9 Mo. App. 59.

But under a clearing-house rule giving banks the right to return "checks not good" to the bank depositing them, before 1 o'clock P. M. of the day they are received from the clearing house, where a drawee bank, merely for its own convenience and to expedite the transaction of its business, immediately places upon a canceling file a check received from the clearing house, and then enters the check in the journal, but does not carry it forward to the ledger, such acts are, at most, only a conditional acceptance, subject to the right of the bank to revoke it for cause and return the check at any time before 1 o'clock; and the drawer of the check may, as against the drawee, stop payment of the check at any time while the

drawee may thus return it. *German Nat. Bank v. Farmers' Deposit Nat. Bank*, 118 Pa. 294, 12 Atl. 303.

And the drawee's mere affirmative reply to a telegram from the payee of certain checks, inquiring if the drawer's checks for the amount of those drawn to him are good, does not terminate the drawer's right to stop payment of the checks held by the inquiring payee. *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 203.

The decision in *FIRST NAT. BANK v. SCHOOL DIST. No. 4*, it will be noted, turns upon the fact that the drawer had no funds on deposit with the drawee, at the time the check was presented to the latter by the payee and the provision of the statute that an acceptance of a bill must be made in writing. If the drawer of the check had had on deposit with the drawee, at the time sufficient funds to pay the check, it would seem that the acts of the vice president of the drawee bank in retaining the check when presented by the payee, and saying to the latter that the bank would give him credit for the amount of the check, against which he might draw at pleasure, might have been deemed a payment of the check, which would have terminated the drawer's right to stop payment, although no credit was then given to the payee in writing. In the absence of the statute requiring that

upon which judgment was duly entered, to reverse which this proceeding in error was commenced. For convenience, the plaintiff below will be called the school district and the defendant below the bank.

It seems that on the 8th day of September, 1908, the school district gave to one Bartsch a check or order on the bank for the sum of \$250; that the next morning E. T. Lawrence, treasurer of the school district and acting therefor, asked the vice president of the bank if the check or order had been paid, and upon the vice president answering that he had seen the check or order and the same had not been paid, Lawrence told the vice president not to pay the same, and the vice president said he would not; on the 13th day of October, 1908, the school district deposited at said bank the sum of \$1,000, the price received for certain school district bonds; on the 8th day of September, before payment of the check or order was countermanded, Bartsch took the same to the vice president of the bank, who retained the same, and said to said Bartsch the bank would give him credit for said amount against which he might draw at pleasure; that said order was not accepted in writing by said bank, but was put in the note case with other notes of the bank, and kept there until it was returned to the school district, with other vouchers, when its account was closed. Upon said account being closed, it appeared that on the 11th day of September, 1908,

said bank paid Bartsch on his check or order the sum of \$150, and on October 2, 1908, \$100, making a total of \$250 paid to said Bartsch by virtue of his arrangement with the vice president of the bank, after the payment of the check or order of the school district had been countermanded. The peremptory instruction was given upon the theory that, said check or order not having been accepted in writing by the bank, plaintiff was entitled to countermand its payment, and thereafter the bank was not authorized to pay the same. The judgment of the court below is correct.

"Checks are but inland bills of exchange, and subject to all the rules applicable to instruments of that character, and impose no obligation upon the drawees until accepted, and until presented and paid, are revocable by the drawer, who has the legal control of the moneys to his credit until actual acceptance or payment of the checks, and this upon the principle that the contract and obligation of the banker is to and with the depositor, and not the holders of his checks." *Aetna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314. Section 3666, Wilson's Statutes (§ 4700, Compiled Laws of Oklahoma 1909), provides: "An acceptance of a bill must be made in writing, by the drawee, or by an acceptor for honor; and may be made by the acceptor writing his name across the face of the bill with or without other words." Section 3668, Wilson's Statutes (§ 4702, Compiled

an acceptance of a bill must be made in writing, it would also seem that such acts of the bank officer, although the drawer had no funds in the bank at the time, might have been deemed an "acceptance" which would likewise have terminated the drawer's right to stop payment. And although the drawer had no funds on deposit with the drawee at the time, if the bank had actually given the payee credit for the amount of the check, in writing, either by a pass-book entry, or on the books of the bank, or both, it would seem that this would have constituted an "acceptance written . . . upon a separate paper," within the meaning of the statute, which would also have terminated the right to stop payment.

In jurisdictions where the holder of an unaccepted check is deemed to have a right of action thereon against the drawee, provided the latter has on hand sufficient funds of the drawer to pay it, on the ground that the check constitutes an assignment *pro tanto* of the drawer's deposit with the drawee, the drawer has no right to stop payment after his check has passed to the hands of a bona fide holder, who is either the payee holding for value received by the drawer or a bona fide indorsee; and no action by the drawee is necessary to fix the rights of a bona fide holder of the check as against the drawer's power to stop payment. 29 L.R.A. (N.S.)

Union Nat. Bank v. Oceana County Bank, 80 Ill. 212, 22 Am. Rep. 185; *First Nat. Bank v. Keith*, 183 Ill. 475, 56 N. E. 179, affirming 84 Ill. App. 103; *Loan & Sav. Bank v. Farmers' & M. Bank*, 74 S. C. 210, 114 Am. St. Rep. 991, 54 S. E. 364.

And in Illinois, even if the drawer of a check had not sufficient funds on deposit with the drawee to pay the check, at the time he gave it, he cannot, as against a bona fide holder, by notifying the drawee not to pay the check, stop the payment thereof out of funds subsequently deposited and remaining on deposit when the check is presented for payment. *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 531, 39 L.R.A. 479, 63 Am. St. Rep. 270, 49 N. E. 420, reversing 69 Ill. App. 681.

And where a check works an assignment *pro tanto* of the drawer's deposit, although the payee has no right of action thereon against the bank, the drawer cannot, as against the drawee, at any time after the giving of a check for a valuable consideration, under such circumstances that it is irrevocable between him and the payee, so revoke the check, by a notice to the drawee to stop payment, as to render the latter liable to him for a subsequent payment to the holder. *Raesser v. National Exch. Bank*, 112 Wis. 591, 56 L.R.A. 174, 88 Am. St. Rep. 979, 88 N. W. 618. A. C. W.

Laws of Oklahoma 1909), provides: "The holder of a bill of exchange may, without prejudice to his rights against prior parties, receive and treat as a sufficient acceptance: (1) An acceptance written upon any part of the bill, or upon a separate paper; (2) an acceptance qualified so far only as to make the bill payable at a particular place within the city or town, in which, if the acceptance was unqualified, it would be payable; or (3) a refusal by the drawee to return the bill to the holder after presentment; in which case the bill is payable immediately without regard to its terms." Counsel for plaintiff in error contend that when the vice president of the bank took said order and retained the same, and stated to the holder that the bank would give him credit for said amount, and afterwards returned it to the school district as a voucher against its account, that was not only an acceptance of the bill, but it was also an assignment of the account in so far as the immediate parties were concerned. The authorities do not seem to support this contention. In *Chicago Heights Lumber Co. v. Miller*, 219 Ill. 79, 109 Am. St. Rep. 314, 76 N. E. 52, it was held: "The verbal acceptance by the drawee of a bill of exchange, who holds no funds of the drawer, is no more than a parol promise to answer for the debt of another."

Nor can the contention that the giving of the check or order to Bartsch constituted an assignment of that much of the money belonging to the school district on deposit in the bank be sustained. In the case at bar, the bank had no funds in its possession belonging to the school district, and was not in debt to the school district in any manner whatever at the time of its transaction with Bartsch. But, if at that time the school district was a creditor at the bank, still the check given to Bartsch would not operate as an assignment *pro tanto* of funds deposited.

"A draft drawn in the ordinary form does not constitute an equitable assignment *pro tanto* of funds in the hands of the drawee to the credit of the drawer before such draft has been accepted or presented for payment." *Guthrie Nat. Bank v. Gill*, 6 Okla. 560, 54 Pac. 434. In *Cincinnati, H. & D. R. Co. v. Metropolitan Nat. Bank*, 54 Ohio St. 60, 31 L.R.A. 653, 56 Am. St. Rep. 700, 42 N. E. 700, it was held: "The giving of a check is not an assignment of so much of the creditor's claim. It passes no title, legal or equitable, to the holder in the moneys previously deposited, nor does it create a lien on the fund; for there is no special fund out of which the check can be paid, nor does it transfer any money to the credit of the holder. It is simply an

order which may be countermanded and payment forbidden by the drawer any time before it is actually cashed or accepted."

Finding no error in the record, the judgment of the court below is affirmed.

All the Justices concur, except Williams, J., disqualified, not sitting.

OKLAHOMA SUPREME COURT.

G. W. McKAY, Appt.,

v.

H. A. HALL et al.

(— Okla. —, 120 Pac. 1108.)

Note — transfer after maturity — set-off.

1. A defendant may set off a debt arising upon a contract due him from the payee of a negotiable note, against the note in the hands of a person to whom the payee transfers it after maturity.

Same — joint maker — individual set-off.

2. One joint maker of a note can set off against it an indebtedness from the payee due him individually.

(January 16, 1912.)

Headnotes by ROSSEN, C.

Note. — Right to set off against transferee of negotiable paper after maturity, claim against original payee.

The earlier cases upon the question stated in the title are treated in the note to *Vann v. Marbury*, 23 L.R.A. 326, and the present annotation is merely supplementary thereto.

Cases involving the right to set off claims against an intermediate indorsee are not included in this note, as they involve distinctive principles.

As is stated in the earlier note, there is a conflict among the authorities, although the overwhelming weight of authority permits the right of set-off. There is, however, a great diversity of conclusion as to what claims may be used in set-off, but in most instances this conflict is more apparent than real when consideration is taken of the facts involved, and especially whether the set-off is claimed under a statute or is equitable in nature, and whether the claim arises out of the same or collateral transactions, as will be observed by an examination of the cases.

Thus numerous cases in the main turn upon the question whether or not the set-off claimed and the negotiable instrument in question arose out of the same or collateral transactions. Thus in *Hunleth v. Leahy*, 146 Mo. 408, 48 S. W. 459, it was said to be the settled law of the state that a negotiable promissory note in the hands

A PPEAL by defendant from a judgment of the County Court for Stephens County in plaintiffs' favor in an action on a note. Reversed.

The facts are stated in the opinion.

Mr. A. L. Herr for appellant.

Mr. J. B. Wilkinson, for appellees:

The holder of a negotiable promissory note after maturity for value takes the same free from all set-offs not in some way attached to the note, and free from all independent indebtedness owing by the original payee to the maker.

Johnson v. Acme Harvesting Mach. Co. 24 Okla. 468, 103 Pac. 638; 25 Am. & Eng. Enc. Law, 2d ed. 532; 8 Cyc. 62-64.

Mutuality is essential to a set-off, and one of two parties jointly liable on an indebted-

ness cannot set off against the plaintiff a claim due to one of the parties.

Richardson v. Penny, 10 Okla. 32, 61 Pac. 584; Murphy v. Colton, 4 Okla. 181, 44 Pac. 208; 25 Am. & Eng. Enc. Law, 519, ¶ 8; Van Arsdale v. Edwards, 24 Okla. 41, 101 Pac. 1123.

Rosser, C., filed the following opinion:

This is a suit originally brought before Elzey W. Moore, justice of the peace for the town of Comanche, Oklahoma. The case was appealed to the county court of Stephens county. The county court sustained a demurrer to the amended answer of the defendant. The defendant declined to plead further, and there was a judgment for the plaintiffs for the amount of the note, and

of an indorsee after maturity is subject to such equities only as are connected with the note itself, and not such as grow out of independent and distinct transactions between the original parties.

And under the Washington statute claims arising out of collateral matter cannot be set off against an assignee of a note delivered after maturity. Harrisburg Trust Co. v. Shufeldt, 31 C. C. A. 190, 59 U. S. App. 532, 87 Fed. 669.

And under Georgia Civil Code, §§ 3750, 4944, it is held that the maker may set off against the holder of a promissory note received in dishonor, to the extent of the amount due on the note, any sum which may be due him from the payee which is in any way connected with the debt sued on or the transaction out of which it sprang. Butler v. Mitchell, 128 Ga. 431, 57 S. E. 764; Butler v. Scandrett, 128 Ga. 432, 57 S. E. 764.

And in Ludwig v. Dearborn, 8 Pa. Dist. R. 69, it was held that the indorsee of an overdue note may enforce it against the maker, free from offsets growing out of distinct transactions, even when the indorsement is made for the express purpose of shutting off a set-off which would have been good against the indorser. And in Davis v. Noll, 38 W. Va. 66, 45 Am. St. Rep. 841, 17 S. E. 791, it was held that, in the absence of legislative enactment, the indorsee of an overdue negotiable instrument does not take it subject to set-offs arising out of collateral and wholly independent matters, and this although he gave no consideration and took it with notice of and for the purpose of defeating the offset. But of course where a statute provides that the transfer of any writing with intent to delay, hinder, or defraud shall be void, the transfer of an overdue note made for the purpose of defeating an offset between the original parties is void as to such an offset, unless made to a bona fide purchaser for value without notice of such intent. Idem.

So, in Crawford v. Johnson, 87 Mo. App. 478, it was held generally that the taker for value of a past-due promissory note is

not subject to equities against his indorser, arising out of collateral transactions.

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And in Harrell v. Citizens' Bkg. Co. 111 Ga. 846, 36 S. E. 460, where the payee of a promissory note converted the collateral security, it was held that the maker could recoup the value of such collateral in an action by the purchaser of the note after maturity, on the ground that the purchaser took the note subject to the equities between the original parties. In connection with this case it may be stated that recoupment in Georgia differed from set-off, in that the former term was applied to claims arising out of the same contract, while the latter term was applied to collateral matters.

In Gordon v. Decker, 19 Wash. 188, 52 Pac. 856, in holding that the purchaser of a past-due note takes it subject to all the equities that existed between the original parties, and that a judgment arising out of the transaction could be pleaded against such purchaser, who took with notice, the court said that the assignee cannot be allowed to intrude himself between the original parties to the note and destroy any equity which the maker of the note had, or any defense that he had to it before it matured, whether it was taken with or without notice of the existing equities.

But in McDonald v. Mackenzie, 24 Or. 573, 14 Pac. 866, the court, in dealing with the contention that set-off does not extend

Laws of Oklahoma 1909), provides: "The holder of a bill of exchange may, without prejudice to his rights against prior parties, receive and treat as a sufficient acceptance: (1) An acceptance written upon any part of the bill, or upon a separate paper; (2) an acceptance qualified so far only as to make the bill payable at a particular place within the city or town, in which, if the acceptance was unqualified, it would be payable; or (3) a refusal by the drawee to return the bill to the holder after presentment; in which case the bill is payable immediately without regard to its terms." Counsel for plaintiff in error contend that when the vice president of the bank took said order and retained the same, and stated to the holder that the bank would give him credit for said amount, and afterwards returned it to the school district as a voucher against its account, that was not only an acceptance of the bill, but it was also an assignment of the account in so far as the immediate parties were concerned. The authorities do not seem to support this contention. In *Chicago Heights Lumber Co. v. Miller*, 219 Ill. 79, 109 Am. St. Rep. 314, 76 N. E. 52, it was held: "The verbal acceptance by the drawee of a bill of exchange, who holds no funds of the drawer, is no more than a parol promise to answer for the debt of another."

Nor can the contention that the giving of the check or order to Bartsch constituted an assignment of that much of the money belonging to the school district on deposit in the bank be sustained. In the case at bar, the bank had no funds in its possession belonging to the school district, and was not in debt to the school district in any manner whatever at the time of its transaction with Bartsch. But, if at that time the school district was a creditor at the bank, still the check given to Bartsch would not operate as an assignment *pro tanto* of funds deposited.

"A draft drawn in the ordinary form does not constitute an equitable assignment *pro tanto* of funds in the hands of the drawee to the credit of the drawer before such draft has been accepted or presented for payment." *Guthrie Nat. Bank v. Gill*, 6 Okla. 580, 54 Pac. 434. In *Cincinnati, H. & D. R. Co. v. Metropolitan Nat. Bank*, 54 Ohio St. 60, 31 L.R.A. 653, 56 Am. St. Rep. 700, 42 N. E. 700, it was held: "The giving of a check is not an assignment of so much of the creditor's claim. It passes no title, legal or equitable, to the holder in the moneys previously deposited, nor does it create a lien on the fund; for there is no special fund out of which the check can be paid, nor does it transfer any money to the credit of the holder. It is simply an

order which may be countermanded and payment forbidden by the drawer any time before it is actually cashed or accepted."

Finding no error in the record, the judgment of the court below is affirmed.

All the Justices concur, except Williams, J., disqualified, not sitting.

OKLAHOMA SUPREME COURT.

G. W. McKAY, Appt.,

v.

H. A. HALL et al.

(— Okla. —, 120 Pac. 1108.)

Note — transfer after maturity — set-off.

1. A defendant may set off a debt arising upon a contract due him from the payee of a negotiable note, against the note in the hands of a person to whom the payee transfers it after maturity.

Same — joint maker — individual set-off.

2. One joint maker of a note can set off against it an indebtedness from the payee due him individually.

(January 16, 1912.)

Headnotes by ROSSER, C.

Note. — Right to set off against transferee of negotiable paper after maturity, claim against original payee.

The earlier cases upon the question stated in the title are treated in the note to *Vann v. Marbury*, 23 L.R.A. 326, and the present annotation is merely supplementary thereto.

Cases involving the right to set off claims against an intermediate indorsee are not included in this note, as they involve distinctive principles.

As is stated in the earlier note, there is a conflict among the authorities, although the overwhelming weight of authority permits the right of set-off. There is, however, a great diversity of conclusion as to what claims may be used in set-off, but in most instances this conflict is more apparent than real when consideration is taken of the facts involved, and especially whether the set-off is claimed under a statute or is equitable in nature, and whether the claim arises out of the same or collateral transactions, as will be observed by an examination of the cases.

Thus numerous cases in the main turn upon the question whether or not the set-off claimed and the negotiable instrument in question arose out of the same or collateral transactions. Thus in *Hunleth v. Leahy*, 146 Mo. 408, 48 S. W. 459, it was said to be the settled law of the state that a negotiable promissory note in the hands

APPEAL by defendant from a judgment of the County Court for Stephens County in plaintiffs' favor in an action on a note. Reversed.

The facts are stated in the opinion.

Mr. A. L. Herr for appellant.

Mr. J. B. Wilkinson, for appellees:

The holder of a negotiable promissory note after maturity for value takes the same free from all set-offs not in some way attached to the note, and free from all independent indebtedness owing by the original payee to the maker.

Johnson v. Acme Harvesting Mach. Co. 24 Okla. 468, 103 Pac. 638; 25 Am. & Eng. Enc. Law, 2d ed. 532; 8 Cyc. 62-64.

Mutuality is essential to a set-off, and one of two parties jointly liable on an indebted-

ness cannot set off against the plaintiff a claim due to one of the parties.

Richardson v. Penny, 10 Okla. 32, 61 Pac. 584; Murphy v. Colton, 4 Okla. 181, 44 Pac. 208; 25 Am. & Eng. Enc. Law, 519, ¶ 8; Van Arsdale v. Edwards, 24 Okla. 41, 101 Pac. 1123.

Rosser, C., filed the following opinion:

This is a suit originally brought before Elzey W. Moore, justice of the peace for the town of Comanche, Oklahoma. The case was appealed to the county court of Stephens county. The county court sustained a demurrer to the amended answer of the defendant. The defendant declined to plead further, and there was a judgment for the plaintiffs for the amount of the note, and

of an indorsee after maturity is subject to such equities only as are connected with the note itself, and not such as grow out of independent and distinct transactions between the original parties.

And under the Washington statute claims arising out of collateral matter cannot be set off against an assignee of a note delivered after maturity. Harrisburg Trust Co. v. Shufeldt, 31 C. C. A. 190, 59 U. S. App. 532, 87 Fed. 669.

And under Georgia Civil Code, §§ 3750, 4944, it is held that the maker may set off against the holder of a promissory note received in dishonor, to the extent of the amount due on the note, any sum which may be due him from the payee which is in any way connected with the debt sued on or the transaction out of which it sprung. Butler v. Mitchell, 128 Ga. 431, 57 S. E. 764; Butler v. Scandrett, 128 Ga. 432, 57 S. E. 764.

And in Ludwig v. Dearborn, 8 Pa. Dist. R. 69, it was held that the indorsee of an overdue note may enforce it against the maker, free from offsets growing out of distinct transactions, even when the indorsement is made for the express purpose of shutting off a set-off which would have been good against the indorser. And in Davis v. Noll, 38 W. Va. 66, 45 Am. St. Rep. 841, 17 S. E. 791, it was held that, in the absence of legislative enactment, the indorsee of an overdue negotiable instrument does not take it subject to set-offs arising out of collateral and wholly independent matters, and this although he gave no consideration and took it with notice of and for the purpose of defeating the offset. But of course where a statute provides that the transfer of any writing with intent to delay, hinder, or defraud shall be void, the transfer of an overdue note made for the purpose of defeating an offset between the original parties is void as to such an offset, unless made to a bona fide purchaser for value without notice of such intent. Idim.

So, in Crawford v. Johnson, 87 Mo. App. 478, it was held generally that the taker for value of a past-due promissory note is

not subject to equities against his indorser, arising out of collateral transactions.

And the maker of a purchase-money note was held in Wolf v. Shelton, 159 Ind. 531, 65 N. E. 582, to be entitled to set-off as against the assignee of the note after maturity a sum that he had been compelled to pay in discharge of a lien on the purchased property, the court saying: "The note went to appellee [assignee] discredited upon its face by nonpayment at maturity. It was a broken contract when appellee purchased it; and he was bound to take notice of the defense, and to know that he would have no greater right to enforce payment than the payee had, and that it would be open to the same defenses in his hands that it would have been subject to if it had remained the property of the payee."

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But in McDonald v. Mackenzie, 24 Or. 573, 14 Pac. 866, the court, in dealing with the contention that set-off does not extend

the defendant appeals. The note was given by C. M. Rutcliff and the defendant, G. W. McKay, to J. T. Morris. J. T. Morris indorsed the note to plaintiffs without recourse after maturity. In his amended answer the defendant pleaded that Morris at the time of, and prior to, the transfer of the note was indebted to him for 20 bushels of cotton seed to the amount of \$7, and for services rendered on oral contract in the case of the State of Oklahoma v. J. T. Morris in the sum of \$200, and claimed those amounts as set-off against the note. The defendant further alleged that the plaintiffs had full knowledge of the indebtedness existing against Morris in favor of the defendant, prior to the transfer of the note.

The question in this case is whether or not the items as set forth in the answer could be pleaded as a set-off against the note in the hands of a holder, to whom it had been indorsed after maturity. In arriving at a decision of this question, it will be necessary to consider the provisions of the statutes of Oklahoma bearing upon the question. Section 5638 of Snyder's Compiled Laws is as follows: "A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract or ascertained by the decision of a court." Section 5640 of Snyder's Compiled Laws is as follows: "When cross demands have existed between persons under

such circumstances that, if one had brought an action against the other, a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other; but the two demands must be deemed compensated so far as they equal each other." Section 5559 of Snyder's Compiled Laws provides that "in the case of an assignment of a thing in action, the action of the assignee shall be without prejudice to any set-off or other defense now allowed; but this action shall not apply to negotiable bonds, promissory notes, or bills of exchange transferred in good faith and upon good consideration before due." An examination of these statutes leads to the conclusion that the demurrer should have been overruled. The action was on contract, and the set-off pleaded was one arising upon contract, and, therefore, if the suit had been brought by Morris the set-off pleaded would have come squarely within the terms of § 5638, *supra*. Section 5640, *supra*, preserved the benefit of the act, notwithstanding the assignment; or, if that section be construed to apply only in cases where there has been a general assignment, as possibly it should be, still § 5559, *supra*, preserved the right of set-off against the assignee. And the exception of negotiable bonds, etc., "transferred in good faith and upon good consideration before due" from its terms indicates clearly that the right

to claims arising out of collateral matters, holds that one who took negotiable paper after maturity took it subject not only to equities inherent in the paper, but subject also to all set-offs in the nature of payments that may have attached to it in the hands of the original parties by reason of an agreement between them.

In some cases where the original payee was insolvent at the time of the transfer, it is held that such insolvency raises an equity sufficient to warrant the allowing of a set-off. Thus in *Eigenmann v. Clark*, 21 Ind. App. 129, 51 N. E. 725, it was held that the maker of a note, sued by the payee's assignee, may set off payments made by him as surety on a note executed by such payee, where the payee was insolvent at the time of the assignment, which was after maturity; the decision being based upon the fact of insolvency, and it being said that insolvency is a distinct equitable ground of set-off outside of the statute, that the assignment gave the assignee only the right that the assignor had in the notes, and that as they were past due they were charged with all equities outstanding between the original parties.

And in *Gemmell v. Hueben*, 71 Mo. App. 201, it was said that in equity the transferee of a past-due note takes it subject to all the equities between the parties, but that the mere existence of a cross demand

would not be sufficient to justify a set-off against such transferee, it being necessary that there be some fact disclosing imminent danger of loss. Applying this rule, the court held that a judgment in favor of the payee against the maker of a note connected with the transaction out of which the note grew could be set off in equity against the indorser after maturity suing on the note, where the payee of the note was insolvent, it being said that the insolvency raised an equity requiring the maker to be protected.

So, in *Craighead v. Swartz*, 219 Pa. 149, 67 Atl. 1003, the maker of promissory notes was held entitled to set-off against them. In a suit by the assignee thereof, a liability which had matured against him on notes indorsed by him as surety for the payee of the notes in suit, who was insolvent, it being said that set-off in such case was an equitable one.

And in *Little v. Sturgis*, 127 Iowa, 298, 103 N. W. 205, where a note payable to an insolvent bank was assigned after maturity by the bank's assignees for creditors, it was held that the maker was entitled to set off against the note the amount of his deposit account with the bank; the court saying that the rights of the assignee must be measured by what would have been the rights of the original payee. The opinion in this case does not expressly treat the case as one of equitable set-off arising from

of set-off applied as against such instruments transferred after due.

In the case of *Wilbur v. Jeep*, 37 Neb. 604, 56 N. W. 198, the first paragraph of the syllabus is as follows: "Any set-off to a promissory note, which would have been good between original parties, may be pleaded against an indorsee who acquires it after maturity, as he takes it subject to any set-off which the maker had against any prior holder." This decision was based on provisions of the Nebraska Statutes identical with §§ 5638 and 5640, Snyder's Compiled Laws, supra. The cases bearing upon this subject are collected in a note to *Vann v. Marbury*, 23 L.R.A. 325. The annotator states that there is a diversity of opinion as to whether set-off is permissible, and cites quite a number of cases holding that a collateral matter cannot be used as set-off, but says that there is another line of cases which go to the full extent of holding that a set-off should be allowed for any claim held against the assignor at the time of the assignment, and cites the following cases, all of which are in point: *McKenna v. Kirkwood*, 50 Mich. 544, 15 N. W. 898; *Armstrong v. Chadwick*, 127 Mass. 156; *Bond v. Fitzpatrick*, 4 Gray, 89; *Harris v. Burwell*, 65 N. C. 584; *Hurdle v. Hanner*, 50 N. C. (5 Jones, L.) 360; *Harrington v. Wilcox*, 53 N. C. (8 Jones, L.) 349; *Haywood v. McNair*, 19 N. C. (2 Dev. & B. L.) 283; *O'Callaghan v. Sawyer*, 5 Johns. 118;

the insolvency of the bank; but that fact would, at least, render the case similar to the *Eigenmann Case*, supra.

And a note given for corporate stock and assigned after maturity in pledge, the corporation having become insolvent, was held subject to a set-off of a claim against the corporation for services rendered under a contract for employment entered into in consideration of the purchase of the stock, in *Indiana Novelty Mfg. Co. v. McGill*, 15 Ind. App. 1, 43 N. E. 464.

Miscellaneous cases.

Under the Nebraska statute any set-off against negotiable paper which would have been good as between the original parties may be set off against an indorsee who acquires it after maturity. *Wilbur v. Jeep*, 37 Neb. 604, 56 N. W. 198, set out in *McKAY v. HALL*.

And see *Brown v. Smedley*, 136 Mich. 65, 98 N. W. 856, to the effect that a set-off for services may be pleaded in defense to a note indorsed to plaintiff after maturity.

But in *Gemmell v. Hueben*, supra, under a statute providing that if two persons are mutually indebted in any manner, one debt may be set off against the other although such debts are of a different nature, it was 39 L.R.A. (N.S.)

Ford v. Stuart, 19 Johns. 342; *Bank of Niagara v. McCracken*, 18 Johns. 493; *Robinson v. Perry*, 73 Me. 168; *Norton v. Foster*, 12 Kan. 44. See also *Johnston v. Humphrey*, 91 Wis. 76, 51 Am. St. Rep. 873, 64 N. W. 317; *Sargent v. Southgate*, 5 Pick. 312, 16 Am. Dec. 409; *Phipps v. Shegogg*, 30 Miss. 241; *Bissell v. Curran*, 69 Ill. 20. Section 2546 of the Iowa Code of 1873 provided that "in case of the assignment of a thing in action, the action by the assignee shall be without prejudice to any counterclaim, defense, or cause of action, whether matured or not, if matured when plead, existing in favor of the defendant and against the assignor before notice of the assignment; but this section shall not apply to negotiable instruments transferred in good faith and upon valuable consideration before due." The resemblance between this section and § 5559 of Snyder's Compiled Laws is very close. In the case of *Downing v. Gibson*, 53 Iowa, 517, 5 N. W. 699, it was held that under that section in an action by the assignee of negotiable paper, transferred after due, the defendant could set off a note executed by plaintiff's assignor and assigned to defendant before notice of the assignment to plaintiff. The court said: "We think no importance should be attached to the use of the word 'assignment,' instead of 'indorsement,' in the statute under consideration." No reason is perceived why the rule should be

held that a judgment against the payee of a note cannot be set off against the indorsee after maturity of such payee, the ground being that the maker and the indorsee were not "mutually indebted" within the meaning of the statute.

And under the Washington statute the demand sought to be set off must have existed at the time of the assignment. *Harrisburg Trust Co. v. Shufeldt*, 31 C. C. A. 190, 59 U. S. App. 532, 87 Fed. 669.

In *Merchants' Exch. Bank v. Fuldner*, 92 Wis. 415, 66 N. W. 691, it was held that the maker of a promissory note could set off deposits in the insolvent payee bank against the note in the hands of a transferee after maturity who was not a bona fide holder, where the set-off was good at the time of the transfer of the note.

The general question of the rights of a holder of negotiable paper transferred after maturity is exhaustively treated in the note to *Y. M. C. A. Gymnasium Co. v. Rockford Nat. Bank*, 46 L.R.A. 753.

For a discussion of the general question of set-off against assignee of commercial paper of claim against assignor, see note to *Vann v. Marbury*, 23 L.R.A. 325.

As to set-off against assigned claim of debtor's demand against assignor, see note to *Bradley v. Thompson Smith's Sons*, 23 L.R.A. 305. G. J. C.

otherwise. The maker of a note who has a claim against the payee arising out of a contract should certainly be allowed to set it off in a suit against him by the payee. As soon as the payee became indebted by contract, the note would be reduced just that much as between the parties, whether credited with the amount or not, and the assignee, after maturity, cannot get more than the payee had. He stands in the shoes of the assignor. The fact that the note is not paid puts him upon inquiry. As was said by Chief Justice Shaw in *Fisher v. Leland*, 4 Cush. 456, 50 Am. Dec. 805: "Where a negotiable note is found in circulation after it is due, it carries suspicion on the face of it. The question instantly arises, Why is it in circulation—Why is it not paid? Here is something wrong. Therefore, although it does not give the indorser notice of any specific matter of defense, such as set-off, payment, or fraudulent acquisition, yet it puts him on inquiry. He takes only such title as the indorser himself has, and subject to any defense which would be made if the suit were brought by the indorser."

Plaintiff relies upon the case of *Johnson v. Acme Harvesting Mach. Co.* 24 Okla. 468, 103 Pac. 638, to uphold the action of the lower court in sustaining the demurrer. In that case the defendant was sued on a note given a machine company for a mower. As a defense against an assignee after maturity, he pleaded that he had bought a binder from the same company, for which he had executed notes, and that the binder failed to do good work. He made no complaint as to the mower for which the note was given. The court held that the counterclaim for defects in the binder could not be pleaded in a suit upon the note given for the mower. The holding in that case does not conflict with the conclusions arrived at here. The defense there was a counterclaim. A counterclaim must arise out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or be connected with the subject of the action. The claim pleaded as a defense here is a set-off. The defendant is entitled to use the set-off as a defense to the note, but, of course, if it exceeds the note, he cannot recover any excess against the plaintiff. The plaintiff owes him nothing. All that he can do with the set-off is to show that he owes plaintiff nothing. The plaintiff by purchasing the note after maturity did not incur any liability to pay the defendant anything. *Norton v. Foster*, 12 Kan. 44. The authorities cited by plaintiff to sustain the proposition that there must be allegation and proof of insolvency of the assignor before the set-off

could be allowed against the assignee are cases of equitable set-off, and have no application to this case.

Another contention of plaintiff is that the defendant cannot set off the claim pleaded in the answer, because the defendant is a joint maker of the note with C. M. Rutcliff, and that the debts attempted to be set off are due McKay individually, and that, therefore, there is a want of mutuality. Following the weight of authority the supreme court of the territory of Oklahoma, in the cases of *Murphy v. Colton*, 4 Okla. 181, 44 Pac. 208, and *Richardson v. Penny*, 10 Okla. 32, 61 Pac. 584, decided this question favorably to the contention of plaintiff; but since the act of 1905 (§ 3, art. 7, chap. 28, Snyder's Compiled Laws § 5635), which provides, "Either party can plead and prove a set-off or counterclaim of a proper nature in defense of the liability sought to be enforced by the other party, and it shall not be necessary that such set-off shall exist as between all parties plaintiff and defendant in such suit, but any party may enforce his set-off or counterclaim against the liability sought to be enforced against him,"—it was held in the case of *Loeb v. Loeb*, 24 Okla. 384, 103 Pac. 570, that the set-off or counterclaim could be pleaded and proven, whether it existed between all the parties plaintiff and defendant or not. This holding seems to follow as a matter of course from the terms of the statute quoted. And a large number of courts in other states have decided that one of the makers of a joint obligation may set off a debt due from the obligee to him individually. 25 Am. & Eng. Enc. Law. 525, and cases cited under note 2. It is believed that the better reasoning favors this rule, even in the absence of statute directly permitting it. In the case of *Leach v. Lambeth*, 14 Ark. 668, Mr. Justice Walker, in deciding that one defendant could plead as a set-off a debt due him individually against cause of action against several, said: "A payment by one defendant is, in effect, a payment by all. The defendants may plead separately, and any defense to the merits of the action inures to the benefit of all; and, if the plaintiff is indebted to one of several defendants, and such defendant should choose to pay and discharge the debt of himself and his codefendant out of it, it is, in effect, the payment and satisfaction of both, and no good reason seems to exist why he should not be permitted to do so. Such defense in no wise affects the rights of the codefendant or of the plaintiff; not of the defendant, because so far from increasing his liability it lessens it by discharging a debt for the whole of which he was bound to the plaintiff; nor

does it prejudice the rights of the plaintiff, because if in truth he owes the defendants or either of them he should not, in good conscience, be permitted to coerce payment from them, or one of them (which is in effect from both), without at the same time paying that which he owes them; and to compel this, and prevent litigation and unnecessary costs and delay, the statute of set-off was passed."

This case should be reversed and remanded, with instructions to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

Per Curiam:

Adopted in whole.

OKLAHOMA SUPREME COURT.

LENA LILLY, Plff. in Err.,

v.

ST. LOUIS & SAN FRANCISCO RAIL-
ROAD COMPANY.

(— Okla. —, 122 Pac. 502.)

Carriers — refusing information to passenger — carrying past destination.

1. Plaintiff, a passenger upon one of defendant's trains, had purchased a ticket from defendant's agent at one of its stations to another station upon defendant's road;

Headnotes by HAYES, J.

Note. — Carrier: liability for failure to notify passenger when and where to change cars.

It is the duty of a carrier to give a passenger reasonable notice of the necessity for changing cars at junction points. *Central of Georgia R. Co. v. Ashley*, 159 Ala. 154, 48 So. 981.

And a passenger who is informed by the carrier's agent who sells him his ticket that no change is necessary is justified in relying upon that information, unless he is later notified that a change is necessary; and it is not sufficient to show that the announcement was made at the opposite end of the car from where he was sitting, but the proof must show that he actually heard it, or that it was made under such circumstances that it can be reasonably said that he should have heard it. But if the correct information comes to the passenger in an intelligible manner from an authorized agent of the carrier, it will not be liable if the passenger elects to ignore such information, and rely upon that first given to him. *Dye v. Virginia Midland R. Co.* 9 Mackey, 63.

However, if before or on reaching the junction point the passenger is given actual notice of the necessity for changing, or if such means is used to give him such notice

but, in order for her to reach her destination, it was necessary that she change at an intervening station to another train upon another of defendant's lines of railway. She was without knowledge as to her route, or where she would be required to change. Before reaching the destination at which she was required to change, she made repeated efforts to ascertain from defendant's servants and employees in charge of the train information regarding her route, and as to where she would have to change; but they disregarded her and failed and refused to instruct her as to where she would have to make the change, on account of which she was carried beyond the junction point off her route, and to a town where she was required to take passage upon another railway than defendant's, in order to reach her destination, and expended an additional sum for fare, and caused her to suffer a loss of time and certain inconveniences. Held, that a petition stating in substance the foregoing facts stated a cause of action against defendant railway company, and a general demurrer thereto should not have been sustained.

Damages — exemplary — misleading passenger.

2. Where defendant's employees wilfully neglected and refused to give plaintiff the information requested, as stated above, plaintiff may in such case recover exemplary damages.

(March 12, 1912.)

ERROR to the District Court for Carter County to review a judgment sustaining a demurrer to a petition filed to recover

that by it every traveler of ordinary intelligence, by the use or reasonable care and attention, would have acquired a knowledge that a change was necessary, the company would not be liable. *Barker v. New York C. R. Co.* 24 N. Y. 599, affirming 6 Duer, 523.

And a passenger who learns that he must change cars before reaching his destination must find out where such change should be made, and is not authorized to rely on a promise by the conductor to give him special notice when that point is reached, beyond the customary announcement, such promise being beyond the scope of his authority. *St. Louis Southwestern R. Co. v. McCullough*, 18 Tex. Civ. App. 534, 45 S. W. 324.

Nor is a carrier liable for failure of its conductor to awaken a passenger at the junction point, although he has promised to do so. *Missouri, K. & T. R. Co. v. Kendrick*, — Tex. Civ. App. —, 32 S. W. 42.

And it follows that no liability would result from failure of the conductor to give personal notice that the junction point had been reached, to a passenger who had been informed of the junction point and warned not to go to sleep, but who did so in spite of the warning. *Houston & T. C. R. Co. v. Cohn*, 22 Tex. Civ. App. 11, 53 S. W. 698.

R. L. S.

ment that the defendants have been convicted and sentenced to death without a fair and impartial trial—brings up for decision an issue of vital concern to every citizen of the state. By our Constitution, the people have set the law above themselves, except as they choose to change it by the methods which they themselves have ordained; and they have laid upon the courts the duty of enforcing their promise that the weak, as well as the strong, shall be condemned only after a fair trial according to law before an impartial jury. In the faithful performance of their promise by the people, and in the discharge of their duty by the courts, is involved, not only the public honor, but public safety, prosperity, and happiness; for in the long run

neither individual nor community success is possible, unless men feel that they will not lose life nor liberty nor property without a fair and impartial trial under the law of the land. Therefore the complaint of the defendants that a large and hostile crowd of persons so interfered with the trial that it was not a fair trial concerns, not only the defendants, but all the people.

Ideal conditions, it is true, are not to be expected, and verdicts should not be set aside by an appellate court for misconduct in a trial, unless the evidence is clear and convincing that extraneous influences so interfered with the conduct of the trial, or so pressed upon the jury, as to become factors in the result. A vast number of cases might be cited to show that this court will refuse

and constant contact with the audience as that remarks of bystanders as to the guilt or innocence of the accused, or other indications of public feeling for or against him, may reach their ears or come under their observation. The bar, at least, should at all times be kept sufficiently open and clear for the prompt and orderly despatch of the business of the court."

In *Massey v. State*, 31 Tex. Crim. Rep. 371, 20 S. W. 758, a judgment upon conviction for murder was reversed for unfairness, where certain people of the county where the trial was had organized and agreed among themselves that, if a change of venue was granted to the defendant, they would hang him before he left the courthouse; that a great crowd surged around the jail and gathered in the courthouse yard, and the court refused to grant a change of venue for the reason "that it would at once precipitate an attack upon the jail, which he desired to avoid;" that the defendant, through fear, waived his right to be present at the time the verdict was rendered, and the "spirit, if not the presence, of that same howling, threatening, tumultuous, blood-thirsty mob had overawed the justice [and] dominated the court." It was said: "Such a state of affairs existing,

... the court being environed and dominated by such a mob breathing out such threats to the life of appellant, it is solemn mockery to talk, think, or imagine a fair trial, under such conditions. Appellant was not required to apply for a change of venue, when, if granted, his life would be forfeited,—the price. To hold that a trial under such circumstances was fair, impartial, and legal would be a travesty on decency, law, common sense, and justice, notwithstanding good men may have tried appellant."

And while the person said to have been assaulted in *Collier v. State*, 115 Ga. 803, 42 S. E. 226, reversed on another point, on a former appeal in 115 Ga. 17, 41 S. E. 261, 12 Am. Crim. Rep. 608, was testifying in rebuttal to the evidence introduced by the defendant, she became very much excited and began upbraiding the defendant

and the husband of the witness took hold of a chair in a threatening manner as if to strike the defendant with it, but was seized by an officer and forced to take his seat; and the crowd at this point became very much excited, got upon the seats, looking and moving towards where the defendant was sitting, but became seated again, after a little while, when commanded so to do by the trial judge; but subsequently, while the jury was in its room considering the case, a large number of men collected in the court room and courthouse yard, swearing and using threatening language towards the jury. It was held that the defendant did not have a fair and impartial trial, which the law guaranteed to him, and to which he was entitled whether he was guilty or innocent.

But in *Long v. State*, 59 Tex. Crim. Rep. 103, 127 S. W. 551, Ann. Cas. 1912 A, 1244, where, upon a trial for the murder of a school teacher in one of the public schools of a city, it appeared that the school practically adjourned or took a recess in order that the teachers and pupils might attend the trial during the closing argument for the state, and many of the children did attend, as well as some of the school teachers,—the defendant alleging that this was done by concert of action for the purpose of influencing the jury in behalf of the state, and that for this reason his trial was not fair,—the court said that it was not prepared to agree that the trial was not a fair one, and that it was a matter of such grave moment as to require a reversal of the judgment of conviction.

So, in *Young v. State*, 49 Tex. Crim. Rep. 207, 92 S. W. 841, where, upon a motion for a new trial, the defendant, among various errors assigned, urged that the spectators were permitted to lean in the jury box and crowd the court room, but did not state that they in any way interfered with the trial of his case, the court was of the opinion that the bare allegation was not sufficient to warrant a new trial.

As to plea of guilty under intimidation, see note to *Little v. Com.* 34 L.R.A. (N.S.) 257.

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to heed unsubstantial charges that trials have not been fair. Yet in all the course of the development of the administration of law in England and America since that time, there has never been a doubt of the rule laid down in 1819, in the case of the *Rex v. Hunt*, 2 Chitty, 130, when the court said it is of the greatest importance that the administration of justice should be free not only from spot or blame, but that it should be, as far as human infirmity could allow it to become, as free from all suspicion.

The special judge, Hon. George W. Brown, who presided at the trial, has certified that, according to the facts as they appeared to him, the rights of the defendant were safeguarded and the trial properly conducted. His opinion and that of Judge Prince, who denied the motion for a new trial, are entitled to great consideration, for their ability and their solicitude that the defendants should have a fair trial cannot be doubted. In passing upon the correctness of their conclusions of law, every statement of fact made by the trial judge will be taken as true; and the evidence offered on behalf of the defendants will be taken as true only in so far as it is consistent with the statement of fact found in the report of the trial judge.

Looking at the case in this way, we find these to be the material facts: An atrocious murder of a worthy citizen had properly aroused the interest and indignation of the entire community. One of the persons suspected had confessed, and implicated as active participants in the crime the two defendants. Very soon after the murder, a special term of court had been ordered to try both the confessed murderer and these defendants. An immense number of people assembled at the trial intensely hostile to the accused, and crowded the courthouse. The defendants being without counsel, the presiding judge sent for Mr. W. F. Clayton and requested him to undertake their defense. On his way to the court through the dense crowd, Mr. Clayton "heard expressions in regard to lynching," which convinced him that, if he should ask for the three days of preparation allowed by law, the prisoners would be lynched, and under the compulsion of this fear he gave up that most vital right and went immediately into the trial court without preparation. That the danger of mob violence was present and imminent is made further manifest by the statements of Mr. Lucien W. McLemore and the stenographer of the court, Mr. F. F. Covington, both witnesses of high character. Not a particle of evidence was of-

fered by the state to controvert this showing. The presiding judge, it is true, says that the crowd was quiet, and that it manifested no mob spirit to his eye nor in his hearing; but this statement does not impair the force of the testimony of those who mingled with the people, and thus had better opportunity to observe. Thus it appears, beyond all doubt, that the circumstances of the trial were such that counsel of experience and courage gave up, under the most urgent compulsion, the right to three days of preparation guaranteed to the accused by the law; and that, too, when he had been called into the case by the court without previous notice. Compulsion is sufficient to annul a will or a contract for the sale of property. How, then, can it be held that a trial involving life or death was fair and impartial, according to the law of the land, when the accused, under the compulsion of a reasonable apprehension of lawless violence, surrenders a right vital to his defense?

In an opinion delivered by the distinguished Judge Elliott, the supreme court of Indiana, under circumstances very similar to those appearing here, set aside for compulsion a plea of guilty, which defendant's counsel showed to the court had been entered, by their advice, on the reasonable apprehension that if their client should be acquitted, he would be lynched. *Sanders v. State*, 85 Ind. 318, 44 Am. Rep. 29.

It is argued, however, that counsel should have sought the protection of the court. No doubt, that course would have been the most judicious; but, in view of the surroundings, and especially in view of the fact that the judge's seat was itself pressed upon by the crowd, it would be an unjust judgment to hold that the accused lost a vital right by the failure of their counsel to do the most judicious thing in the sudden emergency which he was called on by the court to meet.

Consideration of the further proceedings deepens the conviction that the trial was not fair. With respect to the charge that the space within the bar immediately around the judge, the jury, and the witnesses was so taken by the great crowd that the trial could not proceed with decorum and fairness, the presiding judge says that it was the best behaved crowd he ever saw, and that there was nothing to indicate to him a sign of a riotous spirit; that it did crowd within the bar, but that it was not in possession of the courthouse. He says further: "In every instance when I observed that it was becoming too much crowded within the bar, or my attention

was called to such conditions, my admonitions received the most respectful consideration and obedience, and there was never any crowding within the bar that in any way interfered with the orderly despatch of the business of the court, or with the rights of the counsel of the accused." The affidavit of Mr. Clayton contains the following statement: "That during the trial of the case deponent did not see the jury until he addressed them, from the crowd intervening; that on several occasions deponent requested the judge to compel the sheriff to clear away the crowd that he might see the witness whom he was examining." There is no statement of fact made by the presiding judge inconsistent with the statement of Mr. Clayton. It thus appears that a large number of persons hostile to defendants were allowed to so press upon the court that counsel for the defense had to ask several times that they be cleared away so that he could see the witness under examination, and to so press around the jury that counsel could not see them until he stood before them to argue the case. We are unable to assent to the opinion of the presiding judge that such a state of affairs did not interfere with the orderly conduct of the business of the court, or with the rights of the accused. Trials must be public; but the right of the accused to a fair trial is superior to the right of the public to witness the trial. In all trials, not only the dignity and decorum which should characterize the administration of justice, but the preservation of the rights of the people and of the parties to the cause, require that the public should be kept away from the witnesses and the jury and the counsel, to the end that the issue may be tried and decided without interference or extraneous influence. In this case, the public was not so kept away. On the contrary, a large number of persons justly indignant at an atrocious murder, and undeniably hostile to the accused, pressed upon the court, the jury, and the witnesses.

Clearing away the hostile crowds from time to time did not meet the case. Fairness required that at least the space between the accused and their counsel, the jury, and the witnesses should have been kept free from intrusion. Courts cannot control public sentiment; but their commission from the people is to keep the inviolable precincts of the prisoner's dock, the counsel's place, the witness chair, the jury seats, and the intervening space, free from either hostile or friendly invasion or intrusion, lest the accused be terrified or his counsel confused in making his defense, lest

the witness testify falsely under fear of inducement, lest the jury be overawed, or their minds influenced by an atmosphere surcharged with hostility or partiality. The intrusion into these inviolable precincts of a large number of persons, part of a vast assemblage hostile to the prisoners, was calculated to terrify the defendants, to confuse their counsel, to intimidate the witnesses, and to overawe the jury. This, with the fact that counsel gave up the right of the accused to have three days to prepare for their trial, under the compulsion of a reasonable apprehension that the assertion of the right would result in their death by lynching, compels the conclusion that the defendants did not have a fair and impartial trial.

Applying the law more specifically, we reach these conclusions: The conditions under which counsel conducted the defendants' cause, and under which their witnesses were examined, substantially interfered with the due exercise of the right granted by § 49 of the Criminal Code of 1902, "that the accused shall, at his trial, be allowed to be heard by counsel, may defend himself, and shall have a right to produce witnesses and proofs in his favor, and to meet the witnesses produced against him face to face."

The jury was not so safeguarded against extraneous influences as to allow the defendants the right of trial by an impartial jury, guaranteed by § 18, art. 1, of the Constitution; and the defendants were, by the compulsion of the fear of death by lynching, deprived of the right to have three days to prepare for their trial, conferred on them by § 40 of the Criminal Code.

Under varying facts, other courts have, with practical unanimity, held that verdicts should not be allowed to stand, where action by those in attendance on a trial was calculated to overawe or influence the jury, or substantially interfere with the rights vital to the parties. *Hamilton v. State*, 36 Tex. Crim. Rep. 372, 37 S. W. 431; *Woolfolk v. State*, 81 Ga. 551, 8 S. E. 724; *Raines v. State*, 81 Miss. 489, 33 So. 19, 13 Am. Crim. Rep. 404; *Sanders v. State*, 85 Ind. 318, 44 Am. Rep. 29; *People v. McMahon*, 244 Ill. 45, 91 N. E. 104; *Doyle v. Com.* 100 Va. 808, 40 S. E. 925; *State v. Wilcox*, 131 N. C. 707, 42 S. E. 536, 12 Am. Crim. Rep. 606; *Robinson v. State*, 6 Ga. App. 696, 65 S. E. 792.

The judgment of this court is that the judgment of the Circuit Court be reversed, and the cause remanded for a new trial.

Gary, Ch. J., and Hydrick, J., concur.

TEXAS COURT OF CRIMINAL
APPEALS.

BILL MAYHEW, Appt.,
v.
STATE OF TEXAS.

(— Tex. —, 144 S. W. 229.)

**Homicide — self-defense — excessive
force — liability.**

1. The use of more force than is necessary, which results in killing the assailant, will not render one guilty of murder, who goes to the defense of his child against an assault which threatens death or serious bodily injury.

Same — defense of child — right to act.

2. The culpability of one who kills an assailant in defense of his son is not measured by the rights which the son might have had to defend himself, but upon the appearance of conditions when the father appeared upon the scene, unless he knew, or might reasonably have known, the actual rights possessed by the son under the circumstances of the conflict.

Same — threats — justification.

3. That one who kills another in defense of his son was informed and believed that deceased had made threats of bodily harm

or death against the son will justify his acting, although the threats were not in fact made.

Same — concert of action — necessity.

4. A concert of action between two persons assailing another with intent to kill him or do him great bodily harm is not necessary to justify the father of the latter in defending the son against the attacks of both or either, to the extent of taking life, if necessary.

Same — defense — prior threats — effect.

5. That one had, because of provocation, threatened to kill another, will not render him guilty of murder if, upon the latter's attacking his son, he goes to the aid of the son and kills the assailant, for the sole purpose of protecting the son from death or great bodily injury.

(February 7, 1912.)

APPPEAL by defendant from a judgment of the District Court for Eastland County, convicting him of murder in the second degree. Reversed.

The facts are stated in the opinion.

Messrs. C. H. Jenkins, Scott & Brelsford, W. L. Grogan, and J. J. Butts for appellant.

**Note. — Is one assisting relative in peril
bound by the latter's act in bringing
on the difficulty.**

The subject here under consideration is covered in the notes to *Foutch v. State*, 45 L.R.A. 703, and *State v. Cook*, 15 L.R.A. (N.S.) 1013, and only the decisions which have passed upon the point since the writing of the last note are here included.

As laid down in the former notes it is a general rule that one who interferes on behalf of a relative will not be allowed the benefit of a plea of self-defense unless such plea would have been available to the relative in whose behalf he interfered.

This rule was applied in *Weaver v. State*, 1 Ala. App. 48, 55 So. 936, where it was held that the fact that one who committed a homicide while assisting his brother, honestly and reasonably believed that the latter was not at fault in bringing on the difficulty, did not justify him in striking in defense to his brother, although the latter was in imminent peril; but it was held that the brother must in fact have been free from fault in bringing on the difficulty in order to authorize the defendant to intervene and strike in self-defense in his brother's behalf.

In *State v. Cox*, 153 N. C. 638, 69 S. E. 419, it was held that the same principles applied to the conduct of a son fighting in defense of his father, who had willingly entered the fight, that applied to the father; and that if he had not retreated to the wall, or if he used excessive force, he could not successfully set up a plea of self-defense. It would seem from the statement of this 39 L.R.A. (N.S.)

case that the defendant must have had knowledge of all facts relative to the commencement of the difficulty. No point, however, is specifically made of this fact.

So, in *Wheatley v. State*, 93 Ark. 409, 125 S. W. 414, it was held that one might lawfully do for his brother, when threatened with death or great bodily injury, what the latter could lawfully do for himself; and it was held that where the brother was in fault in provoking the assault, the defendant must retreat as far as he safely could before he would be justified in killing his brother's assailant. No point is made in this case of the knowledge by the defendant of his brother's fault in bringing on the difficulty, but it would seem from the facts that the defendant must have had such knowledge.

And in *Wheat v. Com.* — Ky. —, 118 S. W. 264, where one of the defendants had gone to the assistance of his brother, who apparently to his knowledge had brought on the difficulty, it was held that when a person attempts to excuse his act upon the ground that it was done in defense of another, that other must himself be without blame, or be in such a position that the law would excuse him if he had done in his own behalf what the other did for him.

In *State v. Eastham*, — Mo. —, 144 S. W. 492, where the defendant's brother, in starting the difficulty, intended only an ordinary battery on the deceased, and the latter subsequently assaulted him with a pistol, it was held that the brother had the right to kill deceased without being guilty of any greater crime than manslaughter, and that therefore defendant, who knew all of the

Messrs. John A. Mobley, Assistant Attorney General, James T. Wilson, D. G. Hunt, and J. R. Stubblefield, for the State:

The defendant had a right to use whatever force was necessary to defend himself or Jim Mayhew against an unlawful attack, or what reasonably appeared to be an unlawful attack, viewed from his standpoint; but he had no right to use greater force than reasonably appeared to be necessary to defend himself or Jim Mayhew against real or apparent danger.

Rucker v. State, — Tex. Crim. Rep. —, 47 S. W. 1015.

Davidson, P. J., delivered the opinion of the court:

Appellant was convicted of murder in the second degree; the jury awarding him a term of five years in the penitentiary.

The issues presented may be briefly stated as follows: The state's contention from the evidence was that appellant and Jim Mayhew and Aaron Mayhew had entered into an agreement or sort of conspiracy to whip and probably kill the deceased, Will Burkhead. On the day of the homicide, prior thereto in the morning, about 11 o'clock, a difficulty occurred in Jim Mayhew's barber shop between one of the Mayhew boys and Burkhead, which resulted in an ordinary fist fight. In that fight, Jim Mayhew undertook to reach Burkhead, the deceased, with a razor, but was prevented. The parties were separated. In some way, information of this trouble was conveyed to appellant. This angered appellant, and on account of this, and the fact that Burkhead owed him a considerable amount of money, and had not paid it, caused appellant to make a threat against deceased; and it is further shown on the part of the state that appellant sought

Burkhead, but failed to find him, and he also remarked, in speaking of the former fight, something to the effect that if Jim Mayhew got in a contest with deceased the result of the fight might be different from what it was with the other Mayhew, with whom he had had a fight in the barber shop. It is shown that about 2:30 or 3 o'clock Jim Mayhew went to where the deceased was, or met him (deceased), who was on horseback, and caught the bridle reins of his horse; whereupon deceased jumped from his horse, and a fight ensued. In the meantime, appellant had gone to his store, and was engaged about his usual business. One of the younger Mayhews informed appellant that they had his son Jim down, and were killing him. Appellant immediately ran to where the trouble was, and as he approached a man named Pruett picked up a rock and threw it, striking appellant. Appellant ran to where his son Jim and Burkhead were engaged in their difficulty, and began cutting Burkhead with his knife. From these wounds Burkhead died. It is shown also by the evidence that Burkhead made some threats, which were communicated to appellant. The evidence also suggested the issue of self-defense in favor of appellant personally, as well as in favor of his defense of his son.

1. The court undertook to charge these various theories in instructions given the jury. It will be seen from this brief summary the issue of murder in the second degree was in the case from the state's standpoint. From the defendant's standpoint, there was self-defense, defense of his son, and self-defense, viewed from the standpoint of communicated threats. Error is assigned upon these various charges of the court, and various and sundry special charges asked and refused. It is not the

facts concerning the difficulty, could not be convicted of murder in killing the deceased in defense of his brother.

In Cooper v. State, 123 Tenn. 37, 138 S. W. 826, where a son had gone to his father's assistance, it was laid down as a general rule that one who intervenes in a difficulty between others stands with and must accept all the responsibility of the party for whom he intervenes. And in this case an instruction to the effect that if the son believed that his father intended to go and meet the deceased solely for the purpose of talking with him, and that when they met the deceased began firing on the son, he had the right to kill the deceased, although the father had gone toward the latter for the purpose of provoking the difficulty, was held erroneous where it was undisputed that the son knew of his father's threat to kill the deceased in sight, that such threat had been 39 L.R.A. (N.S.)

communicated to the deceased, that his father approached the latter without informing him of any change of purpose, and that the son followed the father for the purpose of protecting him in case a difficulty ensued.

In Arnett v. Com. 137 Ky. 270, 125 S. W. 700, where the difficulty was brought about by reason of language used by the defendant's brother to the deceased, it was held that if the defendant killed the deceased when the latter was wrongfully attempting to strike defendant's brother with a deadly weapon, he would not be guilty if he believed and had reasonable grounds to believe that his brother was in immediate danger of death or great bodily harm, and he used no greater force in defending his brother than he reasonably believed necessary.

J. T. W.

purpose of this opinion to review all these matters in detail. It is deemed unnecessary to do so. In charging self-defense, the court gave the following: "Every person, in law, is permitted to defend himself, or to defend the person of another, against any unlawful attack, or against what to him might reasonably appear to be an unlawful attack, reasonably threatening injury to his person or to the person of another, and is justified in using all necessary and reasonable force to defend himself or the person of another, but no more than the circumstances reasonably indicate to be necessary; and homicide is justified by law, when committed in defense of one's person, or the person of another, against what, to him, reasonably appears to be an unlawful attack, made in such a manner as to produce a reasonable expectation or fear of death or some serious bodily injury," etc.

Exceptions were reserved to this charge, especially that portion of it which limited his perfect right of self-defense to the use of no more force than was necessary. This charge is not the law in regard to the matter of perfect self-defense as held by an unbroken line of authorities in this state. It has been held error to charge that, if defendant used more force than necessary to protect himself, he would be the aggressor, where perfect self-defense is the issue. When the state's case is an unprovoked attack, and the defendant's case is perfect self-defense, and where defendant had the right of self-defense at all, the question of excessive force is not involved. *Rice v. State*, 51 Tex. Crim. Rep. 286, 103 S. W. 1156; *Terrell v. State*, 53 Tex. Crim. Rep. 604, 111 S. W. 152; *Hightower v. State*, 56 Tex. Crim. Rep. 252, 133 Am. St. Rep. 966, 119 S. W. 691. If the evidence shows that defendant was authorized to use any force upon the theory of perfect self-defense, he was authorized to use all force necessary; and it is error to charge on the theory of excessive force. *Scott v. State*, 46 Tex. Crim. Rep. 313, 81 S. W. 950; *Rice v. State*, 51 Tex. Crim. Rep. 286, 103 S. W. 1156. It has been held error, also, to charge the defendant was not authorized to use more force than necessary, or reasonably indicated to be necessary, and where there is no evidence of excessive force, and when, if defendant's theory is to be credited, he acted while deceased was making an attack upon him. *Carson v. State*, 57 Tex. Crim. Rep. 394, 136 Am. St. Rep. 981, 123 S. W. 590; *Huddleston v. State*, 54 Tex. Crim. Rep. 93, 130 Am. St. Rep. 875, 112 S. W. 64; *Scott v. State*, 46 Tex. Crim. Rep. 313, 81 S. W. 950.

Appellant's theory of the case, as before stated, was that of self-defense, both as to

himself, as well as to protect his son from death or serious bodily injury. Under such circumstances, the question of excessive force is not in the case, and it was error to limit the right to act in perfect self-defense by charging the jury that the accused could use no more force than was necessary. Where the right of perfect self-defense is involved, and is the issue, forming the predicate of the charge, then the accused has the right to use all force necessary, without any limitation as to the quantity of such force. This doctrine also applies where the party is defending another; and this must be viewed from his standpoint, and not that of the attitude of the party to whose defense he goes. The law is that whatever he may do for himself he may do for another, under such circumstances, and this to be viewed from his standpoint. *Johnson v. State*, 5 Tex. App. 47; *Glover v. State*, 33 Tex. Crim. Rep. 227, 26 S. W. 204; *Glaze v. State*, — Tex. Crim. Rep. —, 45 S. W. 906; *Garcia v. State*, — Tex. Crim. Rep. —, 57 S. W. 651; *Martinez v. State*, — Tex. Crim. Rep. —, 88 S. W. 234; *Johnson v. State*, — Tex. Crim. Rep. —, 59 S. W. 269; *Monson v. State*, — Tex. Crim. Rep. —, 63 S. W. 647; *Palmer v. State*, 47 Tex. Crim. Rep. 270, 83 S. W. 202; *Parnell v. State*, 50 Tex. Crim. Rep. 424, 98 S. W. 269; *Griffin v. State*, 57 Tex. Crim. Rep. 280, 122 S. W. 553; *Scott v. State*, 60 Tex. Crim. Rep. 318, 131 S. W. 1073; *Sterling v. State*, 15 Tex. App. 256.

2. This brings us to another exception to the charge, which is as follows: "A person acting in behalf of another, to prevent such other from being killed, disfigured, or to sustain serious bodily injury, is entitled to the same right and justification under the law as would have the party in whose behalf he acted." Various and sundry objections are urged to this charge. The vice in this charge, it is contended, among other things, is that it is a proposition of law tersely stated, and it stands out in the charge as a separate paragraph. This charge, as stated, cannot be the law of this case. It places the defendant's attitude in an erroneous light before the jury, and one that was evidently detrimental to him. The evidence seems to be without contradiction that Jim Mayhew was in the wrong in the difficulty between himself and Burkhead, the deceased; that he went to or met Burkhead, who was riding, caught the bridle reins of his horse, and said or did something which provoked or brought about the difficulty. Burkhead alighted, and they engaged in a fight. Appellant was not present, and was not informed of the circumstances of the fight. His notification from one of the Mayhews was to the effect that they had his

son down, and were killing him. In this attitude, he ran to his rescue, and as he approached the scene, he found Burkhead had his son down, and was on him. As he approached, Pruett interfered, and struck him with a rock. This charge limited appellant's right to defend his son to the same right that the son had to defend himself. Under the facts of this case, this was not the correct proposition. The unquestioned correctly stated proposition of law in regard to this matter in Texas is that the culpability of one who acts in defense of another is measured by the intent with which he acted, and not by the intent of the other, or the party for whom he was acting, unless the defendant knew or might reasonably have known the intent of the other party. *Monson v. State*, — Tex. Crim. Rep. —, 63 S. W. 650; *Guffee v. State*, 8 Tex. App. 187; *Henry v. State*, — Tex. Crim. Rep. —, 50 S. W. 399; *Chambers v. State*, 46 Tex. Crim. Rep. 66, 79 S. W. 572; *Glover v. State*, 33 Tex. Crim. Rep. 227, 26 S. W. 204; *Foster v. State*, 8 Tex. App. 253; *Snell v. State*, 29 Tex. App. 240, 25 Am. St. Rep. 723, 15 S. W. 722; *Parnell v. State*, 50 Tex. Crim. Rep. 420, 98 S. W. 269; *Hargrove v. State*, 33 Tex. Crim. Rep. 431, 26 S. W. 903. If the appellant knew nothing about who brought on the difficulty between his son and the deceased, and came upon the scene and saw his son in peril of his life or serious bodily injury, and he interfered and killed the deceased, it would be on his part a homicide in self-defense. *Chambers v. State*, 46 Tex. Crim. Rep. 66, 79 S. W. 572; *Parnell v. State*, 50 Tex. Crim. Rep. 420, 98 S. W. 269, and authorities already cited.

It is an undeniable proposition of law in this state that the apprehension of danger must always be viewed from the standpoint of the accused, whether he acts in his own behalf or in behalf of another. *Parnell v. State*, 50 Tex. Crim. Rep. 420, 98 S. W. 269; *Griffin v. State*, 57 Tex. Crim. Rep. 280, 122 S. W. 553; *Glover v. State*, 33 Tex. Crim. Rep. 227, 26 S. W. 204; *Snell v. State*, 29 Tex. App. 236, 25 Am. St. Rep. 723, 15 S. W. 722; *Saens v. State*, — Tex. Crim. Rep. —, 20 S. W. 739. A party acting in defense of another is only bound to answer for his own intent. The intent of his codefendant, unless he adopts the same acts with the same intent, does not bind him. Authorities already cited. These would seem to be a sufficient number of authorities to sustain the proposition that this charge of the court was erroneous. Under this charge, the jury could have found, and doubtless did from the verdict, that appellant and his son Jim were in an agreement for Jim to bring on the diffi-

culty, and that his father was to interfere, if it became necessary. Under the court's charge, they could easily and readily, and, perhaps, did, reach that conclusion. The state's theory was that this agreement or understanding was had between the parties, and in pursuance of this, when the fight came on, appellant rushed upon the scene and engaged in the conflict. This was the state's theory, and this theory is emphasized in the charge by leaving the jury to look at the defense's proposition from the standpoint of the son, and not the standpoint of the appellant. The son had provoked the difficulty, and if appellant knew that, and engaged in the difficulty under these circumstances, the charge was correct; but it was an issue earnestly combated by appellant in his testimony and throughout the trial. This was error.

3. The charge on threats, is also made the subject of exception. As before stated, it had been communicated to appellant that deceased had made threats. The language employed by the court is as follows: "You are further charged that, should you believe from the evidence that prior to the difficulty between the deceased and Jim Mayhew, the deceased made a threat or threats to take the life of Jim Mayhew, or to do him serious bodily harm, and if, from knowledge of such threats, it reasonably appeared to the defendant, at the time he stabbed and cut the deceased, if he did so, that the deceased was then about to carry out and to put in execution such threat so previously made, and was then about to take the life of Jim Mayhew, or to do him serious bodily harm, or, should you believe from the evidence that, at the time the defendant stabbed and cut the deceased, if he did so, it then reasonably appeared to the defendant that he (deceased) was then making any hostile demonstration toward Jim Mayhew reasonably evidencing an intention to put into execution such threat, if any, and was then about to inflict death or some serious bodily harm upon Jim Mayhew, and that, reasonably believing such action to be necessary to prevent the infliction of death or serious bodily harm upon said Jim Mayhew, the defendant stabbed and cut the deceased, if he did do so, you would in such case acquit the defendant."

A casual inspection of this charge will discover that the jury was required to believe the threats were made, and not that the defendant so believed. If defendant was informed that the threats were made, and believed and acted upon them, they were the same to him as if they were in fact made; but the jury was not so instructed on this phase of the law, but on

the contrary, the criterion was given the jury that they should believe the threats were or had been made. If the defendant believed the threats had been made, and acted upon them under the conditions stated, he would be entitled to an acquittal, whether the jury, in the light of subsequent events, believed them or not. It is the defendant's belief of the threats that prompts his action, and the case must be viewed from that standpoint, and not from the jury's standpoint. It has been always held error to require the jury to find that threats were made. Defendant would have the right to act on them if he believed they were made. *Swain v. State*, 48 Tex. Crim. Rep. 103, 86 S. W. 335; *Huddleston v. State*, 54 Tex. Crim. Rep. 93, 130 Am. St. Rep. 875, 112 S. W. 64; *Buckner v. State*, 55 Tex. Crim. Rep. 517, 117 S. W. 802; *Lundy v. State*, 59 Tex. Crim. Rep. 131, 127 S. W. 1034; *Hightower v. State*, 56 Tex. Crim. Rep. 251, 133 Am. St. Rep. 906, 119 S. W. 691.

4. There is another exception to the charge which it may be well enough to notice. The court charged the jury that if defendant made an attempt to go to the place where Will Burkhead and Jim Mayhew were engaged in a conflict on the ground, if they were so engaged, and in making such attempt was attacked by one A. M. Pruett, and at the time he stabbed or cut deceased, if he did so, it reasonably appeared to defendant that Will Burkhead and A. M. Pruett were then present and acting together for the purpose of taking the life of said Jim Mayhew, or doing him some serious bodily injury, then defendant had the right to take the life of either or both the said Will Burkhead and A. M. Pruett, if it reasonably appeared, etc. The contention is made that this limited the right of self-defense on the part of appellant, and made it contingent on whether Burkhead and Pruett were acting together, and whether Pruett made an actual attack on defendant; whereas he would have the right to defend as well against either or both as if they were not acting together, and equally so if Pruett had made an attack upon the defendant. This charge is, to say the least of it, awkwardly framed, and upon another trial appellant's legal rights in regard to this phase of the testimony should be more aptly stated. This seems to have been a limitation upon appellant's right of self-defense, and may have been so regarded by the jury. While it is unquestionably true that appellant would have the right to defend against Burkhead and Pruett, acting together to take the life of his son, at the same time, he would have the right to act against Burkhead and

deceased as well without a concert of action as with such concert. The limitation, from this aspect of the case, upon another trial, should not be so strictly limited to a concert of action between the parties to take the life of the son of appellant.

5. There are several charges asked, among others, by the accused to the effect that if the killing occurred, not on a previously formed design, but on a subsequently formed design, that the jury would attribute it to the latter, and not the original design. There had been a difficulty in the morning, as before stated, in which appellant was not a party in any way, but which had been communicated to and angered him, and he used language indicating resentment. This had passed, and defendant's testimony was that he had gone to his place of business, and was engaged in other matters, when he was informed of the trouble between his son and the deceased, and that he then rushed to his defense. The jury's attention should have been called to this, and if the killing occurred with reference to the latter transaction, and the purpose to kill was in defense of his son from that standpoint, and not from any previous provocation that may have arisen, then they would give defendant the benefit of that view of the case, and impute it to the latter, instead of the former, design. The state's theory was appellant was acting under former design, aided by the claimed agreement to whip or kill deceased. Appellant contradicted this by his testimony. Such a charge was called for and pertinent. We understand this to be the law in Texas since the famous decision by Judge Roberts, in the case of *McCoy v. State*, 25 Tex. 33, 78 Am. Dec. 520.

There are other errors urged for reversal, but, in view of what has been said, we deem it unnecessary to discuss them.

The judgment is reversed, and the cause is remanded.

INDIANA SUPREME COURT.

KOKOMO NATURAL GAS & OIL COMPANY, Appt.,

v.

ELIZABETH L. MATLOCK.

(— Ind. —, 97 N. E. 787.)

Pleading — oil and gas lease — completion of well.

1. One suing for the rental to be paid for

Note. — Lease as encumbrance or conveyance within statute requiring joinder or consent of spouse.

Perkins v. Morse, 78 Me. 17, 57 Am. Rep. 780, 2 Atl. 130, holds that a lease is not a

an option to explore land for oil and gas need not allege that no well had been completed which would change the measure of compensation, since such fact would be matter of defense.

Husband and wife — encumbrance of wife's estate — oil and gas lease.

2. An option to explore land for oil and gas for a period of five years, with right of renewal, is not an encumbrance so as to require a man to join his wife in the granting thereof upon her land, under a statute giving her control of her separate estate with a right to its rents and profits, but providing that no conveyance or encumbrance of the property shall be made unless he joins in the conveyance.

Landlord and tenant — oil and gas — action for rent — necessity of possession.

3. That the lessee never took possession of land under an oil and gas lease does not defeat an action for the compensation provided by the lease to be paid for the right to explore the property for these substances.

(March 6, 1912.)

A PPEAL by defendant from a judgment of the Circuit Court for Tipton County in favor of plaintiff in an action brought to recover the compensation provided by a gas and oil lease. Affirmed.

The facts are stated in the opinion.

conveyance within the meaning of a statute forbidding conveyances by a married woman without the joinder of her husband. In this case the court said: "The word 'convey' or 'conveyance' must refer to an alienation of the estate,—a transference of the title. It is 'real estate' that cannot be conveyed. A lease is personal property. It bargains away a temporary possession,—does not dispose of any fee or title. There is no inhibition against a sale of personal property by the wife alone, although given to her by the husband. Real estate 'conveyed to' a married woman is the property described; 'cannot be conveyed by her' are the words to be interpreted. A lease may be in a sense a conveyance, but such is not the commonly accepted nor the accurate meaning of the term. When we say 'premises are leased' we generally mean that the use of them is transferred; and by the term 'conveyed' that the title is deeded. It is a significant fact that the word 'convey' is many times used in the Revised Statutes, and especially in chapter 73 relating to conveyances, and generally, if not at all times, in the sense of an alienation of the title to real estate. The distinction is clearly observed in § 8, which provides that 'no conveyance of an estate, etc., or lease for more than seven years,' shall be effectual against third persons, unless the deed be recorded. If the legislature intended that the wife should not lease property acquired by her through her husband, it would have been easy to declare its intention in explicit terms. It is 39 L.R.A. (N.S.)

Messrs. Bell & Purdum for appellant.
Messrs. Joseph C. Henon and Oglebay & Oglebay for appellee.

Monks, J., delivered the opinion of the court:

Appellee brought this action against appellant upon a written contract, to recover the compensation provided therein for the right to explore 112½ acres of land for natural gas and oil. Trial by the court, and judgment for appellee.

The errors assigned call in question the action of the court in overruling appellant's demurrer to the complaint and the motion for a new trial. The written contract sued on was entered into by appellee with one Forehand, granting him the exclusive right to explore the land therein described, belonging to her, "for natural gas and oil, for the period of five years, with the privilege of a further period of five years for the same purpose and upon the same terms, and as much longer as gas and oil may be found in paying quantities," the second party, Forehand, to pay to the party of the first part compensation at the rate of 50 cents per acre per annum after the expiration of the first year, "until the completion of a well on said premises, which shall, in his opinion, produce gas in sufficient quantities

hardly to be supposed that it was left to be implied. A married woman is not limited in the management of her property, however obtained by her. She may control its income, unless she releases it to her husband. How can she manage this property or control its income, when not occupying it, unless she can rent it? The counsel for the defendant argues that if the wife could lease at all, she can lease the farm for ninety-nine years,—a lease practically equivalent to a conveyance of title. This argument is quite plausible, but not in our judgment sound. If the wife cannot make a lease for two years, it must be because she cannot lease at all. If the lease is for ninety-nine years, a rent will be presumed to be reserved. It would be different from an absolute conveyance, which might result in a waste or loss of the property. If the statute needs amendment, the legislature can amend it. We construe it as it stands."

And it was held in New Jersey that a married woman could execute a lease for years upon her real property, notwithstanding the statute in relation to property of married women provided that nothing therein should enable a married woman to execute any conveyance or any instrument encumbering the same without her husband joining therein. *Sullivan v. Barry*, 46 N. J. L. 1, followed in *Sullivan v. Barry*, 47 N. J. L. 339, 1 Atl. 240.

This rule was recognized in *Shipley v. Smith*, 162 Ind. 526, 70 N. E. 803; but the case held the lease subject to disaffirm-

to justify said second party in marketing said gas." The contract then provides what compensation shall be paid after a well is completed. "Said payments to be due and payable semiannually, on the 1st day of January and the 1st day of July. The second party to have the right to cancel and end the contract at any time. . . . All conditions and rights between the parties hereto shall extend to their heirs, executors, and assigns." On February 4, 1905, said Forehand assigned said contract to the Indiana Northern Oil & Gas Company, and said corporation afterward assigned said contract to appellant. Appellant afterward, on June 24, 1908, canceled said contract, as it had the right to do under the terms thereof.

Appellant insists that the complaint was insufficient because it was not alleged therein that "neither appellant nor its immediate or remote assignor had drilled or completed any well upon said land." It will be observed that the compensation to be paid was 50 cents per acre per annum after the first year, until a well had been completed, as provided in the contract. If any such well had been completed by appellant or its assignors, the same was a matter of defense as to so much of the complaint as sought to recover the compensation of 50

cents per acre per annum thereafter. In an action on a contract by which the defendant is only to pay the consideration until the doing of some act by the defendant or other person, as the completion of a well, the plaintiff is not required to aver that the act has not been done or the contingency has not happened. That is a matter of defense to be set up by the defendant. 1 Chitty, Pl. 14th Am. ed. by Perkins, § 321; 1 Chitty, Pl. 16th Am. ed. by Perkins, § 246; Gould, Pl. §§ 17, 19, pp. 164, 165; 9 Cyc. 727; 1 Abbott, Trial Brief Pl. & Demurrer, 2d ed. § 182, p. 360; Root v. Childs, 68 Minn. 142, 146, 70 N. W. 1087; Wooters v. International & G. N. R. Co. 54 Tex. 294; Redman v. Aetna Ins. Co. 49 Wis. 431, 435-442, 4 N. W. 591; Griswold v. Scott, 13 Ga. 210, 214.

The second error assigned by appellant is the overruling of the motion for new trial on the ground that the finding of the court was not supported by sufficient evidence, and was contrary to law. It is contended that the contract upon which appellee sued "was void, for the reason that appellee, being a married woman, was prohibited by statute from conveying or encumbering her land unless her husband had joined in such conveyance or encumbrance." The question presented is whether or not this con-

ance, upon the ground that the married woman was also an infant, the court saying that this statute simply removed the disability of coverture, but did not emancipate from the disability of infancy.

Perhaps it should be observed that in the case of *Heal v. Niagara Oil Co.* 150 Ind. 483, 50 N. E. 482, which is otherwise sufficiently set out in *KOKOMO NATURAL GAS & OIL CO. v. MATLOCK*, it was urged that the lease was void under the Indiana statute forbidding a married woman to encumber or convey property except by deed in which her husband should join.

It was said in *Vandevoort v. Gould*, 36 N.Y. 639, that where the instrument creating the separate estate of the wife expressly stated that the property was conveyed to her for her sole use and benefit, free from all interference by her husband, a lease thereof by her for five years was not a sale and conveyance, within the purview of a statute requiring the assent of the husband to a conveyance by the wife.

Some decisions, however, incline toward the contrary view.

Thus, an oil lease for twelve years executed by a married woman, her husband not joining, was declared void in *Buchanan v. Hazzard*, 95 Pa. 240, on the authority of *Trimmer v. Heagy*, 16 Pa. 487. The latter case, however, involved a deed, and not a lease, and it appears therein that the statutes provided that the real estate of the wife could be conveyed by a deed executed by the husband and wife. However, in *Welsh v.* 39 L.R.A. (N.S.)

Oates, 9 Phila. 154, *Lynd, J.*, holds that a lease for a year is not a disposal or conveyance, within the meaning of this statute, but is a right accruing to her under a provision assuring her the "use and enjoyment" of her separate estate. The court disapproved language to the contrary, appearing in *Miller v. Harbert*, 6 Phila. 531, holding that the respective length of leases which should be deemed to have been executed as incident to the right of use and enjoyment, and of those which constituted a disposal, was a question of law; and that necessarily the right to use and enjoyment included the power to lease for a term of one year.

So, it is held that a lease is an encumbrance within the meaning of a statute in relation to community property, and that therefore the husband could not execute a lease of the community without the wife's joinder. *Hoover v. Chambers*, 3 Wash. Terr. 28, 13 Pac. 547.

Without expressly discussing the matter, the court, in *Emrick v. Sullivan*, 25 U. C. Q. B. 105, seemed to assume that a life lease was a conveyance in which the husband must join, for, in holding the lease void for nonjoinder of the husband, the court said that the statute, although enabling a married woman to hold and enjoy her real estate free from the debts and obligations of the husband, left the law "as to the conveying such estate untouched."

In *Melley v. Casey*, 99 Mass. 241, holding that to make a lease by the wife binding upon the husband, it must be made with his

tract for exploring her land for natural gas and oil for five years, with privilege of renewal, was a conveyance or encumbrance of said land within the meaning of the statute. Section 7852, Burns's 1908, provides that "no lands of any married woman shall be liable for the debts of her husband; but such lands and the profits therefrom shall be her separate property, as fully as if she were unmarried: Provided, that such wife shall have no power to encumber or convey such lands, except by deed in which her husband shall join." Section 7853, Burns's 1908, provides that "a married woman may take, acquire, and hold property, real or personal, by conveyance, gift, devise, or descent, or by purchase with her own separate means or money; and the same, together with all the rents, issues, income, and profits thereof shall be and remain her own separate property, and under her own control, the same as if she were unmarried."

assent, which the statute requires, it did not appear whether or not the statute expressly specified leases. So, also, as to *Child v. Sampson*, 117 Mass. 63, holding that the statute was sufficiently complied with when the husband signed merely as an attesting witness.

Ables v. Ables, 86 Tenn. 333, 9 S. W. 692, holds merely that, while a statute providing that the rents and profits of the wife's separate estate shall in no manner be subject to the husband's debts or contracts, except by her written consent, protected such rents from the husband's creditors, and extinguished his right to contract them away over her objection, still it did not in any other respect interfere with the husband's ancient right as governor of the family, to control his wife's land; and that therefore she could not lease such lands without his consent.

It was held in an Alabama case that a wife was authorized to lease her statutory separate estate when joined by her husband, by a statute authorizing her to sell and convey real and personal property. *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446.

Other cases seem to take the position that leases not required to be in writing by the statute of frauds are not such conveyances as require the joinder of the spouse.

Thus, it has been held that a lease for a period of time coming within the exception of the statute of frauds, and therefore not required to be in writing, is not an encumbrance or conveyance within the meaning of a statute providing that the wife shall have no power to encumber or convey her separate property, except by deed in which the husband shall join. *Pearcy v. Henley*, 82 Ind. 120, cited in *Nash v. Berkmeir*, 83 Ind. 536, which does not, however, decide the precise question.

And, conversely, it was held in *Chandler v. Jost*, 81 Ala. 411, 2 So. 82, that while the husband could as trustee lease his wife's separate estate for a period of one year, a 30 L.R.A. (N.S.)

Where a married woman is given by statute the right to the rents, issues, income, and profits of her land, and is given the control of the land, the same as if unmarried, it is evident that she has the power to lease her land for a term of years, without her husband joining in such lease. In Illinois a statute similar to § 7853, supra, has been construed to mean that a married woman may lease her separate property for a term of years without the consent of her husband, and such a lease for a period of ten years was held binding. *Parent v. Callender*, 64 Ill. 97; 21 Cyc. 1501. It has been held in this state that a lease of real estate for years is personal property and passes to the personal representative of the lessee, and not to his heir. *Shipley v. Smith*, 162 Ind. 526, 528, 529, 70 N. E. 803, and cases cited. It has also been held under §§ 7852, 7853, supra, that a lease by a married woman of her lands for the purpose of cultivation, for

lease for a longer term was a species of sale required to be in writing, and in which the wife must unite to make it valid.

So, it is held in *Dority v. Dority*, 96 Tex. 215, 60 L.R.A. 941, 71 S. W. 950, that a lease of land which is the separate estate of a married woman, for a period of more than one year, is a conveyance within the meaning of a statute requiring husband and wife to join in the conveyance of real estate, the separate property of the wife, and forbidding the conveyance of an estate for a term of more than one year, unless the conveyance be in writing; and the wife must therefore join in this execution, notwithstanding a statute giving the husband the sole management of the wife's property during marriage.

As to the effect of one spouse joining in the execution of the other's deed or mortgage, to convey the former's separate property included therein, see the note in 28 L.R.A. (N.S.) 289.

As to the effect of the nonjoinder of the husband in the wife's executory contract to convey, where his joinder is essential to a conveyance, see the note in 30 L.R.A. (N.S.) 353.

As to the validity of the limitation upon the power of alienation imposed upon a grant or devise of an equitable estate to a married woman, see the note in 28 L.R.A. (N.S.) 426.

As to the power of the husband without the wife's consent, to abandon the homestead, or to convey premises by his sole deed after abandonment, see the note in 37 L.R.A. (N.S.) 807.

As to the validity of a conveyance or encumbrance of the homestead by the wife, after the husband has abandoned her, see the note in 36 L.R.A. (N.S.) 1024. And as to the husband's conveyance of the homestead after abandonment by the wife see the note in 8 L.R.A. (N.S.) 565.

L. A. W.

a term not exceeding three years, is not an encumbrance or conveyance within the meaning of this statute, and that it was not essential to the validity of the lease that the husband join in the execution thereof. *Ibid.*; *Pearcy v. Henley*, 82 Ind. 129; *Nash v. Berkmeir*, 83 Ind. 536.

Appellant contends, on the authority of these cases, that a contract by a married woman for the exploration of her land for natural gas and oil, in which her husband did not join, and which runs for a term longer than three years, is an encumbrance under the statute, and therefore void. Said cases do not sustain this contention. While they sustain leases made by a married woman of her lands for three years, where her husband did not join therein, they do not hold that such a lease so executed would be void if for a longer period than three years. It has been held by this court that the rules applying to the relation of landlord and tenant have no application to a contract like the one in this case. *Hancock v. Diamond Plate Glass Co.* 162 Ind. 146, 153, 70 N. E. 149; *New American Oil & Min. Co. v. Troyer*, 166 Ind. 402, 412, 76 N. E. 253, 77 N. E. 739; *Dill v. Frazee*, 169 Ind. 53, 57, 79 N. E. 971. In *Heal v. Niagara Oil Co.* 150 Ind. 483, 486, 50 N. E. 482, 483, the contract was executed by a married woman, Mrs. Swan, her husband not joining therein, giving the exclusive right of prospecting and exploring for gas and oil on her land, and was substantially the same as the contract sued upon in this case, except that the provisions in regard to the term were "for the term of one year and as much longer as oil and gas is found in paying quantities thereon or the rental paid by lessee. . . . If no well be completed on the above-described premises within six months from the date hereof, then this lease shall become null and void, unless the lessee shall thereafter pay for the further delay at the rate of \$80 per year, until a well shall be completed." The court held in that case that the contract only gave the right of prospecting and exploring for natural gas and oil, and that Mrs. Swan, the married woman who executed the same, parted with "no immediate title or estate," and that any "title or estate which may be contemplated remaining inchoate and of no effect until oil or gas is found. . . . For the purpose of prospecting, such leases involve a mere use, and part with no greater interest in the freehold than the ordinary agricultural lease. We have here no question of the effect of the instrument of Mrs. Swan to carry a freehold estate; the question being as to the validity of the lease to the appellees, in vesting the exclusive right of prospecting

or operating for gas and oil. For such purpose we do not doubt the power of Mrs. Swan to lease without her husband joining." *New American Oil & Min. Co. v. Troyer*, 166 Ind. 402, 411, 412, 76 N. E. 253, 77 N. E. 739. In this case no well was ever completed, and the contract under which appellant had the right to explore said real estate of appellee for natural gas and oil was canceled by appellant on June 24, 1908. Appellant canceled said contract according to the provisions thereof. Upon the authority of *Heal v. Niagara Oil Co.* supra, we hold the contract sued upon in this case was not an encumbrance or conveyance of appellee's land, and was valid, although her husband did not join therein. The mere fact that such a contract gives five years with the privilege of renewal, for prospecting and exploring for natural gas and oil, does not make it any more an encumbrance or conveyance than if it were for a period less than three years.

It is contended by appellant that the finding of the court is not sustained by sufficient evidence, because it was not shown that appellant ever took or held possession of said land under said contract. It is not material whether appellant or its assigns took or held possession of said land. It may be, as the contract sued upon is not a lease, and the relation of landlord and tenant did not exist between appellant and appellee (*Dill v. Frazee*, 169 Ind. 53, 57, 79 N. E. 971, and cases cited) that, unless there was a beneficial use or occupation of the land by appellant, no action could be maintained on an implied agreement to pay. *Dill v. Frazee*, supra, 169 Ind. 57. This, however, is not an action on an implied agreement, but on an express contract to pay 50 cents per acre per annum, not as rent, but compensation for the delay. As long as said contract was in force, appellant had the right to enter upon said land and prospect for natural gas and oil, and it is liable for the compensation fixed in said contract for such right, to the date said lease was canceled. In *Hancock v. Diamond Plate Glass Co.* 162 Ind. 146, 150, 70 N. E. 149, 151, where no possession had been taken, this court said: "On the part of the company, it agreed, in equally certain terms, to give appellants for the valuable concession a supply of free gas for domestic use, and pay them \$20 in cash, not for one year, but for every year that might elapse before it made a well on the premises, and thereafter \$100 per annum for each well. As we have seen, the company has not bound itself to construct a gas well on appellant's land within any specified time; but, so long as natural gas continues in general use for manufacturing purposes,

it has bound itself to pay the annual sum of \$20 until it does make such a well. The parties themselves have agreed upon the thing to be done, and the exact amount to be paid when done, and for the delay in the doing of it, and we cannot look beyond the agreement. It is not to be supposed for a moment that either party understood when the contract was entered into that the company was to have these valuable and continuing rights without rendering to appellants what was deemed to be a coequal, valuable, continuing consideration. Nor is it to be doubted that it was the mutual understanding that, as long as the company excluded others from mining the gas on appellant's land, it should be liable for the sum it agreed to pay for the right to do so. We must so view the agreement, because in accord with the plain, simple meaning of its terms, and in harmony with a proper sense of fairness and natural justice."

Finding no error, the judgment is affirmed.

KANSAS SUPREME COURT.

RE PETITION OF ANNA M. CLARK, on behalf of George W. Clark.

(86 Kan. 539, 121 Pac. 492.)

Criminal law — insane criminal — incarceration — ex post facto law.

1. Section 5 of chapter 299 of the Laws of 1911, providing that a person acquitted of a criminal charge on the ground that he was insane when the offense was committed shall be committed to the asylum for the dangerous insane, and shall not be liberated therefrom except as prescribed in the act, is not *ex post facto* as to a person tried and acquitted on that ground after the statute was enacted for an offense committed before its passage.

Same — constitutionality.

2. The section referred to in the preceding paragraph is not obnoxious to the provision of the Federal Constitution that a state shall not deprive any person of due process of law, nor to the provisions of the state Constitution that all persons for injuries to person, reputation, or property shall have remedy by due course of law.

(February 10, 1912.)

Headnotes by BENSON, J.

Note. — The question of confinement of one acquitted of crime by reason of insanity is covered by notes to *Ex parte Brown*, 1 L.R.A.(N.S.) 540, and *People ex rel. Peabody v. Chanler*, 25 L.R.A.(N.S.) 946.

Trial of insane person as former jeopardy, see note to *Com. v. Endrukut*, 35 L.R.A.(N.S.) 470.
38 L.R.A.(N.S.)

PETITION for a writ of habeas corpus to secure the release of George W. Clark from an insane asylum to which he had been committed upon acquittal of murder because of insanity. Denied.

The facts are stated in the opinion.

Messrs. Edgar Foster and Albert Hoskinson for petitioner.

Messrs. Clad Hamilton, Clay Hamilton, and E. R. Thorpe, with Mr. John S. Dawson, Attorney General, for respondent:

No person has a vested right in a rule of procedure regardless of the time when a cause of action has arisen, and the procedure must be that prescribed by law at the time of trial.

Cooley, Const. Lim. 6th ed. 326, 327; State ex rel. Thompson v. Snell, 49 Wash. 177, 94 Pac. 926; St. Louis v. Calhoun, 222 Mo. 44, 120 S. W. 1152; Re Patterson, 155 Cal. 626, 26 L.R.A.(N.S.) 654, 132 Am. St. Rep. 116, 102 Pac. 941, 18 Ann. Cas. 625; Harris v. United States, 4 Okla. Crim. Rep. 317, 31 L.R.R.A.(N.S.) 820, 111 Pac. 982, Ann. Cas. 1912 B. 810.

Petitioner is not confined as punishment for crime, but because of a mental deficiency or condition of insanity which renders him dangerous to the public.

Com. v. Ellis, 207 Mass. 572, 93 N. E. 823; State v. Strasburg, 60 Wash. 106, 32 L.R.A.(N.S.) 1216, 110 Pac. 1020, Ann. Cas. 1912 B, 917; People ex rel. Peabody v. Chanler, 133 App. Div. 159, 117 N. Y. Supp. 322.

There was due notice and a hearing.

Re Brown, 39 Wash. 160, 1 L.R.A.(N.S.) 540, 109 Am. St. Rep. 868, 81 Pac. 552, 4 Ann. Cas. 488; Brown v. Urquhart, 139 Fed. 846, 205 U. S. 179, 51 L. ed. 760, 27 Sup. Ct. Rep. 459.

The statute provides for release upon recovery.

Re Brown, 39 Wash. 160, 1 L.R.A.(N.S.) 540, 109 Am. St. Rep. 868, 81 Pac. 552, 4 Ann. Cas. 488; Re Boyett, 136 N. C. 415, 67 L.R.A. 972, 103 Am. St. Rep. 944, 48 S. E. 789, 1 Ann. Cas. 729.

The legislature may empower the court to act upon the theory that a mental state recently shown to exist continues to exist up to the time of the order of commitment.

State ex rel. Thompson v. Snell, 46 Wash. 327, 9 L.R.A.(N.S.) 1191, 89 Pac. 931; Re Brown, 39 Wash. 160, 1 L.R.A.(N.S.) 540, 109 Am. St. Rep. 868, 81 Pac. 552, 4 Ann. Cas. 488; People ex rel. Peabody v. Chanler, 196 N. Y. 525, 25 L.R.A.(N.S.) 946, 89 N. E. 1109, 133 App. Div. 159, 117 N. Y. Supp. 322; People ex rel. Thaw v. Lamb, 118 N. Y. Supp. 389; People ex rel. Peabody v. Baker, 59 Misc. 359, 110 N. Y. Supp. 848; Re Thaw, 138 App. Div. 91,

122 N. Y. Supp. 970; *People ex rel. Peabody v. Chanler*, 116 N. Y. Supp. 62.

Benson, J., delivered the opinion of the court:

On a trial for murder George W. Clark introduced evidence to prove that he was insane when the homicide occurred. The jury found the defendant not guilty, because at the time of the commission of the offense he was insane. Thereupon the defendant was committed to the Asylum for the Dangerous Insane for safe-keeping and treatment, and was in that institution when this writ was issued. The contention is that the statute under which he was committed is *ex post facto* as to Clark; that it is unconstitutional because it deprived him of the right to trial by jury in the probate court, of the question of his sanity at the time of commitment, and, if insane, of the benefit of admission to a regular hospital for treatment; and that it deprives him of the right to institute proceedings to obtain his discharge and of liberty without due process of law. Section 5 of the statute, which took effect March 17, 1911, reads: "Whenever during the trial of any person on an indictment or information, and evidence is introduced to prove that he was insane, an idiot or imbecile, or of unsound mind, at the time of the commission of the offense, and such person shall be found to have been at the date of the offense alleged in said indictment or information, insane, an idiot, or an imbecile, and is acquitted on that ground, the jury or the court, as the case may be, shall so state in the verdict, and in said case it shall be the duty of the jury to pass specially on the question of the sanity of the defendant, and the court shall thereupon forthwith commit such person to the State Asylum for the Dangerous Insane for safe-keeping and treatment, and such person shall be received and cared for at said institution. No such person so acquitted shall be liberated therefrom except upon the order of the court committing him thereto, and until the superintendent of the said Asylum for the Dangerous Insane shall certify in writing to such committing court that in his opinion such person is wholly recovered, and that no person will be in danger by his discharge." Laws 1911, chap. 299, § 5. The homicide occurred on December 12, 1910, and the trial took place in April, 1911.

When the act charged in the information was committed, there was no provision for commitment to an asylum for the dangerous insane, and it is argued that the statute passed afterwards authorizing such commitment is *ex post facto*. There were, 39 L.R.A.(N.S.)

of course, at that time, other provisions of law providing for the restraint of insane persons, and their treatment in institutions provided for the purpose. The commitment is not for punishment, but for the restraint and treatment of insane persons. *State v. Linderholm*, 84 Kan. 603, 114 Pac. 857; *State ex rel. Thompson v. Snell*, 49 Wash. 177, 181, 94 Pac. 926.

The term *ex post facto*, as used in the Constitution, relates to criminal punishment, and has no relation to other retrospective laws. *Cooley, Const. Lim.*, 6th ed. 318; *Meffert v. State Bd. of Medical Registration (Meffert v. Packer)* 66 Kan. 710, 1 L.R.A.(N.S.) 811, 72 Pac. 247. The statute merely provides a new procedure for the restraint, care, and treatment of a class of the insane. It would be strange if the legislature could not change the procedure affecting insane people, or if such new procedure could not relate to persons thus afflicted before the passage of an act authorizing the inquiry. The state also has the undoubted right to classify the insane for treatment, and this is constantly done in ordinary asylums. Certainly those who are dangerous may be segregated in a separate building as well as in a separate ward. It is contended that the act by its terms authorizes the deprivation of liberty without due process of law, first, because there is no provision for finding whether an accused person is insane at the time of his trial on the criminal charge, and, second, because he has no power to commence proceedings for release when restored to reason. While an orderly proceeding adapted to the nature of the case is essential, inquests called in cases of alleged insanity, such as are ordinarily provided by the statutes of various states and by laws of our state, are sufficient. *Gen. Stat.* 1909, §§ 4819-4854, chap. 8464-8470. A jury trial is not necessary, although the tribunal provided for the purpose may be called a jury, and the inquest designated a trial. *State v. Linderholm*, 84 Kan. 603, 114 Pac. 857; *Re Latta*, 43 Kan. 533, 23 Pac. 655; *Re Dowdell*, 61 Am. St. Rep. 290, and note, 293 (169 Mass. 387, 47 N. E. 1033) notes in 13 Ann. Cas. 877, and 1 Ann. Cas. 733. The same well-established rule applies in cases where delinquent children are committed to industrial schools. *Ferrier's Petition*, 103 Ill. 387, 43 Am. Rep. 10. "Legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters; that is, by process or proceedings adapted to the

nature of the case." *Dent v. West Virginia*, 129 U. S. 114, 124, 32 L. ed. 623, 626, 9 Sup. Ct. Rep. 231, 234. The confinement of persons acquitted of crime by reason of insanity is a matter of common statutory regulation in this country. Note in 1 L.R.A.(N.S.) 540. It was said in the note last cited: "The right to confine one who is still insane, and who is dangerous to the public peace and safety, until such time as he can be released with safety, providing that the present existence of such insanity or dangerous condition is properly shown, has apparently never been questioned; and it would seem that no objection thereto could be successfully raised."

Questions arising under such statutes relating to the present existence of insanity, and how that fact should be determined, have afforded occasion for much judicial consideration. A statute of Washington contains this provision: "When any person indicted or informed against for an offense shall, on trial, be acquitted by reason of insanity, the jury, in giving their verdict of not guilty, shall state that it was given for such cause; and thereupon, if the discharge or going at large of such insane person shall be considered by the court manifestly dangerous to the peace and safety of the community, the court may order him to be committed to prison, or may give him into the care of his friends, if they shall give bonds, with surety to the satisfaction of the court, conditioned that he shall be well and securely kept; otherwise he shall be discharged." 2 Ballinger's, Anno. Codes & Statutes, § 6959. In *Re Brown*, 39 Wash. 160, 1 L.R.A.(N.S.) 540, 109 Am. St. Rep. 868, 81 Pac. 552, 4 Ann. Cas. 488, it was contended that the statute was void for the reasons urged here. The court said: "Has the petitioner been deprived of due process of law in the premises? He was tried before a jury, to whom he himself submitted the issue that he was insane when the crime was committed. He was permitted to fully introduce his evidence upon that subject, and the jury were instructed as to their duty in the premises. The verdict returned was in his favor upon the issue which he tendered, and he was therefore accorded due process of law and the right of trial by jury upon that subject." The opinion referred to the presumption that general insanity once shown to exist still continues, and held that the burden was upon the accused person to show that he was sane at the time of the trial, which he neither alleged nor proved, but demanded his discharge as a matter of right, which was denied, and the act was held valid. A later application in habeas corpus proceedings in behalf of the 39 L.R.A.(N.S.)

same prisoner was made to a Federal court, which also held that the act was valid; that, while it provided no procedure for trying the issue of insanity at the time of the commitment, the court had the inherent right to cause an arraignment, and to give a hearing upon the question in an ordinary course of practice, still, because that was not done, his discharge was ordered. *Brown v. Urquhart* (C. C.) 139 Fed. 846. This judgment of the Federal court was, however reversed in *Urquhart v. Brown*, 205 U. S. 179, 51 L. ed. 760, 27 Sup. Ct. Rep. 459, but without expressing any opinion on the constitutionality of the act. In a later case the supreme court of the same state held that a statute providing for inquiry concerning persons alleged to be insane, and their commitment to a hospital, had no application to persons acquitted of crime on the ground of insanity. The court, reaffirming the constitutionality of the statute relating to such persons, said: "The question is suggested as to what evidence establishes his 'manifestly dangerous' condition. The fact of his having killed a human being is conclusive that he was 'dangerous,' and the verdict of the jury that he was insane at the time of the homicide; and, unless there is clear, ample, and conclusive evidence that his mental condition has undergone a radical change toward a normal condition since that time, the trial judge should not hesitate to find him 'manifestly dangerous' within the meaning of the statute." *State ex rel. Thompson v. Snell*, 46 Wash. 327, 9 L.R.A.(N.S.) 1191, 89 Pac. 931. The courts of New York have given much consideration to a statute of that state somewhat similar to our own on this subject, and designed to accomplish the same end, in the various *Thaw Cases*. *Thaw* was committed to a hospital for the criminal insane in pursuance to a provision of the New York Criminal Code as follows: "When the defense is insanity of the defendant, the jury must be instructed, if they acquit him on that ground, to state the fact with their verdict. The court must, thereupon, if the defendant be in custody, and they deem his discharge dangerous to the public peace or safety, order him to be committed to the state lunatic asylum until he becomes sane." *Cook's Crim. & Penal Code of N. Y.* 1897, Crim. Code, § 454. He sought release in habeas corpus proceedings. Mr. Justice Jenks in an opinion upon this application, reported in *People ex rel. Peabody v. Chandler*, 123 App. Div. 159, 117 N. Y. Supp. 322, said: "But, as there is no provision for enlightenment of the court in any other manner, it must be that the legislature intended that the court could rest its con-

clusion upon the evidence given at the trial and the appearance of the defendant thereat. If the defendant's plea was insanity, and it had prevailed, it would follow that insanity was litigated at the trial. Although the inquiry at the trial would be directed to insanity at the time of the commission of the offense, yet the evidence might establish that such insanity had not ceased, but had continued; that it was chronic, that the defendant might then or thereafter, in the very nature of his disease, be subject to recurrences of a state of mind like unto that in him when he committed the alleged crime. And, moreover, such evidence might well bear directly upon the condition of the defendant at the time of trial. . . . It cannot then be said that a defendant who makes the plea of insanity, and seeks to establish it, did not have notice under this provision of a hearing that might reveal his condition of insanity at the time of his trial, and a hearing of which the result might be such commitment upon acquittal for insanity, under the said provision of the Code of Criminal Procedure, as was made in this case. . . . Such a commitment is not for the punishment of such a defendant, for there can be no punishment for him who has been acquitted, but it is for protection for the public, made in the exercise of the police power of the state, which permits the restraint of an insane person who at large would be a danger to the peace and safety of the people. . . . Freund on the Police Power (§ 255) says: "The right to apply at any time for discharge has been held to reconcile even the absence of hearing in the first instance with the constitutional requirement of due process, and, if upon such proceeding the petitioner is found to be insane, his detention may be continued." pp. 160-163. The opinion of Judge Jenks also states that, by the provision of the Code (quoted above), the defendant had notice and a hearing that contemplated the process upon which he was committed, and, besides, the provisions of express law whereby he could institute proceedings to establish his sanity and secure his release satisfied the constitutional safeguards invoked against the statute. Mr. Justice Rich, in a concurring opinion in the same case, said: "Upon his trial Thaw had established his insanity at the time the crime was committed. It is presumed to continue until the contrary is shown, which in this case has not been done. His condition had led to one murder, and it cannot be said that the duty devolving upon the court to safeguard the public by the detention of the prisoner under the provisions of § 454 of the Code of Criminal Procedure was im-

properly exercised. The order was a valid adjudication of his then insanity to an extent rendering his liberty dangerous to the public." p. 173. The court of appeals affirmed the judgment denying the writ, upon the opinions of the two justices referred to. *People ex rel. Peabody v. Chanler*, 196 N. Y. 525, 25 L.R.A.(N.S.) 947, 89 N. E. 1109.

The grounds upon which the statute was held valid suggested in these opinions may be briefly summarized thus: (1) That insanity of a nature dangerous to others proved on the trial was presumed to continue to the time of the commitment; (2) that the commitment was based on evidence showing the continuance of such insane condition; and (3) that, the commitment resulting from the express command of the statute, the trial and verdict upon the criminal charge was only an equivalent of proceedings provided to determine the question of insanity in cases not involving a charge of crime. Doubtless there is merit in each of these views, and each should have weight in upholding a statute which is not to be set aside unless clearly unconstitutional. If the legislature in framing the law sought to give practical effect to the ordinary presumption referred to, which, so well accords with ordinary observation and experience, no good reason is perceived why it could not do so, leaving a reasonable opportunity for a future determination of the question whether and when the detention should cease.

A further question remains to be considered. It is earnestly insisted that the right to a remedy by due course of law is denied by this act; that it prevents the subject or anyone acting for him from instituting proceedings for his release when restored to sanity. The alleged deprivation rests upon the requirement of a certificate from the superintendent that the person is recovered, and is not dangerous, as a condition of release. The same argument was urged in the Thaw Case just referred to. It is stated in the opinion of Judge Rich that one objection urged to the New York statute was that "it authorizes the commitment of a defendant acquitted of the crime for which he has been tried to a state lunatic asylum, and provides no way in which he can be discharged other than one dependent upon the volition of the superintendent of such asylum. . . . The same principles of law are applicable in the one case as in the other, the same objects are accomplished, and the same results obtained. If the statute under the provisions of which a lunatic is, by a civil proceeding, temporarily restrained of his liberty, with its prescribed summary pro-

cedure, is constitutional,—which cannot be seriously questioned,—the statute under which a person charged with crime, who is acquitted because of insanity at the time the crime was committed, may be summarily deprived of his liberty for the protection of the public while his insanity and dangerous proclivities continue, is constitutional" (p. 168), and the judge quotes from the statute: "A patient held upon an order of a court or judge having criminal jurisdiction in an action or proceeding arising from a criminal offense may be discharged upon the superintendent's certificate of recovery, approved by any such court or judge." 1 Laws of N. Y. 1908, chap. 261, § 2. The opinion, however, appears to hold that this remedy is not exclusive, since it is also said that Thaw was at all times entitled to the writ of habeas corpus, and that, "upon establishing in such proceeding his then sanity, he was entitled to be discharged." p. 171. An examination of our statute (Laws 1911, chap. 299) containing the § 5, first above quoted, discloses a scheme for the care and treatment in the asylum for the insane persons found in state institutions, not only those in penal institutions who are insane when committed, but those who become insane afterward, and also inmates of hospitals for the insane or epileptic, or home for the feeble minded, who have homicidal tendencies, or whose presence is dangerous to other inmates. All these unfortunates thus placed in the asylum for the dangerous insane are under the immediate care of the medical superintendent, and any or all of the superintendents of state hospitals may be called in consultation with him when deemed necessary.

The particular provision for liberation of a person acquitted of a criminal charge because of insanity, and committed under this statute, specifies two conditions, *vis.*, the order of the court issuing the commitment, and the certificate of the superintendent that the person is recovered, and that no one will be in danger by his discharge. This action of the court may be taken upon the application of the person committed or of someone in his behalf. No particular procedure is prescribed, but ordinary methods by which the action of a court is invoked and a judicial investigation carried on in other matters, adapted to the end sought, under the supervision of the court as to notice and hearing, are sufficient. Nor is the certificate of the superintendent a condition precedent to, or a necessary accompaniment of, the application, but it should be presented so that the court may give it consideration and effect at the hearing. A Massachusetts statute provided that

one acquitted of murder or manslaughter by reason of insanity should be committed to a lunatic hospital for life, with the further provision, however, that he might be discharged by the governor and council whenever it appeared that he might be discharged without danger to himself or others. The statute did not require the court to inquire whether the insanity continued at the date of the trial. In an action involving the question whether the state or a municipality was liable for expenses of the support of a person so committed, who it appeared was sane, the supreme court of that state said: "The practical effect of the Stat. of 1873 is to provide that, in case of an indictment for homicide, the insanity of the defendant is not a defense which entitles him to an unconditional acquittal, but that he shall be detained in confinement until it appears to the governor and council that he may be discharged and set at large without danger to others. He is not committed to the hospital for the purposes of treatment as a lunatic. He is not held there as other inmates are held. He cannot be discharged, as others can be, by the trustees or by a court upon proof that he is not insane, or, if insane, can be sufficiently provided for by himself or his friends, or the town of his settlement. Pub. Stat. chap. 87, § 40. He is confined in the hospital as a place of detention, because his being at large would be dangerous to the peace and safety of the community." *Gleason v. West Boylston*, 136 Mass. 489. While objections to the law such as are made here were not presented or considered, no doubt of its validity was suggested in the opinion. A similar statute of North Carolina provided for like commitment in such cases, and that there should be no discharge therefrom unless by an act of the legislature; and it was held in *Re Boyett*, 136 N. C. 415, 67 L.R.A. 972, 103 Am. St. Rep. 944, 48 S. E. 789, 1 Ann. Cas. 729, that the act was void. The opinion quotes freely from many other cases on this subject, and concludes with the conservative direction that the person so detained be brought into court upon habeas corpus, but that the affidavit should show that he is not a dangerous lunatic. From this conclusion it would seem that in the opinion of that court a dangerous lunatic should not be summarily placed at liberty, notwithstanding the invalidity of the statute under which he was committed.

As an inquest provided by statute to determine charges of insanity may determine that question, and commitment to a hospital be made thereon without the intervention of a jury, it follows that a proper

tribunal provided by law may pass upon the question of his restoration. Under our statute in cases of lunacy generally this may be done by an inquiry in the probate court with or without a jury (Gen. Stat. 1909, § 8466), but the jury referred to here is composed of four triers of the fact, who are not really a jury (Gen. Stat. 1909, § 8470; *State v. Linderholm*, 84 Kan. 603, 114 Pac. 857). In that statute it is provided that a written statement of the case must be presented by the superintendent, although it is not provided that a certificate favorable to the claim of the applicant for discharge shall be a positive condition upon which it shall be granted, and in this respect the statute differs from the one under which this commitment was issued. The legislature probably made this distinction to provide an additional safeguard where persons have taken life, or otherwise committed offenses punishable as crimes if done by a responsible person. The legislature must have believed that the person qualified for the highly important duty of superintending such an institution, and who is in a position to observe conduct and symptoms, is qualified to determine the condition of mind of an inmate, and will be just to him and the public alike. The practical difficulties in deciding such questions upon the testimony of experts called by the parties, and great variance in their opinions, are the subject of much comment and criticism, leading to earnest inquiry whether the truth of such an issue ought not to be determined by the aid of disinterested persons appointed to investigate and testify or report. Report of Committee on Insanity and Criminal Responsibility, *Journal of Am. Inst. of Criminal Law and Criminology*, November, 1911, p. 621. The statute is in aid of a judicial proceeding for the determination of a matter in which not only the subject of the inquiry, but the public, have a profound interest. It is a legislative effort to discover the truth of a vital issue, not altogether novel, for a statute with essentially the same provisions was enacted by the legislature of Minnesota in 1907. The supreme court of that state has expressed no opinion concerning its validity, although brought to its attention in November, 1911, in *Northfoss v. Welch*, 116 Minn. 62, 36 L.R.A.(N.S.) 578, 133 N. W. 82. *Northfoss* had been committed in 1894 to a hospital for the insane for safe-keeping and treatment, upon an acquittal of a criminal charge because of insanity. The superintendent refused to certify that the petitioner was not dangerous, and habeas corpus proceedings were instituted in a district court, which held that the statute applied, and that it was con-

situtional, and refused a discharge. On appeal it was held that the statute was not intended to be retroactive, and that persons committed under a former act should be released according to its provisions, rather than those of the later statute, and the constitutional question was not decided. The state, as *parens patriæ*, may make provision for the care of those unable to care for themselves, as in the case of insane persons and neglected children. *Re Dowdell*, 169 Mass. 387, 61 Am. St. Rep. 290, 47 N. E. 1033. It was said in *Re Wares*, 161 Mass. 70, 36 N. E. 586, where a child had been committed to the care of the commissioners of public institutions of Boston, who were also vested with the power of discharge, that "the discretionary power given to the board or officers to whose custody the child may be committed, to discharge it before the end of the term if the object of the commitment had been accomplished, is to the advantage rather than disadvantage of the parent, and we see no valid objection to bestowing it upon such board or officers. Equally important discretionary powers vested in other boards have been upheld, and similar powers exercised by the trustees of the state industrial and reform schools have never, so far as we are aware, been questioned." p. 75. The decision appears to be based upon the fact that, after a proper commitment, the right of the party was concluded when it was decided, after a full and fair hearing by the board, that the object of the commitment had not been accomplished. It was said that the liberty remained to apply for a discharge by habeas corpus, if rights are prejudiced by errors of law or wrongful conduct of the board. Construing the provision of our law requiring a certificate as stated in the act as a necessary condition of the discharge, if that opinion is sound, the act is not thereby necessarily unconstitutional. The presumption is that the officer will do his duty faithfully, but, if the certificate should be corruptly or oppressively withheld, the applicant would not be without remedy.

The petition does not allege that Clark is now sane, nor that he is not dangerous, and the claim to release is based solely on the supposed unconstitutionality of the statute; but an immediate release would not necessarily follow, even if that view should be adopted. As already noted in the *Boyett Case* in North Carolina, where the law was held void, proof that the person was not a dangerous lunatic was required. And in the *Thaw Case*, Mr. Justice Gaynor, who in a strong dissent held the act void, still said that the petitioner should be held for proceedings and commitment under the

general insanity law of that state. Again, it does not follow that the statute in question is wholly void, even if the provision requiring the certificate referred to is obnoxious to the Constitution. That clause is separable and independent, and there is no reason to believe that the legislature would not have passed the provisions for commitment without the provisions for discharge. *Turner v. Woodson County*, 27 Kan. 314; *Hardy v. Kingman County*, 65 Kan. 111, 68 Pac. 1078, *Harrod v. Latham Mercantile & Commercial Co.* 77 Kan. 466. 95 Pac. 11. If the provisions for discharge should fail, it would leave the person detained any remedy available before its enactment to a sane person held as an inmate of a hospital for the insane. Having reached the conclusion that so much of the statute as authorized a commitment is valid, it follows that the relief now sought should be refused, whatever views are entertained concerning the particular clause requiring a superintendent's certificate. It seems best, however, now that the matter has been fully presented, to state the views of the court upon the validity of the entire act, which we do, holding that its passage was within the constitutional powers of the legislature. The purposes of the statute are highly beneficent. It gives protection to the public against repetitions of homicides, or other acts of irresponsible frenzy or distraction, and affords to the unfortunate persons so committed safe seclusion and humane treatment, which it is the province of the state to give in the exercise of its parental power. The judicial department may not interfere with the legislative conscience, unless there is a clear violation of some provision of the Constitution. *Linn County v. Snyder*, 45 Kan. 636, 23 Am. St. Rep. 742, 26 Pac. 21; *Wulf v. Kansas City*, 77 Kan. 358, 94 Pac. 207; *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 333; *Doyle's Petition* (Re Gannon) 16 R. I. 537, 5 L.R.A. 359, 27 Am. St. Rep. 759, 18 Atl. 159, and other cases, are cited as being at variance with the views or some of the views herein expressed. These cases and others have been carefully considered, but it is believed that the conclusions reached are in harmony with the best considered precedents, and are sustained by the better reasoning.

The petitioner's husband is remanded.

Johnston, Ch. J., concurring specially:

I concur in the judgment remanding Clark to custody, and in holding that the law under which he was committed to the Asylum for the Dangerous Insane is valid, but I reach this conclusion on the theory that the legislature intended that a person so com-

mitted, who had been restored to sanity, may be liberated by the proper court with or without the consent of the superintendent of the asylum. The duty and action required of that officer is in aid of a judicial proceeding for a discharge, but, in my view, it was not intended that his decision should be a substitute for a judicial proceeding, nor that his adverse decision would prevent a judicial inquiry as to the sanity of the inmate. Serious questions might arise if a statute were enacted which provided that a release from custody of one restored to sanity could not be had in a judicial proceeding until the consent of the superintendent of the asylum was obtained, or where application to the judicial department for release depended on the will of a ministerial officer. Under our statute, it is the duty of the superintendent to bring his opinion or certificate that there has been a restoration to the attention of the court, but his opinion does not preclude a judicial inquiry, nor bind the court when an inquiry is made. There was the requisite authority in the court which committed Clark to the asylum. There was the essential inquiry and finding that he was insane at the time he was committed; and the statute affords him, and anyone so restrained, an opportunity to directly apply to a court for discharge on the ground that he is no longer insane. Not having availed himself of this remedy, nor shown a restoration to sanity, he is not entitled to a discharge.

NEBRASKA SUPREME COURT.

STATE OF NEBRASKA, Plff. in Err.,
v.
M. ELAM.

(— Neb. —, 136 N. W. 59.)

Food — cream — time of payment — regulation.

The statute provides that testing of cream for commercial purposes "shall be done in accordance with the rules and regulations therefor prescribed by said commission." Anno. Stat. 1911, § 9838. The commissioner made a rule that payment for cream pur-

Headnote by SEDGWICK, J.

Note. — Right to regulate time of payment therefor as incident to authority to make rules and regulations as to testing foods.

The decision in *STATE v. ELAM*, to the effect that under a statute providing that "in testing milk or cream for commercial purposes . . . the same shall be done in accordance with the rules and regulations

chased for commercial purposes should not be made on the same day of the purchase. Held, that the defendant could not be punished criminally for a violation of this rule.

(May 13, 1912.)

EXCEPTIONS to a ruling of the District Court for Richardson County in a prosecution charging defendant with violation of the pure food act which resulted in a judgment in his favor. Overruled.

The facts are stated in the opinion.

Messrs. Grant G. Martin, Attorney General, Frank E. Edgerton, Assistant Attorney General, and Amos E. Gantt, for plaintiff in error:

As long as the regulation is necessary for the proper execution of a law enacted by the legislature, it may properly be delegated to an executive authority by the legislature.

St. Louis Merchants' Bridge Terminal Co. v. United States, 110 C. C. A. 63, 188

Fed. 192; Marshall Field & Co. v. Clark, 143 U. S. 694, 36 L. ed. 310, 12 Sup. Ct. Rep. 495; Locke's Appeal, 72 Pa. 498, 13 Am. Rep. 716; United States v. Eaton, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764; United States v. Bailey, 9 Pet. 238, 9 L. ed. 113; Re Kollock, 165 U. S. 526, 41 L. ed. 813, 17 Sup. Ct. Rep. 444; Pierce v. Doolittle, 130 Iowa, 333, 6 L.R.A. (N.S.) 143, 106 N. W. 751; Hurst v. Warner, 102 Mich. 238, 26 L.R.A. 484, 47 Am. St. Rep. 525, 60 N. W. 440.

Mr. Frank Reavis, for defendant in error:

Until the defendant has violated one of the laws of the legislature of this state, he cannot be subjected to a prosecution in the name of the state. The pure food commission cannot enact laws.

United States v. Eaton, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764; Re Kollock, 165 U. S. 526, 41 L. ed. 813, 17 Sup. Ct. Rep. 444.

therefor prescribed by said commission," the commission had no power to make a rule that payment for cream purchased for commercial purposes should not be made on the same day of the purchase, although the delay in payment might have a tendency to afford more time for testing and be more convenient, seems sound.

No other case dealing with this exact question has been disclosed. An act of this character, however, clearly cannot be enlarged and extended beyond the purpose for which it was enacted.

This principle is well illustrated by the decision in *United States v. Bohl*, 125 Fed. 625, where it was held that a statute for the protection of the public health, authorizing the secretary of agriculture to cause an inspection to be made of renovated butter, and to make rules and regulations for carrying such act into effect, did not authorize the making of a rule forbidding the obliteration of the brand on the product, which tended in no way to aid in the protection of the public health, but was designed solely to prevent fraud.

In *United States v. Eaton*, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764, it was held that a wholesale dealer in oleomargarin who wilfully neglected to keep a book showing the oleomargarin received and sold by him, and omitted to make monthly returns, as required by the regulations made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, was not liable to the penalty imposed by a section of the act regulating the sale of oleomargarin, where the act required manufacturers to keep books, but did not impose such a duty upon wholesalers. The court said: "It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it,' 4 Am. & 39 L.R.A. (N.S.)

Eng. Enc. Law, 642; 4 Bl. Com. 5. It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the oleomargarin act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in oleomargarin, in such manner as to become a criminal offense punishable under § 18 of the act; particularly when the same act, in § 5, requires a manufacturer of the article to keep such books and render such returns as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require; and does not impose, in that section or elsewhere in the act, the duty of keeping such books and rendering such returns upon a wholesale dealer in the article. It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for wholesale dealers in oleomargarin to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly in connection with an enactment such as that above recited, made in § 41 of the act of October 1, 1890. Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense." J. T. W.

Sedgwick, J., delivered the opinion of the court:

The defendant was informed against in the district court for Richardson county for an alleged violation of the pure food act. A general demurrer was filed to the information, which was sustained by the court, and the county attorney was permitted to file his exceptions in this court to obtain a construction of the statute under which the prosecution was brought. The information alleges that the defendant held a permit from the pure food commissioner to test cream, and that on a certain day he purchased cream for commercial purposes and paid for the cream on the same day that he purchased it, "contrary to the provisions of regulation 59 of the rules and regulations of the food, drug, and dairy laws, and contrary to the form of the statute," etc. The pure food commissioner has adopted regulations, among which is regulation 59, which recites that the test of cream requires great care and exactness, and that to make a test it requires at least thirty minutes, and agents cannot test deliveries of cream as they are received and give a test the necessary time and attention, and continues: "Pursuant to the above facts it is hereby ruled by the food, drug, and dairy commissioner that samples of cream shall be grouped and tested at the close of each day's receipts or the following morning. The samples to be kept in closed jars while being held. In order to prevent any evasion of the above ruling it is further ruled that the payment in whole or in part for cream shall be suspended until the following day, or the time of the next delivery. Payment for cream, prior to the day following delivery, as a means of securing business or of taking advantage of another operator, is a violation of the rule, and punishable under the law."

The gist of the offense which it was attempted to charge against the defendant is that he paid for the cream on the same day that he purchased it. The statute provides: "In testing milk or cream for commercial purposes under the provisions of this act the same shall be done in accordance with the rules and regulations therefor prescribed by said commission." Anno. Stat. 1911, § 9838. "The term 'to test milk or cream, as used in this act, is hereby defined as the process or method by which the percentage of butter fat in said milk or cream is determined." Section 9832. The contention of the state appears to be that since it requires thirty minutes or more to test cream properly, and it is not convenient for the party testing it to collect his samples and make his tests until "at the

close of each day's receipts or the following morning," paying for the cream purchased is so far a part of the testing, or so necessarily connected with the testing, as to justify the regulation thereof by the food commissioner; and since this regulation is therefore within the jurisdiction of the food commissioner, to make payments for the cream on the same day of purchase is a violation of the act, and subjects the defendant to punishment under § 9840. "Any person violating any provision of this act shall, upon conviction thereof, be fined in a sum not less than \$50 nor more than \$500, at the discretion of the court." Anno. Stat. 1911, § 9840.

No doubt the legislature may by statute "delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." *Marshall Field & Co. v. Clark*, 143 U. S. 649, 694, 36 L. ed. 294, 310, 12 Sup. Ct. Rep. 495, 505. The legislature, however, cannot delegate its power to make laws. The time and manner of paying for the cream purchased cannot, in the nature of things, have any connection with the testing of the cream. The fact, if it is a fact, that delay in payment for the cream would have a tendency to afford more time or convenience for testing it, does not in any way affect the character or efficiency of the testing, or make the payment for the cream any part of the testing. The statute contains some directions in regard to the manner of making the test, and authorizes the food commissioner to make further rules for that purpose if the same should be found necessary; but this does not include the power to make rules to prevent unfair competition in business or "taking advantage of another operator." We think the district court was right in holding that a criminal prosecution cannot be sustained for a violation of this rule of the commissioner.

Other questions that might be presented as to the sufficiency of this information are not discussed in the briefs, and they are not considered.

The exceptions are overruled.

NEW JERSEY COURT OF ERRORS AND APPEALS.

CHARLES J. MCCARTHY et al.

v.

MARY MULLEN, Admr., etc., of Thomas Flynn, Deceased, Plff. in Err.

(— N. J. —, 82 Atl. 51.)

Descent — Liability for ancestor's debt. Under the "act for the relief of creditors Headnote by PITNEY, C.

against heirs and devisees," passed March 7, 1797 (Paterson's Laws, p. 243; 2 Gen. Stat. 1895, p. 1679), where a devisee dies without selling or aliening the lands devised, liability for the debts of the devisor, in respect of the lands devised, devolves not upon the personal representatives, but upon the heirs and devisees of the deceased devisee of the original debtor.

(January 9, 1912.)

ERROR to the Circuit Court for Sussex County to review a judgment in plaintiffs' favor in an action brought to enforce the statutory liability for debt of Thomas Flynn, deceased. Reversed.

The facts are stated in the opinion.

Mr. Theodore E. Dennis for plaintiff in error.

Messrs. Coult & Dolan for defendants in error.

Pitney, C., delivered the opinion of the court:

The defendants in error, who were plaintiffs below, by their declaration averred that one Thomas Flynn in his lifetime was indebted to them for goods sold and delivered, money loaned, etc., and being so indebted departed this life leaving a last will and testament, whereby he devised and bequeathed to Timothy Flynn all his estate,

both real and personal; that the said Timothy Flynn thereby became possessed of more than sufficient real and personal property to meet the debt so due and owing from the said Thomas Flynn to the plaintiffs; and that thereafter the said Timothy Flynn departed this life leaving a last will and testament, whereof Mary Mullen, the defendant, is the sole executrix; that Thomas Flynn in his lifetime promised the plaintiffs to pay to them the said indebtedness, yet the said Thomas Flynn in his lifetime, and the said Timothy Flynn, his devisee, since the death of the said Thomas, and the said Mary Mullen, executrix, since the death of the said Timothy, have not paid the same or any part thereof, but, on the contrary, have refused and still do refuse to pay the same. The defendant demurred, on the ground that the declaration disclosed no ground of recovery against her as executrix of Timothy Flynn. The circuit court overruled the demurrer, and after assessment of the damages rendered final judgment in favor of the plaintiffs. To review this judgment, the defendant sued out the present writ of error.

As will be seen presently, the action, if it have legal foundation, must rest upon the "act for the relief of creditors against heirs and devisees," passed March 7, 1797, as a part of what is known as Judge Paterson's

Note.—Upon whom does the liability of an heir or devisee for his decedent's debts devolve at his own death.

The majority of the courts which have passed upon this question agree with the statement in *McCARTHY v. MULLEN* that the heir of such deceased heir or devisee is liable for the debts of the ancestor. Liability, however, is limited, as in case of the first heir, to the extent of the property received. This question is viewed more in the nature of an attempt to hold the property of the original debtor, and the courts have been liberal in allowing this to be held wherever found.

Thus, in *Rinard v. West*, 48 Ind. 159, an heir who inherited through two intermediate descents, and who was not of the blood of the debtor, was held liable for the debt to the extent of the property received by her, under a statute providing that heirs, devisees, and distributees of a decedent shall be liable to the extent of the property received. In the course of the opinion it is stated by the court that it is the receipt of the property which renders the heir liable, and if that property by another descent cast come to the hands of one not an immediate heir, or not of the blood of the deceased, it should not change the rule.

And in *Buford v. Pawling*, 5 Dana, 283, in passing upon a demurrer, it was held that the heirs of a devisee are liable to an action in equity for the debt of the testator

to the extent of the land devised. The court states that the land is regarded as a fund for the payment of debts, and the heirs as holding as trustees until such debt is paid. On a second appeal of this case, reported in 3 B. Mon. 224, it was held that where the creditor so negligently conducted an action against the executor as to permit personal estate to be wasted, none of which came into the hands of the devisee or her heirs, the heirs were not liable in equity.

In *Traud v. Magnes*, 17 Jones & S. 309, the heirs of a devisee were held liable to the extent of the property received by them, on a bond of the devisor, in which he bound himself, his heirs, executors, and administrators.

And in *Waller v. Ellis*, 2 Munf. 88, the liability of the heirs of an heir and devisee of the obligor on a bond in which he bound himself and his heirs is recognized, to the extent of the property received.

And in *Pyatt v. Waldo*, 85 Fed. 399, the heir of a devisee who took the same share under the will that he would have taken by inheritance was held liable on a bond of the ancestor to the extent of the property received.

So, an heir who inherited assets from his ancestor, part directly and part by reason of the death of his brother, has been held chargeable to the extent of the entire assets, on a bond in which the father bound himself and his heirs. *Anonymous*, 3 Dyer, 368a.

Revision, and which still remains unrepealed. Paterson's Laws, p. 243; 2 Gen. Stat. 1895, p. 1679. The court below, in overruling the demurrer, did so upon the ground that by this act the liability imposed upon a devisee of the original debtor is of a personal nature, and survives against the personal representatives upon the death of such devisee; relying upon the decision of the supreme court in *Congar v. Brady*, 62 N. J. L. 641, 42 Atl. 415.

Before proceeding to deal with this question (which is the only question that has been argued before us), we may first dispose of the suggestion that arises out of the averment of the declaration that Timothy Flynn became possessed of certain personal property upon the death of Thomas Flynn. Defendants in error do not rely upon this as a ground of recovery against the executrix of Timothy Flynn, nor is it sufficient to warrant such a recovery. An action at law would not lie against Timothy, as legatee, for the debt of Thomas. The creditor should sue Thomas's executor, or, if barred of such suit, should proceed as provided in the orphans' court act (P. L. 1898, p. 742, §§ 77, 78). It is not averred that Timothy Flynn was the executor of Thomas; and were this true it would not render his executrix liable in this action, for under our statute concerning executors (2 Gen. Stat. 1425, pl. 2) the executor of an executor does not represent the first testator. Nor is it averred

that Timothy Flynn, in consideration of having received the property of Thomas Flynn, or for any other consideration, made Thomas's debt his own by expressly promising to pay the same. There is no averment of any promise either by Timothy Flynn or by the defendant, his executrix. It is clear, therefore, that the declaration raises no other question than whether the action may be maintained under the "act for the relief of creditors against heirs and devisees." In considering this question, it is to be borne in mind that the declaration does not aver either (1) that Timothy Flynn in his lifetime sold or aliened any of the lands that came to him by devise from Thomas or (2) that Timothy by his will devised those lands or any of them to the defendant.

In *Congar v. Brady*, supra, suit was brought against an heir at law of a deceased devisee of the original debtor. A demurrer to the declaration presented the question whether, by virtue of the statute, the defendant was chargeable with the payment of the obligations of the original debtor to the extent of the value of the lands so descended. This question was answered in the negative, the opinion declaring: "An examination of that statute will at once disclose that although it makes the devisee of a deceased debtor liable for his debts, no action is given against any successor to the title of such devisee. The right of action is not given for the purpose of creat-

In *Dennyes's Case*, Noy, 56, the court states that debt lies against the heir of an heir upon an obligation of the ancestor, who obliges himself and his heirs, unto the tenth degree.

In *Holley v. Weeden*, 2 Ch. Cas. 175, 1 Vern. 400, the devisee of an heir who inherited through an intermediate descent was held not liable for the debt of the ancestor, notwithstanding the creditor had recovered a verdict on the debt against such heir, who died before the day in bank, so that the creditor could not have judgment. This decision, however, was one rendered under the old common law, when the devisee was not in any event liable for the debt, even if he were a devisee of the original debtor.

In an action upon a bond of an ancestor, in which he bound himself and his heirs, where the land of such ancestor is held by his heirs and heirs of a deceased heir in common, the heirs of the deceased heir, being liable to the extent of the land received, should be joined with the direct heirs. *St. Mary's Church v. Wallace*, 10 N. J. L. 311. In a concurring opinion rendered in this case the bond is spoken of as having been signed by the ancestor and also his son (the deceased heir), and as binding "themselves and their heirs jointly and severally."

Other courts treat the question as being whether or not a cause of action is given against the heir of a deceased heir or devi-

see. Thus, in *Fink v. Berg*, 50 Hun, 211, 2 N. Y. Supp. 851, a decision rendered subsequent to the decision in *Traud v. Magnes*, supra, and in which the earlier case is not referred to, it is held that under the statute making devisees liable for the debts of the decedent to the extent of the property devised to them, a devisee who, subsequent to the death of the testator, inherited part of the property devised to another devisee, owing to the death of such devisee, is not liable for the debts of the testator as to the property thus inherited.

And in *Green v. Dunlop*, 136 App. Div. 116, 120 N. Y. Supp. 583, the heirs of the heirs of an intestate were held not liable in an action for breach of covenant of their ancestor.

In *Congar v. Brady*, 62 N. J. L. 641, 42 Atl. 415, under the statute that was under consideration in *MCCARTHY v. MULLEN*, it was held that an action could not be maintained on a bond of the ancestor binding his heirs, executors, and administrators, against as heir of his devisee, to whom his lands had descended.

Liability of personal representative.

Where the devisee has aliened the lands devised to him, his personal representative is liable to the extent of the lands aliened. *Traud v. Magnes*, 17 Jones & S. 309.

W. A. E.

ing and enforcing a lien upon the lands devised. It is not the land, but the devisee who is made liable for the indebtedness. That liability is purely personal, and survives, if at all, not against the heirs, but against the executors and administrators of the devisee upon his decease."

It seems to us that if the statute by proper construction does create a purely personal liability on the part of the devisee, that liability would, on general principles, survive against his personal representative upon his decease. To quote from Williams on Executors, *1721: "The general rule has been established from very early times, with respect to such personal claims as are founded upon any obligation, contract, debt, covenant, or other duty, that the right of action on which the testator or intestate might have been sued in his lifetime survives his death and is enforceable against his executor or administrator. Therefore it is clear that the executors or administrators are answerable, as far as they have assets, for debts of every description due from the deceased, either debts of record, as judgments, statutes, or recognizances; or debts due on special contract, as for rent or on bonds, covenants, and the like, under seal; or debts on simple contract, as notes unsealed, and promises not in writing, either expressed or implied."

In at least two previous decisions the supreme court had expressed views at variance with the decision in *Congar v. Brady*, above cited. In *St. Mary's Church v. Wallace* (1829) 10 N. J. L. 311, it was held upon much consideration that in an action against surviving heirs of a deceased obligor, the heirs of a deceased heir having lands by descent should be joined in the action, or their nonjoinder might be pleaded in abatement. This was upon the ground that (where the lands have not been aliened prior to suit brought) the heirs are responsible for the debt only with respect to and to the extent of the lands descended; that if the lands have passed through more than one descent the heir of the heir is liable; and that where there are several heirs all ought to be joined in the suit, to the end that they may have contribution from each other. The learned opinions delivered by Chief Justice Ewing and Mr. Justice Ford wholly negative the theory that (except for false pleading or the like, or the alienation of the lands prior to suit brought), there is any personal liability on the part of the heir. In *Muldoon v. Moore* (1893) 55 N. J. L. 410, 21 L.R.A. 89, 26 Atl. 892, the decision proceeded upon the ground that, in an action under our statute, a creditor of a deceased obligor may recover in an action against the heir 39 L.R.A. (N.S.)

or devisee either: (1) If defendant plead properly, a special judgment requiring the debt to be made only out of lands descended or devised to defendant which have not been by him bona fide aliened before the commencement of the action; or (2) if defendant plead falsely or improperly or fail to plead, a general judgment for the debt as if it were a debt of the defendant; or (3) if the lands have been bona fide aliened before action brought, a like general judgment, but only for the value of those lands.

In view of these conflicting decisions respecting the proper construction of our act, it may be proper to briefly review the practice in England, both under the common law and under act 3 & 4 Wm. & Mary, cap. 14, upon which our statute was for the most part modeled.

At the common law, heirs were liable on specialties of the ancestor only when he had assumed by express mention of "his heirs" to bind them; and then they were held liable (except for false pleading or the like) only for the lands descended to them. Prior to the act of Parliament, the heir might alien the lands free of any charge by reason of the ancestor's debt, and he was not in that event even bound to answer for their value (at least not in an action at law), but if suit was brought on the obligation before alienation, the lands were bound in the hands of the heir, and the obligee upon recovery could have execution on the lands descended, even in the hands of an alienee pending suit. But he could have no further recovery, unless the heir had made himself personally liable by false pleading or otherwise. The hardship upon creditors consequent upon allowing the heir to alien before suit brought, and without being responsible even for the value of the lands, was relieved by the act of Wm. & Mary, which provided that where the heir did thus alien, he should be liable to the value of the lands descended, but that the lands aliened should not be liable. The same act for the first time gave a remedy against devisees, for since devisees did not come within the words of the obligation (not being in the description of "heirs"), they could formerly enjoy the land or alien it free from any claim of creditors (at least at law) against either the alienee or themselves; for remedy of which act 3 & 4 Wm. & Mary, cap. 14, gave an action against devisees upon such obligations as bound the heirs.

This act is found in 3 Stat. at Large, 481 [England], 1 Evans's Stat. 462; and the substance of it (but without the preamble) is given in Bacon, Abr. title, "Heir and Ancestor," ¶ F. It was made in terms to continue for three years only, but was made

perpetual by act of 6 & 7 Wm. III. cap. 14. Its title is: "An Act for the Relief of Creditors against Fraudulent Devises." After a preamble which recites that persons "having by bonds or other specialties bound themselves and their heirs" have, to the defrauding of such creditors, by their wills disposed of their lands so that the creditors have lost their said debts, it is at the outset enacted that as against such creditors all wills and testamentary dispositions of lands shall be void. It is next enacted that "every such creditor" may maintain his "action . . . of debt upon . . . said bonds and specialties, against the heir and heirs at law of such obligor or obligors, and such devisee and devisees, jointly, by virtue of this act; and such devisee or devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands and tenements to him descended."

The 5th section (after a preamble which recites that heirs at law, to avoid the payment of such just debts as in regard of the lands descended to them they have been liable to pay, have aliened such lands before any process was or could be issued against them) enacts that "where any heir at law shall be liable to pay the debt of his ancestor in regard of any lands, tenements, or hereditaments descending to him, and shall sell, alien, or make over the same before any action brought or process sued out against him, that such heir at law shall be answerable for such debt or debts in an action or actions of debt, to the value of the said land so by him sold, aliened, or made over; in which cases all creditors shall be preferred, as in actions against executors and administrators, and such execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said land, as if the same were his own proper debt or debts; saving that the lands, tenements, and hereditaments bona fide aliened before the action brought shall not be liable to such execution."

The 6th section enables the heir to plead *riens per descent* at the time of the original writ brought or the bill filed against him, and the plaintiff may reply that he had lands, etc., from his ancestor before the original, etc., and if upon issue joined it be found for the plaintiff, the jury shall inquire of the value of the lands so descended, and thereupon judgment shall be given and execution shall be awarded as aforesaid; but if judgment be given against such heir by confession of the action, without confess-

ing the assets descended, or upon demurrer, or *nihil dicit*, it shall be for the debt and damages, without any writ to inquire of the lands, tenements, or hereditaments so descended.

By § 7 it is enacted: "That all and every devisee and devisees made liable by this act shall be liable and chargeable in the same manner as the heir at law by force of this act, notwithstanding the lands, tenements, and hereditaments to him or them devised shall be aliened before the action brought."

For a general review of the English law and practice, both before and after the act of Wm. & Mary, reference may be had to Bacon Abr. title, "Heir & Ancestor," ¶¶ F. G. and H; Vin. Abr. title, "Heir," ¶¶ C and D; Davy v. Pepys, 2 Plowd. 438, and reporter's comments thereon; note to Jefferson v. Morton, 2 Wms.' Saund. 7, note 4; 4 Griff. Ann. Law Reg. 1286; St. Mary's Church v. Wallace, 10 N. J. L. 311; Muldoon v. Moore, 55 N. J. L. 410, 21 L.R.A. 89, 26 Atl. 892; Myers v. Weger, 62 N. J. L. 432, 439, 42 Atl. 280.

That by the ancient common law the heir, when sued for the debt of his ancestor, could, by confessing the action and showing what lands he had by descent, limit the recovery to a judgment specially to be levied of the lands descended, is clear from all the authorities. The form of pleading and judgment may be found in Davy v. Pepys, 2 Plowd. 438, 440,—a case that antedated by more than a century the act of 3 & 4 Wm. & Mary. See also Tidd, Pr. **937, 938. And likewise, prior to the act, it had been repeatedly held that in case of the death of the heir before action brought, the creditor could sue his heir in his stead, and so on through any number of inheritances. Anonymous (22 Eliz.) 3 Dyer, 368, pl. 46; Jenks's Case, Cro. Car. 151; Denny's Case, Noy, 56, where the court said the liability of the heirs extended unto the tenth degree.

In an early book of entries (Rast. Ent. 172, b. pl. 4), there is found a form of declaration for an action of debt to be brought against the executor of an heir upon an obligation of the ancestor. Although this precedent was often referred to (note to Henningham's Case, 3 Dyer, 344a; note to Davy v. Pepys, 2 Plowd. 441; Chief Justice Dyer's Comment in Hinde and Lyon's Case, Leon, pt. 2, p. 11; Leon, pt. 3, pp. 64 and 70), we are unable to find that this course of procedure (by suit against the executor of an heir) was followed or approved in any reported case. In Bacon, Abr. title, "Heir & Ancestor," par. F, written after the act of Wm. & Mary, the precedent re-

ferred to is cited in a note, but in the text is the following: "It seems that neither before nor since this statute the executor or administrator of the heir are liable; for the person of the heir is not chargeable, but with respect to the land," etc.

In *Bowyer v. Rivet*, Popham, 155, Doderidge, J., is reported to have said: "Debt will lie against his [the heir's] executor, as it is said in *Plow. Com.*, and so against the heirs of the heir to many generations, albeit of this *Plowden* makes a doubt," etc. A reference to *Plowden*, however (page 441), makes it plain that his doubt was whether there was any liability on the part of the executor of the heir, not whether the heir of the heir was liable.

In 1 *Lill. Mod. Entr.* 147, is a form of declaration against the heir of the heir of the heir of the original debtor; and in 2 *Lill. Mod. Entr.* 504, is the form of a special judgment in an action against an heir in the third degree.

It seems to us that by the reason of the matter as well as by the weight of authority, it must be taken to have been the law of England, prior to the act of Wm. & Mary, that upon the death of an heir the liability, in respect of the lands descended, devolved upon his heirs, and not upon his personal representatives. The action (except for false pleading or the like) was in effect an action to enforce a lien upon lands, and that only; and it followed the lands so long as they passed by successive inheritances. And such was the view taken by our supreme court in *St. Mary's Church v. Wallace*, 10 N. J. L. 311. There followed the act of Wm. & Mary, with its very clearly expressed purpose of rendering all devises void as against creditors, and subjecting devisees to action in the same manner and to the same extent that heirs were theretofore liable (of course, with the modifications contained in the act itself), requiring, indeed, that the heirs and devisees should be sued jointly. And then came our act of 1797, giving a more extensive remedy to creditors, in that it includes obligations arising "whether by simple contract or specialty, and whether the heirs are mentioned therein or not," but making no essential change in the character of the remedy. It authorizes an action to be maintained "against the heir and heirs at law, and devisee and devisees of such debtor, in case such debtor made any last will and testament." It omits the word "jointly" used in this connection in the act of Wm. & Mary, but we think it at least permits. if it does not require, that the heirs and

devisees be joined in a single action. At least, it very clearly evinces the intent that devisees shall be subjected to the like liability with heirs.

As this court pointed out in *Dodson v. Taylor*, 53 N. J. L. 200, 204, 21 *Atl.* 293, the statute is remedial, and should receive a liberal interpretation.

Excluding, for the present, those provisions of the act that have to do with alienations before suit brought, and the consequent liability imposed upon the heir or devisee thus aliening, it seems to us plain that in the case of heirs and devisees alike no personal liability is imposed (save for their own improper pleading or failure to plead), and that the action is in effect an action to enforce a lien upon the lands of the debtor in the hands of his heirs and devisees; and that as no number of inheritances would at the common law operate to deprive the creditor of his action, so, under the statute, the action may be maintained against not only heirs and devisees, but against heirs of heirs, devisees of heirs, heirs of devisees, and devisees of devisees, so long as the lands of the original debtor remain in the hands of any person by descent or devise. And this view of the statute is at the same time inconsistent with the theory that the executor of a devisee may be held responsible where the devisee in his lifetime made no alienation of the lands. The executor, as such, does not succeed to any title to the lands, and would have to pay the debt from personal property, whereby the creditor would be deprived of the direct lien upon the realty that it was the very object of the statute to give him. At the same time, in the case of several heirs and devisees, some dying and others surviving, the question of contribution among them would be hopelessly confused.

This view is borne out by the phraseology of § 6 of the "act making lands liable to be sold for the payment of debts," passed February 18, 1799 (only two years after the act now under consideration), found in *Patterson's Laws*, p. 369, and which is now § 1 of the act respecting executions (2 *Gen. Stat.* 1414). This section, in prescribing the form of a writ of execution against lands, provides that "when such execution shall be issued against terre tenants or heirs or devisees (unless they shall have made their estate liable by false pleading or otherwise), it shall only command the sheriff or other officer that of the lands, etc., whereof the ancestor, testator, or person deceased was seised on the day when the

said lands, etc., became liable as aforesaid, or at any time afterwards, etc., he cause to be made the debt, etc., in said writ mentioned."

Upon full consideration, therefore, it seems to us that the primary object of the statute is to afford to the creditor alternative remedies against the heirs and devisees, dependent upon whether the lands descended or devised have been aliened before suit brought, viz.: (1) If not so aliened, or with respect to such as have not been aliened, the remedy is in effect an action at law to enforce a lien for the debt upon the lands descended or devised; in this action, if the defendants plead properly, no personal responsibility is imposed, but the judgment and consequent execution are special, and limited in their effect to the lands descended and devised so far as not aliened before action brought. (2) In case of such alienation, the lands aliened being freed from the debt by the express terms of the act, a personal liability to the extent of their value is imposed upon the heir or devisee who has made the alienation, as a substitute for the lien upon the lands of which the creditor has been thereby deprived. (3) But the statute further provides (and this may be called its secondary object) that for false pleading, or for confession of the action without confessing the assets descended, or if judgment go against defendant upon demurrer or *nihil dicit*, there shall be a personal judgment (at least, if the plaintiff so elects) for the amount of the debt, irrespective of the value of the lands descended or devised.

This view of the statute is substantially in accord with that adopted by the supreme court in *Muldoon v. Moore*, 65 N. J. L. 410, 21 L.R.A. 89, 26 Atl. 892, and is consistent with the earlier decision of the same court in *St. Mary's Church v. Wallace*, 10 N. J. L. 311.

As already pointed out, the declaration in the case before us does not aver that Timothy Flynn, the devisee, in his lifetime, sold or aliened the lands devised or any part of them, and without this it shows no ground of recovery against the defendant as his executrix, because it shows no personal liability on Timothy's part; and the declaration does not aver that he (Timothy) at his death devised the lands of the original debtor or any of them to the defendant, and without this it shows no ground for suing defendant as devisee.

The judgment under review should therefore be reversed, and final judgment be entered in favor of the defendant, with costs. 39 L.R.A. (N.S.)

OHIO SUPREME COURT.

STATE OF OHIO EX REL. WALLACE
D. YAPLE

v.

DAVID S. CREAMER, State Treasurer.

(85 Ohio St. 349, 97 N. E. 602.)

Master and servant — employees' insurance act — constitutionality.

The act entitled "An Act to Create a State Insurance Fund for the Benefit of Injured and the Dependents of Killed Employees," etc., 102 O. L. 524, is a valid exercise of legislative power, not repugnant to the Federal or state Constitutions, or to any limitation contained in either.

(February 6, 1912.)

PETITION for a writ of mandamus to compel the defendant as state treasurer to pay a certain traveling expense voucher contracted by the members of the liability board of awards. Demurrer to petition overruled.

The facts are stated in the opinion.

Messrs. Timothy S. Hogan, Attorney General, Clarence D. Laylin, Frank Davis, Jr., J. Harrington Boyd, Wallace D. Yaple, James L. Boulger, Daniel J. Ryan, and J. L. Hampton for relator.

Mr. George B. Okey, for Ohio State Federation of Labor:

The act does not conflict with § 2 of the Ohio Bill of Rights, nor with the 14th Amendment to the Federal Constitution, which guarantee the equal protection of the laws.

State ex rel. Schwartz v. Ferris, 53 Ohio St. 314, 30 L.R.A. 218, 41 N. E. 579; *Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; *McLean v. Arkansas*, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; *Mégoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 293, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Missouri, K. & T. R. Co. v. May*, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638; *Field v. Barber Asphalt Paving Co.* 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 106, 43 L. ed. 913, 19

Headnote by the COURT.

Note.—The constitutionality of compulsory industrial insurance is discussed in *State ex rel. Davis-Smith Co. v. Clausen*, 37 L.R.A. (N.S.) 466, and note, and in *Borgnis v. Falk Co.* 37 L.R.A. (N.S.) 489, since which there have been no other decisions on the subject.

As to the constitutionality of workmen's compensation legislation in general, see note to *Ives v. South Buffalo R. Co.* 34 L.R.A. (N.S.) 162.

Sup. Ct. Rep. 609; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Orient Ins. Co. v. Dagga, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 55 L. ed. 78, 32 L.R.A.(N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912 A, 463; People *ex rel.* Duntz v. Coon, 67 Hun, 525, 22 N. Y. Supp. 865; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423.

The act is not void as in contravention of §§ 1 and 19 of the Ohio Bill of Rights, or of § 1 of the 14th Amendment to the Federal Constitution, which guarantee all persons against deprivation of property without due process of law.

Jones v. Brim, 165 U. S. 182, 41 L. ed. 678, 17 Sup. Ct. Rep. 282; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; Deems v. Baltimore, 80 Md. 164, 26 L.R.A. 541, 45 Am. St. Rep. 339, 30 Atl. 648; State *ex rel.* Walker v. Section "A" Crim. Dist. Judge, 39 La. Ann. 138, 1 So. 437; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Clark v. Russell, 38 C. C. A. 541, 97 Fed. 902; State *ex rel.* Davis-Smith Co. v. Clausen, 65 Wash. 156, 37 L.R.A.(N.S.) 466, 117 Pac. 1101.

Messrs. Lentz, Karns, Linton, & Hengst, for respondent:

The workmen's compensation act of the state of Ohio is unconstitutional and void.

Ives v. South Buffalo R. Co. 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912 B, 156; Davidson v. New Orleans, 96 U. S. 97, 102, 24 L. ed. 616, 619; Denver & R. G. R. Co. v. Outcalt, 2 Colo. App. 395, 31 Pac. 177; Catril v. Union P. R. Co. 2 Idaho, 576, 21 Pac. 416; Ohio & M. R. Co. v. Lackey, 78 Ill. 55; Thompson v. Northern P. R. Co. 8 Mont. 279, 21 Pac. 25; Bielenberg v. Montana Union R. Co. 8 Mont. 271, 2 L.R.A. 813, 20 Pac. 314; Jensen v. Union P. R. Co. 6 Utah, 253, 4 L.R.A. 725, 21 Pac. 994; Camp v. Rogers, 44 Conn. 291; Ziegler v. South & North Ala. R. Co. 58 Ala. 594; Oregon R. & Nav. Co. v. Smalley, 1 Wash. 206, 22 Am. St. Rep. 143, 23 Pac. 1008; *Ex parte* Falk, 42 Ohio St. 638; State v. Ellet, 47 Ohio St. 90, 21 Am. St. Rep. 772, 23 N. E. 931; Gaylord v. Hubbard, 56 Ohio St. 37, 46 N. E. 66; Hixon v. Burson, 54 Ohio St. 470, 43 N. E. 1000; State *ex rel.* Gard v. Harmon, 13-23 Ohio C. C. 292; Cleveland, C. C. & St. L. R. Co. v. State, 26 Ohio C. C. 348; French v. Shirley, 9 Ohio S. & C. P. Dec. 181, 7 Ohio N. P. 26; Kane v. R. Co. 14 Ohio 39 L.R.A.(N.S.)

Fed. Dec. 542; State *ex rel.* Schwartz v. Ferris, 53 Ohio St. 314, 30 L.R.A. 218, 41 N. E. 579; Senior v. Ratterman, 44 Ohio St. 678, 11 N. E. 321; State *ex rel.* Monnett v. Guilbert, 56 Ohio St. 627, 38 L.R.A. 519, 60 Am. St. Rep. 756, 47 N. E. 551; Lucas County v. State (Davies v. State) 75 Ohio St. 114, 7 L.R.A.(N.S.) 1196, 78 N. E. 955; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Wisconsin Keeley Institute Co. v. Milwaukee County, 95 Wis. 153, 36 L.R.A. 55, 60 Am. St. Rep. 105, 70 N. W. 68; Putney Bros. Co. v. Milwaukee County, 108 Wis. 554, 84 N. W. 822; State *ex rel.* Garrett v. Froehlich, 118 Wis. 129, 61 L.R.A. 345, 99 Am. St. Rep. 985, 94 N. W. 50; State *ex rel.* Garth v. Switzler, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245; State *ex rel.* Huston v. Perry County, 5 Ohio St. 497; Fayette County v. People's & D. Bank, 47 Ohio St. 503, 10 L.R.A. 196, 25 N. E. 697; Monroe v. Collins, 17 Ohio St. 685; Byers v. Meridian Printing Co. 84 Ohio St. 408, 38 L.R.A.(N.S.) 913, 95 N. E. 917; Baltimore & O. R. Co. v. Stankard, 56 Ohio St. 224, 49 L.R.A. 381, 60 Am. St. Rep. 745, 46 N. E. 577; Franklin v. United R. & Electric Co. 57 Bulletin, Bureau of Labor 689.

Messrs. S. H. Tolles, H. B. Arnold, H. H. McKeehan, M. B. Johnson, H. H. Johnson, T. H. Hogsett, Outhwaite, Linn, & Thurman, D. N. Postlewaite, Theodore W. Reath, F. M. Rivinus, and Henry Bannon also for respondent.

Johnson, J., delivered the opinion of the court:

The statute in question provides for the creation of a state liability board of awards, which shall establish a state insurance fund from premiums paid by employers and employees in the manner provided in the act. It provides a plan of compensation for injuries not wilfully self-inflicted, resulting from accidents to employees of employers, both of whom have voluntarily contributed to the fund in the proportion of 10 and 90 per cent respectively. It applies only where the employer has five or more operatives regularly in the same business or in or about the same establishment. An employer who complies with the act is relieved from liability to respond in damages at common law or by statute, for injury or death of an employee who has complied with its provisions, except when the injury arises from the wilful act of himself or officer or agent, or from failure to comply with any law or ordinance providing for protection of life and safety of employees, in which event

the employee or his representatives have their election between a suit for damages and a claim under the act. Employers of five or more who do not pay premiums into the fund are deprived, in actions against them, of the common-law defenses of the fellow-servant rule, the assumption of risk, and of contributory negligence. Where the parties are operating under the act, the injured employee and his dependents in case of death, are compelled to accept compensation from the insurance fund in the manner provided, except in the cases above set forth.

The objections to the validity of the act are stated by different counsel at the bar, and in their briefs, under various heads. All of them are substantially comprised in the following: First. That it is an unwarranted exercise of the police power and directs the state to use public funds for private purposes. Second. That §§ 20—1 and 21—1 take private property without due process of law, in contravention of §§ 5, 16, and 19, art. 1, of the Constitution of Ohio, and the 14th Amendment to the Constitution of United States, in that it deprives employers of the defense of assumption of risk, and deprives the employee of part of his wages to be paid to the state insurance fund, of the right to sue for injuries sustained, of recourse to the courts, and of a trial by jury. Third. That it deprives parties of the freedom of contract and impairs the obligations of contracts. Fourth. That it makes an unjust and arbitrary classification, and does not affect all who are within its reason.

Sections 20—1 and 21—1 are as follows, viz.:

"Sec. 20—1. Any employer who employs five or more workmen, or operatives regularly in the same business or in or about the same establishment, who shall pay into the state insurance fund the premiums provided by this act, shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injuries or death of any such employee, wherever occurring, during the period covered by such premiums, provided the injured employee has remained in his service with notice that his employer has paid into the state insurance fund the premiums provided by this act; the continuation in the service of such employer with such notice shall be deemed a waiver by the employee of his right of action as aforesaid. Each employer paying the premiums provided by this act into the state insurance fund shall post in conspicuous places about his place or places of business typewritten or printed notices

stating the fact that he has made such payment; and the same, when so posted, shall constitute sufficient notice to his employees of the fact that he has made such payment, and of any subsequent payments he may make after such notices have been posted.

"Sec. 21—1. All employers who employ five or more workmen or operatives regularly in the same business or in or about the same establishment, who shall not pay into the state insurance fund the premiums provided by this act, shall be liable to their employees for damages suffered by reason of personal injuries sustained in the course of employment, caused by the wrongful act, neglect, or default of the employer, or any of the employer's officers, agents, or employees, and also to the personal representatives of such employees where death results from such injuries; and in such action the defendant shall not avail himself or itself of the following common-law defenses: the defense of the fellow-servant rule, the defense of the assumption of risk, or the defense of contributory negligence."

The law was passed after a report referred to in the briefs, of a commission appointed by the governor, in obedience to a statute passed for that purpose. The report was prepared after an exhaustive research into industrial conditions in many countries, and an examination of laws which have been passed in the effort to improve such conditions. Substantially, its conclusions are: That the system which has been followed in this country, of dealing with accidents in industrial pursuits, is wholly unsound; that there is an intelligent and widespread public sentiment which calls for its modification and improvement, and that the general welfare requires it; that there has been enormous waste under the present system, and that the action for personal injuries by employee against employer no longer furnishes a real and practical remedy, annoys and harasses both, and does not meet the economic and social problem which has resulted from modern industrialism. Conceding the desirability of improvement, of legislative and governmental action, and the good results in other countries which have no written Constitution to limit the legislative power, we, in this country, have the problem of devising a plan which shall not infringe the fundamental law.

It is apparent, from a contemplation of the whole enactment and its scope and purpose, as well as of the participation of the state in its administration, that it must find its validity, if at all, in the police power of the state. There is now

(it can be fairly said) general concurrence in the meaning of the term "police power" and as to its extent. Prof. Freund, in his work, says, at § 2: "The term 'police' has never been circumscribed. It means at the same time a power and function of government, a system of rules, and an administrative organization and force." And in § 3, after discussing its nature and aims, he says: "It will reveal the police power not as a fixed quantity, but as the expression of social, economic, and political conditions. As long as these conditions vary, the police power must continue to be elastic, i. e., capable of development." In *State ex rel. Monnett v. Buckeye Pipe Line Co.* 61 Ohio St. 520, 56 N. E. 464, as to the constitutionality of the Ohio anti-trust law, it is said: "The definite proposition of counsel upon this point is that, although the act is an exercise of legislative power, it transcends the provisions of the state and Federal Constitutions, which render inviolable the rights of liberty and property, which include the right to make contracts. It would be difficult to place too high an estimate upon these guaranties, and they include the right to make contracts. But it is settled that these guaranties are themselves limited by the public welfare or the exercise of the police power." In *Phillips v. State*, 77 Ohio St. 216, 82 N. E. 1065, it is said: "It is almost an axiom that anything which is reasonable and necessary to secure the peace, safety, morals, and best interests of the commonwealth may be done under the police power; and this implies that private rights exist subject to the public welfare. These principles are plainly recognized in article 14, § 1, of the Constitution of the United States, and article 1, § 19, of the Constitution of Ohio." The cases of *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912 A, 487, and *Assaria State Bank v. Dolley*, 219 U. S. 121, 55 L. ed. 123, 31 Sup. Ct. Rep. 189, involved the constitutionality of laws enacted by Oklahoma and Kansas, in the exercise of the police power to establish bank depositors' guaranty funds created by levy on each of the banks. Objection was made that the tax was an appropriation of the property of one bank to pay debts of another, without due process of law. Mr. Justice Holmes said: "The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. . . . Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first 39 L.R.A.(N.S.)

place, it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. . . . It may be said in a general way that the police power extends to all the great public needs. *Campfield v. United States*, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion, to be greatly and immediately necessary to the public welfare." We think it clear that the objects and purposes as above set forth, which the legislature contemplated in the passage of the law in question, are sufficient to sustain the exercise of the police power, and the participation of the state in the manner provided. Whether the plan adopted is the most appropriate or best calculated to accomplish those objects are matters with which the court is not concerned, and the law should not be held to be invalid unless clearly in violation of some provision of the Constitution.

It is urgently insisted that while the law is apparently permissive, and leaves its operation to the election of employers and employees, it is really coercive, and upon this premise much persuasive argument against the validity of the law is based. This is an important question in the case.

An examination of the section touching the questions made is here necessary. After providing in § 20—1 that an employer who elects to comply with the act shall be relieved from liability to the employee at common law or by statute (except as provided in § 21—2), it is then enacted in § 21—1: "All employers who shall not pay into the insurance fund, . . . shall be liable to their employees for damages, . . . caused by the wrongful act, neglect, or default of the employer, his agents," etc. And in such cases the defenses of assumption of risk, fellow servant, and contributory negligence are not available. So that an employer who elects not to come into the plan of insurance may still escape liability if he not guilty of wrongful act, neglect, or default. His liability is not absolute, as in the case of the New York statute hereinafter referred to. And it cannot be said that the withdrawal of the defenses of assumption of risk, fellow servant, and contributory negligence, as against an employer who does not go into the plan, is coercive, for such withdrawal is in harmony with the legislative policy of the state for a number of years past. The law known as the Norris law, passed in 1910, withdrew these de-

fenses in the particulars covered by the law.

As to the employee, if the parties do not elect to operate under the act, he has his remedy for the neglect, wrongful act, or default of his employer and agents, as before the law was passed, and is not subject to the defenses named. If the parties are operating under the act, the employee contributes to an insurance fund for the benefit of himself or his heirs, and, in case he is injured or killed, he or they will receive the benefit, even though his injury or death was caused by his own negligent or wrongful act, not wilful. And that is not all. Under § 21—2, if the parties are operating under the act, and the employee is injured or killed, and the injury arose from the wilful act of his employer, his officer or agent, or from failure of the employer or agent to comply with legal requirements as to safety of employees, then the injured employee or his legal representative has his option to claim under the act or sue in court for damages. Therefore the only right of action which this statute removes from the employee is the right to sue for mere negligence (which is not wilful or statutory) of his employer, and it is within common knowledge that this has become in actual practice a most unsubstantial thing.

It is conceded by counsel that the particulars named in § 21—2 are such as form the basis for a large portion of claims for personal injuries. Many employers may elect to remain outside its provisions; it would not be strange if many do so. On the other hand, some workmen may feel disposed to do likewise in spite of what would seem to be to their manifest advantage in securing the benefits of the insurance. However, if there should be such general acceptance of and compliance with the statute as its framers hope for, so as to bring a large part of the labor employed in the industrial enterprises of the state within its influence and operation, that would not demonstrate its coercive character. On the contrary, it would justify the enactment. Naturally time and experience will disclose imperfections and inefficiencies in the plan; but if it should prove to be feasible, and appropriate in a general way, these imperfections can be corrected by the legislature. On account of the common-law and statutory rights still preserved to the parties by this statute (as we have pointed out), in cases where the election is made to come under its provisions, as well as not to do so, taken in connection with the advantage to each which the plan contemplates, we cannot say that the statute is coercive. As was

said in the Wisconsin case: "Laws cannot be set aside upon mere speculation or conjecture. The court must be able to say with certainty that an unlawful result will follow." [147 Wis. 327.] We do not see how any such thing can be said here. Every consideration of prudence and self-interest (things not easily associated with compulsion and coercion) would seem to lead an employee to voluntarily make the contribution and waiver contemplated.

Second. Does this statute take private property without due process of law, and deny the guaranties of the Constitution as claimed?

Perhaps no exact definition of "due process of law" has been agreed on. Judge Story defines it in his work on the Constitution, § 1936: The right "to be protected in life and liberty and in the acquisition and enjoyment of property, under equal and impartial laws which govern the whole community. This puts the state upon its true foundation, a society for the establishment and administration of general justice,—justice to all, equal and fixed, recognizing individual rights, and not impairing them." In Cooley on Constitutional Limitations, § 356, it is said: "Due process of law, in each particular case, means such an exercise of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the classes of cases to which the one in question belongs."

The case of *Ives v. South Buffalo R. Co.* 201 N. Y. 276, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912 B, 156 (relied on by some of counsel), involved a statute different in many essentials from the Ohio law. Its controlling feature was that every employer engaged in any of the classified industries should be liable to a workman for injury arising in the course of the work by a necessary risk inherent in the business, whether the employer was at fault or not, and whether the employee was at fault or not, except when his fault was wilful. The court held the law invalid, as imposing the ordinary risks of a business (which under the common law the employee was held to assume) on the employer. The court states one of the premises on which it proceeds, as follows: "When our Constitutions were adopted it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another." But that rule was not of universal application. At common law one may sustain such relation to the inception of an undertaking that he will be held liable for

negligence in the progress of the enterprise, even though he have no part or connection with the negligent act itself which caused the injury. Such, for instance, as where the owner of property contracts with an independent contractor to do work which, though entirely lawful, yet has inherent probabilities of harm if negligently performed. The position in the line of causation which employers sustain in modern industrial pursuits is, of course, the basic fact on which employers' liability laws rest.

As to the right to abolish the defense of assumption of risk, it is enough to say here that the great weight of authority is against the New York position and the position of such of the counsel in this case as insist on that rule. Some of counsel appearing against the validity of this law concede the right to abolish the defenses referred to. The supreme courts of Massachusetts, Wisconsin, and Washington have recently held, in cases sustaining the validity of statutes similar to the one here attacked, that it is within the legislative power to abolish the defense referred to. Opinion of Justices, 209 Mass. 607, 96 N. E. 308; *Borgnis v. Falk Co.* 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209; *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 37 L.R.A.(N.S.) 466, 117 Pac. 1101.

Since the argument of this case, the Supreme Court of the United States has decided the case of *Mondou v. New York, N. H. & H. R. Co.* 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, and has sustained the constitutionality of the employers' liability law passed by Congress. The abolition of these rules was urged as an objection to the law. The court say: "Of the objection to these changes it is enough to observe: First. 'A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.' *Munn v. Illinois*, 94 U. S. 113, 134, 24 L. ed. 77, 87; *Martin v. Pittsburg & L. E. R. Co.* 203 U. S. 284, 294, 51 L. ed. 184, 191, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87; *The Lottawanna (Rodd v. Heartt)* 21 Wall. 558, 577, 22 L. ed. 654, 663; *Western U. Teleg. Co. v. Commercial Mill. Co.* 218 U. S. 408, 417, 54 39 L.R.A.(N.S.)

L. ed. 1088, 1091, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815."

The recent case of *State v. Boone*, 84 Ohio St. 346, — L.R.A.(N.S.) —, 95 N. E. 924, is cited as indicating limitations of the police power which apply here. The act involved in that case required the physician in attendance on a case of confinement to investigate and certify without compensation to certain facts which would not naturally come within the knowledge of the attending physician, and as to matters wholly outside the scope of his professional duty. The court held the statute unconstitutional as to physician and midwife, because of an unreasonable and arbitrary exercise of the police power. That was the proposition of law decided in that case, and no other proposition was decided. The court was careful to point out in the opinion and also on motion for rehearing that the state might require the physician to report to proper authority facts which would come naturally under his observation in the line of his duty without compensation. Other matters referred to in the opinion were not included in the syllabus, which stated the law decided by the court.

The court remarks that the police power inhere in the sovereignty. Its foundation "is the right and duty to provide for the common welfare of the governed." Manifestly the reasoning which led to the conclusion in that case that the statute had been passed by an unreasonable exercise of the police power, can have no application here.

State ex rel. Ward v. Hubbard, 22 Ohio C. C. 253, affirmed without opinion in 65 Ohio St. 574, 58 L.R.A. 654, 64 N. E. 109, and *State ex rel. Monnett v. Guilbert*, 56 Ohio St. 575, 38 L.R.A. 519, 60 Am. St. Rep. 756, 47 N. E. 551, involving the validity of statutes creating a teachers' pension fund, and the Torren's law to establish an insurance fund for the protection of land titles, concerned laws which were wholly compulsory with no element of choice, and were not claimed to have been passed under the police power to cure undesirable public conditions, but for mere private benefit. These cases can therefore have no relation to a plan adopted to promote the general welfare, the contributions to which are made after an election by the parties to participate in the undertaking.

It is urged by counsel opposing this law, that the case of *Byers v. Meridian Printing Co.* 84 Ohio St. 408, 38 L.R.A.(N.S.) 913, 95 N. E. 917, is of conclusive weight condemnatory of the legislation we are examining. In that case it is ruled that an amendment to § 6094, Revised Statutes

(changing the presumption of malice and burden of proof in actions for libel, where retraction is made on demand, in the manner stated), is unconstitutional. The decision was put on the ground that plaintiff was guaranteed his remedy by due course of law for an injury done in his land, goods, person, or reputation, under article 1, § 16, Constitution of Ohio. When the injury was done to the reputation of plaintiff by the libel, he was entitled to his constitutional remedy at law; but at the same time he was entitled to demand of the publisher a retraction of the libel. Therefore the legislature had no right to put him on his election as to two courses, both of which he was entitled to follow. The court is careful to declare that it is not disposed to question that a citizen may waive a constitutional right. But being compelled to elect between two rights, both of which a person is entitled to, has no resemblance to waiver. And under the law under investigation here, as already shown, the right of action (for injury by wilful act of the employer, and for his failure to comply with requirements as to the safety of employees) is still reserved to the employees. So that the only thing withdrawn by this law, and to which withdrawal he consents by his voluntary election to operate under the law, is his right of action for mere negligence, and in place of it he receives the substantial protections and privileges under the state insurance fund.

It is stated in *Butt v. Green*, 29 Ohio St. 670, that persons may expressly or impliedly waive either constitutional or statutory provisions intended for their benefit, and, as above shown, the court in the *Byers Case* state it is not disposed to question that one may waive a constitutional right.

We think that in a case such as is presented here, in which the state itself has undertaken a great enterprise in the interest of the general good, and in the exercise of its police power, and presents to its citizens the option to join in the undertaking and receive its protection and benefit, on a right of action being withdrawn by the legislature, which experience has shown to be difficult of practical enforcement, while preserving the valuable and substantial kindred rights of action, it cannot be said that in such withdrawal there is a violation of the Constitution in the respects claimed.

But it is insisted that the act delegates judicial power to the board of awards, and denies recourse to the courts and trial by jury.

Of course, if the board is a court, there is an end of the whole matter. The statute would be unconstitutional; for if the board 30 L.R.A. (N.S.)

is a court, it has not been created in accordance with the manner provided by the Constitution. We do not consider the board of awards a court, or invested with judicial power within the meaning of the Constitution. It is created by the act purely as an administrative agency to bring into being and administer the insurance fund, and the fact that it is empowered to classify persons who come under the law, and to ascertain facts as to the application of the fund, does not vest it with judicial power within the constitutional sense. Under our system the executive department of the government has many boards to assist in the administration of its affairs.

In *State ex rel. Atty. Gen. v. Hawkins*, 44 Ohio St. 98, 5 N. E. 228, it is said: "What is judicial power cannot be brought within the ring fence of a definition. It is undoubtedly power to hear and determine, but this is not peculiar to the judicial office. Many of the acts of administrative and executive officers involve the exercise of the same power." The court then shows that many boards hear and determine questions affecting private as well as public rights, and quotes with approval from *State v. Harmon*, 31 Ohio St. 250: "The authority to ascertain facts, and apply the law to the facts when ascertained, appertains as well to the other departments of the government as to the judiciary." These principles were applied in *France v. State*, 57 Ohio St. 1, 47 N. E. 1041, in which case the court remark that the case of *State ex rel. Monnett v. Guilbert*, 56 Ohio St. 576, 38 L.R.A. 519, 60 Am. St. Rep. 756, 47 N. E. 551, forms no exception, for the powers of the recorder under the statute there in question were essentially those which properly belong to a court.

Does the law deny recourse to the courts and trial by jury? How does it affect an injured employee where the parties are operating under the act?

In *Baltimore & O. R. Co. v. Stankard*, 56 Ohio St. 232, 49 L.R.A. 381, 60 Am. St. Rep. 745, 46 N. E. 577, which was a suit by the beneficiaries of a member of the relief department of the railroad, the company answered setting up a rule which provided that the decision of the relief department should be final. The court say: "The right to appeal to the courts for the redress of wrongs is one of those rights which is in its nature, under our Constitution, alienable, and cannot be thrown off or bargained away." But the court shows that parties may contract to submit the fixing of facts to some nonjudicial tribunal, and say: "In insurance and other like cases, where the ultimate question is the payment

of a certain sum of money, certain facts may be fixed by a person selected for that purpose in the contract; but the ultimate question as to whether the money shall be paid or not may be litigated in the courts, and a stipulation to the contrary is void." So that under that rule the parties may conclusively bind themselves in advance to submit questions of amount, etc., to some tribunal other than a court; but the ultimate question of actual liability cannot be removed from the courts.

Now, in this statute, § 36 is as follows: "Sec. 36. The board shall have full power and authority to hear and determine all questions within its jurisdiction, and its decision thereon shall be final. Provided, however, in case the final action of such board denies the right of the claimant to participate at all in such fund, . . . upon any . . . ground going to the basis of the claimant's right, then the claimant, within thirty (30) days after the notice of the final action of such board, may, by filing his appeal in the common pleas court of the county wherein the injury was inflicted, be entitled to a trial in the ordinary way, and be entitled to a jury if he demands it. In such a proceeding, the prosecuting attorney of the county, without additional compensation, shall represent the state liability board of awards, and he shall be notified by the clerk forthwith of the filing of such appeal. Within thirty days after filing his appeal, the appellant shall file a petition in the ordinary form against such board as defendant." Therefore, if the board denies the claimant's right to participate in the fund on any ground going to the basis of his claim, he may, by filing an appeal and petition in the ordinary form, be entitled to trial by jury; the case proceeding as any other suit.

It is not an appeal in the sense of appealing from one court to another, but is really the beginning of an original suit. As to this it must be remembered that the whole proceeding is with and against the board of awards. His claim is not against the employer. There is no dispute between them. His claim is for the benefits of the insurance fund. The board of awards inquires into the matters pointed out in the statute, and, in case of dispute as to whether there is any ultimate right to "participate at all in such fund," he has his recourse to the courts. But he is not confined to that method of proceeding. If he claims that the injury was caused by the wilful act of the employer or officer or agent, or from failure to comply with legal requirements as to safety of employees, etc., he may waive his claim under the act, and sue in court for his damages. But in his petition in such 39 L.R.A.(N.S.)

case he could not claim damages for mere negligence; he having elected to waive that cause of action, having elected, as it were, to assume the risk of his employer's mere neglect in return for the benefits and protection to himself and his heirs afforded by the terms of the act.

Another objection that is urged against this statute is that it makes an unjust and arbitrary classification and does not affect all who are within its reason, as required by § 26, art. 2, of Constitution of Ohio. Under the law only employers of five or more are affected by it.

Spear, J., in *Cincinnati v. Steinkamp*, 54 Ohio St. 295, 43 N. E. 492, remarked: "In order to be general and uniform in operation, it is not necessary that the law should operate upon every person in the state, nor in every locality; it is sufficient, the authorities coincide in holding, if it operates upon every person brought within the relation and circumstances provided for, and in every locality where the conditions exist." To same effect are *Platt v. Craig*, 66 Ohio St. 75, 63 N. E. 594; *Gentsch v. State*, 71 Ohio St. 151, 72 N. E. 900; *Cincinnati Street R. Co. v. Horstman*, 72 Ohio St. 107, 73 N. E. 1075.

We think the classification is reasonable and proper. In the nature of the case the risks of any regular employment are less, and the opportunity for avoiding them better, where an employee is one of four than when the number is larger. As was said by Winslow, Ch. J., in *Borgnis v. Falk Co.* 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209. "The difference in the situation is not merely fanciful; it is real." *Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616, is a case in which a classification was made under somewhat similar manner, and was upheld. Nor do we think it an objection that the law applies only to workmen and operatives, and not to all others. This classification brings within the law all employees within its reason.

As to the suggestion that this statute impairs the obligations of contracts, it is sufficient, to say that it can, of course, not affect contracts in existence and unexpired at the time it is put into operation by the employer.

It is suggested that this legislation marks a radical step in our governmental policy not contemplated by the Constitution, and which it is the duty of the court to condemn. But it creates no new right, or new remedy for wrong done. It is an effort to in some degree answer the requirements of conditions which have come in an age of invention and momentous change. The courts of the country, while firmly resist-

ing encroachment on the Constitutions in the past, have yet found in their ample limits sufficient to enable us to meet the emergencies and needs of our development, and we do not find that this statute goes beyond the bounds put upon the legislative will.

The demurrer to the petition is overruled, and the writ of mandamus awarded.

Spear, Price, and Donahue, JJ., concur.

OKLAHOMA SUPREME COURT.

AMERICAN SURETY COMPANY, Plff. in Err.,
v.
A. D. MORTON.

(— Okla. —, 122 Pac. 1103.)

Principal and agent — want of authority — personal liability.

1. If a man contracts as agent, but without authority, for a principal whom he names, he cannot bind his alleged principal by the contract; but the party whom he induces to contract with him may sue the alleged agent upon a warranty of authority if said agent honestly believed that he had authority which he did not possess, or he may sue the alleged agent in an action of fraud and deceit if the professed agent knew he had not the authority which he assumed to possess and exercise, but he cannot sue the agent on the contract, unless the contract contains apt words to bind him personally.

Damages — action against agent — absence of authority.

2. In an action by a third person against one who assumes authority to enter into a contract as agent for another, or against an agent for acting in excess of his authority, the measure of damages is the loss which has accrued to the third person as a natural consequence of the want of authority, and is not limited by the contract, but embraces all injuries resulting from the wrongful assumption.

(April 9, 1912.)

ERROR to the Washington County Court to review a judgment in defendant's favor in an action brought to recover premiums alleged to be due on a guardian's

Headnotes by ROBERTSON, C.

Note. — The matter of the personal liability to the other contracting party, of one who, without authority, assumes to contract as agent of another, is discussed in a note to Haupt v. Vint, 34 L.R.A.(N.S.) 518.

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bond and expenses incurred in attempting to collect the same. Affirmed.

The facts are stated in the commissioner's opinion.

Mr. J. T. Shipman, for plaintiff in error:

An agent who, without authority, contracts in the name of his principal, is himself liable to the person with whom he contracts as such agent.

31 Cyc. 1545; Kroeger v. Pitcairn, 101 Pa. 311, 47 Am. Rep. 718; Bank of Hamburg v. Wray, 4 Strobb. L. 87, 51 Am. Dec. 659; White v. Skinner, 3 Johns. 307, 7 Am. Dec. 381; Dusenbury v. Ellis, 3 Johns. Cas. 70, 2 Am. Dec. 144; Dale v. Donaldson Lumber Co. 48 Ark. 188, 3 Am. St. Rep. 224, 2 S. W. 703; Frankland v. Johnson, 147 Ill. 520, 37 Am. St. Rep. 234, 35 N. E. 480; Keener v. Harrod, 2 Md. 63, 56 Am. Dec. 706; Farmers' Co-Op. Trust Co. v. Floyd, 47 Ohio St. 525, 12 L.R.A. 346, 21 Am. St. Rep. 846, 26 N. E. 110; Cochran v. Baker, 34 Or. 555, 52 Pac. 520, 56 Pac. 643; Talbot v. Mattox, D. & P. Realty Co. 26 Okla. 298, 109 Pac. 128.

Messrs. J. P. O'Meara and H. H. Montgomery, for defendant in error:

The rule that an agent acting without or in excess of his authority is personally liable is subject to the qualification that the person dealing with him must have acted on the faith and representations, expressed or implied, that the agent had the authority assumed, and without any knowledge of any want of authority on the agent's part.

2 Enc. L. & P. 1152; Beattie v. Ebury, L. R. 7 Ch. 800, 41 L. J. Ch. N. S. 804, 27 L. T. N. S. 398, 20 Week. Rep. 994; Thilmany v. Iowa Paper Bag Co. 108 Iowa, 357, 75 Am. St. Rep. 259, 79 N. W. 261; Lewis v. Nicholson, 18 Q. B. 511, 21 L. J. Q. B. N. S. 311, 16 Jur. 1041; Kent v. Addicks, 60 C. C. A. 660, 126 Fed. 112; Lawson, Contr. § 195.

Robertson, C., filed the following opinion:

The plaintiff brought this suit against defendant to recover premiums alleged to be due on guardian's bond, and for expenses incurred in attempting to collect the same. The judgment of the lower court was for the defendant. The complaint, in substance, charges that in March, 1904, the defendant, Morton, representing to plaintiff that he was the agent of one James Donnelly, made application to have it become surety on the bond of one Silas Bryan as guardian of his (Bryan's) children, and by the terms of the agreement Donnelly was to sign a contract which would obligate the guardian to pay \$5 per year premium on the bond until it was released.

Donnelly's name was signed by Morton. It is charged that Morton had no authority to sign Donnelly's name to the application, and that, therefore, Morton became liable to the surety company to the same extent as if he had signed his own name, instead of Donnelly's. This action is on the contract itself, and plaintiff does not attempt to recover on defendant's warranty of his authority to sign the name of his principal, nor does it attempt to recover against defendant for damages for fraud and deceit.

The case was tried to the court without a jury, and at the request of the surety company the court made special findings of fact, among which are the following:

"(1) The court finds that the defendant, Morton, made no representations as to his authority that were untrue, or that he had reason to believe were untrue.

"(2) The court finds that plaintiff's agent who took the application for the bond in this case was not deceived as to Morton's authority by anything that was said or done by Morton, and that Morton answered truthfully the questions asked him."

It seems plain that Morton would not be personally liable on the contract as sued on herein, inasmuch as the court found that he acted honestly, and that the agent was not deceived as to Morton's authority to sign Donnelly's name. Lawson on Contracts, § 195, lays down the rule in such case as follows: "Although there are decisions which hold an agent personally liable on a contract which he makes in the name of another without his authority, they are clearly wrong, for it is not the business of courts to make contracts for parties which neither of them intended to make or would have consented to make." This does not mean that the surety company would be left without a remedy, for, as the author above quoted says in the latter part of § 195, supra: "The agent's liability in such a case is either upon an implied warranty of authority on his part, when he acts in good faith, or upon the ground of fraud when he intentionally misrepresents his authority. The party contracted with has the right, on learning the facts, to repudiate the contract and to hold the assumed agent immediately responsible for damages, without waiting for the time when an action would lie on the contract itself, and the damages are to be measured, not by the contract, but by the injury resulting from the agent's want of power." Anson on the Law of Contract, Am. ed. p. 420, lays down the rule as follows: "If a man contracts as agent, but without authority, for a principal whom he names, he cannot bind his alleged principal or him-

self by the contract; but the party whom he induced to contract with him has one of two remedies: (a) If the alleged agent honestly believed that he had an authority which he did not possess, he may be sued upon a warranty of authority. . . .

(b) If the professed agent knew that he had not the authority which he assumed to possess, he may be sued by the injured in the action of deceit." Lawson on Contracts, § 195, further says: "But it would be stating the rule rather too broadly to say that the agent is liable on this warranty of authority, even where he bona fide believes that he had the authority, though this would seem to be the doctrine of the leading English case. If he enters into the contract as the agent of another, and does so honestly, at the same time fully disclosing all the facts touching his authority, so that the person contracting is fully informed of the authority possessed or claimed by him, he does not become personally liable if it turns out that he really had no authority." In 31 Cyc. p. 1614, it is said: "As to the ground upon which the liability of an agent contracting for another without authority rests, the authorities in the several states differ widely; nor is it easy to reconcile the various decisions in the same state. In some jurisdictions, particularly in the earlier cases, it is held that an action may be maintained against the agent as principal upon the contract itself, although it contains no apt words to bind him personally, but only to bind the principal, upon the theory that the contract must have been intended to bind someone; if not the principal, then the agent. By the great weight of recent authority, however, this theory has been emphatically repudiated, and it is now generally held, more logically, that the agent cannot be held upon the contract unless it contains apt words to bind him personally, in the absence of which the only remedy is by an action for the breach of his implied warranty or an action for deceit if the circumstances warrant the latter remedy."

These authorities, without doubt, are decisive of the question raised in this case. The plaintiff below sued Morton on the contract, just as though he had signed his own name, instead of Donnelly's. The recovery under the complaint would of necessity have been measured by the terms of the contract itself. A recovery under an implied warranty of authority would have been measured by the real damage sustained by the breach of the warranty. The rule for the measure of damages in such case is stated in 31 Cyc. 1651, as follows: "In an action by the third person against one who

assumed without authority to enter into a contract as agent for another, or against an agent for acting in excess of his authority, the measure of damages is the loss which has accrued to the third person as a natural and probable consequence of the want of authority, and is not limited by the contract, but embraces all injuries resulting from the wrongful assumption." The contract contains no reference to Morton, nor are there any apt words which tend to bind him personally. Clearly, under the pleadings, no recovery could have been had on the contract. None was sought on any other theory. Therefore it necessarily follows that the judgment of the county court of Washington county was correct, and should be in all things affirmed.

Per Curiam:

Adopted in whole.

CALIFORNIA SUPREME COURT.
(In Banc.)

PEOPLE OF THE STATE OF CALIFORNIA, Resp.,
v.

M. W. COFFEY, Appt.

(161 Cal. 433, 119 Pac. 901.)

Trial — jury — accomplice.

1. Whether or not a witness is an accomplice of accused is for the determination of the jury on conflicting evidence, but for the court where his acts and conduct are admitted.

Appeal — witness — accomplice.

2. An appellate court must consider whether or not a witness was an accomplice of accused, when an appeal from a conviction is upon the ground that the con-

viction was based upon the uncorroborated testimony of an accomplice.

Accomplice — definition — bribery — evidence.

3. An intermediary representing one who desires to influence the action of a public board by bribery, who makes the bargain with the members and delivers their compensation, is an accomplice with one agreeing to receive and receiving the bribe, under a statute defining accomplices as all persons concerned in the commission of crime, whether they directly commit the act constituting the offense, or aid and abet in its commission, so that his uncorroborated testimony is not sufficient to convict the latter.

Same — liability to indictment — necessity.

4. Liability to indictment for the same offense is not necessary to render one an accomplice with a person on trial for agreeing to receive and receiving a bribe, under a statute defining accomplices as all persons concerned in the commission of crime, whether they directly commit the act constituting the offense, or aid and abet in its commission.

Evidence — accomplices — corroboration — bribery.

5. That an official voted for a proposition to support which he is accused of agreeing to receive and receiving a bribe does not corroborate the testimony of the accomplice that he entered into the agreement, so as to support a conviction.

Same — fund — immunity agreement.

6. Establishing the existence of a fund for bribery, and showing a general immunity contract with one accused of agreeing to receive and receiving a bribe, are not sufficient to corroborate testimony of an accomplice who secured the bargain to receive the bribe, so as to support a conviction; nor is the fact that the accomplice

Note. — Who is accomplice in bribery case within the rule requiring corroboration of testimony.

In *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127, 11 Am. Crim. Rep. 179, it was held that one who gives or offers a bribe is not an accomplice of the acceptor, as they are separate offenses.

And in *People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54, it was held that the following instruction was proper: "One who offers a bribe is not for that reason alone an accomplice of the one to whom it is offered, and one to whom a bribe is offered, or who asks or agrees to receive a bribe, is not for that reason alone an accomplice of one who offers a bribe."

In *State v. Quinlan*, 40 Minn. 55, 41 N. W. 299, in a prosecution under a section of the Penal Code providing for punishment of one who received money as a bribe, one who makes an agreement with another that the latter shall withhold evidence of crime, and pays money therefor to such person, is 39 L.R.A. (N.S.)

not an accomplice of the acceptor of the bribe, within the rule requiring testimony of an accomplice to be corroborated.

In *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989, in a prosecution of the chief of police for soliciting and accepting a bribe to be influenced in his official action so as to permit houses of prostitution to be operated by bribe givers, under a statute providing that any public official who shall ask or receive directly or indirectly any compensation, gratuity, or reward, or any promise thereof upon an agreement or understanding that his official acts shall be influenced thereby, shall be punished, etc., it was held that the bribe givers were not accomplices of defendant, under the rule as to corroboration of testimony of accomplices. It was said that the true test to determine whether a witness is an accomplice or not is: "Could the witness himself have been indicted either as principal or accessory for the crime charged and under investigation?" If he could not, he is not an accomplice. Manifestly, under that test the witnesses

sought to secure an abandonment of the prosecution against accused.

Bribery — acceptance of gift — effect.

7. Acceptance of a gift for prior official action without corrupt private understanding is not bribery.

(December 1, 1911.)

APPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco convicting him of bribery, and from orders denying motions to set aside the judgment and for a new trial. Reversed.

The facts are stated in the opinion.

Messrs. Carroll Cook, Franklin P. Bull, and Robert Ferral for appellant.

Mr. William Hoff Cook with Messrs. U. S. Webb, Attorney General, W. H. Langdon, and Francis J. Heney for the People.

Henshaw, J., delivered the opinion of the court:

Defendant was indicted under § 165 of the Penal Code, and was charged as a su-

in question were not accomplices, as neither had received a bribe and neither was a public officer:

In a prosecution of an indictment for offering a bribe to a supervisor, with corrupt intent to influence the official acts of such supervisor in the granting of a particular franchise, it was held that such supervisor did not become an accomplice, because of the fact that he was a party to a general scheme to deal in franchises for money, to which agreement defendant and other supervisors were also parties. *People v. Ruef*, supra.

And in *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364, 370, a prosecution of a member of the legislature for asking and receiving a bribe, it was held that witnesses who were parties to a plan to detect and expose crime, who did not suggest, advise, or encourage crime, but only assisted in procuring the money and paying it over to defendant, were not accomplices, within the rule as to corroboration of accomplice's testimony. The court said: "The appellant was guilty of a crime when he asked for or offered to receive the bribe, and his acceptance of it neither added to his guilt nor to the penalty already entailed. Hence, the plan to 'entrap' him amounted to nothing more than procuring corroborative evidence essential to conviction. Such methods, under these circumstances, are not within the rule against encouraging crime merely to procure its commission, to the end that those willing to become offenders may be punished. They fall within that other rule which justifies dissemblance in order to procure additional and necessary evidence of guilt."

In *Butt v. State*, 81 Ark. 173, 118 Am. St. Rep. 42, 98 S. W. 723, a prosecution of a state legislator for bribery, it was said 30 L.R.A. (N.S.)

supervisor with having "agreed to receive and receiving" a bribe of \$4,000 from James L. Gallagher, Abraham Ruef, and Tiley L. Ford. It was alleged that the agreement to receive the bribe and the reception of the bribe were "with the wilful, felonious, unlawful, and corrupt intent" upon the part of Coffey, that his official vote, opinion, judgment, and action should be influenced thereby in the matter of granting to the United Railroads of San Francisco a franchise for an overhead trolley system. From the judgment of conviction, and from his various motions to set aside the judgment, in arrest of judgment, and for a new trial, each of which was denied by the court, defendant appeals. His principal contentions are that the court erred in the instructions which it gave upon the law of accomplices, and that his conviction was had in violation of the law, upon the uncorroborated testimony of a self-confessed accomplice in his crime.

When the question of an accomplice arises in the trial of a case, the general and accepted rule is for the court to in-

that mere silence in the presence of the crime, or the mere failure to inform the officers of the law when one has learned of the commission of a crime, does not make one an accomplice.

On the other hand, it has been held that one offering or paying a bribe is an accomplice of the acceptor or receiver. *Ruffin v. State*, 36 Tex. Crim. Rep. 565, 38 S. W. 169.

And that a deputy sheriff who was present when a bribe was paid, knew all the facts, and received one half of the amount of the bribe money, was an accomplice of a justice of the peace charged with accepting a bribe for not causing the arrest of one accused of carrying a gun on his person. *Morawietz v. State*, 46 Tex. Crim. Rep. 436, 80 S. W. 997.

And a friend of the one who paid the bribe, and who was present at the time and furnished part of the bribe money, was also held to be an accomplice. *Ibid*.

And in *People v. Bissert*, 71 App. Div. 118, 75 N. Y. Supp. 630, affirmed without opinion in 172 N. Y. 643, 65 N. E. 1120, it was held that one who paid to a police officer a sum of money with the understanding on his part that he would permit the party so paying, without molestation or interference, to conduct at a place specified a disorderly house, was an accomplice of such officer, within the rule requiring such testimony to be corroborated.

And in *People v. Winant*, 24 Misc. 361, 53 N. Y. Supp. 695, in the trial of an indictment for offering to bribe a grand juror, it was held that though, under the Penal Code, acceptance of a bribe is a separate offense from that of bribing or offering to bribe, yet one who accepts a bribe is an accomplice of the briber, within the definition given to that word by the authorities.

J. H. B.

struct the jury touching the law of accomplices, and leave the question whether or not the witness be an accomplice for the decision of the jury as a matter of fact. *People v. Kraker*, 72 Cal. 459, 1 Am. St. Rep. 65, 14 Pac. 196.

Whenever the facts themselves are in dispute, that is to say, wherever the question is whether the witness did or did not do certain things, which, admittedly, if he did do them, make him an accomplice, the jury's finding upon similar principles is not disturbed. But where the facts are not in dispute, where the acts and conduct of the witness are admitted, it becomes a question of law for the court to say whether or not those acts and facts make the witness an accomplice. For the law declares in mandatory terms that "a conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Penal Code, § 1111.

Therefore, whenever upon appeal it is argued that the conviction was had upon the uncorroborated testimony of an accomplice, it is equivalent to a declaration that the verdict is contrary to the law and the evidence, and this is always a legal question. Penal Code, § 1181, subd. 6. Therefore, in every proper case, a court of appeals is called upon to consider whether or not the witness is an accomplice, and, if so, whether his evidence has received the corroboration demanded by the law, before a defendant may be convicted upon it.

To the consideration of what constitutes a man an accomplice in a bribery case, we are thus at once brought, and to an understanding of these matters a brief statement of the evidence becomes necessary. The principal witness for the prosecution was Gallagher, himself a supervisor. Gallagher, by his own statements, was testifying under a promise of immunity agreed to by the prosecution, in consideration of his giving truthful evidence touching his own crimes, and the crimes of others on the board of which he was a member, including the crime under examination. He swore that he acted as the intermediary of Abraham Ruef and for Ruef, and approached and consulted with his fellow members on the board in relation to the corrupt bargains which were, and were to be, entered into, and the amounts of money which the members of the board were to receive for voting as Ruef desired. In this particular

instance Gallagher spoke to Coffey, at the suggestion of Ruef (quoting from his testimony): "Mr. Ruef told me what he could or would give the board of supervisors in the matter, and asked me to present the proposition to them, and I did so, and I reported back to Mr. Ruef from them that it was all right; that the matter could go through. I said to Mr. Coffey, in the matter of the overhead trolley, that there would be \$4,000 in that matter, and Mr. Coffey said that that would be all right,—words to that effect. That is the substance of it." The trolley franchise was granted, and subsequent thereto, Gallagher testifies, he gave to Coffey \$4,000 in two separate payments. This evidence, coming from the prosecution itself, is uncontroverted, and presents the legal question whether, by virtue of it, Gallagher was an accomplice of Coffey in the corrupt agreement thus charged and proved.

The rules of law and principles of evidence controlling the testimony of accomplices are drawn from the common law. The difficulty which the common-law judges experienced was not in determining the weight to be given to the testimony of an accomplice. Under their rules of evidence, a convicted felon could not testify. Influenced in no small degree by the maxim of the Roman law that a man of self-confessed infamy should not be heard as a witness against another (*nemo, allegans turpitudinem suam, est audiendus*), their principal difficulty was in determining whether the oath and evidence of a self-confessed, though unconvicted, felon,—an accomplice,—should be received at all. When this question was resolved against the doctrine of the Roman law, it was, of course, recognized that evidence of an accomplice, coming from a tainted source,—the witness being, first, an infamous man, from his own confession of guilt, and, second, a man usually testifying in the hope of favor or the expectation of immunity,—was not entitled to the same consideration as the evidence of a clean man, free from infamy. Hence, it soon became the practice of the common-law judges, in the wide latitude allowed to them in the instruction of their juries, to advise the latter that the testimony of an accomplice, for the reasons indicated, was to be viewed with care, caution, and suspicion (see Code Civ. Proc. § 2061); that the accomplice stood before them as a witness entitled to little credit; and that the surest way of establishing his credit in their eyes was for them to note whether his testimony was corroborated in any material matter by independent evidence, and that, if it

were so corroborated, they might put faith in all that the accomplice had said. Instructions to this effect did not, of course, embody any rule of positive law. They were but the expression of considerations naturally arising from a contemplation of the weight and value to be given to such evidence. Subsequently, they were cast into the form of positive law by varying enactments in the Codes and statutes of the states. In this state, the rule of positive law since the year 1851 is as has been declared in § 1111 of the Penal Code. Time has not changed the value of such evidence, and succeeding legislatures have retained the rule; the amendment to the section in 1911 not materially affecting it.

But while the legislature was thus at pains to declare that a conviction could not be had on the uncorroborated testimony of an accomplice, it omitted to define this word. At common law no difficulty was experienced, for the word was interpreted broadly to include principals in every degree and accessories before and after the fact. Those who "receive, relieve, comfort, or assist" the felon, were regarded as having participated in his crime, and as meriting the same punishment that he had earned. And so it will be found that at common law, and in the jurisdiction of the Federal courts, an accepted definition of an accomplice includes "*all participes criminis*, whether they are considered, in strict legal propriety, as principals in the first or second degree, or merely as accessories before or after the fact." *Re Rowe*, 23 C. C. A. 103, 40 U. S. App. 516, 77 Fed. 161.

Although the legislature did not in terms define an accomplice, it did lay down certain rules from which an acceptable definition of an accomplice may readily be derived. Thus, it obliterated the common-law distinctions between principals in their different degrees and accessories before the fact, and declared that "all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, . . . are principals in any crime so committed." Penal Code, § 31. The object of this was both to simplify criminal procedure and to do away with the technicalities of the common law which made the aider or abetter a principal in the second degree, and which forbade the accessory to be brought to trial until the principal had been convicted or outlawed, a rule that lived in modern times and did much mischief. 2 Stephen, *History of Crim. Law*, 232. 39 L.R.A. (N.S.)

Rejecting from the category of accomplices the accessory after the fact (*People v. Collum*, 122 Cal. 186, 54 Pac. 589), we may derive a satisfactory definition of an accomplice from the language of § 31 of the Penal Code above quoted. Accomplices, then, are "all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission." Certainly since the law has said that all such persons are so tainted with guilt that they may be indicted as principals, it cannot be denied that they are also accomplices. This definition, moreover, runs counter to no authority, since, by all, every person of legal responsibility, who knowingly and voluntarily co-operates with, or aids or assists or advises or encourages, another in the commission of a crime, is an accomplice, without regard to the degree of his guilt. 1 Russell, *Crimes*, 49; Wharton, *Crim. Ev.* 440; Rice, *Crim. Ev.* § 319; Bishop, *Crim. Proc.* § 1159.

Having reached the point of defining an accomplice, it becomes proper to consider what acts or facts fix this relationship or characteristic upon a witness. Manifestly, the single, sole determinative consideration is the part which the witness has borne in the crime perpetrated. If the witness has committed the crime, if he has knowingly aided and abetted in its commission, if he has advised and encouraged its commission, the existence of any one of these facts admitted or established stamps his status as that of an accomplice. This is the precise language of the law, and this, and this alone, is the governing principle of the law. Yet, in view of the cases hereinafter to be considered, it will be found that occasionally a court losing sight of this paramount and well-controlling consideration, namely, the conduct of the witness in relation to the crime, has wandered widely from the true test, and, in accordance with faulty definitions of its own making, has determined upon entirely false premises whether a witness is or is not an accomplice.

The commonest of these errors may thus be expressed: The law declares that all persons concerned in the commission of a crime, whether they directly commit it, or aid and abet in its commission, or advise and encourage its commission, are principals. They are, of course, accomplices. Therefore an accomplice is one who may be indicted for the same crime as that charged against the person on trial, and therefore, if he cannot be charged

with the same crime, he is not an accomplice. Here is epitomized the reasoning of such cases as *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127, 11 Am. Crim. Rep. 179, and the fallacy of the reasoning must be obvious. One is an accomplice in a crime because of the part that he has taken in it, not because he may be indicted as a principal. The latter is a mere accidental circumstance, depending upon the language of the statute, and in no way affecting the true touchstone, namely, the part which the witness has taken in the offense. The judicial declaration that, under a statute such as our § 31 of the Penal Code, all accomplices may be indicted as principals, is perfectly sound. But the attempted reasoning from this that if a person cannot be indicted as a principal, he is therefore not an accomplice, is absolutely fallacious. To illustrate: In the present condition of our law, no one would question but that the man who instigated and incited a murder, and the man who actually committed the murder, were both accomplices in the crime of murder. No one would question, moreover, but that both could be indicted as principals in the crime of murder. But suppose that to-morrow the legislature, as it would be quite competent for it to do, should declare that where a man had incited murder, he should be indicted only for subornation of murder, and upon conviction be punished by death; but that the man who committed the murder under such incitement should be charged with murder, and upon conviction should be punished by life imprisonment, there would be presented a case where the law denounced as different crimes the different acts of the parties. Would it for a moment be said that they ceased therefore and thereby to be accomplices in the crime of murder? Or, again, the law to-day declares that the giver of a bribe may be punished for the giving; that the officer who receives a bribe may be punished for the receiving. A offers B a bribe, and by this means advises and encourages the commission of a crime. B, in turn, consults his friend C, who "advises and encourages" B to accept the bribe. B returns to A and agrees to A's corrupt proposition, and A pays the bribe money. C is admittedly an accomplice. He has advised and encouraged B in the commission of a crime, but A has done precisely the same thing, and has gone even further than B, in that he has not only advised and encouraged, but has become a party to the criminal agreement. By what logic or reasoning may it be said that C is an accomplice, and A is not? Not because of the accidental circumstance, if

such circumstance exist, that A can be charged with another crime growing out of the same acts; not because of the accidental circumstance, if it exist, that A cannot be charged with the same crime as B, for these are purely accidental circumstances, and are not of the essence of the consideration. At common law the accomplice could not be indicted for the same crime, yet he was none the less an accomplice. The declaration that one is an accomplice if he can be indicted for the same crime charged against the defendant on trial is perfectly sound; but the converse of the declaration, namely, that, if he cannot be indicted for the same crime, he is not an accomplice, is the merest sophistry, which, ignoring the true test and meaning of the word, seeks to turn shadow into substance. That test and meaning, as we have said, are expressed in § 31 of the Penal Code. If a man has committed a crime, if he has aided and abetted in its commission, if he has advised and encouraged its commission, he is an accomplice with all other *participes criminis*.

It is, of course, no argument to say that, where the law has denounced as separate crimes the separate acts of the parties as bribe-giving and bribe-taking, to hold the parties to be accomplices would make them principals in one crime and accomplices in another, "at the same time and through the same overt act." This is a frequent occurrence in and condition of the law. The law may and oft does go further, and make different offenses with different punishments of the same act. The prosecution may be had for any of the crimes embraced within the acts committed. But the law exacts only a single punishment, and, upon conviction or acquittal for the given acts, the defendant may successfully plead *autrefois convict* or *autrefois acquit* against another prosecution for the same acts, under a different section of the Code. Indeed, this condition of the law is expressly recognized, in § 654 of the Penal Code, which declares that "an act or omission which is made punishable in different ways by different provisions of this Code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other." And as specific illustrations, subornation of perjury is declared a crime punishable by imprisonment in the state prison for not less than one nor more than fourteen years. Penal Code, §§ 126, 127. A futile effort to induce a witness to commit perjury may be punished as an attempt un-

der § 664 of the Penal Code, when, upon conviction, the defendant could be sentenced to state prison for a term not exceeding seven years. Yet by § 137 of the Penal Code, the same attempt is declared to be a felony, and by § 18 of the Code that felony could be punished only by a term of imprisonment not exceeding five years. Again, extortion under color of office contains all the elements of bribetaking, and the guilty official may be indicted and prosecuted indifferently for either offense, notwithstanding that their punishments may be different. *Com. v. Wilson*, 30 Pa. Super. Ct. 26.

While our law generally does not seek to admeasure the degrees of guilt between principals, accessories, and accomplices, it is quite competent for it to do so, and in the past it has been quite common for it to do so. If A instigates B, C, D, and E to join in the commission of a murder, B furnishing the weapon, C transporting D and E to the scene of the crime, D holding the victim while E inflicts the fatal blow, the law might admeasure their degrees of criminality, define their offenses separately, and punish them accordingly. If it did not do so, all, under our Code, would be accomplices and principals alike in the crime of murder. Would they be any the less accomplices, would they any the less have instigated, aided, abetted, and committed the crime, because the law should happen to mete out different punishments for their separate acts of participation, as it actually did at common law?

Nor yet does it follow, because the particular act of participation of an accessory or accomplice in a crime has been denounced by our law as a separate crime, that he cannot therefore be indicted as a principal. If the law made manifest its intent that he should not be so indicted as a principal, it would be but an exception to the general provision of § 31. If it did not make manifest this intent, then the situation presented is that contemplated by § 664 of the Penal Code where the act is made punishable in different ways by different provisions of the Code. But in either case the accidental circumstances clearly do not affect the definition of an accomplice. One is an accomplice, we repeat, because of what he has done, and not because of the form of punishment which the law may mete out for his acts. Wherever the law has denounced as a separate crime the particular act of participation by an accessory or accomplice, the sole logical and legal effect is not to destroy the relationship of accomplice, but merely to effect a modification of § 31 of the Penal Code, as though by an express proviso it should read: "All persons con-

cerned in the commission of a crime," etc., "are principals in any crime so committed, provided that they shall not be indicted as principals in any case where the law has denounced their participation as a separate crime, and declared that they shall be prosecuted exclusively for such separate crime." But this, as we have said, does not and cannot, by any species of legal hermeneutics or legerdemain, relieve an accomplice of his character of accomplice. It is merely prescribing a separate punishment for the particular act of one who is still an accomplice.

By a few courts which have regarded the effort to induce a witness to commit perjury as the essence of the crime of subornation, disregarding as negligible the success of the effort resulting in a corrupt agreement and in the commission of the perjury itself, it is held that, in a charge of subornation, the perjurer is not an accomplice with the suborner. The case most often cited, and here relied upon by respondent, is that of *Stone v. State*, 118 Ga. 717, 98 Am. St. Rep. 145, 45 S. E. 630. That was a charge of subornation of perjury, the perjury having been committed. The testimony of the perjurer was received. It was contended that the perjurer was an accomplice. The supreme court of Georgia reasoned that while "in perjury and subornation of perjury the act of the two offenders is concurrent, parallel, and closely related in point of time and conduct," still there was "sufficient inherent difference between the two to warrant the lawmaking power in separating the act into its component parts, and making that of the suborner a new and independent offense, punishable with greater or less severity than that inflicted on the perjurer." From this the court reasoned that "the suborner is not, under our law, treated as the accessory of the perjurer." This is "further evident from the fact that they are punished differently, while under the Code accessories before the fact are punished in the same way as principals." The next step in the reasoning is unsound. It is that "if not accessories, the suborner and the perjurer are not accomplices." And having determined to its satisfaction that the suborner and the perjurer were not accessories, the conclusion that they were not accomplices followed irresistibly. The court would have made a more plausible presentation if it had reasoned solely from the proposition that the one substantive element of subornation is the effort and attempt to procure perjury, and that the success or nonsuccess of the effort is a negligible quantity, and that it was thus like the crime of soliciting a bribe or the crime

of offering a bribe. But to place its reasoning upon the ground that the suborner is not an accessory of the perjurer, so that, if the trial were for perjury, the suborner would not be considered as an accomplice, does violence to the common law, and to the decision of every state which has made the common law the basis of its jurisprudence. The accomplice at common law—the accomplice in this state—is one who advises and encourages the commission of a crime. How can it be said that the very instigator of the crime—the suborner—has not advised or encouraged it? But faulty as we believe even this reasoning would have been, because we conceive the corrupt agreement to be of the essence of the crime of subornation, though not of attempt to suborn, it would still have been at variance with the common-law rule and the rule of such well-considered cases, as *People v. Evans*, 40 N. Y. 5, and *Com. v. Smith*, 11 Allen, 243. The latter case merits quotation at length: "The crime of subornation of perjury is clearly in its nature that of an accessory before the fact to the perjury. Both perjury and subornation are felonies under our statute, being punishable by imprisonment in the state prison. Gen. Stat. chap. 163, §§ 1, 3; Id. chap. 168, § 1. Whoever procures a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact, for it is not necessary that there should be any direct communication between the accessory and the principal. *Rex v. Cooper*, 5 Car. & P. 535; *Fost. C. L. 125*; 2 Hawk. P. C. chap. 29, §§ 1, 10; *Somerset's Case*, cited in 19 How. St. Tr. 804. And the accessory is a felon, though his felony is different in kind from that of the principal. *Fost. C. L. 343*. So it is said to be a principle in law which can never be controverted, that he who procures felony to be done is a felon. 1 Russell, Crimes, 32. We cannot see that the application of these principles is changed, when the crime of the accessory before the fact is made by statute a substantive felony. The object of making it a substantive felony may be either to provide a distinct or milder punishment upon conviction, or to authorize the indictment and conviction of the accessory where the principal has not been convicted. But whether the crime is made the subject of separate prosecution and punishment, or is to be included in an indictment with the principal offense, will not, in the opinion of the court, change the definition of it, or alter the facts or circumstances in which the commission of it consists. The same facts to be averred and proved in the same way will substan-

tiate the crime in one case as in the other. . . . The crime of subornation of perjury would consist in procuring perjury to be committed, directly or indirectly, as much after subornation was made a felony as before."

To the same effect is the case of *State v. Fahey*, 3 Penn. (Del.) 594, 54 Atl. 690, and in *State v. Renswick*, 85 Minn. 19, 88 N. W. 22, the supreme court of Minnesota, which, as we shall see, is the only court that announces the extreme view that the briber and bribed are not accomplices, declares that in a trial for subornation of perjury the mere attempt to suborn, testified to by the witness, does not make him an accomplice; but, if the subornation itself is sought to be established by the testimony of the perjurer, the latter is an accomplice, and his evidence must be corroborated.

Wherever the commission of a crime involves the co-operation of two or more people, the guilt of each will be determined by the nature of that co-operation. Whenever the co-operation of the parties is a corrupt co-operation, then always those agents are accomplices, even as at common law they were principals. To the crime of seduction, two parties are necessary, but the co-operation of the seduced is not criminal. She is a victim, and she is not therefore an accomplice of the seducer. In such lesser offenses as created by laws denouncing the sale of lottery tickets or the sale of liquor, while two are necessary to the transaction and to the commission of the crime, the law reasons that the purchaser's act is entirely innocent, and he will not be regarded as an accomplice. In cases of abortion, where the law denounces the commission of an abortion, some cases hold that the consenting pregnant woman is not an accomplice. These decisions doubtless arise in part out of a tenderness for the sex, and a consideration of the extreme temptations by which a woman so situated may be beset. Under our law a woman may or may not be an accomplice, depending upon her part in the transaction. Thus she may consent to the taking of the drugs, or the performance of the operation, in ignorance of the intended purpose. She may, indeed, be coerced into submission, in neither of which cases would she be an accomplice. But if a woman voluntarily solicits the performance of such an operation upon herself, and to that extent induces it, it is impossible to see how she can fail to have been an instigator and encourager of the crime, and so an accomplice. Such is the ruling of the Ohio supreme court in *State v. McCoy*, 52 Ohio St. 157, 39 N. E. 316, and such is the deci-

sion of this state in *People v. Josselyn*, 39 Cal. 393; and the recognition of the relationship of an accomplice is evidenced by the provisions of the Penal Code, which, in § 1108, declares that upon a trial "for procuring or attempting to procure an abortion, or aiding or assisting therein, . . . the defendant cannot be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence."

In adultery and fornication, where the willing consent of the woman is proven or assumed, the courts have found no difficulty in declaring her to be an accomplice with the man. For there, differing from abortion, no considerations of the temptation of the woman's hard lot operate to soften the court's views. They are accomplices the one with the other, because their conduct is corrupt and each has mutually aided the other in the commission of a crime to which the corrupt participation of the two is necessary. *State v. Scott*, 28 Or. 331, 42 Pac. 1, 10 Am. Crim. Rep. 13; *Merritt v. State*, 12 Tex. App. 203; *Townser v. State*, 58 Tex. Crim. Rep. 453, 137 Am. St. Rep. 976, 126 S. W. 572.

"Bribery" at common law, as defined by Bishop (1 Bishop, New. Crim. Law, 85), was "the voluntary giving or receiving of anything of value in corrupt payment for an official act done or to be done." It is the uniform rule of decision, not only of the common law, but of every state of the United States, with one exception, hereinafter to be considered, that the giver and receiver of the bribe are principals in the crime, and so necessarily accomplices of each other. The giving and the receiving are reciprocal. *Rex v. Vaughan*, 4 Burr. 2494; *Reg. v. Boyes*, 1 Best & S. 311, 2 Fost. & F. 157, 30 L. J. Q. B. N. S. 301, 7 Jur. N. S. 1158, 5 L. T. N. S. 147, 9 Week. Rep. 690, 9 Cox, C. C. 32. In the *Vaughan Case*, supra, says Lord Mansfield: "Wherever it is a crime to take, it is a crime to give." Various states have in various ways denounced as crimes certain phases, elements, and transactions going to the crime of bribery, but stopping short of its completion. Thus, in some states the soliciting of a bribe without its payment is a crime. Penal Code, § 93. In others it is not. In some states the offer to pay a bribe without regard to its acceptance is a crime. *Ibid.* In others it is not. Manifestly, in the crimes last mentioned, since the denounced act in no wise depends upon a plurality of agents, in no wise rests upon the corrupt assent, agreement or procurement of another, the per-

son approached is not an accomplice of the approacher. But whenever a crime necessarily embraces the corrupt, guilty, criminal co-operation of two or more persons, those persons always have been and must be accomplices.

This, then, is the true test and rule: If in any crime the participation of an individual has been criminally corrupt, he is an accomplice. If it has not been criminally corrupt, he is not an accomplice. In those cases where the concurrent act or co-operation of two people is necessary, as in seduction, sometimes in abortion, and in the minor offenses of selling liquor, lottery tickets, or harmful drugs, the relationship of accomplice does not exist, because the co-operation of the other party is not denounced by the law as criminally corrupt, and, as matter of fact, need not be criminally corrupt. Upon the other hand, where the act requires the co-operation of two persons, and their co-operation is criminally corrupt, the relationship of accomplice is at once established, as in adultery and fornication, in dueling, in agreeing to fight a duel, in illegal rebating (*United States v. New York C. & H. R. R. Co.* [C. C.] 146 Fed. 298), in bribery, and in all forms of criminal agreement, where the agreement itself constitutes the crime. Conspiracies are typical instances of agreements in and of themselves constituting crimes. All the conspirators are principals and, of course, accomplices.

In the charge against this defendant of "agreeing to receive a bribe" and "receiving a bribe," each element, the agreeing and the receiving necessarily contemplates the criminally corrupt co-operation of an other (eliminating from consideration, of course, the feigned accomplice). To this proposition the authorities are so numerous and so uniform that one is rather embarrassed by the wealth than by the dearth of them. But on the question of accomplices in bribery alone, as sustaining this principle either tacitly or with discussion, may be cited: *Newman v. People*, 23 Colo. 300, 47 Pac. 278; *People v. Bissert*, 71 App. Div. 118, 75 N. Y. Supp. 630, affirmed in 172 N. Y. 643, 65 N. E. 1120; *People v. Winant*, 24 Misc. 361, 53 N. Y. Supp. 695; *People v. Acritelli*, 57 Misc. 574, 110 N. Y. Supp. 440; *State v. Callahan*, 47 La. Ann. 444, 17 So. 50, 10 Am. Crim. Rep. 97; *State v. Smalls*, 11 S. C. 262; *State v. Horner*, 1 Marv. (Del.) 504, 26 Atl. 73, 41 Atl. 139; *Murphy v. State*, 124 Wis. 635, 102 N. W. 1087; *People v. McGarry*, 136 Mich. 318, 99 N. W. 147; *People v. Fielding*, 36 App. Div. 401,

55 N. Y. Supp. 530; Ruffin v. State, 36 Tex. Crim. Rep. 565, 38 S. W. 169; O'Brien v. State, 6 Tex. App. 665; Birch v. State, — Tex. Crim. Rep. —, 106 S. W. 344; State v. Carr, 28 Or. 389, 42 Pac. 215; Butt v. State, 81 Ark. 173, 118 Am. St. Rep. 42, 98 S. W. 723; and State v. Duff, 138 Am. St. Rep. 269, note, where it is said: "It may be stated as a general rule that a person offering, giving, or paying a bribe is an accomplice of the person who receives it, particularly wherever the statutes make it a crime for a person to offer, give, or pay, and a crime for a person to receive, a bribe."

There is but one court; as has been intimated, which has advanced a view on this subject contrary to all other authorities and decisions. That is the supreme court of Minnesota, in the case of State v. Durnam, 73 Minn. 150, 75 N. W. 1127, 11 Am. Crim. Rep. 179. In that case the defendant was indicted and convicted of the crime of "asking" for a bribe, the crime contemplated in our state by such sections as Penal Code, 93 and 94. He had solicited the bribe from Richards and Halvorson, witnesses in the case. The defendant's demands were not acceded to; the bribe money was not paid. Upon appeal it was contended that Richards and Halvorson were accomplices. The attorney general in his brief made the argument that follows: "As to defendant's contention that Richards was an accomplice, it seems to us that, if a person from whom a bribe is asked is an accomplice when he refuses to give it, then a person who is held up on the street at night by a highwayman is an accomplice. In both cases, the person robbed and the person solicited furnish subjects upon which the crime could be committed; but that does not make them accomplices. In order to be an accomplice, a person must be a criminal. He must do a criminal act with a criminal intent, and the person who is merely asked for a bribe may refuse it, and be perfectly innocent of any offense." The position of the attorney general was perfectly sound. It could have been adopted by the court with absolute security. But the court went still further and, under the fallacious formula above adverted to, worked out the proposition that if the witness could not have been indicted for the offense, he was not an accomplice; and that, consequently, if the law has denounced the acts of participation of the two as separate offenses, "the one is not the accomplice of the other." How utterly mistaken this argument is, we think, 39 L.R.A. (N.S.)

has been abundantly shown. We have already pointed out how this same court, in the case of perjury and subornation, crimes made separate and distinct by the Minnesota law, has held, notwithstanding, that the testimony of the perjurer must be corroborated in a charge against the suborner. We are not called upon to reconcile the inconsistency of those decisions, and it is sufficient to point out that State v. Durnam is unique in the history of the law.

The charge against the defendant, as we have seen, is under § 165 of the Penal Code. It is not for asking or soliciting a bribe. It is for "agreeing" to receive and "receiving" a bribe. The agreement necessarily carries with it the essential concept of a criminal and corrupt bargain. There can be no agreement without a meeting of minds, and a meeting of minds for this base bargain is declared to be a crime. There is nothing in the law to suggest even that in such a crime the two parties stand in any different position from that occupied by two who agree to fight a duel. In such an agreement the act of the person who contracts to pay the consideration is admittedly base, corrupt, and criminal. Moreover, his conduct is essential to the very existence of the crime of agreeing. How then shall it be said that he is not, within the narrowest or the fullest meaning of the law, an accomplice of the man agreeing to take the bribe? He is an actual participant in the crime, as well as an aider, abettor, adviser, and encourager in its commission, for it is to be remembered that in the case at bar the crime itself is the agreement. An officer may solicit bribes, may ask for bribes, may advertise his willingness to accept bribes. Each one of these acts is a separate, distinct, and recognized crime; but no one of them is the crime of agreeing to take a bribe, which *ex vi termini* requires the guilty co-operation of another. United States v. Dietrich (C. C.) 126 Fed. 664. Moreover, if, as we have seen by all of the authorities, saving one, when the bribery is completed, the payer of the bribe and the recipient of the bribe are reciprocally accomplices in the bribing, it cannot successfully be argued that, in the perfected agreement for the accomplishment of this crime the same two persons are not accomplices.

With the law thus before us, we are in a position to consider the rulings of the trial court.

The court gave the following instruction: "Where two or more persons are concerned in the commission of a crime, whether they, or either of them, directly

commit the act constituting the offense, or aid and abet in the commission, or, not being present, have advised and encouraged in its commission, each one of them is an accomplice with the other in any crime so committed, and the final test of the question, as applied to a witness in any case, is: Could such witness lawfully be indicted with the defendant for the offense on trial? If so, he is an accomplice within the meaning of the law. If not, he is not, and the man who gives or offers a bribe is not for that reason an accomplice of the one who receives or agrees to receive a bribe." The opening sentence of this instruction defines an accomplice in just terms. But when it proceeds to say that the final test as applied to a witness in any case is: "Could such witness lawfully be indicted with the defendant for the offense on trial?" the court adopted the fallacious reasoning of the *Durnam Case*, supra, and fell into error, an error which was repeated in the closing sentence with, "the man who gives or offers a bribe is not, for that reason, an accomplice of the one who receives or agrees to receive a bribe." For, as Lord Mansfield said, "Wherever it is a crime to take, it is a crime to give." These crimes are reciprocal and mutually interdependent. The same is true of an agreement to receive a bribe.

It thus being established that Gallagher was clearly an accomplice, the equally important question remains whether or not his testimony was corroborated. If it be corroborated up to the requirements of the law, it might be argued that, notwithstanding the erroneous instruction above quoted, the jury determined that he was an accomplice, but rendered its verdict because of the corroborating evidence. Upon this it is declared by respondent that, treating Gallagher as an accomplice, his evidence was sufficiently corroborated.

The corroboration of an accomplice's testimony, as has been said, may be slight. *People v. Melvane*, 39 Cal. 616; *People v. Clough*, 73 Cal. 351, 15 Pac. 5. But it must in and of itself, and independent of the testimony of the accomplice, tend to inculcate the defendant on trial with the commission of the crime.

But no part of the testimony which the respondent declares effects such corroboration is of any legal effect for this purpose. Thus, it is said that the defendant's act "established primarily by Gallagher's direct testimony" tends to corroborate Gallagher. But this, in legal effect, is but the untenable declaration that one 39 L.R.A. (N.S.)

part of the evidence of an accomplice may corroborate another part. "The testimony of independent witnesses as to the defendant's votes in the board of supervisors on the bills and ordinances in relation to the overhead trolley system" does no more than to show how he voted, and affords not the slightest independent evidence that he so voted under a corrupt agreement to accept a bribe for so doing. The immunity contract offered in evidence did no more than to declare that immunity would be granted for any and all crimes which Coffey as a supervisor might have committed, but contained no reference whatsoever to this or any particular crime. The tracing of a fund from the United Railways into the hands of Ruef was likewise insufficient. This was but a showing of the possession of sufficient money by the alleged briber. It did not tend to show that the defendant actually received any of it. See *People v. Bissert*, 71 App. Div. 118, 75 N. Y. Supp. 630, Id., 172 N. Y. 643, 65 N. E. 1120.

The other matters of evidence alleged as establishing sufficient corroboration are equally without substance. It is unnecessary to discuss them all. But in exemplification, after Coffey was indicted for the present crime, Gallagher interceded on his behalf with the district attorney, and sought to have the latter abandon the prosecution. This is urged as corroboration. So far as appears, it was an unsolicited act, and could not have the slightest effect as showing, from an independent source, that Coffey either corruptly agreed to take a bribe, or corruptly received a bribe. The latter fact, the reception of the bribe, stands equally upon the uncorroborated testimony of Gallagher.

Moreover, the money was received after the franchises were granted, and it is well established that, however atrocious in good morals the reception of a present after the act may be, the acceptance of a gift without corrupt prior understanding is not bribery. 2 Wharton, *Crim. Law*, 10th ed. § 1858; *State v. Ellis*, 33 N. J. L. 102, 97 Am. Dec. 707; *Walsh v. People*, 65 Ill. 58, 16 Am. Rep. 569.

It follows herefrom that the testimony of Gallagher is corroborated in no respect required by the law, and for the reasons given the judgment and orders appealed from are reversed, and the cause is remanded.

We concur: Beatty, Ch. J.; Shaw, J.; Melvin, J.; Lorgan, J., Sloss, J.

NEBRASKA SUPREME COURT.

JOE MCKAY, Plff. in Err.,
v.
STATE OF NEBRASKA.

(90 Neb. 63, 132 N. W. 741.)

Indictment — impossible date — sufficiency.

1. An information is defective if it charges the commission of the offense as subsequent to the date upon which the information is filed, or on an otherwise impossible date.

Same — amendment — rearraignment.

2. And in such a case it is error for the trial court, after permitting an amendment curing such defect, to require the accused, over his objection, to immediately proceed with the trial without arraignment under and plea to such amended information, and without giving him the statutory time of twenty-four hours in which to plead thereto.

Criminal law — amended information — trial — jeopardy.

3. Where one accused of a felony is put upon trial under an information defective upon its face, and, after trial begun, the information is amended and the trial proceeded with, there being no change in the offense charged, held, that the accused is not thereby placed in jeopardy a second time.

Same — assistant prosecutor — regularity.

4. Under the provisions of § 20, chap. 7, Comp. Stat. 1911, private counsel can only be permitted to assist in the prosecution of a person charged with the crime of felony, when procured by the county attorney, under the direction of the district court.

Same — permission — validity.

5. And an order by the district court, at the opening of the trial, that an attorney appearing as private prosecutor, under the employment of outside parties, is "permitted" to assist in the prosecution, is not a compliance with the statutory provision.

Same — objection — effect.

6. And when timely objection is made by the accused to the participation of such private prosecutor in the prosecution of the case it is error to overrule such objection.

Evidence — criminal trial — relevancy.

7. An accused in a criminal prosecution is entitled to a trial upon competent, relevant evidence; evidence which at least tends

to establish his guilt or innocence; and evidence which has no such tendency, but which, if effective at all, could only serve to excite the minds and inflame the passions of the jury, should not be admitted.

(October 6, 1911.)

(Rose and Letton, JJ., dissent.)

ERROR to the District Court for Antelope County to review a judgment convicting defendant of murder in the first degree. Modified.

The facts are stated in the opinion.

Messrs. O. A. Williams, William V. Allen, and William L. Dowling, for plaintiff in error:

The information charging that the crime was committed December 7, 1910, an impossible date, was void, and the court could not permit the county attorney to strike out "1900" and insert "1909," and force the defendant to trial.

Murphy v. State, 106 Ind. 96, 55 Am. Rep. 722, 5 N. E. 767, 7 Am. Crim. Rep. 264, s. c. 107 Ind. 598, 8 N. E. 158; *Serpentine v. State*, 1 How. (Miss.) 256; *Markley v. State*, 10 Mo. 291; *Com. v. Doyle*, 110 Mass. 103; *State v. Pratt*, 14 N. H. 456; *State v. Sexton*, 10 N. C. (3 Hawks) 184, 14 Am. Dec. 584; *State v. Woodman*, 10 N. C. (3 Hawks) 384; *Com. v. McKee*, Addison (Pa.) 33; *State v. Davidson*, 36 Tex. 325; *Williams v. State*, 12 Tex. App. 226, 4 Am. Crim. Rep. 292; *State v. Litch*, 33 Vt. 67; *Terrell v. State*, 165 Ind. 443, 2 L.R.A.(N.S.) 251, 112 Am. St. Rep. 244, 75 N. E. 884, 6 Ann. Cas. 851; *Hall v. State*, — Tex. Crim. Rep. —, 38 S. W. 996; *McJunkins v. State*, 37 Tex. Crim. Rep. 117, 38 S. W. 994; *Wright v. State*, — Tex. Crim. Rep. —, 92 S. W. 256; *Stephens v. State*, 51 Tex. Crim. Rep. 406, 103 S. W. 904; *Haney v. State*, 52 Tex. Crim. Rep. 545, 107 S. W. 858; *Newsome v. State*, 2 Ga. App. 392, 58 S. E. 672; *State v. Noland*, 29 Ind. 212; *State v. Windell*, 60 Ind. 300; *Trout v. State*, 107 Ind. 578, 8 N. E. 618; *Dyer v. State*, 85 Ind. 525; *State v. Patterson*, 116 Ind. 45, 10 N. E. 289, 18 N. E. 270; *State v. Smith*, 88 Iowa, 178, 55 N. W. 198; *State v. Ray*, Rice, L. 1, 33 Am. Dec. 90.

The court erred in permitting prosecutor to conduct case for the state.

People v. Etter, 72 Mich. 175, 40 N. W. 241; *Biemel v. State*, 71 Wis. 444, 37 N. W. 244, 7 Am. Crim. Rep. 556; *Meister v. People*, 31 Mich. 99, 1 Am. Crim. Rep. 91; *Sneed v. People*, 38 Mich. 248; *People v. Hurst*, 41 Mich. 328, 1 N. W. 1027; *Com. v. Knapp*, 10 Pick. 477, 20 Am. Dec. 534; *Com. v. Williams*, 2 Cush. 584; *Com. v. King*, 8 Gray, 501; *Com. v. Gibbs*, 4 Gray, 146; *People v. Bussey*, 82 Mich. 49, 46 N. W. 97.

Headnotes by FAWCETT, J.

Note. — As to the right of accused to complain because prosecution is conducted or assisted by unofficial member of bar, see note to *State v. Bartley*, 24 L.R.A.(N.S.) 564.

As to right of prosecutrix in bastardy proceeding to private counsel, see note to *State v. Smith*, 33 L.R.A.(N.S.) 463. 39 L.R.A.(N.S.)

Messrs. Grant G. Martin, Attorney General, and Frank E. Edgerton, Assistant Attorney General, for the State:

The court did not err in permitting amendment of the information to correct a clerical error.

Razee v. State, 73 Neb. 732, 103 N. W. 438; State v. Wister, 62 Mo. 592; State v. Wilcoxon, 38 Mo. 370; State v. Sam, 13 N. C. (2 Dev. L.) 567; Jones v. Com. 1 Bush, 34, 89 Am. Dec. 605; State v. Barnett, 3 Kan. 250, 87 Am. Dec. 471; People v. Kelly, 6 Cal. 210; People v. Littlefield, 5 Cal. 355; Hampton v. State, 8 Ind. 336; Hardebeck v. State, 10 Ind. 459; State v. Elliot, 34 Tex. 148; State v. Hoover, 31 Ark. 676; State v. Cooper, 31 Kan. 508, 3 Pac. 429; State v. Stebbins, 29 Conn. 463, 79 Am. Dec. 223; United States v. Evans, 1 Cranch, C. C. 55, Fed. Cas. No. 15,063; United States v. Shuck, 1 Cranch, C. C. 56, Fed. Cas. No. 16,285; Blondel v. Bolander, 80 Neb. 532, 114 N. W. 574; Bliss v. Beck, 80 Neb. 292, 114 N. W. 162, 16 Ann. Cas. 366; State v. Brooks, 85 Iowa, 366, 52 N. W. 240; Terrell v. State, 165 Ind. 443, 2 L.R.A.(N.S.) 251, 112 Am. St. Rep. 244, 75 N. E. 884, 6 Ann. Cas. 851.

It was not error to permit a private prosecutor to conduct the case for the state.

State v. Bartlett (State v. Bartley) 105 Me. 212, 24 L.R.A.(N.S.) 565, 134 Am. St. Rep. 542, 74 Atl. 18; Burnett v. State, 88 Neb. 638, 130 N. W. 263.

Mr. John W. Rice also for the State.

Fawcett, J., delivered the opinion of the court:

Plaintiff in error, whom we will herein-after designate as defendant, was convicted of murder in the first degree in the district court of Antelope county. A motion for a new trial was overruled, and a sentence of life imprisonment imposed.

Defendant was prosecuted under an information filed April 28, 1910, which, omitting the formal part, alleged "that Joe McKay, late of the county aforesaid, on the 7th day of December, A. D. 1910, in the county of Antelope, and the state of Nebraska, aforesaid, then and there being in and upon one Albert Brown, then and there being unlawfully, feloniously, purposely, and of his deliberate and premeditated malice, did make an assault with the intent then and there of him, the said Joe McKay, him, the said Albert Brown, unlawfully, feloniously, purposely, and of his deliberate and premeditated malice to kill and murder," etc. On the next day, defendant assailed this information with a motion to quash, and a demurrer, both of which were overruled in the order named. Defendant was thereupon arraigned and 39 L.R.A.(N.S.)

pleaded not guilty, and the case was assigned for trial May 2, 1910. On May 2d the case was called for trial, and the impaneling of the jury begun. May 3d the jury was finally selected and sworn. The opening statements were made to the jury by counsel for the state and defendant, respectively. W. L. Staples, a witness for the state, was then called. After being interrogated as to his name, residence, and official position, he was asked whether or not he had made a trip to Brunswick, whereupon the defendant objected to the introduction of any evidence, upon the grounds: "(4) Because said complaint does not state an offense punishable by the laws of the state of Nebraska;" and "(6) Because the information charges the commission of the crime on an impossible date, to wit, the 7th day of December A. D. 1910, which has not yet arrived, and not on a date at any time prior to the filing of the information." Thereupon the court took a recess until the next morning (May 4th), on which day, at the opening of court, the county attorney filed a motion for "leave of this court to correct the clerical error appearing near the end of line 7 in the body of said information, by striking out the numerals, to wit, 1910, there appearing, and inserting in their stead the numerals, to wit, 1909." Defendant objected to the proposed amendment, upon the grounds that the defendant was prepared to go to trial on the information as it stood, but was wholly unprepared to proceed to trial under the proposed change in the information; that no copy of the information as it was proposed to be amended had been served upon defendant or his counsel, as required by statute; and that defendant had a statutory and constitutional right to twenty-four hours after service upon him of the information as amended within which to plead thereto. These objections were overruled. The court then, over defendant's objection, permitted the state to introduce the clerk of the court and the county attorney as witnesses for the purpose of laying the foundation for the state's motion to amend the information, at the conclusion of which the court sustained the motion to amend the information, and permitted the same to be amended by drawing a line through the figures "1910" without obliterating them, and by placing over them the figures "1909," and ordered that the defendant be served with a copy of the information as corrected. The information was thereupon amended as directed by the court, reverified, and refiled. The information as amended was served upon defendant at 8:49 in the evening of that day. On the next morning (May 5th) on the con-

vening of court, defendant tendered a plea in abatement, or plea in bar, "to the further proceeding of the court in this case," and also moved the court to exclude the Honorable M. F. Harrington, attorney at law, from participating in the prosecution of the case, upon the grounds that he had not been appointed by the court, as provided by statute, to assist in the prosecution; that he is not a deputy county attorney of Antelope county, or acting officially, or under the solemnity of official oath in connection with the case; and, third, because his employment and payment are by private parties. All of defendant's objections and his motion were overruled, and at 10 o'clock A. M. of that day the jury were called into the box, and defendant's objection to the introduction of any evidence was then overruled, and, over the objection of defendant, the trial proceeded.

The objections of defendant to the information upon which he was arraigned, and under which the trial was entered upon, were well taken, and should have been sustained. It charged the commission of the crime upon an impossible date, viz., a date nearly eight months in the future. Joyce, *Indictments*, § 319, announces the rule thus: "It is a general rule that an indictment is fatally defective if it charges the commission of the offense as subsequent to the date upon which the indictment is found, or on an otherwise impossible date." A large number of cases cited by the author in support of the rule. Maxwell, *Crim. Proc.* 2d ed. p. 67, says: "Time and place must be alleged as to every material fact in an indictment;" and on page 69 he says that time "should be stated with certainty. It must not be an impossible date, such as a date after the indictment is found; and such defect is bad, even after verdict." In *State v. Smith*, 88 Iowa, 178, 55 N. W. 198, it was held: "An indictment containing but one allegation as to the time of the commission of the offense, and stating that it was committed on a future day, is bad; the provisions of Code, § 4306, that no indictment is insufficient for want of an allegation of the time of any material fact when the time has once been stated, and of § 4305, that an indictment is good if it can be understood therefrom that the offense was committed some time prior to the finding of the indictment, being inapplicable." In the opinion the court say: "This is not an omission to state the time when it had once been stated, but stating an impossible time. . . . It cannot be so understood from this indictment. It states but one date; a date, not prior, but subsequent, to the finding of the indictment. . . . No

indictment is sufficient that does not state the time at or about which the offense was committed, and, if it states an impossible time, it fails to charge an offense. We are in no doubt but that the first indictment was sufficient." In *Terrell v. State*, 165 Ind. 443, 2 L.R.A. (N.S.) 251, 112 Am. St. Rep. 244, 75 N. E. 884, 6 Ann. Cas. 851, the supreme court of Indiana, in the opinion, and the annotator, in his notes, both exhaustively review the authorities on this point, which to our minds conclusively show that the original information was void, and hence did not state any offense.

Indeed, we do not understand the attorney general to contend that a conviction in this case could have been sustained under the information as originally filed; his contention throughout his brief being in support of the amendment permitted by the court. Upon that question we think the law must be taken as settled in this state. Section 436 of the Criminal Code provides: "And within twenty-four (24) hours after the filing of an indictment for felony, and in every other case on request, the clerk shall make and deliver to the sheriff, the defendant, or his counsel, a copy of the indictment, and the sheriff on receiving such copy shall serve the same upon the defendant; and no one shall be, without his assent, arraigned or called on to answer to any indictment until one day shall have elapsed, after receiving in person or by counsel, or having an opportunity to receive a copy of such indictment as aforesaid." In *Zink v. State*, 34 Neb. 37, 51 N. W. 294, the syllabus holds: "(2) The right conferred upon the accused in a prosecution for a felony by § 436 of the Criminal Code, to a copy of the indictment or information, and one day to prepare for trial, is a substantial right, to deny which is error. (3) When an information for a felony is insufficient for want of a material averment, it is error for the trial court to permit an amendment supplying such deficiency, and require the accused, over his objection, to proceed with the trial immediately, refusing him a copy of the amended information, and the statutory time to plead thereto." In the opinion by Post, J., we have a very lucid discussion of this point. Among other things, it is said: "This right to be furnished with a copy of the indictment or information, and one day to prepare for trial, is a substantial right which cannot be denied the accused in a prosecution for a felony. It is no answer to say that the information as filed contains sufficient matter to indicate the crime and the person charged. We do not agree with the attorney general that there was no substantial defense the ac-

cused could make before the amendment that was not equally available after. He had before the amendment this most potent of defenses, that he was not charged with a crime, and might object to being put on trial; or, if tried and found guilty, that a motion in arrest of judgment would be available." In *Barker v. State*, 54 Neb. 53, 74 N. W. 427, *Zink v. State* is cited and followed, and the same rule again announced. In *Zink v. State*, *supra*, it appears that the amendment was made before the trial was actually entered upon; but after it was made, and on the same day, the court refused defendant's demand for the statutory time in which to prepare for trial, and immediately put him upon trial without further arraignment or plea to the information as amended. The case at bar is stronger. Here the court permitted the amendment, and deprived defendant of his statutory rights, after the trial had been entered upon and the examination of witnesses had begun.

We do not agree with counsel for defendant that a trial under the amended information would be placing defendant in jeopardy a second time. The original information, being void upon its face, was no information at all. Hence nothing under it could in any manner place the defendant in jeopardy. The court did right in permitting the amendment, but erred in forcing the defendant to immediately proceed with the trial without arraignment under and plea to the only information filed which stated an offense, without giving him the statutory time in which to plead thereto, and before a jury which had been impeached under a void information.

Defendant strongly insists that the court erred in permitting private counsel to conduct the case for the state. When counsel for the defendant moved the court to exclude Mr. Harrington from participating in the prosecution, as hereinbefore set out, the record contains this: "By Mr. Harrington: The parties agree that M. F. Harrington is not the deputy county attorney of Antelope county, has not been appointed by the court to prosecute this case, but has been permitted by the court to prosecute the same, and that he is employed and is paid by the brothers and sisters of the deceased, Albert Brown, and that he has not taken an oath as an officer or deputy county attorney or prosecutor of Antelope county. By the Court: The order of the court having been made at the commencement of the impanelment of the jury herein that M. F. Harrington is permitted to assist the county attorney in the prosecution of this case, and made a matter of record in this case, said order having been made in the presence

of the defendant and his counsel; objection overruled by the court, to which ruling the defendant excepts."

It must be remembered that at the time the court announced Mr. Harrington's permission to assist in the prosecution of the case, there was, as counsel for defendant well knew, no information on file under which defendant could be convicted of any crime. Hence it was immaterial to him who conducted the prosecution; but immediately upon the resumption of the trial on the amended information counsel objected to the participation of Mr. Harrington in the case. If, therefore, the objection was good, we think it was timely. The bill of exceptions shows that all of the most important witnesses for the state were examined, and the principal witnesses for the defense, including the defendant himself, cross-examined by Mr. Harrington. It also appears that, over the objection of defendant, he made the closing argument to the jury. Section 16, chap. 7, Comp. Stat. 1911, makes it the duty of the county attorney to appear in the several courts of their respective counties, and prosecute and defend on behalf of the state and county all actions, civil or criminal. Section 20 provides: "The county attorney may appoint one or more deputies, who shall act without any compensation from the county, to assist him in the discharge of his duties: Provided, that the county attorney of any county may, under the direction of the district court, procure such assistance, in the trial of any person charged with the crime of felony, as he may deem necessary for the trial thereof, and such assistant or assistants shall be allowed such compensation as the county board shall determine for his services, to be paid by order on the county treasurer, upon presenting to said board the certificate of the district judge before whom said cause was tried, certifying to services rendered by such assistant or assistants." The stipulation of Mr. Harrington, which we have given above, does not state that the county attorney had, under the direction of the district court, procured his assistance, but, on the contrary, states that he had been employed and was being paid by the brothers and sisters of the deceased; that he had not been appointed by the court to prosecute the case, "but has been permitted by the court to prosecute the same."

When placed upon the witness stand and examined by counsel for defendant, Mr. Harrington testified as follows:

Q. Now, have you been appointed under the statutes of this state, the method of which you understand well, to assist

the county attorney in the prosecution of this case?

A. No; not at public expense.

Q. You have simply been permitted to appear?

A. I don't know; I have been employed by relatives of the deceased, his brothers and sisters.

Q. These relatives live in Beemer county, Iowa?

A. I don't know what county.

Q. Live near Gritole, in Iowa?

A. Some of them, I think.

Q. Any of them residents of this section?

A. Not that I know of.

Q. They employed you and are paying you?

A. Yes, sir.

Q. And you are appearing here in the capacity of private prosecutor?

A. Yes, sir.

The question of the right of private counsel to appear in the prosecution of a criminal action has been before this court a number of times. The first reported case is *Polin v. State*, 14 Neb. 540, 16 N. W. 898. That case was decided in 1883. We there held, under the statute as it then existed, that the district attorney in a criminal trial may have the assistance of counsel employed on private account. The next case is *Bradshaw v. State*, 17 Neb. 147, 151, 22 N. W. 361, 363, 5 Am. Crim. Rep. 499, where the rule in *Polin v. State* was reannounced. In that case, however, it appears from the opinion, that "the record shows that before any evidence was introduced the district attorney stated to the court that he desired the assistance of Mr. Ashby in the trial of the cause on account of the magnitude of the case; that he had before that time requested his aid," etc. It will be observed that the facts in that case are very different from those in the case at bar. The next case was *Gandy v. State*, 27 Neb. 707, 723, 43 N. W. 747, 752, where the rule in *Polin v. State* was again announced. In that case it was insisted by counsel that *Polin v. State* and *Bradshaw v. State*, supra, arose under the statute existing prior to the passage of the act of March 10, 1885 (Laws 1885, chap. 40). The opinion then sets out the sections of the statute referred to, which are substantially the same as those now in force. In commenting thereon, Cobb, J., said: "But it by no means appears that Martin and Falloon were deputies of the district attorney appointed under the provisions of the 20th section, but were his assistants, procured by him under the direction of the district court, in accordance with the proviso of said section, and were not required to take

an official oath, other than that as attorneys of the court." It appears from this statement in the opinion that the appearance of Messrs. Martin and Falloon in that case was strictly in accordance with the requirements of statute. The next case is *Blair v. State*, 72 Neb. 501, 515, 101 N. W. 17, 22. In that case the syllabus holds: "(10) An objection to the appearance of private counsel to assist the county attorney in conducting a criminal prosecution, to be available, should be made at a suitable time and in the proper manner, and must be supported by at least some showing that the county attorney did not request or require any assistance, and the court had not appointed such counsel for that purpose. (11) Held, that a general objection to the appearance of such counsel, made during the trial in connection with the examination of a witness, and without any showing to support it, was properly overruled." In the opinion, Barnes, J., said: "No statement was made, or evidence offered, showing, or tending to show, that the prosecution had not requested the assistance of counsel, or that the court had not properly appointed them to render such assistance." Under those facts the decision in that case was clearly right. It is urged by the state that the question of employment of private counsel in the prosecution of a criminal case has been very recently discussed by this court in *Burnett v. State*, 88 Neb. 638, 130 N. W. 263. In that case the question was not raised at any time during the trial. Moreover, it could not have been raised under the statute above quoted, for the reason that that case was a misdemeanor simply, and not a felony. To such a case the statute has no application. The only other authority cited by the state upon this point is the note to *State v. Bartlett*, 24 L.R.A.(N.S.) 564. There the principal case was simply a misdemeanor. An examination of the copious notes will show that there is a conflict in the holdings of the different states upon this point. In his brief the attorney general says: "I cannot see that the statute of 1893, quoted by counsel, provides for any change of this general rule." In *Biemel v. State*, 71 Wis. 444, 37 N. W. 244, 7 Am. Crim. Rep. 556, and *Bird v. State*, 77 Wis. 276, 45 N. W. 1126, it is held that a statute very similar to ours does change the rule, and that under it an unofficial member of the bar may not assist in the prosecution for a fee to be paid by private persons.

In support of his contention, defendant cites *Biemel v. State*, supra; *Meister v. People*, 31 Mich. 99, 1 Am. Crim. Rep. 91; *People v. Bussey*, 82 Mich. 49, 46 N. W. 97, and other cases. We are im-

pressed with and prefer to follow the rule announced by the supreme court of Wisconsin and the other states that are in harmony therewith. We are not unmindful of the fact that in many cases, particularly in sparsely settled counties, young lawyers of little experience are oftentimes, from necessity, elected to the office of county attorney, and, if the prosecution of felony cases were left to such a county attorney alone, crime might go unpunished. In such cases it is to the interest of the state that such a county attorney should have the assistance of outside counsel; and, if there were nothing in the statute providing therefor, as was the case when *Polin v. State*, supra, was decided, we would adhere to the rule there announced; but our legislature, by the statute under consideration, has wisely provided for just such emergencies. In doing so, however, it has not left it to outside parties to select the assistant counsel. It has imposed that duty upon the county attorney and district court, and has provided that the county attorney may, under the direction of the district court, procure such assistance. Counsel thus procured will not be actuated by sordid motives. He will enter upon the discharge of his duties in the same spirit that any honorable county attorney would enter upon the same, *viz.*, with the desire simply to see that justice is done. It is just as much the duty of a county attorney to see that an innocent man is not convicted as to see that the guilty receive their just deserts. As said by Mr. Chief Justice Christiancy, in *Hurd v. People*, 25 Mich. 405, 416: "The only legitimate object of the prosecution is 'to show the whole transaction, as it was, whether its tendency be to establish guilt or innocence.' The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success." Counsel called to assist in the prosecution should govern his actions in like manner, and when procured in the manner and for the compensation contemplated by the statute quoted would doubtless do so; while counsel employed by outside parties, and, in the case of a homicide, by relatives of the deceased, would not feel bound by any such rule of conduct. He appears as private counsel simply, to represent the wishes, prejudice, and animosities of his clients; to secure a conviction at all hazards. Such is not the policy of the law as indicated by the legislature, and we must decline to give it our sanction. In the case at bar there is nothing to show that the county attor-

ney, who is a lawyer of known ability, requested the assistance of Mr. Harrington, nor that he had been in any manner previously consulted in reference thereto.

The mere fact that the court permitted Mr. Harrington to assist in the prosecution cannot be held to be a compliance with the statute, which provides that private counsel may be procured by the county attorney, under the direction of the court. This provision of the statute calls for affirmative action by the county attorney and the court. Mere acquiescence in or assent to the appearance of private counsel does not constitute the affirmative action required by the statute, and is not sufficient. If, in the further prosecution of this case, the court and county attorney deem it necessary to have the assistance of outside counsel, it is their duty to follow the plain provisions of the statute in procuring the same.

As the case will have to be tried again, we will refrain from expressing any opinion as to the weight of the evidence, and will only consider one of the errors complained of in connection therewith. It is urged that the court erred in admitting in evidence Exhibits 6, 7, 18, 19, and 22. Exhibits 6 and 7 were two shirts, stained with blood. 18 was the coat, 19 the vest and 22 the cap of the deceased. The testimony of the coroner, who was also a practising physician and surgeon, showed conclusively that the deceased had received three blows on the side of his head, each of which fractured his skull, and two of which penetrated the brain, either of which the doctor said was sufficient to have proved fatal. It was thus clearly established that the deceased had been murdered. There was no room for contention that his injuries had been self-inflicted, and the only question before the jury was, Did the defendant commit the murder? The admission of these blood-stained garments, and the flaunting of them before the jury, could in no manner identify, or even tend to identify, the prisoner at the bar as the murderer. We can conceive of no other purpose which these exhibits could subserve than to excite the passions and inflame the minds of the jury. A defendant who is being tried for any offense, and particularly one involving the possible taking of his life, is entitled to a trial upon competent evidence, — evidence which tends to show his guilt or innocence, — and not upon evidence which has no tendency in that direction, but which can only serve the purpose of distracting the minds of the jury from the real issue to gruesome exhibits, which may easily lead them to a wrong conclusion.

For the errors above indicated, the judgment of the District Court is reversed, and the case remanded for further proceedings in harmony herewith.

Letton, J., dissenting in part:

I am unable to concur in that portion of the opinion holding it was reversible error to permit other counsel to assist the county attorney. We held, in *Rickley v. State*, 65 Neb. 841, 61 L.R.A. 489, 91 N. W. 867, that the county attorney has complete control of criminal prosecutions, and that he may exclude other counsel if he so desires, even if the complainant desires to employ such counsel. Of course, this is subject to the direction and control of the court. When the county attorney allows private counsel to appear with him, and assist him in the trial without objection, it is clear that he desires his assistance; otherwise he could summarily dismiss him from the case; and, when the fact that such counsel is employed and his assistance is desired by the county attorney, is known and expressly permitted by the court, as the record shows, the defendant cannot complain.

The statutory provisions (Comp. Stat. 1911, chap. 7, § 16) are intended to limit the liability of the several counties to pay for assistance to the county attorney, and are not intended to deprive him of assistance which he believes to be necessary, and which is furnished, with the consent of the court, without expense to the county. It is true counsel paid by private persons are apt to err by excess of zeal; but this is entirely within the control of the official prosecutor, and he has the undoubted right to refuse to allow counsel to appear further if they go beyond the limits proper to an official prosecutor.

I think the opinion on this point is opposed to our former decisions, and is against the weight of authority. See note to *State v. Bartlett* 24 L.R.A.(N.S.) 564.

A rehearing having been granted, *Fawcett, J.*, on April 20, 1912, handed down the following opinion (135 N. W. 1024):

When our opinion was handed down in this case (90 Neb. 63, ante, 714, 132 N. W. 741), the county attorney of Antelope county requested and the attorney general directed a mandate to go down. Subsequently and within forty days from the filing of the opinion the private prosecutor employed by the relatives of the deceased requested and was given leave to file a motion for a recall of the mandate and for a rehearing of the case. Upon the filing of the motion, argument thereon was ordered and has been had. The case 39 L.R.A.(N.S.)

is now before us on that motion, for review.

Counsel for defendant has entered objections to a further consideration of the case in this court for various reasons, which we deem it unnecessary to set out. It is sufficient to say that we permitted the filing of the motion for rehearing, and must now decline to dispose of it without consideration. Defendant's objections are therefore overruled.

Upon the original hearing we held the information originally filed to be void. This holding is now assailed. The writer is satisfied with our former holding and is still of the opinion that the information was void. A majority of the court, however, are of opinion that this is stating the matter too strongly; that the information was defective merely, but not void. Paragraphs 1, 2 and 3 of the syllabus of the former opinion are therefore hereby modified so as to read as follows:

1. An information is defective if it charges the commission of the offense as subsequent to the date upon which the information is filed or on an otherwise impossible date.

2. And in such a case it is error for the trial court, after permitting an amendment curing such defect, to require the accused, over his objection, to immediately proceed with the trial without arraignment under and plea to such amended information, and without giving him the statutory time of twenty-four hours in which to plead thereto.

3. Where one accused of a felony is put upon trial under an information defective upon its face, and, after trial begun, the information is amended and the trial proceeded with, there being no change in the offense charged, held, that the accused is not thereby placed in jeopardy a second time.

That portion of the opinion upon which the above three paragraphs of the syllabus are predicated is also modified so as to conform therewith.

Our opinion in relation to the employment of private counsel, as embodied in paragraphs 4, 5, and 6 of the syllabus, is next assailed. We deem it unnecessary to again discuss that question. We are satisfied with our former opinion upon that point and adhere thereto. This case presents a good illustration of the sufficiency of the reasons which prompted the legislature to amend the statute in relation to the employment of private counsel in felony cases, and of the soundness of our former holding. Here we have private counsel, employed by relatives of the deceased, not only dominating the trial of a felony case in

the court below, but obtruding himself into this court, after the attorney general and the county attorney had accepted the opinion and obtained the issuance of a mandate, and attempting to further serve his private clients by a persistent contention at variance with the orderly course then being pursued by the able prosecuting officers of the state.

Our opinion, as reflected in paragraph 7 of the syllabus, is next assailed. An attempt is made to justify the offering in evidence of the blood-stained garments of the deceased upon the theory that the evidence shows that the defendant was seen leaving the house of the deceased early in the morning of the day when the body was discovered, and that this evidence would show that the deceased was murdered after arising in the morning. It had already been shown by the testimony of the persons who first found the body of the deceased that, at the time they made the discovery, the body was lying at the foot of the cellar stairs, fully dressed, with the bloody ax, with which the deed had evidently been committed, lying beside it. This undisputed testimony established the fact that at the time of the murder the deceased was fully dressed; but neither that testimony, nor the blood-stained garments themselves, would prove that he had been murdered after arising in the morning, any more than they would prove that he had been murdered before the time for retiring the evening before. No attempt to disguise the motive of counsel in offering these blood-stained garments in evidence can obscure the fact that the real motive was for the purpose of exciting the passions of the jury. We are satisfied with our former holding, and adhere thereto.

The motion for rehearing is therefore overruled, and our former opinion, modified as above set out, is adhered to.

Reese, Ch. J., not having heard the arguments upon the motion, took no part.

Rose, J., dissenting:

Upon further reflection, I do not think the conviction should be set aside for any reason assigned in the former opinion or in the modification thereof on the motion for a rehearing.

1. Though the information was filed in the district court April 28, 1910, and the homicide occurred December 7, 1909, the date of the murder, as stated in the charge, was December 7, 1910. Why should the future date, which was palpably erroneous, control the charge that the felonious act had been committed in the past, where time is no part of the crime and the prosecution

never outlaws? The information shows on its face that it was verified by the oath of the county attorney April 28, 1910, and that it was filed in the district court the same day. It is also formally and fully charged in technical language that defendant did feloniously make the fatal assault in Antelope county and did strike and wound his victim, and that in consequence the victim "then and there did die." The verbs are in the past tense. They contradict the immaterial future date. The figures "1910," which constitute no part of the felony, are repugnant to the material charges in the past tense. The nonessential future date should yield to the fundamental charges that the unlawful acts were committed in the past. In these respects the legislature in adopting the Criminal Code of this state departed from the technical exactitude formerly required by the rules of the common law.

"No indictment shall be deemed invalid, nor shall the trial, judgment, or other proceedings be stayed, arrested, or in any manner affected," declares the Criminal Code, "for omitting to state the time at which the offense was committed, in any case where time is not of the essence of the offense; nor for stating the time imperfectly;" nor "for any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime or person charged; nor for want of the averment of any matter not necessary to be proved, nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Criminal Code, § 412. The Criminal Code further provides that a variance between the statements of the information and the evidence offered in proof thereof shall not be deemed "ground for an acquittal of the defendant, unless the court before which the trial shall be had shall find that such variance is material to the merits of the case or may be prejudicial to the defendant." Criminal Code, § 413. Construing these provisions of the Criminal Code, this court held: "Under § 412 of the Criminal Code, an indictment or information is not rendered fatally defective 'for omitting to state the time at which the offense was committed, in any case where time is not of the essence of the offense, nor the stating the time imperfectly.'" *Rema v. State*, 52 Neb. 375, 72 N. W. 474.

This rule applies to the present case, because time was not of the essence of the offense and the date was imperfectly stated. Within the meaning of the Criminal Code, the erroneous figures "1910" are repugnant to the formal charge that the felony had been committed by defendant before the

county attorney filed his information. Besides, the omission to give the date correctly did not prejudice defendant. The county in which the murder was committed was named. The name of the murdered man was stated. The weapon used was described. In the complaint filed before the justice of the peace the date was correctly stated. Under this complaint he was arrested and bound over to the district court to answer the identical charge, giving the correct date. He had time to prepare for trial under the original information filed in the district court, and was represented by eminent counsel. Every fact necessary to a flawless information was as fully imparted to him by the judicial record of the proceeding, as would have been disclosed had the date been correctly stated. That the information, before the year "1910" was changed to 1909, was sufficient to support a conviction, seems to be sustained by the weight of authority, where the rules of the common law have been modified by statute, as in this state.

The report of *Conrad v. State*, 65 Ark. 559, 47 S. W. 628, shows that the indictment was filed July 14, 1896, and that it gave the date of the felony as May 15, 1899. In passing on the sufficiency of the indictment under statutes which modify the rules of the common law, the court in that case said: "In the indictment before us the grand jury of Faulkner county accused the defendant of the crime of slander, 'committed as follows,' and alleged that the defendant, 'on the 15th day of May, 1899, then and there maliciously, wilfully, feloniously, and falsely did use, utter, and publish,' etc. They alleged that the offense was committed in the past, using the words 'committed' and 'did' for that purpose, on a day some time in the future. No man of common understanding could infer from the indictment that the grand jury intended to accuse the defendant of 'having committed a crime before it was committed. To accuse one of a crime is to charge that it was committed prior to the accusation. The allegation as to the date of the commission of the offense was a clerical error, apparent on the face of the indictment, and was not calculated to, and did not, mislead the defendant, and did not affect the validity or sufficiency of the indictment or the judgment against him,"—citing *Williams v. Com.* 13 Ky. L. Rep. 893, 18 S. W. 1024.

In *Stevenson v. State*, 5 Baxt. 681, defendant was indicted for burglary February 5, 1876; the date of the crime as stated in the indictment being February 22, 1876. In passing on the sufficiency of the indictment under statutes changing the

common law, the supreme court of Tennessee said: "The indictment was found 5th of February, 1876, and charges that the offense was committed 'heretofore, to wit, the 22d of February, 1876.' The Code only requires that the offense be charged to have been committed previous to the finding of the indictment; no particular day being necessary to be alleged or proven where time is not an ingredient in the offense. Code, § 5124. It is true it has been held that it must be distinctly alleged, and not left to inference or construction (*King v. State*, 3 Heisk. 148); but the language here is heretofore, to wit, this certainly means before the finding of the indictment. It is true 22d of December [February] 1876, is repugnant and an impossible date, in reality a mere mistake of the draftsman, and may be rejected; but we think the indictment good after verdict."

In *State v. Brooks*, 85 Iowa, 366, 52 N. W. 240, the indictment was returned February 13, 1890, and charged that the offense was committed November 15, 1890; whereas, the latter date should have been November 15, 1888. The prosecution was allowed to correct the mistake, and the supreme court observed: "It is not only apparent that the date '1890' was an impossible date and a clerical error, but that, omitting that date, still the offense is charged to have been committed at a time possible and certain, namely, 'on or about the 15th day of November, 1888.' Code, § 4538, requires that we 'must examine the record, and without regard to technical errors or defects which do not affect the substantial rights of the parties, render such judgment on the record as the law demands.' 'A mere clerical error, which can be discovered by a casual reading of the indictment itself, will not render it fatally defective.' *State v. Crawford*, 66 Iowa, 318, 23 N. W. 684; *State v. Gurlock*, 14 Iowa, 444; *State v. Emeigh*, 18 Iowa, 122; *State v. White*, 32 Iowa, 17. This being a mere clerical error, apparent upon the face of the indictment, the defendant was not prejudiced by allowing the correction."

In *State v. McDaniel*, 94 Mo. 301, 7 S. W. 634, the court enforced a statute providing that no indictment shall be deemed invalid for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened. The rule was stated thus: "An indictment for murder which charges the assault and wounding to have occurred on the 25th day of December, 1886, from the effects of which the deceased died on the 25th day of December, 1885, is not fatally defective:

The mistake is merely clerical, is cured by the statute (Rev. Stat. 1879, § 1821), and should be disregarded."

In *Conner v. State*, 25 Ga. 515, 71 Am. Dec. 184, the presentment was dated September term, 1857, and charged that the offense was committed December 15, 1857, and the court said: "Have not all the courts, both in England and in this country, settled it so long ago that the memory of man runneth not to the contrary, that while some day must be stated, any other may be proven? Who does not see that if it be immaterial to prove the day as charged, that no day or an impossible day will do just as well? But it will be replied that it never was decided, but that the time charged must be before the accusation is preferred. And I concede this to be so, at least for the purposes of the argument. But let us look at the reason of the thing. Suppose the day be laid subsequent to the finding of the grand jury; it is the same in effect as stating an impossible day, as the 40th of May, and if it be correct that any day within the statute of limitations and before indictment found will suffice, it is quite clear that no day, or one that is impossible, will do just as well."

In *State v. Pierre*, 39 La. Ann. 915, 3 So. 60, it was decided: "An immaterial and impossible date in an indictment may be corrected at any time, particularly when the date is not of the essence of the offense charged."

In modifying the rules of the common law on this subject the Criminal Code of Nebraska goes further than that of most of the states in which the decisions cited were rendered. To give effect to the changes which the legislature of this state made in the rules of the common law, it seems to me to be necessary to hold that the information as originally filed in the district court in the present case was sufficient to support a conviction without amendment or correction. If I am correct in this conclusion, it follows that the amendment inserting in the information "1909," instead of "1910," was immaterial, and that there was no error in refusing a postponement because of the change.

2. As I view the law, the majority opinion places too many restrictions around the engaging of private counsel to assist in criminal prosecutions. The proper solution of this question must rest upon the construction of the statute relating to the powers and duties of county attorneys. In 1885 the legislature passed an act containing the following provisions: "It shall be the duty of the county attorney to appear in the several courts of their respec-

tive counties and prosecute and defend, on behalf of the state and county, all suits, applications, or motions, civil or criminal arising under the laws of the state, in which the state or the county is a party or interested. . . . The county attorney may appoint one or more deputies, who shall act without any compensation from the county, to assist him in the discharge of his duties; provided, that the county attorney of any county may, under the direction of the district court, procure such assistance, in the trial of any person charged with the crime of felony, as he may deem necessary for the trial thereof, and such assistant or assistants shall be allowed such reasonable compensation as the county board shall determine for his services, to be paid by order on the county treasurer, upon presenting to said board the certificate of the district judge before whom said cause was tried, certifying to the services rendered by such assistant or assistants." Laws 1885, chap. 40, §§ 2, 6; Comp. Stat. 1885, chap. 7, §§ 16, 20.

It is matter of common knowledge that the officers of the executive department of the state government, in the enforcement of the criminal laws, have construed the foregoing statutory provisions to allow the county attorney such assistance as he believes to be necessary, if obtained by him with the consent of the court and without expense to the county; and such assistance, if allowed by the judge of the district court without objection from the county attorney, has not been regarded as a violation of the statute. This construction is not unreasonable. It does not deprive accused of any right. The statutory provisions quoted show that the county attorney has ample control of criminal prosecutions. As the representative of the state, he may exclude at any time an assistant who abuses his privileges or otherwise misbehaves. The trial court has authority to protect the defendant from all improper acts of any attorney representing the state. It ought to be assumed that a judge of the district court, in presiding in his own tribunal, will be anxious about proper decorum and the due administration of the justice. It should not be presumed that a trial judge will fail to observe and repress improper conduct of counsel for the state, whether it grows out of excessive zeal, malice, hope of reward, or professional vanity. The construction which gives sanction to the rulings of the trial court in this case has been followed by the prosecuting officers of the executive department of the state government, with the approval of the district courts, since

the statute was passed, in 1885. While the sections containing the provisions under consideration have been amended from time to time, the provisions themselves, construed and applied as already stated, have remained unchanged during all these years. The question should therefore be determined according to a doctrine recently stated in the following language: "When a statute has for nearly forty years been practically construed by the officers whose duty it is to enforce it, and has during that time been several times re-enacted by the legislature in substantially the same terms, such construction will be regarded as adopted by the legislature, although the language of the statute would indicate a different meaning." *State ex rel. Platte County v. Sheldon*, 79 Neb. 455, 113 N. W. 208.

For these reasons I am constrained to recede from the construction adopted in the former opinion.

3. I am unwilling to say that the garments worn by the victim of the homicide at the time of his death were incompetent for every purpose in proving the state's case. In my judgment the record does not establish the correctness of that proposition. "If the evidence offered be legally admissible for any purpose, an objection of such evidence should be overruled." *Carleton v. State*, 43 Neb. 373, 61 N. W. 699. Competent evidence bearing on an issue cannot be excluded from the jury because it may incidentally arouse their prejudices. *Missouri P. R. Co. v. Palmer*, 55 Neb. 559, 76 N. W. 169. If this were not the law, the shocking atrocity of the homicide in this case would prevent a conviction. I think the majority opinion attaches too much importance to the rulings admitting the garments in evidence, when more revolting proofs of the crime are considered.

Unless an assignment of error not discussed is meritorious, the judgment, in my opinion, should be affirmed.

Letton, J., concurs in dissent.

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIS O. NEWCOMB et al.

v.

ALBERT KLOEBLEN, Plff. in Err.

(77 N. J. L. 791, 74 Atl. 511.)

Guaranty — credit — contention.

1. The promise to be responsible for any bill that a certain person may make is a 30 L.R.A. (N.S.)

continuing guaranty, and not limited to the purchase made at the time it is first presented, where the person named has a running account with the one to whom the paper is addressed, who refuses further credit unless the account is guaranteed.

Evidence — explaining writing — conversation — absence of party.

2. Evidence of a conversation between one who guaranteed another's account and the latter, in the absence of the one to whom the guaranty is addressed, is not admissible against the latter, for the purpose of showing the meaning in which the guarantor intended the instrument to be understood.

Same — necessity of notice.

3. One who guarantees another's account is not entitled to notice of the latter's default, before steps are taken to hold him liable on his guaranty.

(November 15, 1909.)

Note. — When is a guaranty a continuing one.

As to whether notice of acceptance is necessary in order to bind guarantor, see note to *William Deering & Co. v. Mortell*, 16 L.R.A. (N.S.) 367, et seq.

As to liability under continuing guaranty to partnership or corporation for goods sold or credits extended, after a change in the firm or corporation, see note to *Lyon v. Plum*, 14 L.R.A. (N.S.) 1231. And as to whether guaranty of credit extended for price of goods sold covers sales to successor, see note to *Lamm & Co. v. Colcord*, 19 L.R.A. (N.S.) 901.

As to when contract of guaranty of commercial paper covers renewals, see note to *American Trust Co. v. Louderback*, 16 L.R.A. (N.S.) 775. And as to whether liability of guarantor of payment of interest ceases at maturity of the obligation, see *Merritt v. Haas*, 21 L.R.A. (N.S.) 153, and note appended thereto.

As has been well stated, the question under annotation is one of the most perplexing with which the courts have had to deal, especially where an attempt is made to follow either precedent or principle. This is true for the reason that from the great mass of cases selections may be made which seemingly are on all fours with almost any conceivable case, but which arrive at contrary conclusions. This in turn results from the fact that the construction in each particular case turns not only upon the terms of the guaranty, but, except in very clear cases, upon the circumstances under which the guaranty was given, which naturally differ in almost every case. The result then is that it is practically impossible to formulate any definite rule or set of rules for determining whether a guaranty is a continuing one or not. Likewise, precedents are of little use except for purposes of illustration, and even then, owing to the diversity of conclusions reached, often tend to confusion. There are, however, a number of principles deducible from

ERROR to the Circuit Court for Hudson County to review a judgment in plaintiffs' favor in an action brought to recover upon the guaranty of an account. Affirmed.

The facts are stated in the opinion.

Mr. John J. Fallon, for plaintiff in error:

The paper writing did not constitute a continuing guaranty.

20 Cyc. 1439; 9 Am. & Eng. Enc. Law, 77-88.

Extrinsic evidence may be used to ascertain the true import of a letter of guaranty.

Bell v. Bruen, 1 How. 169, 11 L. ed. 89.

The defendant was not bound by the guaranty until after notice that it had

been accepted and the plaintiff intended to act upon it.

20 Cyc. 1404; Douglass v. Reynolds, 7 Pet. 113, 8 L. ed. 626; Acme Mfg. Co. v. Reed, 197 Pa. 359, 80 Am. St. Rep. 832, 47 Atl. 207.

Mr. Clarence Linn, for defendants in error:

What the guarantor intended can be ascertained only from the guaranty itself.

Naumberg v. Young, 44 N. J. L. 339, 43 Am. Rep. 380; Grueber Engineering Co. v. Waldron, 71 N. J. L. 598, 60 Atl. 386; Van Horn v. Van Horn, 49 N. J. Eq. 328, 23 Atl. 1079; Ellison v. Gray, 55 N. J. Eq. 581, 37 Atl. 1018.

The instrument was a continuing or standing guaranty.

the authorities, but these rules, like the individual decisions, are also conflicting. The most general, as well as equitable, of these rules, seems to be that that construction should be adopted which, under all the circumstances of the case, ascribes the most reasonable, probable, and natural conduct to the parties, according to the true import of the terms used and what is presumed to have been the understanding of the parties. As a matter of fact, the real conflict among the authorities usually arises when the terms of the guaranty are ambiguous or leave the import of the guaranty uncertain. Among this class of cases there are three rules, all of which are well supported by authority, if precedents may be considered authority, namely: That rule which requires the guaranty to be construed most strongly against the guarantor; that rule which says that, inasmuch as the promise is to pay the debt of another, the presumption is that a guaranty of a single transaction was intended, rather than a continuing guaranty; and that rule which assumes the middle ground, or that the true principle of sound ethics is not to set up a presumption for or against the guarantor, but to give the contract the sense in which the persons making the promise believed the other party to have accepted it.

Of course, where a guaranty by express terms is a continuing one, the courts, as is illustrated by the following cases, will so hold, unless the words used were clearly not intended to have that effect: Lawrence v. McCalmont, 2 How. 426, 11 L. ed. 326; Indiana Bicycle Co. v. Tuttle, 74 Conn. 489, 51 Atl. 538; American Exch. Nat. Bank v. Seaverns, 121 Ill. App. 480; Tapper v. New Home Sewing Mach. Co. 22 Ind. App. 313, 53 N. E. 202; LaRose v. Logansport Nat. Bank, 102 Ind. 332, 1 N. E. 805; Weed Sewing Mach. Co. v. Winchel, 107 Ind. 260, 7 N. E. 881; Clark v. Hyman, 55 Iowa, 14, 39 Am. Rep. 160, 7 N. W. 386; Peoria Rubber Mfg. Co. v. Doring, 85 Mo. App. 131; Cochran v. Kennedy, 10 Daly, 346; Whitall-Tatum Co. v. Manix, 61 Misc. 615, 113 N. Y. Supp. 1010; Picker v. Fizzle, 28 App. Div. 519, 51 N. Y. Supp. 205; Johnson v. 39 L.R.A. (N.S.)

Bailey, 79 Tex. 516, 15 S. W. 499; John A. Tolman Co. v. Butt, 116 Wis. 597, 93 N. W. 548; Staars v. Cosgrave Brewing & Malting Co. 12 Can. S. C. 571; Struthers v. Henry, 32 Ont. Rep. 365; Parr's Bkg. Co. v. Yates [1898] 2 Q. B. 460, 67 L. J. Q. B. N. S. 851, 79 L. T. N. S. 321, 47 Week. Rep. 42. And this is true notwithstanding the guaranty contains a limitation as to amount, it being said that the limitation merely applies to the liability of the guarantor, and not to the credit to be given. Bond v. John V. Farwell Co. 96 C. C. A. 546, 172 Fed. 58; Picker v. Fizzle, 28 App. Div. 519, 51 N. Y. Supp. 205.

In some instances, as for example in California, a continuing guaranty is defined by statute (Cal. Civ. Code, § 2814), and naturally, where this is the case, the decisions will often be influenced or controlled thereby.

Some courts have made a distinction between guaranties which were limited either as to time or amount, or both, and guaranties which were not so limited, but in the main no such distinction seems to have been made. For purposes of classification, however, the cases have been divided according to the nature of the limitation in the respective guaranties, and the various rules as established and applied by the cases stated and illustrated thereunder.

Unlimited as to time or amount

The general rules above stated apply to cases involving unlimited guaranties, but it has been said that there is more reason perhaps for giving a freer interpretation where the sum is limited, because there the party entrenches himself within a certain amount. See Anderson v. Blakely, 2 Watts & S. 237. As above stated, however, such a possible distinction has not been generally recognized.

Some courts announce the strict rule that, unless the words in which the guaranty is expressed fairly imply that the liability of the guarantor is to be limited, it continues until the guaranty is revoked. Thus, in the following cases the parenthesized guar-

Robbins v. Robinson, 176 Pa. 341, 35 Atl. 337; Mason v. Pritchard, 12 East, 227, 2 Campb. 436, 11 Revised Rep. 369; Merle v. Wells, 2 Campb. 413.

The defendant can be held liable upon his guaranty, in the absence of proof of notice to him by the plaintiffs that they accepted it and intended to act upon it.

20 Cyc. 1407, 1409; Davis Sewing Mach. Co. v. Richards, 115 U. S. 524, 29 L. ed. 480, 6 Sup. Ct. Rep. 173; Davis v. Wells, F. & Co. 104 U. S. 159, 26 L. ed. 686.

Vroom, J., delivered the opinion of the court:

This action was brought by S. Judd & Company, against the defendant below, Albert Kloeblen, as guarantor for goods sold to his son, James Kloeblen. It ap-

peared from the evidence at the trial that the plaintiffs below were live stock commission merchants. James Kloeblen was one of their customers. In the month of April, 1906, the plaintiffs refused to make any further sales to him unless they had a guaranty of his account from his father, the defendant in this suit. Such a guaranty was procured from the defendant, and a copy of the same is as follows:

Jersey City, N. J., April 20, 1906.

S. Judd & Company.

Dear Sirs:—

I will be responsible for any bill that my son James will make. Thank you for the same. I remain,

Yours truly,

Albert Kloeblen.

anties were held to be continuing ones under the above rule: Wright v. Griffith, 121 Ind. 478, 6 L.R.A. 639, 23 N. E. 281 ("Please let my daughter, H., have what goods she wants, and I will stand good for the money to settle the bills," etc.); Ker-nochan v. Murray, 111 N. Y. 306, 2 L.R.A. 183, 7 Am. St. Rep. 744, 18 N. E. 868 (guaranty made as inducement to purchase stock, of a certain per cent per annum so long as the purchaser should retain the stock,—held not limited to the duration of the firm).

And that a guaranty should be given a liberal, and not a restricted, interpretation, where the terms are uncertain or ambiguous, is the broad rule indicated by the following cases: Lowe v. Beckwith, 14 B. Mon. 184, 58 Am. Dec. 659, holding the guaranty, "M. being about to commence the retailing of dry goods, . . . and desiring to open a credit with the firm of J. L. & Co., . . . I hereby undertake and contract with said L. & Co. to become responsible to them for the amount of any bill or bills of merchandise sold by them to said M., agreeably to the terms of sale agreed upon by the parties,"—a continuing one, embracing all purchases, and not limited to the first bill of merchandise bought; St. Lawrence Steel & Wire Co. v. Leys, 6 Ont. L. Rep. 235, affirmed in 7 Ont. L. Rep. 72, holding the guaranty, "will guarantee payment of all accounts," to be a continuing one.

On the other hand, where the terms of the guaranty are ambiguous or render the intent uncertain, some courts adhere to the rule that a strict interpretation should be applied in favor of the guarantor. This rule is illustrated by the following cases, in which the respective guaranties were held noncontinuing: Whitney v. Groot, 24 Wend. 82 ("We consider J. E. V. good for all he may want of you. . . . and we will indemnify the same"); Birdsall v. Heacock, 32 Ohio St. 177, 30 Am. Rep. 572 ("Please send my son the lumber he asks for, and it will be all right"); Morgan v. Beyer, 39 Ohio St. 325, 48 Am. Rep. 454 39 L.R.A. (N.S.)

("The bearer, H. A. B., is visiting your city buying a few goods in your line, and anything you may be able to sell him will be paid promptly as agreed on, which I herewith guarantee"); Blyth v. Pinkerton Nat. Detective Agency, 10 Wyo. 135, 57 L.R.A. 468, 67 Pac. 619 (guaranty of the salary and expenses of a detective in working up a murder case held not to continue after conviction of a suspect and settlement of the bill for services to that time, although not canceled or recalled, and therefore the guarantor cannot be held liable for services rendered in connection with a retrial of the accused).

And other courts announce the rule to be that since a guarantor is a favorite of the law, his contract will not be held a continuing one unless the intention so to bind himself is clearly manifest. Under this rule the guaranties in the following cases have been held not to be continuing ones: John S. Brittain Dry Goods Co. v. Yearout, 59 Kan. 684, 54 Pac. 1062 (the guaranty, "We, the undersigned, hereby agree that we will guarantee the payment of goods purchased by Y.," was given upon the refusal of a dealer to ship goods ordered by Y. until a guaranty of payment was made); Gard v. Stevens, 12 Mich. 292, 86 Am. Dec. 52 ("If you will let the bearer have what leather he wants and charge the same to himself, I will see that you have your pay in a reasonable length of time,"—in holding this guaranty to be limited to a single purchase, the court said: "Every person is supposed to have some regard to his own interest, and it is not reasonable to presume any man of ordinary prudence would become surety for another without limitation as to time or amount unless he has done so in express terms or by clear implication. If the guaranty was limited in express terms, either as to time or amount, but not as to both, it might be said it was the intention of the guarantor to leave it open as to the other, or that a further limitation could not be implied. But where it contains no express limitation as to either, and there is nothing in the instrument it-

On the strength of this guaranty the plaintiffs thereafter sold to James live stock, from time to time, as he required it, until July, 1907, when he failed in business, owing them \$2,251.92. The case was tried at the Hudson circuit before Judge Speer, without a jury, and he found for the plaintiffs, and directed a judgment for the plaintiffs for the amount claimed, with interest.

The first contention made by the plaintiff in error in favor of the reversal of the judgment below was that the trial court erroneously held that the paper writing was a continuing guaranty. On motion to nonsuit, made by the defendant below, the trial judge held that the "phraseology that he will guarantee any bill will include any bill the son might contract,

whether in one purchase or more." The insistent is now made that the language of the paper itself, and the circumstances under which it was given, show that the liability of the defendant was intended to be limited to the bill of goods for which James Kloeblen had applied to the plaintiffs to purchase, and that it could not be operative in guaranteeing the payment of all bills sold to him after the delivery of the guaranty. In coming to the consideration of the question as to whether this is or is not a continuing guaranty, it is important to refer to the general rule for the construction of guaranties. Admittedly, in the construction of contracts, it is a general rule that all words are to be taken most strictly against the guarantor or contractor. *De Colyar, Guaranties, 177.*

self from which it can be inferred that it was the intention of the guarantor to leave it open as to both, we think it must be understood as referring to a single transaction"); *Baker v. Rand*, 13 Barb. 152 ("Whatever goods you sell to A. B. to be sold in our store, we will consent that he may take the money out of our concern to pay for the same, only you must treat him as well about prices and length of credit as you do your best customers. The said A. shall have the liberty of taking the pay out of our concern as fast as the goods are sold"); *Dixon v. Frazee*, 1 E. D. Smith, 32 (guarantor stated that "his son would want some hardware," and directed obligee to "let him have what he wanted, and he [guarantor] would see that he [obligee] was paid"); *Stern v. James*, 51 Hun, 640, 4 N. Y. Supp. 16 (obligee having refused to open an account with retailer, guarantor's agent wrote: "Any goods you may sell to B. would be promptly paid for, and if not so paid for by her [B], he [guarantor] will pay the account"); *Whitney v. Groot*, supra ("We consider J. E. V. good for all he may want of you, . . . and we will indemnify the same."—held limited to goods obtained upon the first presentation); *Birdsall v. Heacock*, supra ("Please send my son the lumber he asks for, and it will be all right"); *Anderson v. Blakely*, supra ("P. having informed me that he is making some purchases from you, and not being acquainted with you that you wish some reference. Though not personally acquainted, yet I would say from my knowledge of P. that you might credit him with perfect safety, and that anything he may purchase from you I would see paid for").

The great majority of cases which involve unlimited guaranties, however, reject both the strict and liberal rule of construction, by taking the equitable ground that the contract must be construed according to the intent of the parties, the question being what is the fair import of the language of the guaranty in view of the circumstances under which it was given. *Hotchkiss v. Barnes*, 34 Conn. 27, 91 Am. Dec. 713; 39 L.R.A. (N.S.)

Mamerow v. National Lead Co. 206 Ill. 626, 99 Am. St. Rep. 196, 69 N. E. 504, affirming 98 Ill. App. 460; *Bridgeport Malleable Iron Co. v. Iowa Cutlery Works*, 130 Iowa, 736, 107 N. W. 937; *Menard v. Scudder*, 7 La. Ann. 385, 56 Am. Dec. 610; *Knowlton v. Hersey*, 76 Me. 345; *Mussey v. Rayner*, 22 Pick. 223; *Lehigh Coal & I. Co. v. Scal-len*, 61 Minn. 63, 63 N. W. 245; *Boehne v. Murphy*, 46 Mo. 57, 2 Am. Rep. 486; *Hayden v. Crane*, 1 Lans. 181; *Agawam Bank v. Strever*, 18 N. Y. 502; *Strong v. Lyon*, 63 N. Y. 172, 13 Mor. Min. Rep. 554; *Schwartz v. Hyman*, 107 N. Y. 562, 14 N. E. 447; *Birdsall v. Heacock*, 32 Ohio St. 177, 30 Am. Rep. 572; *Morgan v. Boyer*, 39 Ohio St. 324, 48 Am. Rep. 454; *Merchants' Nat. Bank v. Cole*, 83 Ohio St. 50, 93 N. E. 465, Ann. Cas. 1912 A, 773; *Tischler v. Hofheimer*, 83 Va. 35, 4 S. E. 370; *Hoad v. Grace*, 7 Hurlst. & N. 494, 31 L. J. Exch. N. S. 98, 8 Jur. N. S. 43, 5 L. T. N. S. 359, 10 Week. Rep. 85; *Coles v. Pack*, L. R. 5 C. P. 65, 39 L. J. C. P. N. S. 63, 18 Week. Rep. 292; *Nottingham Hide, Skin & Fat Market Co. v. Bottrill*, L. R. 8 C. P. 694, 42 L. J. C. P. N. S. 256, 29 L. T. N. S. 134, 21 Week. Rep. 739; *Burgess v. Eve*, L. R. 13 Eq. 450, 41 L. J. Ch. N. S. 515, 26 L. T. N. S. 540, 20 Week. Rep. 311. Under this rule the guaranties set out with the following cases were held to be limited, and not continuing, ones: *Knowlton v. Hersey*, 76 Me. 345 ("The bearer of this letter . . . wishes to place a stock of groceries in his provision and meat store in this place. To enable him to do this, I am willing to be responsible to you for the amount of groceries he may order of you"); *Hayden v. Crane*, 1 Lans. 181 ("There is a fair prospect that R. could sell a few chamber sets if he had them. If you will let him have them, we will see that you receive pay for them as sold or soon after"); *Strong v. Lyon*, 63 N. Y. 172, 13 Mor. Min. Rep. 554. ("I hereby agree to save and hold the said S. harmless from any and all loss that he may sustain by reason of the purchase of the within-named 3,000 shares of the C. G. Co., and if any such loss is made, I agree

And although in some jurisdictions it has been laid down that the contract of guaranty must in this respect be construed differently from other contracts, following Baron Bayley, in *Nicholson v. Paget*, 1 Crompt. & M. 48, 3 Tyrw. 164, 5 Car. & P. 395, 2 L. J. Exch. N. S. 18, yet, in this state the doctrine must be considered as settled as stated by Chief Justice Beasley, in *Hoey v. Jarman*, 39 N. J. L. 523, affirmed in 40 N. J. L. 379, that "the words of a guaranty will be read most strongly against the guarantor;" the learned chief justice citing with approval the language of Burge on Suretyship, p. 46: "It may then be considered . . . that the contract of guaranty or surety will be subject, as every other contract, to the

rule that, where there is ambiguity or obscurity which the other parts of the instrument do not explain, it is to be construed *potius contra proferentum*; that is, against the party giving the contract."

Is, then, the guaranty here in question a continuing one or not? In considering the law applicable to the matter of continuing guaranties, De Colyar, in his *Law of Guaranties*, says: "No fixed rules have been laid down for determining whether a guaranty is to be considered a continuing one or not, and that such guaranties are to be so construed as to give effect to what may be fairly inferred to be the real intention and understanding of the parties as expressed in the writing." To the same effect, Brandt on Suretyship &

to pay the same to the said S., provided such loss shall accrue within thirty days from this date,"—held to include only stock first purchased); *Schwartz v. Hyman*, 107 N. Y. 562, 14 N. E. 447 ("You will be kind enough to send J. P. a full line of samples, of course, suitable for spring and summer, at the lowest figures. And I will guarantee the payment of any goods you may sell him. Hoping you will comply with my request and attend to it at once," etc.,—held not continuing, but to refer simply to the goods ordered from the samples sent as requested); *Birdsall v. Heacock*, 32 Ohio St. 177, 30 Am. Rep. 572 ("Please send my son the lumber he asks for, and it will be all right"); *Morgan v. Boyer*, 39 Ohio St. 324, 48 Am. Rep. 454 ("The bearer, B., is visiting your city buying goods in your line, and anything you may be able to sell him will be paid promptly as agreed on, which I herewith guarantee"). And the guaranties in the following cases were held to be continuing in character: *Hotchkiss v. Barnes*, 34 Conn. 27, 91 Am. Dec. 713 ("You may let D have what goods he calls for, and I will see that the same are settled for"); *Mamerow v. National Lead Co.* 206 Ill. 626, 99 Am. St. Rep. 196, 69 N. E. 504, affirming 98 Ill. App. 460 (guaranty reciting that the guarantors "desired" the obligee to continue to sell goods to the principal debtor, that they requested him to do so, and that they guaranteed the payment "upon demand of all moneys, debts, obligations, and demands of whatever nature or character now due or which may hereafter become due, from" the principal debtor to the obligee); *Bridgeport Malleable Iron Co. v. Iowa Cutlery Works*, 130 Iowa. 736, 107 N. W. 937 (guaranty given to perfect credit in terms as follows: "We hereby guarantee that the B. M. I. Co. shall receive prompt remittance for shipments of castings," etc.); *Menard v. Scudder*, 7 La. Ann. 385, 56 Am. Dec. 610 ("I do recommend my friend. . . a planter, and any funds that he may raise or acceptances, in case he does not pay, I feel bound to pay"); *Mussey v. Rayner*, 22 Pick. 223 ("To whom it may concern. The bearer, M. R., son of the subscriber, is

. . . about to establish a store in P. of books and stationery, and now goes to B. to obtain an assortment of stock for that purpose. . . . He wishes to purchase school books, etc., upon a credit of four or six months, and miscellaneous books, paper, etc., on commission. For the faithful management of the business and punctual fulfillment of contracts relating to it, the subscriber will hold himself responsible"); *Lehigh Coal & I. Co. v. Scallen*, 61 Minn. 63, 63 N. W. 245 ("In the matter of furnishing fuel to E. F. S. for his trade, I hereby agree to become responsible for any amount of credit you [obligee] may give him [principal debtor], and in case he fails to pay you, . . . I will pay the same,"—held continuing, but limited to what would be a reasonable time and amount under the circumstances); *Boehne v. Murphy*, 46 Mo. 57, 2 Am. Rep. 485 ("Please let T. have the paints . . . he wants. I will be security for the amount for what he will owe you,"—held continuing in view of the probable intent of the parties as gathered from the circumstances); *Agawam Bank v. Strever*, 18 N. Y. 502,—see *contra id.* 16 Barb. 82 (indorsement on a promissory note as follows: "The above note is left as collateral security for all liabilities incurred by I. S. D. or D. & H. to the A. Bank"); *Tischler v. Hoffheimer*, 83 Va. 35, 4 S. E. 370 ("Let F. have as many shoes and boots as he want, and I see you are getting paid for. Don't charge him more as goods is worth"); *Hoad v. Grace*, 7 Hurlst. & N. 494, 31 L. J. Exch. N. S. 98, 8 Jur. N. S. 43, 5 L. T. N. S. 359, 10 Week. Rep. 85 ("As D. informs me you require some person as guaranty for goods supplied to him by you in his business, I have no objection to act as such for payment of your account,"—held to apply to both goods already furnished and to those to be furnished in the future); *Coles v. Pack*, L. R. 5 C. P. 65 ("Whereas F., coal merchant, is and stands indebted to you, C., in the sum of. . . and whereas you are pressing for the immediate payment of the said sum of. . . now I do hereby, in consideration of your forbearing to take immediate steps for the recovery of the said

Guaranty, (1878) § 130: "The true rule for construing guaranties is to give effect to the intention of the parties as expressed in the instrument read in the light of the surrounding circumstances." It was held, in the case of *Wood v. Priestner*, L. R. 2 Exch. 66, by Chief Baron Kelly, in deciding the guaranty there sued upon to be a continuing one, that "the question in these cases depends not merely on the words, but, when the words are at all ambiguous, requires a consideration of the circumstances to aid the construction. It is therefore necessary to look at the existing state of things, and, looking to that, to construe the words in such a way as we consider most consistent with the intention of the parties; not, indeed, considering any state-

ment of either party as to what he meant by the words used, but taking the words themselves, together with the surrounding facts, as the exponents of the meaning of both."

The guaranty in this case, it will be noticed, contains no limitation either as to time or amount. It reads: "I will be responsible for any bill that my son James will make." The contention that the use of the word "any" limited the guaranty to the one bill of goods purchased at the time of the delivery of the guaranty is without merit. Many cases could be cited showing that, in similar actions upon guaranties, the word "any" has been construed as synonymous with "every." Thus, in *Mason v. Pritchard*, 12 East, 227, 2 Campb. 436, 11

sum, guarantee the payment of, and agree to become responsible for, any sums of money, for the time being, due from the said F. to you, whether in addition to the said sum of . . . or no,"—held unlimited as to both time and amount); *Nottingham Hide, Skin, & Fat Market Co. v. Bott-rill*, L. R. 8 C. P. 694, 42 L. J. C. P. N. S. 256, 29 L. T. N. S. 134, 21 Week. Rep. 739 ("Having every confidence in him [principal debtor], he has but to call upon us for a check and have it with pleasure for any account he may have with you; and when to the contrary we will write you"); *Burgess v. Eve*, L. R. 13 Eq. 450 ("In consideration of your discounting for M. my promissory note to him for £2,000, . . . I deposit with you the several documents mentioned in the schedule hereunder written, which I agree shall remain with you . . . as a security for the payment to you . . . of all money due or to become due from him to the said company, . . . on any account whatsoever,"—held a continuing guaranty for all money already due or which should become due).

In the following cases, which do not adhere to any particular rule or rules, the parenthesized guaranties were held to be continuing ones: *Bell v. Bruen*, 1 How. 169, 11 L. ed. 89 ("In expressing my obligations to you for the continuation of your friendship to this gentleman [one to whom credit had been extended in favor of a designated firm], I take occasion to state that you may consider this, as well as any and every other credit you may open in his favor, as being under my guaranty"); *Scott v. Myatt*, 24 Ala. 489, 60 Am. Dec. 485 ("Let bearer . . . have any little things he may stand in need of, and I shall be good for the same,"—held continuing until revoked or account closed, and applicable to any little necessities); *Cahuzac v. Samini*, 29 Ala. 288 (a promise in consideration of selling and delivering, from time to time, to a third person who desired to open an account such goods as were necessary and proper in his line of business, that the writer would pay for them if the debtor failed to do so); *Doyle v. Nichols*, 15 Colo. App. 458, 63 39 L.R.A. (N.S.)

Pac. 123 (a writing requesting obligee to "kindly furnish H. with groceries, and oblige," written for the purpose of allowing H. to procure groceries on credit); *A. B. Small Co. v. Claxton*, 1 Ga. App. 83, 57 S. E. 977 ("My sons may need some help through the summer, and I ask you to show them all the favors you can, and I will see that you get pay for anything you may sell them,"—held continuing for reasonable time and for reasonable amount); *Conduitt v. Ryan*, 3 Ind. App. 1, 29 N. E. 160 ("I hereby guarantee the payment when due of all bills of goods sold, or that may be sold on and after this date," by the obligee to the principal debtor); *Singer Mfg. Co. v. Littler*, 56 Iowa, 601, 9 N. W. 905 (guaranty and fulfillment by agent of his contract); *Collins v. Alvery*, 10 Ky. L. Rep. 985 (guaranty of 10 per cent dividend on stock, given as inducement to purchase,—held continuing during life of company, and not limited to one year); *White Sewing Mach. Co. v. Powell*, 25 Ky. L. Rep. 94, 74 S. W. 746 (agreement to pay "any and all sums of money and indebtedness of any kind that" principal debtor "might become indebted to and owing" obligee, "either in the form of open account or promissory note or notes, for any machine or other property thereafter to be sold and furnished to" the principal debtor by the obligee); *Batchelder & S. Co. v. Saco Sav. Bank*, 108 Me. 89, 79 Atl. 13 ("You are authorized to contract for material and supplies for S. P. Hotel, and the same will be paid for by us,"—held that obligee was warranted in relying on the guaranty the year following its execution); *American Agri. Chemical Co. v. Ellsworth*, — Me. —, 83 Atl. 546 (agreement in terms, "In consideration of the sum of \$1 to me in hand paid by the A. G. C. Co., . . . I do hereby guarantee the faithful performance by G. E. B. of all and singularly the obligations of the within agreement [appointment of G. E. B. as agent and agreement by him to settle in cash for goods furnished him] on his part, to be kept and performed, and all renewals and extensions thereof, so long as said agency shall be continued"); *Grant v. Ridsdale*, 2 Harr. & J.

Revised Rep. 369, where the words of the guaranty were "to be responsible for any goods he hath or may supply to my brother to the amount of £100." And in *Merle v. Wells*, 2 Campb. 413, where the guaranty was, "I consider myself bound to you for any debt he [my brother] may contract for his business as a jeweler; not exceeding £100, after this date." In both cases the guaranties were held to be continuing. In 14 Am. & Eng. Enc. Law, 2d ed. 1139, a distinction is sought to be made between guaranties containing a limitation as to the amount for which the guarantor will be bound, but containing no limitation as to time, and guaranties containing no limitation either as to time or amount. In the former, where

there is nothing in the circumstances surrounding the execution of the contract to evince a contrary intention, it will, in general, be construed a continuing guaranty, and in the latter, where there is nothing in the instrument itself from which it can be inferred that it is the guarantor's intention to have it open as to both, the guaranty will be understood as referring to a single transaction.

Whatever merit there may be in drawing the distinction so made, it is unnecessary here to consider. I find no adjudged case making such a distinction; but, after all, we must come to the conclusion of Chief Baron Kelly, in the cases above cited, that the true construction can only be reached, whatever be the limitation as to

186 ("I will guarantee their [principal debtors'] engagements, should you think it necessary, for any transactions they may have with your [obligee] house"); *Allen v. Pike*, 3 Cush. 238 ("I hereby make myself responsible for whatever amount D. may become indebted to either of you. I have fixed no limits to the amount, as he has assured me that he shall be cautious on getting much in debt, and this is satisfactory to me"); *Dover Stamping Co. v. Noyes*, 151 Mass. 342, 24 N. E. 53 (guarantor, in reply to a letter from the obligee stating that he have opened trade with the principal debtor, who claimed to be backed by the guarantor, and asking if the guarantor would be responsible for his debts, stated that he, guarantor, was assisting the principal debtor in a small way, that he had advised prompt payment of bills at maturity, that he thought the advice would be followed, but that if the principal debtor failed to do so, "I will see that you [obligee] are taken care of"); *Rotch v. French*, 176 Mass. 1, 79 Am. St. Rep. 292, 56 N. E. 893 (guaranty of dividend of 6 per cent per annum on stock, given as inducement to purchase,—held not limited to one year, but to continue during life of purchaser, but not beyond, and provided he lived only a reasonable time); *Celluloid Co. v. Haines*, 176 Mass. 415, 57 N. E. 691 (obligee wrote principal debtor, "If he [guarantor] will give his written guaranty to pay bills of one month upon the 15th of succeeding month, if not already paid by the company [D. Co., principal debtor], we will accept it and extend credit." Guarantor in reply wrote, "As you have requested me to have me guarantee the payment of the D. Co's. account by the middle of the month, I hereby agree to pay the current month's account of the D. Co. on the 15th of the following month, if not paid by them before,"—held continuing, especially where the guarantor evidently so regarded it); *Froment v. Taylor*, 25 Misc. 776, 55 N. Y. Supp. 609, affirming 25 Misc. 792, 54 N. Y. Supp. 1099 ("I understand we [principal debtors] have purchased from your company [obligee] a bill of goods amounting to something less than a thousand dollars, and you find that 39 L.R.A. (N.S.)

the commercial agencies do not give us any particular rating. I write this letter to assure you that the bills will be paid at maturity, which I understand is within thirty days from shipment. I am so confident of the prompt payment of the bills that we purchase from you that I hereby personally guarantee the payment of them within the time mentioned, thirty days,"—held continuing in light of the circumstances); *First Nat. Bank v. Union Stockyards*, 138 App. Div. 918, 123 N. Y. Supp. 655 (agreement of bank to honor checks of a firm drawn on it and accompanying drafts on an individual so long as another bank will protect the drafts, entered into to extend credit to such firm); *Merchants' Nat. Bank v. Hall*, 83 N. Y. 338, 38 Am. Rep. 434 (assignment of certificate of stock "as security for the payment of any demands" the obligee "may from time to time have or hold" against the principal debtor); *Lester Piano Co. v. Romney*, — Utah, —, 126 Pac. 325 (guarantor in reply to request for guaranty of running account wrote that he did not doubt but that all obligations would be met promptly and that for that reason he guaranteed any amount of credit that might be extended); *Young v. Brown*, 53 Wis. 333, 10 N. W. 394 (guaranty "for all goods" principal debtor may buy from obligee); *Broom v. Batchelor*, 1 Hurlst. & N. 255 ("In consideration of the credit given by B to E, I hereby agree to guarantee the payment of all bills of exchange drawn by the said B. and accepted by the said E. Also I hereby agree to guarantee the payment of any balance that may be due from the said E. to the said B. This guaranty to include all bills of exchange now running, as well as the balance of account due at this day"); *Hitchcock v. Humfrey*, 5 Mann. & G. 559, 6 Scott, N. R. 540, 12 L. J. C. P. N. S. 235, 7 Jur. 423 ("In consideration of your extending the credit already given to my son H., and agreeing to draw upon him at three months from 1st of the following month, for all goods purchased up to the 20th of the preceding month, I hereby, at your request, guarantee the payment, and agree to pay you any sum that shall be due and owing to you upon his account for goods supplied").

time or amount, by taking "the words themselves, together with the surrounding facts, as the exponents of the meaning of both [parties]." The instrument in this case, when considered in the light of the surrounding facts and circumstances, clearly evinces the intention to create a continuing guaranty. The trial judge made a general finding for the plaintiffs. Concededly this finding must be construed as including every fact favorable to the plaintiffs that might reasonably be found from the evidence. The fact of the previous dealing between James Kloeblen and the plaintiffs there appeared, and the absolute necessity on his part for a general credit for the future, as the plaintiffs refused to make him further sales unless his father, the

defendant, would guarantee his account with them. Under these circumstances, the defendant guaranteed to be responsible for "any bill that my son James will make," and this leads inevitably to the conclusion that the guaranty was to remain continuing until revoked.

The next contention on the part of the plaintiff in error was that the trial judge erred in refusing to permit the defendant to show the circumstances under which the guaranty was given. The offer was of evidence of the conversation between James Kloeblen and his father, the defendant, prior to the execution of the guaranty. The refusal of the trial judge was based upon the theory that the offer of the defendant was to show the meaning Albert

And in the following cases, of the same character, a contrary conclusion was reached: *Perryman v. McCall*, 66 Ala. 402, 41 Am. Rep. 752 (a letter written in reply to a reply of wholesalers to a letter from one B., who was about to commence business as a retail dealer, in which latter letter an order for goods was forwarded and credit asked, in which reply of the wholesalers they proposed "to fill your [B's.] order" if proper security can be furnished them by the indorsement of M., directing the filling of the order and stating that the writer, M., indorsed B. and hoped that he would become one of their best customers,—held not a continuing warranty, it being said that the superadded hope that B. would become a good customer was too indefinite to overcome the otherwise manifest purpose that the guaranty should apply to the single order referred to in the letters); *Patterson v. Gage*, 11 Colo. 50, 16 Pac. 560 ("I will be responsible for the hotel bill of H. and will see it paid within twenty days,"—held limited to bill due at date of guaranty); *Williams v. Wyatt*, 7 Ky. L. Rep. 444 (guarantor directed obligee to let guarantor's son have some whisky, promising to see obligee paid,—held to cover delivery of a single lot only); *Bloom v. Kern*, 30 La. Ann. 1263 ("K. tells me that he selected some groceries at your house which you, however, will not ship without my say so. Please ship the same by the first boat out, and I will see that everything is right," and "Yours of the 5th came to hand with invoice. In reply, Mr. K., I want you to ship the goods he selected, and I will see it paid in time. You shall be safe if it takes the last dime I have"); *Crooks v. Propp*, 32 Misc. 309, 66 N. Y. Supp. 753 ("He [S.] [one about to form a partnership with R. for the sale of groceries] wishes to purchase a full line of groceries, and I recommend him to you. They [S. and R.] are perfectly reliable and will pay as soon as bills mature. Any favors conferred upon S. will be appreciated by me,"—assuming it to be a guaranty, held to apply only to the first bill of goods); *Rogers v. Warren*, 8 Johns. 119 ("If W. & B. wish to take goods

of you on credit, we are willing to lend our names as security for any amount they may wish,"—held limited to one transaction); *Standard Supply Co. v. Finch*, 147 N. C. 106, 60 S. E. 904 ("Just as soon as [a certain contingency happens], . . . I will see that your bill is paid"); *Hilliard v. Hons*, 37 Tex. 717 ("T. wants some clothing for a negro and himself, and expects to give his business to you. Please let him have any article he wants, and I will see it paid").

Limitation as to amount.

In many instances the courts construe guaranties which are limited as to the amount, but not as to time, to be continuing until revoked, where there is nothing in the surrounding circumstances to evince a contrary intention. The following cases adhere to this rule: *Frost v. Standard Metal Co.* 215 Ill. 240, 74 N. E. 139, affirming 116 Ill. App. 642, holding the guaranty, "I hereby guarantee the purchase account of . . . to the amount of \$1,500," a continuing one, and not limited to the purchase of goods up to the amount of \$1,500 in the aggregate; *Lane v. Mayer*, 15 Ind. App. 382, 44 N. E. 73, holding the guaranty, "I hereby agree to hold myself responsible for, and agree to pay for, any goods and merchandise which may be purchased of you by L. to the amount of \$300,"—to be a continuing one; *Presbyterian Bd. of Publication & S. S. Work v. Gilliford*, 139 Ind. 524, 38 N. E. 404, holding the guaranty, "We hereby jointly and severally guarantee to P. B. of P. payment for all sales which may be made by them to W. A. P., but our liability on this guaranty not to exceed in any event \$3,000,"—to be a continuing one; *D. B. Fisk & Co. v. Rickel*, 108 Iowa, 370, 79 N. W. 120, holding that a guaranty given in consideration of the obligee selling goods to the principal debtor on credit from time to time, that all bills would be paid promptly at maturity, but not exceeding \$400,—was a continuing one; and *Rindge v. Judson*, 24 N. Y. 64, holding that the limitation in a guaranty to "be accountable to you that B. will

Kloeblen intended to express in the writing, and the conversation between James and his father at the time of its execution. The ruling of the trial court in overruling the questions was correct. *Naumberg v. Young*, 44 N. J. L. 331, 43 Am. Rep. 380; *Grueber Engineering Co. v. Waldron*, 71 N. J. L. 598, 60 Atl. 386.

pay you for a credit of glass, paints, etc., which he may require in his business, to the extent of \$50," is not of the credit of B., but of the extent of the guarantor's liability.

Other courts hold the rule to be that, when the guaranty is ambiguous or other things are equal, it should be given a liberal construction, that is, taken as strongly against the guarantor as the sense will admit, since, if the guarantor desired to limit his responsibility to a single or several transactions not exceeding in all a certain sum, the guaranty should have been, and the courts say probably would have been, so limited in the same manner as the amount. This rule was announced and applied in the following cases, in which the guaranties were held to be continuing ones: *Rapelye v. Bailey*, 5 Conn. 149, 13 Am. Dec. 49 ("Gentlemen:—My brother . . . is wishing to go into business in New York by retailing goods in a small way. Should you be disposed to furnish him with such goods as he may call for, from \$300 to \$500 worth, I will hold myself accountable for the payment should he not pay as you and he shall agree"); *Taussig v. Reid*, 145 Ill. 488, 36 Am. St. Rep. 504, 30 N. E. 1032, 32 N. E. 918 ("I hereby guarantee the prompt payment at maturity of any indebtedness owing to . . . for goods purchased, or which may require in his business, to the extent of the amount of \$1,600"); *Sickle v. Marsh*, 44 How. Pr. 91 ("The bearer L. W. is going to start a peddling route to sell cigars and tobacco. He wishes to buy his goods of your firm if you will give him a liberal credit. We, the undersigned, will be his security to the amount of \$1,000"); *City Nat. Bank v. Phelps*, 16 Hun, 158, affirmed in 97 N. Y. 50, 49 Am. Rep. 513 ("We hold ourselves responsible for the payment of any sum not exceeding \$5,000 W. may require of your bank for legitimate business purposes"); *Rindge v. Judson*, 24 N. Y. 64 (guaranty to "be accountable that B. will pay you for glass, paints, etc., which he may require in his business, to the extent of \$50"); *City Nat. Bank v. Phelps*, 86 N. Y. 484 (same as *City Nat. Bank v. Phelps*, supra); *Hartwell & R. Co. v. Moss*, 22 R. I. 583, 48 Atl. 941 ("I hereby guarantee to be responsible for any account that may be due or to become due to H. & R. Co. from J. H., and to see that such account is paid to the amount of \$500"); *Merle v. Wells*, 2 Campb. 413 (set out in *NEWCOMB v. KLOEBLEN*).

On the other hand, some decisions are to the effect that guaranties, when ambiguous or when other things are equal, should be construed in favor of the guarantor, or, in 39 L.R.A. (N.S.)

It was further urged on the part of the plaintiff in error that the defendant was not bound by the guaranty until after notice to him by the plaintiffs that they accepted it and intended to act upon it. No exception appeared in the record covering this ground, nor was the question raised at the trial.

other words, that his liability should not be extended beyond the strict letter of his contract. To this effect are the following cases: *Cremer v. Higginson*, 1 Mason, 323, Fed. Cas. No. 3,383, holding the guaranty, "The object of the present letter is to request you, if convenient, to furnish them . . . [principal debtors] with any sum they may want, as far as \$50,000. . . . They will reimburse you the amount, together with interest, as soon as arrangements can be made to do it, and as our embargo cannot be continued much longer, we apprehend there will be no difficulty in this. We shall hold ourselves answerable to you for the amount."—exhausted when the sum of \$50,000 was once advanced, and not to cover further advances, although made while the balance due was below the stipulated sum of \$50,000); *Sherman v. Mulloy*, 174 Mass. 41, 75 Am. St. Rep. 286, 54 N. E. 345, holding the guaranty, "I . . . agree to be holden for stock [building materials] delivered to C. to the amount of \$200, and agree to pay the same,"—not to be a continuing one; *Fellows v. Prentiss*, 3 Denio, 512, 45 Am. Dec. 484, holding the guaranty, "I hereby agree to guarantee to you the payment of such amount of goods, at a credit of one year, interest after six months, not exceeding \$100, as you may credit to P."—exhausted by a single purchase; *National Bank v. Garn*, 23 Ohio C. C. 447, holding the guaranty, "We . . . guarantee to you the payment of any and all sums of money that may be loaned by you to the C. P. Co., . . . provided the amount of said loan shall not exceed in the aggregate \$3,000,"—limited to the first \$3,000 loaned; and *Cheshire Beef Co. v. Thrall*, 72 Vt. 9, 47 Atl. 160, holding the liability under the guaranty, "I, T., will be responsible to the amount of \$700, to the C. B. Co. for goods purchased by G. In case of failure of said G. to meet this obligation, I guarantee its payment,"—confined to the first \$700 worth purchased.

And in some courts the tendency is against construing guaranties as continuing unless it is reasonably clear that the intention was to make the guaranty continuing. This was the rule adhered to in the following cases, the guaranty and holding thereon being parenthesized: *Carson v. Reid*, 137 Cal. 253, 70 Pac. 89 (guaranty to secure the payment of a specified part of a promissory note,—held a guaranty that the amount secured would be paid, and obligation to be discharged by payments equaling that amount); *Columbus Sewer Pipe Co. v. Ganser*, 58 Mich. 385, 55 Am. Rep. 697, 25 N. W. 377 (guaranty

The objection that the plaintiffs cannot recover upon defendant's guaranty because they did not notify him of the default of James in paying his bills is without substance. *Columbia Electrical Supply Co. v. Kemmet*, 67 N. J. L. 19, 50 Atl. 663.

The judgment below is affirmed.

For affirmance.—The Chancellor, Chief Justice, Garrison, Swayze, Reed, Trenchard, Parker, Bergen, Voorhees, Min-turn, Bogert, Vredenburg, Vroom, Gray, Dill, JJ.

For reversal.—None.

recited that the principal debtor "has arranged and is about to purchase on credit sewer pipe," and declared it to be void if he shall pay "for all goods purchased, or that he may thereafter purchase, of them [obligees] according to the terms of purchase," otherwise to be "in full force and effect for the amount of his said indebtedness, not exceeding \$3,000"—held not continuing; *Twohy v. McMurran*, 57 Minn. 242, 59 N. W. 301 (guarantor being advised that credit would be extended to the principal debtor, who was about to open a café, only when guaranteed, executed the following guaranty: "If you desire to give B. a credit of \$250 with your house for provisions for the restaurant, . . . I will be responsible for such amount,"—guaranty held noncontinuing); *George D. Witt Shoe Co. v. Peacock*, 150 N. C. 545, 64 S. E. 437 ("Sixty days after date we, or either of us, promise to pay to . . . attorney, or order, the sum of \$1,000 for value received, which money, when received by him, to be applied to the payment of all claims he has now in his hands for collection against the said P., and to such others as he may receive for collection, until the full amount is applied. This note executed for the purpose of securing and guarantying the payment of the said claims to the extent of \$1,000,"—held noncontinuing); *Aldricks v. Higgins*, 16 Serg. & R. 212 ("A., a young man living in this place, having a desire to enter into trade in a small way, and feeling ourselves confident of his well managing the business, we here offer ourselves in security to any gentlemen who may feel disposed to give him credit not exceeding \$700, to be bound and held firmly by this writing to pay the said sum of \$700 or any sum less, as the said A. may think proper to contract,"—held noncontinuing); *Bussier v. Chew*, 5 Phila. 70 ("I, the undersigned, do hereby agree to become surety to B. for any bills contracted by S. from this date, said bills in the aggregate may not exceed \$300,"—held not continuing).

In this class of cases, like the preceding one, the majority of the adjudications are to the effect that the real inquiry is the intention of the parties, and that, to ascertain this, the words of the guaranty must generally be taken in their plain, popular, and obvious sense, and construed in connection with the surrounding circumstances. *Douglas v. Reynolds*, 7 Pet. 113, 8 L. ed. 626; *Hall v. Rand*, 8 Conn. 560; *Lewis v. Dwight*, 10 Conn. 95; *Manry v. Waxelbaum Co.* 108 Ga. 14, 33 S. E. 701; *Campbell Bkg. Co. v. Worman*, 99 Iowa, 671, 68 N. W. 912; *Wilde v. Haycraft*, 2 Duv. 309; *Bent v. Hartshorn*, 1 Met. 24; *Melendy v. Capen*, 120 39 L.R.A. (N.S.)

Mass. 222; *Crittenden v. Fiske*, 46 Mich. 70, 41 Am. Rep. 146, 8 N. W. 714; *Mathews v. Phelps*, 61 Mich. 327, 1 Am. St. Rep. 581, 28 N. W. 108; *Smith v. Van Wyck*, 40 Mo. App. 522; *L. Bauman Jewelry Co. v. Bertig*, 81 Mo. App. 393; *Kansas City use of Kansas City Hydraulic Press Brick Co. v. Youmans*, 213 Mo. 151, 112 S. W. 225; *Tootle v. Elgutter*, 14 Neb. 158, 45 Am. Rep. 103, 15 N. W. 228; *Crist v. Burlingame*, 62 Barb. 351; *Gates v. McKee*, 13 N. Y. 232, 64 Am. Dec. 545; *White's Bank v. Myles*, 73 N. Y. 335, 29 Am. Rep. 157; *Henry McShane Co. v. Padian*, 142 N. Y. 207, 36 N. E. 880; *Foster County State Bank v. Hester*, 18 N. D. 135, 119 N. W. 1044; *Rochford v. Rothschild*, 16 Ohio C. C. 287, 9 Ohio C. D. 47; *National Bank v. Garn*, 23 Ohio C. C. 447; *National Bank v. Thomas*, 220 Pa. 360, 69 Atl. 813; *Boyce v. Ewart*, *Rice*, L. 126; *Lawton v. Maner*, 10 Rich. L. 323; *Frost v. Weathersbee*, 23 S. C. 354; *Bank of Alexandria v. Turney*, — Tenn. —, 52 S. W. 762; *Friedman, K. & Co. v. Peters*, 18 Tex. Civ. App. 11, 44 S. W. 572; *Gardner v. Watson*, 76 Tex. 25, 13 S. W. 39; *Lemp v. Armengol*, 86 Tex. 690, 26 S. W. 941, reversing — Tex. Civ. App. —, 25 S. W. 137; *Michigan State Bank v. Peck*, 28 Vt. 200, 65 Am. Dec. 234; *Keith v. Dwinell*, 38 Vt. 286; *Hargreave v. Smeed*, 6 Bing. 244, 3 Moore & P. 573, 8 L. J. C. P. 46, 31 Revised Rep. 407; *Hefield v. Meadows*, L. R. 4 C. P. 595, 20 L. T. N. S. 746; *Wood v. Priestner*, L. R. 2 Exch. 66, 36 L. J. Exch. N. S. 127, 15 Week. Rep. 912, affirmed in L. R. 2 Exch. 282, 15 L. T. N. S. 317; *Mayer v. Isaac*, 6 Mees. & W. 605, 9 L. J. Exch. N. S. 225. 4 Jur. 437; *Grahame v. Grahame*, Ir. L. R. 19 Eq. 249. Applying this rule, the following cases have construed the parenthesized guaranties as not constituting continuing guaranties: *Hall v. Rand*, 8 Conn. 560 (agreement by A to be responsible to B in one half the amount of any loss sustained by him under an agreement to indorse C's notes, to the amount of \$4,000—held limited to the indorsement of notes once only, to the amount of \$4,000); *Sanford v. Dick*, 15 Conn. 457 ("For any sum that my son G. may become indebted to you, not exceeding \$200, I will hold myself accountable,"—held not a continuing guaranty, but satisfied when any one indebtedness within the amount limited was incurred by G.); *Finnucan v. Feigenspan*, 81 Conn. 378, 71 Atl. 497 (C guaranteed payment of a certain loan and the price of goods A furnished B to start him in business, not exceeding a specified sum,—held limited to the original transaction); *Campbell Bkg. Co. v. Worman*, 99 Iowa,

671, 68 N. W. 912 (guaranty considered alone implied that it was continuing, but when considered with attending circumstances, was held to show a different intention, and therefore to be limited to a single transaction); *Wilde v. Haycraft*, 2 Duv. 309 (joint agreement to become bound "for any goods" bought by the principal debtor from obligee, "for \$100 and no more,—it being the true intent and meaning that each obligor incurs for himself a separate liability of \$100,"—held limited to a guaranty of a purchase of \$100 in the aggregate for each, and therefore not continuing); *Smith v. Van Wyck*, 40 Mo. App. 522 (obligee stated that he could not fill order unless guarantor would guarantee the same, but that if he would guarantee for a certain sum, and they sold more goods than that, they would take the risk; and guarantor executed the following guaranty: "I hereby guarantee the payment of bills as they mature, purchased by . . . to the amount of \$1,300,"—held, in view of the circumstances, not to be a continuing guaranty); *National Bank v. Garn*, 23 Ohio C. C. 447 ("We . . . guarantee to you the payment of any and all sums of money that may be loaned by you to the C. P. Co., providing the amount of said loan shall not exceed in the aggregate \$3,000,"—held restricted to the first \$3,000 loaned); *Boyce v. Ewart, Rice*, L. 126 ("S. E. is about to commence business. . . . To assist him in which he will stand in need of your aid and indulgence, which if you render him, in case of his failure or delinquency, we will indemnify you to the amount of \$4,000,"—held limited to aid rendered in the commencement of the business); *Lawton v. Maner*, 10 Rich. L. 323 ("B. informs me" that he had a conversation with S. of your firm, in which he stated to B. that "if he would get me to be responsible for him to you, or, in other words, to give B. a letter of credit to you, he would sell him on longer time, say nine months or one year. This is therefore to inform you that I will be responsible for B. for the amount of \$1,000,"—held continuing until the specified amount of goods was delivered, but not to extend so as to cover a final balance of \$1,000); *Frost v. Weathersbee*, 23 S. C. 354 ("In consideration of your agreeing to advance to" the principal debtor "not exceeding the sum of \$7,000 and interest, I hereby guarantee to you the repayment of the sums advanced and commissions as agreed"). And in the following cases a contrary conclusion was reached: *Douglass v. Reynolds*, 7 Pet. 113, 8 L. ed. 626 ("H., to assist him in business, may require your aid from time to time, either by acceptance or indorsement of his paper, or advances in cash; in order to save you from harm by so doing, we hereby bind ourselves severally and jointly to be responsible to you at any time for a sum not exceeding \$8,000, should the said H. fail to do so,"—held not limited to advances, etc., in the first instance to the amount of \$8,000, but to cover successive advances,

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etc., made to the same amount at any future times, *toties quoties*, whenever the antecedent transactions were discharged); *Lewis v. Dwight*, 10 Conn. 95 (bond to C, "to pay or cause to be paid to C all sums or sum of moneys, responsibilities, debts, and dues which B might owe C equal to the sum of \$1,500, either contracted, or which might thereafter be contracted"); *Manry v. Waxelbaum Co.* 108 Ga. 14, 33 S. E. 701 ("guarantee the prompt payment of all accounts and notes given in settlement for goods purchased by G. from W. Co., to the extent of \$400," with provision for liberty to withdraw guaranty at any time account of G. was paid); *Bent v. Hartshorn*, 1 Met. 24 ("I hereby agree to be responsible for the price of hats and other goods purchased of you, either by note or account, by H. H. at any time hereafter, to an amount not exceeding \$1,000"); *Melendy v. Capen*, 120 Mass. 222 ("We hereby agree to guarantee the payment to the said M. H. & Co. for any goods which may be purchased of them by A. W., not, however, binding ourselves to become responsible for a larger sum than \$500, except by another special agreement. The above guaranty to remain in force until it is withdrawn by us"); *Crittenden v. Fiske*, 46 Mich. 70, 41 Am. Rep. 146, 8 N. W. 714 ("In consideration that D. B. F. & Co. will and do sell to C. upon credit bills of goods from time to time as she may order, I, the undersigned, do hereby guarantee to the said D. B. F. & Co. prompt payment of all such bills at their maturity, the same being four months from the date of purchase or order, . . . the amount guaranteed not to exceed the sum of \$200"); *Mathews v. Phelps*, 61 Mich. 327, 1 Am. St. Rep. 581, 28 N. W. 108 (agreement to guarantee payment of money received by agent of obligee in selling cigars, to the extent of \$200); *L. Bauman Jewelry Co. v. Bertig*, 81 Mo. App. 393 ("Please allow L. to have goods to the amount of \$500, and I will be responsible to you for the same. This order shall remain in force until I advise you to the contrary,"—held, under the circumstances, to authorize a continuing credit of \$500); *Kansas City use of Kansas City Hydraulic Press Brick Co. v. Youmans*, 213 Mo. 151, 112 S. W. 225 ("Said parties of the second part hereby guarantee that the said party of the first part will well and truly perform the covenant hereinbefore contained; to pay for the work and labor of all laborers and teamsters, teams and wagons, employed in the work, and for all materials used therein, . . . but said second parties shall not be liable on this guaranty on account of the materials used and labor done upon said work beyond the sum of \$83,540, the estimated cost of the materials used and labor done on said work"); *Tootle v. Elgutter*, 14 Neb. 158, 45 Am. Rep. 103, 15 N. W. 228 ("Please let N. have credit for goods to the amount of \$100, and for the payment of which I hold myself responsible"); *Crist v. Burlingame*, 62 Barb. 351 ("I will be and am responsible for any

amount which A. B. may draw on you for any sum not to exceed \$1,500, on condition of your acceptance of the same," the evident object being to secure a continuing credit); *Gates v. McKee*, 13 N. Y. 232, 64 Am. Dec. 545 ("I will be responsible for what stock M. E. N. has had or may want hereafter, to the amount of \$500"); *White's Bank v. Myles*, 73 N. Y. 335, 29 Am. Rep. 157 ("Please discount for C. to the extent of \$4,000. He will give you customers' paper as collateral. You can also consider me responsible to the bank for the same"); *Henry McShane Co. v. Padian*, 142 N. Y. 207, 36 N. E. 880 (guaranty of the "payment by J. P. W., plumber, to them [obligees], for any and all materials which they may deliver to J. P. W., I not to be liable for any balance exceeding \$500 which may become due"); *Foster County State Bank v. Hester*, 18 N. D. 135, 119 N. W. 1044 (guaranty of collection of indebtedness, with a limit of liability of \$1,000); *Rochford v. Rothschild*, 16 Ohio C. C. 287, 9 Ohio C. D. 47 (guaranty in sum of \$500, given in consideration of furnishing merchandise to principal debtor on open account); *National Bank v. Thomas*, 220 Pa. 360, 69 Atl. 813 ("I hereby guarantee the N. bank against any loss on any personal loans made by the said bank to my said son F. G. T., to the amount of \$2,500; also against any loss on business paper of his discounted by said bank, not exceeding the sum of \$1,000"); *Bank of Alexandria v. Turney*, — Tenn. —, 52 S. W. 762 (letter to bank requesting that, if another overdraws his account to the amount of \$500, it honor his check, and the writer will be responsible to the bank to that amount); *Friedman, K. & Co. v. Peters*, 18 Tex. Civ. App. 11, 44 S. W. 572 ("I guarantee the payment of your account with S. of this city, to the amount of \$400. At the same time I would kindly ask you to state terms of sale on each invoice, and to let me know at once if it should happen that an invoice is not met at maturity. Your Mr. K. has been here a few days ago, and S. ordered two barrels of whisky from him, which was afterwards refused on account of S's financial standing. Please forward same now at your earliest convenience"); *Gardner v. Watson*, 76 Tex. 25, 13 S. W. 39 ("I have to-day seen G., and upon consulting with him I am willing to become his security to the amount of \$500 worth of goods, instead of \$250 as heretofore, provided you extend to him a credit of \$500 worth of goods additional on his own individual account or responsibility"); *Lemp v. Armen-gol*, 86 Tex. 690, 26 S. W. 941, reversing — Tex. Civ. App. —, 25 S. W. 137 ("We, . . . in consideration of goods sold and to be delivered to K. by L., do hereby guarantee full payment to said L. of the value of all goods sold and delivered since the 1st day of March, 1889, or that may be hereafter sold and delivered to said K., not to exceed, however, the sum of \$3,000"); *Michigan State Bank v. Peck*, 28 Vt. 200, 65 Am. Dec. 234 ("R. H. & Co. are hereby

authorized to value upon us or either of us to the amount of \$25,000, in such amounts and on such time as they may require, which will be duly honored, and we hereby jointly and severally hold ourselves accountable for the acceptances and payment of such drafts,"—held continuing, especially as that was the practical construction given it by the parties); *Keith v. Dwinnell*, 38 Vt. 286 ("W. wishes to buy stock for his shop and pay in six months or before. We will be surety for him for a sum not to exceed \$100"); *Hargreave v. Smee*, 6 Bing. 244, 3 Moore & P. 573, 8 L. J. C. P. 46, 31 Revised Rep. 407 ("I do hereby agree to guarantee the payment of goods to be delivered . . . to J. & E. A. S., according to the custom of their trading with you, in the sum of £100,"—held, in view of the custom of continued dealing, to be a continuing guaranty); *Heffield v. Meadows*, L. R. 4 C. P. 595, 20 L. T. N. S. 746 ("I, M., will be answerable for £50 sterling, that Y., butcher, may buy of H.,"—circumstances showed that a continuing supply was contemplated); *Wood v. Priestner*, L. R. 2 Exch. 66, affirmed in L. R. 2 Exch. 282 ("In consideration of the credit given by H. G. C. Co. to my son P., for coal supplied by them to him, I hereby hold myself responsible as a guaranty to them for the sum of £100; and in default of his payment of any accounts due, I bind myself by this note to pay to the H. G. C. Co. whatever may be owing, to an amount not exceeding . . . £100"); *Mayer v. Isaac*, 6 Mees. & W. 605, 9 L. J. Exch. N. S. 225, 4 Jur. 437 ("In consideration of your supplying my nephew V. with china and earthenware, I hereby guarantee the payment of any bills you may draw upon him on account thereof, to the amount of £200"); *Grahame v. Grahame, Ir.* L. R. 19 Eq. 249 ("I hereby undertake to guarantee to the N. Bank any advances made to my son G., to the extent of £1,000"); *Whelan v. Keegan*, 7 Ir. C. L. Rep. 544 ("I hereby guarantee the payment of any amount of goods you may give to K., not exceeding £40").

The following cases, in which no definite rule was shown to have been applied, construed the respective guaranties as continuing: *National Exch. Bank v. Gay*, 57 Conn. 224, 4 L.R.A. 343, 17 Atl. 555 (guaranty to bank for the "full, prompt, and ultimate" payment of all loans made by the bank to the principal debtor, "not to exceed \$15,000 in all at any one time," with the right to terminate the obligation by written notice,—held continuing so as to cover substitutions, renewals, and extensions); *Gay v. Ward*, 67 Conn. 147, 32 L.R.A. 818, 34 Atl. 1025 (same guaranty construed in *National Exch. Bank v. Gay*, supra); *Sherburne v. J. W. Butler Paper Co.* 40 Ill. App. 383 (guaranty "at maturity of any bills of account due them [obligees] hereafter from time to time sold and delivered by them to the E. R. Co., whether sold on open account or notes, to the amount of \$30 on twenty days' time"); *Malleable Iron Range Co. v. Pusey*, 244 Ill. 184, 91 N. E. 51, affirming 148 Ill. App. 344

(guaranty of "the payment . . . of any and all indebtedness then due or hereafter to become due . . . for goods heretofore purchased, shipped, or ordered, . . . and for any goods which might then be purchased, shipped, or ordered at any time in the future"); *Platter v. Green*, 26 Kan. 252 ("We hereby authorize the C. L. Co. to furnish W. such building materials as he may wish, not exceeding the value of \$2,000 at once; and if the said W. shall fail to pay for the same, either in money or material received from the C. L. Co., then upon ninety days' notice we agree to pay to the C. L. Co. the amount remaining due from W. to the C. L. Co."); *Emerson v. Dye*, 4 Ky. L. Rep. 236 (obligees "hereby agree to sell D. B. & Co. buggies and carriages not to exceed in amount at any one time the sum of \$3,500," and guarantor obligates himself "that, in case of default in payment. . . he . . . will pay . . . any deficiency or amount that may be due upon settlement to the said E. F. & Co. [obligees] by D. B. & Co., not exceeding, however, in amount not exceeding \$1,000, to include a Dye, 6 Ky. L. Rep. 592 (held generally that a letter of credit is a continuing guaranty); *Tuckerman v. French*, 7 Me. 115 ("I will hold myself responsible for any goods which you may sell him [principal debtor], provided the amount does not exceed at any time the sum of \$500"); *Howe v. Nickels*, 22 Me. 175, guaranty in substance, ("in consideration of \$1 the subscribers agree jointly and severally to guarantee to the plaintiffs payment for all goods which may be purchased of them by N. after the 21st of October, 1834, till otherwise ordered, the amount not exceeding \$1,100, to include a bill before purchased"); *Columbia Electrical Supply Co. v. Kemmet*, 67 N. J. L. 18, 50 Atl. 663 ("We, G. K. & Bro., herewith guarantee the account of D. to the amount of \$500. We are willing to make monthly settlement for the electrical supplies purchased by him, such payments to be made every 15th of the month for the month previous"); *Rosenberg v. Klopfer*, 117 N. Y. Supp. 102 (guaranty of "payment of account . . . to the extent of \$1,800,"—held continuing under the evidence); *Straus v. Beardsley*, 79 N. C. 59 ("We . . . acknowledge ourselves indebted to the firm of S. H. H. & Co. in the sum of \$100 each, for payment of which . . . we bind ourselves. . . . The condition to the above obligation is such that if the said firm . . . shall furnish P., as agent for them, with goods for sale on commission or otherwise, and the said P. shall thereafter fully and fairly settle and account for said goods, then the above obligation to be void; otherwise to be and remain in full force and effect"); *Rouss v. Krauss*, 126 N. C. 667, 36 S. E. 146 (guaranty of a line of credit of \$1,300); *Wolf v. Shillito*, 9 Ohio Dec. Reprint, 273 ("Please let W. have such goods as he may purchase in person or order from time to time, to amount of \$500, and I hereby guarantee the prompt payment of same, and will pay the same myself if not

met by him promptly when due"); *Bentz's Estate* 14 Phila. 258 (guaranty for the payment "of all future bills"); *Schneider-Davis Co. v. Hart*, 23 Tex. Civ. App. 529, 57 S. W. 903 ("I hereby guarantee the account of H. . . . for a line of credit with S.-D. Co., to the amount of \$500, and obligate myself to pay S.-D. Co. for any goods bought by H. to the amount of \$500, in case he should not do so"); *First Nat. Bank v. Wunderlich*, 145 Wis. 193, 130 N. W. 98 ("We . . . hereby guarantee the payment of all future sums of money advanced by you to S., and guarantee the payment of all notes executed by him to said F. N. Bank for loans or sums advanced to him in any amount, not to exceed the sum of \$1,000"); *Sawyer-Massey Co. v. Foster*, 2 West. L. Rep. (Can.) 197 (guaranty of the purchase price of a traction engine, etc., to the extent of \$1,000 only,—held not limited to first \$1,000 paid, but to apply to any balance); *Ross v. Burton*, 4 U. C. Q. B. 357 ("I hereby hold myself accountable to you for any goods M. may purchase of you, to the amount of £250 currency,"—held not limited to a single transaction); *Shaw v. Vandusen*, 5 U. C. Q. B. 357 ("I have just received a line from F. informing me that he wishes to purchase goods from you. Being acquainted with his circumstances and knowing him to be a man of prudence and integrity, I do not hesitate to be responsible to you for £150 or £200 worth of goods, should he require that amount"); *Fennell v. McGuire*, 21 U. C. C. P. 134 ("In consideration of your supplying M. supplies of hardware, iron, etc., out of your store for his business, we agree to become responsible to you for the payment of \$200 for such goods, and guarantee the payment of that amount whether the same be due on note or book account"); *Allan v. Kenning*, 9 Bing. 618 ("Whereas C. is indebted to you in a sum of money, and may have occasion to make further purchases from you, as an inducement to you to sell him such goods and continue your dealings with him, I hereby agree and undertake to guarantee you in the sum of £100, payable to you in default on the part of said C. for two months"); *Mason v. Pritchard*, 12 East, 227, 2 Campb. 436, 11 Revised Rep. 369 (set out in *NEWCOMB v. KLOEBLEN*); *Bastow v. Bennett*, 3 Campb. 220 ("I hereby undertake and engage to be answerable to the extent of £300 for any tallow or soap furnished by B. to F. & B., provided they shall neglect to pay in good time,"—held that the use of the word "any" rendered the guaranty a continuing one); *Johnston v. Nicholls*, 1 C. B. 251 ("As you . . . are about to enter upon transactions in business with C., with whom you have already had dealings, in the course of which C. may from time to time become largely indebted to you, in consideration of your doing so, I hereby agree to be responsible to you for, and guarantee to you the payments of, any sums of money which C. now is or may at any time be indebted to you, so that I am not called upon to pay more than the sum of £2,000"); *Edwards v.*

Jevons, 8 C. B. 436, 19 L. J. C. P. N. S. 50, 14 Jur. 131 ("In consideration of E. R. & Co. giving credit to J. D., I hereby engage to be responsible and to pay any sum not exceeding £120, due to the said E. R. & Co. by the said J. D.,"—held to apply to both past and future debts); *Weston v. Empire Assur. Corp.* 19 L. T. N. S. 305 (memorandum charging premises "with the payment of the sum of £100 for goods delivered or to be delivered to me by you to that amount"); *Browning v. Baldwin*, 40 L. T. N. S. 248, 27 Week. Rep. 644 ("We request you to accept the drafts of L. in your London house of B. & Co. at sixty days' sight to the extent of £1,000, and we undertake to provide you with funds to meet such acceptances before maturity," and "in consideration of your accepting the drafts of L. to the extent of £1,000 further, we undertake to provide you with funds to meet such acceptances before maturity"); *Woolley v. Jennings*, 5 Barn. & C. 165, 7 Dowl. & R. 824, 2 Car. & P. 144, (warrant of attorney with the following defeasance: "The within warrant of attorney is given to secure the payment of £4,000, with lawful interest thereon,"—held, in absence of anything to show an intention that the security was to apply to an existing balance, that it must be construed as a continuing security); *Martin v. Wright*, 6 Q. B. 917 ("In consideration of your agreeing to supply goods to K. at two months' credit, we jointly and separately agree to guarantee his present or any future debt with you, to the amount of £80. Should he fail to pay at the expiration of the above credit, we hereby bind ourselves to pay you within," etc.); *Batson v. Spearman*, 3 Perry & D. 77, 9 Ad. & El. 298 (agreement to discount bills and advance sums not exceeding at any one or more time or times £200, in consideration of repayment, upon default of the principal debtor).

And the following general cases construed the respective guaranties as noncontinuing: *Gerson v. Hamilton*, 30 La. Ann. 737 ("As you have promised to advance my son G., I am willing to go his security for the amount of \$2,500"); *Reed v. Fish*, 59 Me. 358 ("Let the bearer buy merchandise to the amount of two or three hundred dollars on six months, and I will see you paid,"—held limited to first purchase); *Boston & S. Glass Co. v. Moore*, 119 Mass. 435 ("I guarantee the sum of \$500 value in glass shades purchased by my son M. from the B. & S. G. Co., terms of purchase to be sixty days from date of invoice, and if not paid within ninety days draft to be drawn on me for the amount"); *Cutler v. Ballou*, 136 Mass. 337, 49 Am. Rep. 35 ("Please deliver to H. goods as he may want from time to time, not exceeding in amount \$300, and if not paid for by him within thirty days I will be responsible for the same,"—held exhausted and satisfied by first purchase); *Callender, McCa. & T. Co. v. Flint*, 187 Mass. 104, 72 N. E. 345 (obligee wrote guarantor that principal debtor wished "to buy a few goods of us to-day," and asked that guarantor guarantee any such purchase;—guarantor answered

stating that he had decided to help principal debtor, and that he would "guarantee the payment of goods he may buy of you not to exceed \$300"); *Fogel v. Blitz*, 128 Mich. 503, 87 N. W. 640 (guaranty of "the value of a consignment stock of watches, jewelry, etc., that you may ship to and place with the S. S. B. J. Co., to the extent of \$1,000, said stock to be on memoranda for a period of no less than six months, and all reorders from said stock to be accompanied and paid for in cash. At the end of this period or any renewal or extension thereof, the goods unsold can be returned"); *Merchants' & F. Bank v. Calmes*, 82 Miss. 603, 35 So. 161 ("We hereby guarantee the account of C. & St. J. Co. with the M. & F. Bank, to the amount of \$2,500. It is agreed and understood that this guaranty is to cover all amounts which above firm may owe the said bank to the above specified amount"); *Lampport v. Greenberg*, 48 Misc. 513, 96 N. Y. Supp. 143 ("We hereby guarantee the sum of \$100, the amount which they [obligees] will sell to the F. S. Co. [principal debtor], that in case of their failing to pay, we will pay the same amount to them"); *Arnold v. Wilder*, 6 Ohio Dec. Reprint, 819 (in consideration of extending credit, guarantor pledged her property to the extent of and for the payment of \$1,000); *McGough v. Birmingham*, 12 Pittsb. L. J. N. S. 178, as set out in 25 Century Dig. 112 (a letter of credit stating that any draft for \$5,000 drawn upon S. with his permission, by C., would be paid on presentation,—held limited to one \$5,000 draft); *Sollée v. Meugy*, 1 Bail. L. 620 ("M. . . . has requested of me to continue my assistance by lending him my name. I have therefore consented that he shall use it for the amount of from \$1,000 to \$1,500,"—held exhausted by advances made to the amount specified); *Sawyer v. Senn*, 27 S. C. 251, 3 S. E. 298 ("Whereas S., by overdrafts, has become indebted to the said C. N. Bank to the amount of \$1,500, and is unable to refund the same. Now, the condition of this obligation is such that if the said S. . . . do and shall well and truly pay, or cause to be paid, unto the above-named bank "the full sum of \$1,500 twelve months from this date, with interest," etc., then the obligation to be null and void); *Auerbach v. Holley*, — Tex. Civ. App. —, 26 S. W. 83 (obligee wrote guarantor that H. had bought his "opening bill" of goods, and asked if guarantor guaranteed it, to which guarantor replied, "In regard to purchase of H., we guarantee payment of same to amount of \$4,500"); *Sutherland v. Paterson*, 4 Ont. Rep. 565 (guarantor wrote obligee: J. S. "informs me now that I could help him by pledging myself to you, that you might give him a letter of credit in M., and I now say if you will assist him in that say to \$7,000 or \$8,000, that I will become responsible to you for the like amount in any manner you may wish;" J. S. applied for and was given a guaranty continuing for the year of \$5,000,—held, per Wilson, Ch. J., that the letter did not constitute a continuing guaranty, and that no recovery

could be had when \$5,000 had once been paid); *Melville v. Hayden*, 3 Barn. & Ald. 593, 22 Revised Rep. 495 ("I engage to guarantee the payment to the extent of £80 at quarterly account, bill two months, for goods to be purchased by him [principal debtor] of," etc.,—held applicable only to the first quarterly payment); *Re Medewe*, 26 Beav. 588, 28 L. J. Ch. N. S. 891, 5 Jur. N. S. 421, 7 Week. Rep. 319 (guaranty recited that guarantor owed obligee bank on three accounts, and that, security having been required, he guaranteed any balance "which shall or may be found due," and charged his estate with "the three several sums of money which shall or may be found due on the balance of the said several accounts," limited to the aggregate of £3,000,—held not a continuing security for any floating balance, but to apply to the exhausted balance only); *Kay v. Groves*, 6 Bing. 276, 3 Moore & P. 634, 4 Car. & P. 72, 8 L. J. C. P. 9 ("I hereby agree to be answerable to K. for the amount of five sacks of flour to be delivered to T., payable in one month,"—held limited to the first transaction, and not even a continuing guaranty for flour delivered at subsequent periods, though not exceeding in the whole five sacks); *Bovill v. Turner*, 2 Chitty, 205 ("You may let L. have coals to £50, for which I shall be answerable at any time,"—held limited to the first purchase of £50); *Walker v. Hardman*, 4 Clark & F. 258, 11 Bligh, N. R. 292 (firm heavily indebted to bank required to give security; money bond executed to secure a certain sum with interest from date,—held to secure the existing debt and not to cover floating balances, there being nothing on the face of the instrument to show that it was a security for future balances); *Nicholson v. Paget*, 5 Car. & P. 395, 3 Tyrw. 164, 2 L. J. Exch. N. S. 18, 1 Crompt. & M. 48 ("I hereby agree to be answerable for the payment of £50 for T. L. In case T. L. does not pay for the gin, etc., he receives from you, I will pay you the amount"); *Allnutt v. Ashenden*, 5 Mann. & G. 392, 7 Jur. 113, 12 L. J. C. P. N. S. 124, 6 Scott, N. R. 127 ("I hereby guarantee J's account with you for wines and spirits, to the amount of £100,"—held, in view of the fact that there was an existing indebtedness though in a less sum than £100, that the guaranty did not extend to future accounts); *Kirby v. Marlborough*, 2 Maule & S. 18, 14 Revised Rep. 573 (guaranty made to enable C. to carry on business conditioned for the payment of all such sums, not exceeding the sum of £3,000, which should or might at any time or times thereafter be advanced,—held a guaranty for the first £3,000 lent only); *Chalmers v. Victors*, 16 Week. Rep. 1046, 18 L. T. N. S. 481 ("V. hereby engages to be responsible for liabilities incurred by M. & V., to the extent of £50,"—held limited to the existing indebtedness plus such amount as made up £50).

Limitation as to time.

In this class of cases it has been held
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that the guaranty should be construed strictly against the guarantor, it being said that if it had been his intention to limit the credit, he should have so expressed it. *Simpson v. Manley*, 2 Crompt. & J. 12, holding the guaranty, "M. having intimated to us that he is about to make some purchases of goods from you, we beg to say that if you give him credit, we will be responsible that his payments shall be regularly made, to the extent of £1,000 from this period to June 1, 1831,"—to be a continuing one.

But that the liability of a guarantor is not to be extended by construction or implication beyond the strict terms of his contract was the rule announced in *Cushing v. Cable*, 48 Minn. 3, 50 N. W. 891, where a guaranty of prompt payment of rent for four months, and for a renewal of two months if renewed in the manner prescribed, was held noncontinuing, and the guarantor not liable after four months' period where there was no renewal in the manner provided.

The rule that the intention of the parties should govern, and that a wide latitude should be allowed in discovering the intention, was adhered to in *Farmers' & M. Bank v. Kercheval*, 2 Mich. 504, where the guaranty, "Whereas C. & Co. are now or may hereafter be indebted to the F. & M. Bank . . . in divers sums of money, and may from time to time become liable to pay to the . . . said bank divers sums of money, to the amount of \$3,000, by means of notes, discounts, and overdrafts made or indorsed by the said P. C. & Co. and for their benefit: Now, therefore, if the said P. C. & Co. shall pay or cause to be paid . . . said bank . . . this obligation to be void, otherwise to remain in full force and virtue for the space of three years from the 1st day of January, A. D. 1837, unless notice is given . . . to the contrary,"—was held intended to cover successive notes, etc., made by P. C. & Co. at any time within the limited period, whenever the antecedent transaction where discharged, and not to be limited to the first \$3,000, it being said that narrow and restricted rules should not be applied to ordinary business guaranties to relieve the parties from what appears to have been engagements fairly and voluntarily assumed.

In the following cases, it is impossible to determine from the decisions what general rule or rules, if any, were applied: *Johnson v. Fisher*, 4 Colo. 242, holding that a request by A that B give C until November in which to pay for goods, made in reply to B's request that C return goods which he had for the purpose of selling on commission, A stating that "all the goods he [C] is unable to send back at that time shall be paid for. So far I guarantee,"—was a guaranty limited to the goods on hand at the time of its execution; *Rouss v. Creglow*, 103 Iowa, 60, 72 N. W. 429, holding a guaranty for the payment of any sum "which is now, or at any time hereafter may become, due and payable" upon an open account for goods sold and delivered, with the provision that it shall apply to the indebtedness

which may accrue within one year,—not continuous, but limited to one year.

So, it has been held that a guaranty of the payment of the advertising bills of a corporation "for the present" is continuous for a reasonable length of time, in the absence of a termination of contract by notice. *Lewis v. Worrell*, 185 Mass. 572, 71 N. E. 73, holding fifteen months a reasonable time under the circumstances of the case.

The question has also arisen in connection with the guaranty of the rent, etc., under leases. Thus, where the lease is for a definite term with provision for holding over on renewal, and the guaranty is of payment of rent according to the stipulations and covenants in the lease, it has been held that the guaranty is not limited to the definite term, but applies to rents accruing while holding over under the original lease or in possession under a renewal executed pursuant to the terms of the original lease. *Salisbury v. Hale*, 12 Pick. 416; *Rice v. Loomis*, 139 Mass. 302, 1 N. E. 548; *Deblois v. Earle*, 7 R. I. 26; *Heffron v. Treber*, 21 S. D. 194, 130 Am. St. Rep. 711, 110 N. W. 781. And the same is true where the contract is to be renewed if "fulfilled to the satisfaction of the parties," and the guaranty is "security for F. S. G.," the lessee (*Decker v. Gaylord*, 8 Hun, 110); unless by other terms of the guaranty it is manifest that the guarantor intended the guaranty to be limited to the original term (*Woods v. Doherty*, 153 Mass. 558, 27 N. E. 676). But the guaranty will not apply to the holding over or renewal where such holding over or renewal is not under and pursuant to the terms of the guaranteed lease. *Warren v. Lyons*, 152 Mass. 310, 9 L.R.A. 353, 25 N. E. 721. And it has been held that where the guaranty is merely of the punctual payment of the rent in a mentioned lease, it will not cover a renewal lease, although the taking of the renewal lease was in the exercise of an option contained in the original lease. *Kanouse v. Wise*, 76 N. J. L. 423, 69 Atl. 1017.

And a guaranty of the fidelity of an agent or employee, which refers to the contract of employment, is limited to the term of employment under the contract. *John A. Tolman Co. v. Clements*, 98 Mich. 6, 56 N. W. 1038.

Limitation as to time and amount.

In cases in which the guaranties are limited as to both time and amount, the same general rules seem to be applicable.

Thus, it has been said that contracts of guaranty are to be strictly construed, and all reasonable doubts resolved in favor of the guarantor, this being the tenor of the decision in *Hill Mercantile Co. v. Rotan Grocery Co.* — Tex. Civ. App. —, 127 S. W. 1080, wherein the guaranty, "In consideration of the sale of merchandise by the R. G. Co. to the H. M. Co., I, we, or either of us, guarantee unconditionally the payment to the R. G. Co. any indebtedness of said H. M. Co. to it made prior to . . . [a certain date]," and thereafter until further notice 39 L.R.A. (N.S.)

in writing, not to exceed the sum of \$7,000,—was held to be noncontinuing.

So, it has been held that if the terms of the guaranty are uncertain or ambiguous, or other things are equal, the guaranty should be construed most strongly against the guarantor. *Schinasi v. Lane*, 118 App. Div. 76, 103 N. Y. Supp. 127, holding the guaranty, "I hereby guarantee any bills the R. C. & T. B. D. Asso. may contract with you from this date until January 1, 1906, unless I notify you to the contrary, providing the amount of credit shall not exceed \$5,000 at any one time,"—to be limited only as to time and liability.

And the rule that a contract of guaranty should be construed so as to give effect to the intention of the parties as expressed in the instrument read in the light of the surrounding circumstances was applied in the following cases, wherein the respective guaranties were held to be continuing ones: *Lafargue v. Harrison*, 70 Cal. 380, 59 Am. Rep. 416, 11 Pac. 636 ("At the request of J. M. & Son we hereby authorize A. L. & Co. to draw on you at sixty days sight for our account to the amount of £3,000. . . . this credit to be in force for twelve months"); *Home Sav. Bank v. Hosie*, 119 Mich. 116, 77 N. W. 625 (guaranty executed by stockholders to secure borrowed money which might be required for the corporate business during the next ensuing twelve months, to an amount not exceeding a specified sum,—held continuing for time specified); *Rundle v. Scully*, 144 Mich. 62, 107 N. W. 694 (guaranty of the pay for coal furnished the principal debtor on or before a specified date, not to exceed the sum of \$1,000,—held continuing for the amount stated through the whole period, and not discharged by the payment by the principal debtor of a stipulated amount once during the period); *Paakusz v. Bodner*, 75 N. J. L. 447, 67 Atl. 1040 ("We the undersigned do guarantee you to trust E. B. & Co. \$300 worth of material, to be credited to them at the rate of ten or fifteen days terms, for a term of five months from date,"—held to extend to all moneys due for materials purchased within five months, the amount of the credit only being limited to \$300); *Pratt v. Matthews*, 24 Hun, 386 (guarantor agreed that the principal debtor, "who has purchased or is about to purchase anthracite coal of said firm, shall and will pay said firm at such time or times and at such prices as may be agreed upon between said firm [obligee] and said P., for all coal that may be delivered to him up to the 1st of January, 1878, and in default of his so doing, we agree to pay for the same, provided the amount so in default shall not at any time exceed the sum of \$1,000,"—held to limit the liability, and not the amount furnished during the specified time); *Fifth Nat. Bank v. Woolsey*, 21 Misc. 757, 48 N. Y. Supp. 148, affirmed in 31 App. Div. 61, 52 N. Y. Supp. 827 (guaranty by stockholders of a corporation, reciting that it desired to borrow money, and that, as a guaranty had been demanded, they agreed to pay all paper discounted by the

obligee for the corporation, which shall remain due and unpaid within one year, not exceeding \$10,000 in the aggregate); *Sentinel Co. v. Smith*, 143 Wis. 377, 127 N. W. 943 ("You are hereby authorized to furnish H. with copies of the M. S. for sale, the undersigned hereby agreeing to become responsible to you for the prompt payment of all bills for such papers, to the amount of \$500").

The following decisions, which do not state the rule or rules applied, held the respective guaranties to be continuing: *First Nat. Bank v. Waddell*, 74 Ark. 241, 85 S. W. 417, 4 Ann. Cas. 818 (guaranty to pay any and all indebtedness to the obligee, to the extent of \$3,000, on or before April 1, 1891,—held continuing for advances made up to April 1, 1891, and not discharged by the first transaction or payment made, so long as any balance remained unpaid, especially as the evidence showed that the principals had no capital, contemplated business operations which necessarily required the use of thousands of dollars monthly or even daily, and that the manifest purpose of executing the guaranty was to afford a basis of credit); *Consolidated Portrait & Frame Co. v. Claxton*, 1 Ga. App. 809, 57 S. E. 980 ("Should C. order goods of you at one or several times within the next twelve months," we "request that you ship such goods," and if said C. "fails to pay for such goods, . . . we agree to pay, . . . provided our responsibility shall not exceed \$200"); *Hatch v. Hobbs*, 12 Gray, 447 ("I hereby guarantee the sum of \$500 to be drawn out in merchandise by W. from time to time as he may want. This guaranty to remain good until further order or until April 1, 1857,"—held that the guaranty was a continuing one, and covered balances for goods sold up to April 1); *Clark v. Burdett*, 2 Hall, 217 ("I hereby guaranty the payment of any bill or bills of merchandise . . . P. has purchased or may purchase of E. P. C. & Co.; the said P. having the privilege of ninety days' credit on the purchases made by her, the amount of this guaranty not exceeding \$200, and this guaranty to expire at the end of one year from this date"); *Martin v. McMullen*, 18 Ont. App. Rep. 559, reversing 20 Ont. Rep. 257, affirming 19 Ont. Rep. 230 ("In consideration of the goods sold by you on credit to McG. Bros., and of any further goods which you may sell to McG. Bros. upon credit during the next twelve months from date, I hereby undertake to guarantee you against all loss in respect of such goods, so sold or to be sold, provided I shall not be called on in any event to pay a greater amount than \$2,500,"—held continuing for the whole amount of indebtedness, with a limit of liability to the stipulated amount, the majority of the court laying down the rule that where the amount of indebtedness at the time of the giving of the guaranty exceeds a specified limit, the guaranty is not restricted to the specified amount); *W. R. Brock Co. v. Young*, 8 East. L. Rep. (Can.) 244 (guaranty not set out); *Williams v. Rawlinson, Ryan & M.* 233 (a bond condi-

tioned to indemnify and save harmless the obligees for "such sums as they in their banking business should within ten years advance to pay, or be liable to advance or pay for, on account of their accepting, discounting, etc., any bill of exchange, notes, etc., which A. B. should, from time to time, draw upon or make payable, etc., at their house, . . . not exceeding . . . £5,000, . . . together with interest on such advances"); *Laurie v. Scholefield*, L. R. 4 C. P. 622 ("In consideration of the U. Bank agreeing to advance and advancing to the firm of R. & Co. any sum or sums of money they may require during the next eighteen months, not exceeding in the whole . . . £1,000, we hereby jointly and severally guarantee the payment of any such sum as may be owing to the said bank at the expiration of the said period,"—held to cover a floating balance).

And in the following cases a contrary conclusion was reached: *Rueter v. Howe*, 60 N. H. 578 (authorization to deliver ale during twelve months, not exceeding the amount of \$500, and promise to pay for it if original debtor did not,—held limited to first \$500 worth of ale delivered); *Borghfield v. La-Banque d'Hochelaga, Rap. Jud. Quebec* 28 C. S. 344 ("We hereby guarantee you to the extent of \$500, for invoices of goods sold or to be sold to C. & D. within six months from this date, all drafts to be sent to this bank for acceptance,"—held not a continuing guaranty as to all sales, but limited in time and amount as stated in the guaranty).

Parol evidence rules.

Closely allied to the question stated in the title to this note is that of the right to show the intention of the parties and the surrounding circumstances by extrinsic evidence, and as these cases have been collected they will be inserted because of their practical value in connection with the application of the foregoing rules.

In the first place it may be considered as certain that parol evidence is not admissible to vary, contradict, or add to the terms of the guaranty (*Schneider-Davis Co. v. Hart*, 23 Tex. Civ. App. 529, 57 S. W. 903; *Heffield v. Meadows*, L. R. 4 C. P. 595, 20 L. T. N. S. 746); this being especially true where there are equivocal expressions or ambiguities (*Scott v. Myatt*, 24 Ala. 489, 60 Am. Dec. 486; *West-Winfree Tobacco Co. v. Waller*, 66 Ark. 445, 51 S. W. 320; *Indiana Bicycle Co. v. Tuttle*, 74 Conn. 489, 51 Atl. 538; *Lazear v. National Union Bank*, 52 Md. 78, 36 Am. Rep. 355; *Boston & S. Glass Co. v. Moore*, 119 Mass. 435; *Henry McShane Co. v. Padian*, 142 N. Y. 207, 36 N. E. 880; *Bank of Alexandria v. Turney*, — Tenn. —, 52 S. W. 762).

But extrinsic evidence of the existing circumstances is admissible to explain the true meaning of an ambiguous guaranty (*Collins v. Alvery*, 10 Ky. L. Rep. 985; *Columbus Sewer Pipe Co. v. Ganser*, 58 Mich. 385, 55 Am. Rep. 697, 25 N. W. 377; *Perlman v. Ehrlich*, 119 N. Y. Supp. 663;

White's Bank v. Myles, 73 N. Y. 335, 29 Am. Rep. 157; *Lemp v. Armengol*, 86 Tex. 690, 26 S. W. 941; *Hoad v. Grace*, 7 Hurlst. & N. 494, 31 L. J. Exch. N. S. 98, 8 Jur. N. S. 43, 5 L. T. N. S. 359, 10 Week. Rep. 85; or to show the meaning attached to mercantile terms used in the instrument (*Schneider-Davis Co. v. Hart*, 23 Tex. Civ. App. 529, 57 S. W. 903).

So, it has been held that parol contemporaneous evidence is admissible to show the circumstances under which the guaranty was entered into, when the intent and meaning is uncertain, under the rule that a wide latitude should be allowed in interpreting guaranties and in discovering the intention of the parties. *S. Hamill Co. v. Woods*, 94 Iowa, 246, 62 N. W. 735; *Columbus Sewer Pipe Co. v. Ganser*, 58 Mich. 385, 55 Am. Rep. 697, 25 N. W. 377; *Tootle v. Elgutter*, 14 Neb. 158, 45 Am. Rep. 103, 15 N. W. 228; *Crist v. Burlingame*, 62 Barb. 351; *Agawam Bank v. Strever*, 18 N. Y. 502; *Merchants' Nat. Bank v. Cole*, 83 Ohio St. 50, 93 N. E. 465, Ann. Cas. 1912 A, 773; *Gardner v. Watson*, 76 Tex. 25, 13 S. W. 39; *St. Lawrence Steel & Wire Co. v. Leys*, 6 Ont. L. Rep. 235, affirmed in 7 Ont. L. Rep. 72; *Johnston v. Nicholls*, 1 C. B. 251, 14 L. J. C. P. N. S. 151, 9 Jur. 429; *Heffield v. Meadows*, L. R. 4 C. P. 595, 20 L. T. N. S. 746; *Grahame v. Grahame, Ir. L. R. 19 Eq. 249*.

And evidence that the guaranty was considered as a continuing one, and so acted upon, was held admissible in *Douglass v. Reynolds*, 7 Pet. 113, 8 L. ed. 626, not as explaining or construing the guaranty itself, but as showing the reliance placed thereon.

So, in *Bell v. Bruen*, 1 How. 169, 11 L. ed. 89, it was said that extrinsic evidence is admissible to obtain the true import and application of a guaranty, but not to add to it.

G. J. C.

CALIFORNIA SUPREME COURT. (Department No. 2.)

ST. PAUL TITLE & TRUST COMPANY,
Appt.,

v.

LOUIS T. STENSGAARD, Respnt.

(— Cal. —, 121 Pac. 731.)

Pleading — statute of limitations — amendment — discretion.

1. Permitting an amendment of a plea of the statute of limitations so as to set out the subdivision of the section relied on is

not an abuse of discretion where there is only one subdivision that is applicable so that the plea is sufficient without amendment.

Limitation of actions — foreign judgment — change of name — effect.

2. A mere change of name without fraudulent intent, after one against whom a judgment has been entered in one state takes up his residence in another state, will not prevent the statute of limitations running in his favor in the latter state.

(February 3, 1912.)

A PPEAL by plaintiff from a judgment of the Superior Court for Los Angeles County in defendant's favor in an action brought to enforce a judgment which had been recovered against defendant in the state of Minnesota. Affirmed.

The facts are stated in the opinion.

Mr. Constan Jensen, for appellant:

One who comes into this state under an assumed name, fraudulently represents himself to be a person other than his true self, conceals his presence in the state from his family and all who know him in the state of his former residence, and who does this manifestly for the purpose of evading his obligations, is not entitled to the protection of the law.

Palmer v. Shaw, 16 Cal. 93; *Angell, Limitations*, 6th ed. 215, 216; *Stewart v. Stewart*, 152 Cal. 162, 92 Pac. 87, 14 Ann. Cas. 940; 19 Am. & Eng. Enc. Law, 233; 25 Cyc. 1214, 1251; *Goldberg v. Lippmann*, 6 Misc. 35, 25 N. Y. Supp. 1003; *Rogers v. Hatch*, 44 Cal. 280; *Harrigan v. Home L. Ins. Co.* 128 Cal. 531, 58 Pac. 180, 61 Pac. 99; 13 Am. & Eng. Enc. Law, 727, 728.

The California statute of limitations was not pleaded, and the action of the court in permitting amendment after close of trial and over plaintiff's objection, was an abuse of discretion.

Wolters v. Thomas, — Cal. —, 32 Pac. 585; *Bank of Woodland v. Heron*, 122 Cal. 107, 54 Pac. 537; *Cooke v. Spears*, 2 Cal. 409, 56 Am. Dec. 348; *Morton v. Bartning*, 68 Cal. 306, 9 Pac. 146; *Manning v. Dallas*, 73 Cal. 420, 15 Pac. 34.

Appellant's cause of action is not barred in Minnesota, and therefore not barred here under § 361, Code Civ. Proc.

Note. — Concealment of identity by change of name as interrupting statute of limitations.

But three cases aside from *ST. PAUL TITLE & T. Co. v. STENSGAARD* have been found wherein it was sought to make the fact that a debtor had assumed a fictitious name for the purpose of eluding his creditors a

ground for interrupting the running of the statute of limitations, and they are in accord with *ST. PAUL TITLE & T. Co. v. STENSGAARD*, that such fact does not come within the provision of any exception which will suspend such statute.

In *Engle v. Fischer*, 102 N. Y. 400, 55 Am. Rep. 818, 7 N. E. 300, it was held that such a case did not, as therein contended,

Finnell v. Southern Kansas R. Co. 33 Fed. 427; Moores v. Winter, 67 Ark. 106, 53 S. W. 1057; Stuart v. Lander, 16 Cal. 372, 76 Am. Dec. 538; Davidson v. Barnes, 17 Minn. 69, Gil. 49; Lamprey v. Davidson, 16 Minn. 480, Gil. 435; Donner v. Polmer, 23 Cal. 40.

The time of the lien has nothing to do with the right to bring action on the judgment.

23 Cyc. 1352; Haeussler v. Scheitlin, 9 Mo. App. 308; 23 Cyc. 350; Ashton v. Slater, 19 Minn. 347, Gil. 300; Burwell v. Tullis, 12 Minn. 572, Gil. 486; Newell v. Dart, 28 Minn. 248, 9 N. W. 732; Dole v. Wilson, 39 Minn. 330, 40 N. W. 161; Spencer v. Haug, 45 Minn. 231, 47 N. W. 794; Sandwich Mfg. Co. v. Earl, 56 Minn. 390, 57 N. W. 938; D. M. Osborne & Co. v. Heuer, 62 Minn. 507, 64 N. W. 1151.

The defendant, claiming the bar of a foreign statute, must have remained in the foreign state during the entire period prescribed in the statute; otherwise, the statute has not operated.

Drake v. Bigelow, 93 Minn. 112, 100 N. W. 664; Powers Mercantile Co. v. Blethen, 91 Minn. 339, 97 N. W. 1056; Holley v. Coffee, 123 Ala. 406, 26 So. 239; Strong v. Lewis, 204 Ill. 35, 68 N. E. 556; Web-

come within the exception provided for by the Code in case of absence from the state, because the debtor was not without the state when the cause of action accrued and he never thereafter departed from the state; and though he bore an assumed name he was physically at all times within the state, and there was no hiding or concealment of his person except as he assumed and bore a fictitious name.

And in *Miller v. Lesser*, 71 Iowa, 147, 32 N. W. 250, it was said that there was no provision of the Code which created an exception in favor of a creditor upon the ground that he was unable to discover a debtor's place of residence within the period prescribed for bringing an action, and so it was held that where a debtor was a resident of the state when the cause of action accrued, and continued to reside therein during the time prescribed for bringing an action, the statute of limitations was not interrupted by the fact that the debtor was living under an assumed name, which delayed the discovery of his place of residence.

In *Chemical Nat. Bank v. Kissane*, 32 Fed. 429, in holding that one is not estopped to plead the statute by the fact that he removes to another state, and remains in such state under an assumed name until a cause of action is barred by the statute of limitations, the court said: "In this case, there was no legal obstacle in the way, at all. It is true the man, in a certain sense, disguised himself by assuming an additional name, and moved into another state; but there is no legal obstacle to instituting a suit. All 39 L.R.A. (N.S.)

ster v. Davies, 44 Neb. 301, 62 N. W. 484; *Nicholas v. Farwell*, 24 Neb. 180, 38 N. W. 820; *Lewis v. Hyams*, 26 Nev. 68, 99 Am. St. Rep. 677, 63 Pac. 126, 64 Pac. 817; *Chevrier v. Robert*, 6 Mont. 319, 12 Pac. 702; *Kempe v. Bader*, 86 Tenn. 189, 6 S. W. 126; *Osgood v. Artt*, 11 Biss. 160, 10 Fed. 365; *Martin v. Wilson*, 58 C. C. A. 181, 120 Fed. 202; *Story, Conf. L. 8th ed. 801; Whar-ton, Conf. L. 3d ed. §§ 535-543; 25 Cyc. 1241-1411.*

Mr. Edward E. Bacon, with Messrs. Gibson, Dunn, & Crutcher, for respondent:

Where the debtor is within the state at the time that the cause of action accrues, the statute will run in his favor, notwithstanding his departure from the state where the obligation was incurred, and his change of name to conceal his identity and whereabouts.

Miller v. Lesser, 71 Iowa, 147, 32 N. W. 250; *Engel v. Fischer*, 102 N. Y. 400, 55 Am. Rep. 818, 7 N. E. 300; *Chemical Nat. Bank v. Kissane*, 32 Fed. 429; *Myers v. Center*, 47 Kan. 324, 27 Pac. 978; *Amy v. Watertown*, 130 U. S. 320, 32 L. ed. 953, 9 Sup. Ct. Rep. 537; 25 Cyc. 1223; *Davis v. Hart*, 123 Cal. 384, 55 Pac. 1060;

complainant had to do was to find the defendant. It was well aware of the cause of action. It was its own fault, or misfortune, if it was unable to find its debtor. If defendant had come into this state, and gone into some of its most secluded corners, without adding a name to his own, it is not likely he would have been found, within the time allowed by the statute. I apprehend that no one in that case would have set up the fact that he could not be found till the action was barred, as an equitable ground for restraining him from availing himself of the statute of limitations. So if, being baldheaded, he should put on a wig, or cultivate his beard in such way, or wear false whiskers, or in some other way disguise himself, in addition to moving to another state, or while staying in some secluded spot in the state where his obligation was incurred, that would be no legal obstacle to bringing a suit. It would be simply throwing a difficulty in the way of finding or recognizing the man. So, taking on an additional name is only another element of the same kind of disguise. It interposed no legal impediment to the pursuing of the remedy, provided he should be found. It might make it more troublesome to find him. I think, therefore, it is not a case under our statute, or upon equitable principles established before the statutes, covering the points upon which the party can be restrained from setting up the statute of limitations. The taking on of another name is an act of disguise and of secretion, but it interposes no legal impediment."

J. H. B.

Clausen v. Meister, 93 Cal. 555, 29 Pac. 232.

The defense of bar by the limitation prescribed by our Code for actions on judgments was sufficiently pleaded.

25 Cyc. 1407; Pipes v. North Carolina Mica Mineral & Lumber Co. 132 N. C. 612, 44 S. E. 114; Churchill v. Woodworth, 148 Cal. 669, 113 Am. St. Rep. 324, 84 Pac. 155; Trower v. San Francisco, 157 Cal. 762, 109 Pac. 617; Lilly-Brackett Co. v. Sonnemann, 157 Cal. 192, 106 Pac. 715, 21 Ann. Cas. 1279.

Under the statutes of Minnesota a domestic judgment became extinct in ten years from its entry or docketing, and no action could thereafter be maintained thereon.

Brown v. Dooley, 95 Minn. 146, 103 N. W. 894; Relyea v. Tomahawk Paper & Pulp Co. 102 Wis. 301, 72 Am. St. Rep. 878, 78 N. W. 412; Holcombe v. Tracy, 2 Minn. 241, Gil. 201; Burwell v. Tullis, 12 Minn. 572, Gil. 486; Stine v. Bennett, 13 Minn. 153, Gil. 138; State ex rel. National Bond & Secur. Co. v. Krahmer, 105 Minn. 422, 21 L.R.A. (N.S.) 157, 117 N. W. 780; Gaines v. Grunewald, 102 Minn. 245, 113 N. W. 450.

Melvin, J., delivered the opinion of the court:

Appellant sued upon a judgment for something more than \$5,000, recovered in the state of Minnesota on May 6, 1891, against the defendant and respondent herein, under the name of Louis T. Stensgaard. The complaint in this action was filed December 1, 1909. It was alleged in the complaint that the defendant surreptitiously left the state of Minnesota within one year after the recovery of the judgment pleaded; that he concealed his whereabouts from his family and acquaintances at all times after his departure from that state; and that he changed his name to Alton B. Hill, and concealed his identity and kept his place of residence a secret for the purpose of defrauding his creditors. While admitting the recovery of judgment against him as alleged in the complaint, he denied by his answer that he left Minnesota surreptitiously, or that he had fraudulently concealed his identity. He pleaded the statute of limitations.

The court found that defendant lived in Minnesota with his family after the entry of the judgment against him, until the year 1897; that in that year he openly departed from Minnesota; that he did not change his name until 1899; that he had not fraudulently concealed his identity for the purpose of defrauding any creditor; and that he had continuously resided in the

county of Los Angeles since the year 1900 under the name of Alton B. Hill. The court found that long prior to the year 1909 the judgment had ceased to be of any effect in the state of Minnesota, and that the plaintiff's cause of action was barred by provisions of § 336, subd. 1, and § 361, of the Code of Civil Procedure. From the judgment against it, plaintiff appeals.

In his original answer, respondent pleaded the bar of § 336 of the Code of Civil Procedure, but did not specify the subdivision on which he relied. Before final submission of the cause, the court permitted him to amend his pleading by designating the first subdivision of that section as the one upon which he placed special reliance. Appellant asks us to hold that the granting of permission to amend was an abuse of discretion by the trial court. We do not think so. Indeed, the original pleading of the section of the Code, without special reference to the particular part of it upon which defendant depended, was sufficient, because the first subdivision is the only one that could possibly apply to the facts of this case. Hence there was no uncertainty, or, in any event, any such uncertainty as plaintiff could urge, in the absence of special demurrer to the answer. Subdivision 1 of § 336 of the Code of Civil Procedure applies to an action upon "a judgment or decree of any court of the United States or of any state within the United States." The only other subdivision relates to "an action for mesne profits of real property." It will therefore be seen that the original pleading of the statute was sufficient. Churchill v. Woodworth, 148 Cal. 675, 113 Am. St. Rep. 324, 84 Pac. 155. But the court, in the exercise of its discretion, permitted an amendment which removed all possible criticism of the plea of the statute. Such a plea is to the merits, and the court is clothed with discretion to permit the defense of the statute of limitations, just as it is given authority to allow the pleading of any other meritorious defense. Lilly-Brackett Co. v. Sonnemann, 157 Cal. 196, 106 Pac. 715, 21 Ann. Cas. 1279; Trower v. San Francisco, 157 Cal. 769, 109 Pac. 617.

We can see no escape from the court's conclusion that the cause of action was barred because not brought within the time limited by subd. 1 of § 336 of the Code of Civil Procedure. Appellant cites Stewart v. Stewart, 152 Cal. 163, 92 Pac. 87, 14 Ann. Cas. 940; and Palmer v. Shaw, 16 Cal. 95, in support of the proposition that a clandestine entry into this state with intent to defraud creditors does not operate to begin the period of limitation in favor of the debtor thus secretly coming to

California. But in this case the court found that defendant's coming to this state and his change of name were without fraudulent intent. The case of *Stewart v. Stewart*, supra, is authority for the proposition that neither the creditor's ignorance of, nor his inability to discover, the presence of the judgment debtor, will prevent the running of the statute in the latter's favor.

It has been held in this Federal circuit, and we think correctly, that living in this state under an assumed name will not prevent a defendant, sued on a judgment recovered in another state, from pleading the statute of limitations. *Chemical Nat. Bank v. Kissane* (C. C.) 32 Fed. 429. The court, after hearing all of the evidence, concluded that the defendant had not been guilty of fraud, either in coming to California, or in changing his name, and that he had resided in this state for about nine years prior to the filing of the complaint in this action. The only judgment possible, therefore, was the one sustaining the defense urged under subd. 1 of § 336 of the Code of Civil Procedure; and our conclusions upon the applicability of that section make it unnecessary to review the findings and conclusions with reference to the laws of Minnesota and the availability of § 361 of the Code of Civil Procedure as a defense.

The judgment is affirmed.

We concur: *Henshaw, J.; Lorigan, J.*

Petition for rehearing denied, March 4, 1912.

GEORGIA SUPREME COURT.

ADA WEST, Plff. in Err.,

v.

S. M. INMAN.

(137 Ga. 822, 74 S. E. 527.)

Landlord and tenant — supervision of fire escapes — liability for injury.

1. The owner of a building who has pro-

Headnotes by Beck, J.

Note. — Liability for injuries caused by lack or insufficiency of fire escapes.

The earlier cases on this subject are collected in the notes to *Rose v. King*, 15 L.R.A. 160; *Yall v. Snow*, 10 L.R.A. (N.S.) 177; and *Arnold v. National Starch Co.* 21 L.R.A. (N.S.) 178. But little authority has been found since the writing of the latter note.

An attack was made in *Roumfort Co. v. Delaney*, 230 Pa. 374, 79 Atl. 653, upon the validity of a statute requiring fire escapes, etc., upon all buildings, such as theaters, 39 L.R.A. (N.S.)

provided fire escapes in accordance with the provisions of § 3151 of the Code, and who has rented certain stores above the second story in said building to firms engaged in a legitimate manufacturing business, is not bound to exercise supervision over the portions of the building rented, so as to insure that the passages or entrances to the fire escapes are at all times kept open.

(a) Nor is such owner liable in damages to an employee in said building, working on a floor above the second floor, who suffered injuries from fire in consequence of obstructions placed in the passageway to the fire escape by a tenant who had rented that portion of the building around and about the fire escape.

Pleading — failure to provide for fire extinguishment — generality.

2. The allegation that "defendant negligently failed to provide in said building . . . ample means of extinguishing fire" was open to attack by special demurrer, which criticized the allegation on the ground that it was a mere conclusion of the pleader, and which called for more specific information as to what means of extinguishing fires were ample and should have been provided.

(March 14, 1912.)

ERROR to the Superior Court for Fulton County to review a judgment in defendant's favor in an action brought to recover damages for personal injuries from fire alleged to have been caused by defendant's negligence in permitting obstructions preventing access to the fire escape. Affirmed.

The facts are stated in the opinion.

Mr. James L. Key for plaintiff in error.

Messrs. Payne & Jones, for defendant in error:

The owner of a building not particularly exposed to the danger of fire is not bound to anticipate the possibility of remote danger from fire, and where the building is properly constructed for its intended use and purpose, the construction of fire escapes is not required.

Yall v. Snow, 201 Mo. 511, 10 L.R.A. (N.S.) 177, 119 Am. St. Rep. 781, 100 S. W. 1, 9 Ann. Cas. 1161; *Jones v. Granite Mills*, 126 Mass. 84, 30 Am. Rep. 661; *Pauley v. Steam Gauge & Lantern Co.* 131 N. Y. 90, 15 L.R.A. 194, 29 N. E. 999;

public halls, and other places where persons assemble or the public resort, upon the ground that it is an unreasonable exercise of the police power in that the act might be enforced in such an arbitrary manner as to work hardship and do great injustice in some instances. In addressing itself to this argument the court said: "It will be presumed that officers intrusted with its enforcement will only require such reasonable compliance as the exigencies of each particular case demand. The act should be enforced in a spirit not to destroy the usefulness of

Keith v. Granite Mills, 126 Mass. 90, 30 Am. Rep. 666; Rose v. King, 49 Ohio St. 213, 15 L.R.A. 160, 30 N. E. 287; 26 Cyc. 1114; 13 Am. & Eng. Enc. Law, 83.

No duty is imposed upon the owner of the building to so regulate the conduct of his tenants as to interfere with the proper user of the leased floors of the building, even though such user may in some measure interfere with access to one or more of the means of egress from the building.

Sewell v. Moore, 166 Pa. 570, 31 Atl. 370; Yall v. Snow, 9 Ann. Cas. 1166; Huda v. American Glucose Co. 154 N. Y. 480, 40 L.R.A. 411, 48 N. E. 897.

Beck, J., delivered the opinion of the court:

Ada West brought suit to recover damages for personal injuries alleged to have been received in consequence of having inhaled smoke and fumes from a fire in a building of which the defendant was the owner, and in which she was at work on the third story as an employee of a manufacturing company occupying a part of said third story as tenant. It was alleged: That another tenant of the owner of the building occupied the second story and that portion of the third story which was "around and included the entrance to the fire escape of said building." That "there were two means of ingress and egress provided for said building and for said place at which petitioner was at work; to wit, one a stairway inside of said building, and

the other a fire escape stairway on the outside of said building. Said fire escape could be reached only through one window or door on said third story, and through a space which was occupied by the Silverman-Lonsberg Company, as aforesaid. That on the day aforesaid a fire broke out in said building, on the second story thereof, and in the place occupied by the Silverman-Lonsberg Company. That from said fire issued vast volumes of smoke, heated air, and fire, which penetrated and filled the entire third floor of said building where petitioner was at work. That said fire and smoke and hot air cut off the stairway of said building entirely, and it was impossible to flee from said building by the stairway inside of said building. That the only means of escape left was the fire escape on the outside of said building. That the fire escape on said building was completely cut off and obstructed from access and use by petitioner by boxes, goods, merchandise, and other material, which were piled up against the door and window leading to said fire escape, and made access to said fire escape absolutely impossible." General and special demurrers were filed, and to an order sustaining them the plaintiff excepted.

1. If the plaintiff is entitled to recover in this case, it is in consequence of a violation of the statutory provisions contained in § 3151 of the Code. At common law, the failure to provide fire escapes on the part

property or to place undue burdens upon the owner, but only as a protection to such an extent as may be required in view of the situation of the building, having due regard to the use made of it. When so enforced there can be no valid objection on the ground of its requirements being unreasonable. That it will be so enforced may be presumed."

But in *Radley v. Knepfly*, — Tex. Civ. App. —, 124 S. W. 447, affirmed in — Tex. —, 135 S. W. 111, where an ordinance provided that all rooms above the second floor in "every hotel, family hotel, apartment house, boarding house, lodging house, club house, or tenement house, in which persons reside or lodge," shall be provided "with more than one way of egress or escape from fire, placed as near as practicable at opposite ends of the room, and leading to fire escapes on the outside of such building or to stairways on the inside, provided with proper railings," and the evidence showed that it was unusual to have more than one fire escape on a three-story building like the one in question, and impracticable to so construct the rooms on the third floor of such a building, not situated on a corner, so as to provide each room with more than one way of egress or escape from fire, placed at opposite ends of the room leading to the fire escapes on the outside of the building,—

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it was held that the ordinance was oppressive and unreasonable, and therefore void. The court said: "It is clear that such construction would, as to inside buildings, destroy the value of all stories above the second, and amount to a practical confiscation of the same."

And the requirements of the statute may be waived by those for whose protection it is designed.

Thus, where it was alleged that the defendant was negligent in failing to equip the three floors of the building with proper fire escapes, as in *Radley v. Knepfly*, supra, but the deceased had been occupying a room on the third floor of the building for five or six weeks and knew the condition of the building as to fire escapes, the court said: "Having had time to ascertain the condition of the building as to fire escapes, and to secure another room and move thereto, by voluntarily continuing in the building he took the hazard of the failure to provide it with fire escapes (if there was a failure in that respect)."

And of course the failure to construct an additional fire escape as required by ordinance does not make the owner liable for the death of the deceased caused by a fire, unless the failure to construct was the proximate cause of the death. *Ibid*.

E. M. S.

of the owner of a building not particularly exposed to danger from fire from the character of the work being carried on in it did not render the owner liable in damages to an employee of the tenant who might receive injuries incurred in consequence of such failure. *Yall v. Snow*, 201 Mo. 511, 119 Am. St. Rep. 781, 100 S. W. 1, 9 Ann. Cas. 1161, 10 L.R.A.(N.S.) 177, and cases cited in note. So that the liability of the owner in the present case, if any exists, is entirely statutory, and depends upon the construction of the Code section (§ 3151), which reads as follows: "Owners of every building more than two stories in height, not including the basement, used in the third or higher stories, in whole or in part, as factory or workshop, shall provide more than one way of egress from each story of said building, above the second story, by stairways on the inside or outside of said buildings; and such stairways shall be, as nearly as may be practicable, at opposite ends of each story, and so constructed that, in case of fire, the ground can be readily reached from the third and higher stories. Stairways on the outside of said buildings shall have suitable railed landings at each story above the first, and shall connect with each of said stories by doors or windows opening outwardly, and such doors, windows, and landings shall be kept at all times clear of obstructions. All the main doors of such buildings, both inside and outside, shall open outwardly, and each story shall be amply supplied with means for extinguishing fires." We are clear that under the express provisions of this statute it is the duty of the owner of a building of the character of the buildings referred to in the statute to provide fire escapes in accordance with the provisions of this statute, and that in case of injury to an occupant of a building, resulting directly from said failure, on account of a fire in the building which necessitated the use of fire escapes, there would be a corresponding liability on the owner. And we are equally clear that where the owner of a building has properly equipped it with fire escapes in accordance with law, and has rented any of the stories above the second story to tenants who have leased the same for legitimate manufacturing purposes, the owner is under no obligation to exercise any supervision over the conduct of his tenants in the use of the particular floor which he may have rented to any one of them. Where there is an outside stairway erected as a fire escape, it is, of course, contemplated that the entrance to the building from the landing at each story shall in some way be closed at such hours as the building or some particular story is

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unoccupied; as at night, for instance, when the men and women working in the building have left and gone home. At such times, the opening by a window or by a door from the landing of the outside staircase or fire escape would be closed in most instances, unless the business conducted therein is of such magnitude as to require or justify the employment and presence of a special watchman. In all such cases would it be the duty of the owner of the building to go upon the premises which he had rented to someone else, and see that his tenant had unlocked the door or unfastened the window shutter, so that there could be free access to the landing of the fire escape? We apprehend that, before a statute passed in derogation of the common law could be given a construction which would place upon the owner of buildings duties so onerous, the language of the statute itself imposing the duties should be express and unequivocal. The allegations of the petition show that a portion of the third story, on which the plaintiff was at work, had been rented to a named tenant, "which said portion of the third story was around and included the entrance to the fire escape of said building; . . . that the fire escape on said building was completely cut off and obstructed from access and use by petitioner by boxes, goods, merchandise, and other material, which were piled up against the door and window leading to said fire escape, and made access to said fire escape absolutely impossible; . . . that the defendant, in violation of petitioner's legal right, obstructed the passage of said fire escape, and permitted the same to be obstructed, so that petitioner could not reach the same and escape." The allegations last quoted are to be construed as meaning, not that the owner himself, in person or by his agents, had piled up boxes, goods, etc., so as to obstruct the passage to the fire escape, but that the tenant, who during the period of his tenancy had the right to use and control the floor about the passage that led to the fire escape, had obstructed the passage. And this is the construction put upon this allegation in the brief of counsel for plaintiff in error. That being the case, under what we have said above, so much of the plaintiff's petition as sought a recovery on the ground that the owner was liable because of the obstruction of the passage, leading to the fire escape was demurrable, and the court did not err in so holding.

2. In another paragraph of the petition it is alleged: "Defendant negligently failed to provide in said building and on the floors thereof, and particularly on the second floor, where said fire broke out, ample

means of extinguishing fires. That said fire was finally extinguished by the fire department of the city of Atlanta, and that petitioner was finally rescued from said burning building by the fire department of the city of Atlanta." This paragraph was specially demurred to on the ground, among others, that "the allegation that the defendant negligently failed to provide in said building and on the floors thereof, and particularly on the second floor, where said fire broke out, ample means of extinguishing fires, constitutes a conclusion of the pleader, and is not predicated upon any facts to substantiate the same, . . .

and that it does not appear what means of extinguishing fires, if any, said defendant should have furnished, nor what constitutes ample means of extinguishing fires." The court sustained this special demurrer, but allowed the plaintiff twenty days within which to file amendments. No amendments were filed. We are of the opinion that the special demurrer pointed out specifically existing defects in the paragraph of the petition referred to, and that the plaintiff was allowed a reasonable time within which to amend the same; and, she having failed to amend within the time so allowed, this part of his petition was stricken therefrom, which left the case to stand upon the allegations complaining of the failure upon the part of the owner of the building to keep the passage or entrance to the fire escape free from obstructions. And as that part of the case last referred to, under the ruling made above, was properly stricken on general demurrer, the entire case, without reference to certain other grounds of special demurrer, stood dismissed, as it should have stood under this decision.

Judgment affirmed.

All the Justices concur.

KANSAS SUPREME COURT.

KANSAS CITY PAPER HOUSE, Appt.,
v.
FOLEY RAILWAY PRINTING COMPANY.

(85 Kan. 678, 118 Pac. 1056.)

Corporations — account due president — transfer.

1. Where a corporation through its president asks that an account owing to him personally by the holder of its note be credited thereon, this amounts to a transfer of the account from the president to the corporation; and in an action upon the note

the plaintiff cannot object to the account being used as an offset, on the ground that no formal assignment had been made.

Reference — evidence — striking — effect.

2. Where a referee sustains a motion to strike out certain testimony that has been introduced at the trial, and no order is made reinstating it, such testimony cannot be considered by the court in determining whether there was any evidence to sustain the finding of the referee.

Contracts — validity — sale to public.

3. An agreement to pay for services in selling goods to a public board, which does not contemplate the exercise of personal or political influence, and on the carrying out of which no such influence is in fact exerted, and which is otherwise unobjectionable, is not rendered void because the salesman's compensation is made to depend upon the success of his efforts, or because he makes a legitimate argument to one of the members of the board while the others are not present.

(November 11, 1911.)

A PPEAL by plaintiff from a judgment of the District Court for Labette County in defendant's favor in an action brought to recover the amount alleged to be due on a promissory note. Reversed.

The facts are stated in the opinion.

Messrs. ELLIS, COOK, & BARNETT and E. L. BURTON for appellant.

Messrs. KIMBALL & OSGOOD for appellee.

Mason, J., delivered the opinion of the court:

The Kansas City Paper House, a corporation, sued the Foley Railway Printing Company, corporation, upon a promissory note. The defendant claimed a credit of \$500 on account of an indebtedness of that amount which it asserted was owing to P. T. Foley, its president, by the plaintiff. This is the only matter still in controversy. A referee found in favor of the defendant, and a

Note. — Validity of agreement by which compensation is dependent on success in procuring contract with public officer or board.

As to the validity of contracts to procure legislative action, including contracts to procure legislative action on commission, see note to Houlton v. Dunn, 30 L.R.A. 737, and supplementary note to Edwards v. Goldsboro, 4 L.R.A. (N.S.) 589.

For a discussion of the question of the validity of a contract which contemplates the location of a public building, see note to Edwards v. Goldsboro, supra.

While the question does not seem entirely settled in the Federal courts, it appears to be generally well established elsewhere that agreements for the sale of goods to the public, which are otherwise fair and unobjec-

judgment was rendered accordingly, from which the plaintiff appeals.

The appellant contends that, even if it was indebted to Foley, it could not be required to credit the amount upon the note, since no assignment was shown from Foley to the Foley Company. Foley, who personally managed the business of his company, testified in substance that he intended the company to have credit on the note for his claim against the paper company, and gave the latter notice to that effect. This in effect amounted to an assignment, and the paper company, being fully protected against a further assertion of the claim by Foley, cannot complain of the lack of formality.

The appellant also contends that there

was no competent evidence that it owed Foley the \$500, because his claim rested upon an agreement which he professed to have made with a salesman of the paper company, who was not shown to have had any authority to bind his employer in that respect, and whose authority was denied under oath in the reply. Foley testified in effect that the paper company, through the salesman referred to, agreed to pay him \$500 for his assistance in procuring a contract to supply paper and other material to the state; that he went to Topeka, and in the interest of the paper company "talked up" its goods to a member of the executive council, showing samples; that, after the contract had been awarded to the paper

tionable, are not rendered invalid because of a stipulation providing that the sale is to be made on commission.

Thus an agreement by one to procure orders from the United States government for supplies to be furnished for use upon vessels in the public service, in consideration of one half the net profits, is valid where it does not contemplate resort to any but legitimate methods in procuring the orders. *Swift v. Aspell*, 40 Misc. 453, 82 N. Y. Supp. 659. The court said: "If the rule adopted in the Federal courts, as to the enforceability of agreements for contingent compensation in procuring government contracts, is to be applied, the agreement in suit cannot be upheld. In these courts the broad principle is declared that any agreement which has a tendency to introduce into a government transaction involving the purchase of supplies, elements other than the single consideration of a faithful execution of orders at the lowest price, is void; and the inference that personal solicitation or influence is to be employed is held to be enough to defeat the agreement for compensation, irrespective of what was or was not done.

. . . The courts of this state, however, when dealing with the question presented under similar contracts, have not gone so far in the acceptance of inferences to avoid the contract, and have drawn a distinction between agreements to procure legislation and agreements to make sales to the government. A person having something to sell has the right to sell it through an agent, and this right is an incident to his ownership. To declare that he may not employ an agent, upon commission, where the government is the prospective buyer, is to take away what is ordinarily one of the elements of the enjoyment of ownership,—the unrestricted right to sell. Upon this line of reasoning, commission agreements for a sale to the government have been upheld and enforced in this state where the agreement did not actively require corruption in its performance. Treated as a matter distinct in its nature from agreements to procure legislation, an agreement to compensate an agent, for his successful efforts in traffic

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And an agreement to pay a commission of 5 per cent on the amount of the charter for obtaining a charter from the United States for a steamship does not contravene public policy. *Howland v. Coffin*, 47 Barb. 653.

Nor does a contract by which one undertakes to pay a commission for chartering his vessel to the government, to persons who are related to the government's agents in charge of selecting vessels for charter,

company, he had several conversations with its president in regard to his arrangement with the salesman; and that the president did not deny the salesman's authority to make such an agreement. When the Foley company rested its case, the paper company moved "to strike out that part of the conversation in reference to the contract with Mr. Shaw [the salesman], as there was no proof of any authority of Mr. Shaw to make the contract." The record shows that this motion was sustained. The only evidence on the most vital portion of the Foley company's case seems to have been stricken out by this ruling. No order was made reinstating it, and its place was not supplied by any further testimony. It is at least doubtful whether the ruling was

not correct; for there was no evidence that Shaw had authority to make the agreement with Foley, unless it is to be found in the testimony that the president of the company in the course of a conversation, the details of which are not stated, did not deny it. But, whether the ruling was right or wrong, the referee, in deciding that the Foley company could recover without the evidence that was stricken out, must have proceeded upon an erroneous view of the law, which necessarily affected the judgment. Where a court makes its own findings of fact from the evidence reported by a referee, it may doubtless take into account evidence which the referee had stricken out, if the circumstances be such that the adverse party

where the agents so employed did not agree to use any corrupt means to procure the charter. *Southard v. Boyd*, supra.

And in *Lyon v. Mitchell*, supra, a contract by which a broker undertook to dispose of certain steamers to the government for a commission of 10 per cent of the total amount received for them was held valid, and a recovery was allowed thereon.

And in *Cummins v. Barkalow*, 1 Abb. App. Dec. 479, a contract by a dealer in arms to pay an agent a share of the profits for obtaining from the government an order for the purchase of arms was held valid, there being nothing to show that it called for any illegal or improper action on the part of the agent.

And in *Kerr v. American Pneumatic Service Co.* 188 Mass. 27, 73 N. E. 867, it was held that a contract by a company whose business was the carrying of mail by pneumatic tube service, with one to attend to government and franchise matters at a certain amount, with a provision for an advance in salary when the company's contracts amounted to a stated sum, was not rendered invalid because of such provision for an increase of salary, if no corrupt methods by the agent were contemplated. The court said: "If such work only is contemplated, the provision for an increase of salary when the government mail contracts reach a certain amount cannot be said to be one which has a tendency to induce the use of corrupt or improper acts on the part of the agent. An agent who gives all his time to the business of a principal fairly may be given a compensation increasing with the volume of the business."

And in *Barber v. Asphalt Paving Co. v. Botsford*, 56 Kan. 532, 44 Pac. 3, a recovery of a contingent compensation to attorneys and agents for presenting facts as to the character and quality of paving material which the company entering into the contract with them put out was allowed, but no particular stress was laid upon the fact that the compensation was contingent.

In *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 276, 26 L. ed. 545, it was held that a contract by the con-

sul general of Turkey with a manufacturer of firearms, by which the consul general, for a certain commission, agreed to effect through his influence with the representatives of the government, sales of the arms manufactured by the concern with which he contracted, was invalid as against public policy. Referring to the agreement for the payment of a commission, the court said: "So, too, with reference to furnishing the government with arms or supplies of any kind. It is legitimate to lay before the officers authorized to contract, all such information as may apprise them of the character and value of the articles offered, and enable them to act for the best interest of the country. And for such services compensation may be had as for similar services with private parties, either upon a *quantum meruit* or, where a sale is affected, by the ordinary brokerage commission. And here it may be observed, in answer to some authorities cited, that the percentage allowed by established custom of commission merchants and brokers, though dependent upon sales made, is not regarded as contingent compensation in the obnoxious sense of that term, which has been so often the subject of animadversion by this court, as suggesting the use of sinister or corrupt means for accomplishing a desired end. They are the rates established by merchants for legitimate services in the regular course of business. But where, instead of placing before the officers of the government the information which should properly guide their judgments, personal influence is the means used to secure the sales, and is allowed to prevail, the public good is lost sight of, unnecessary expenditures are incurred, and, generally, defective supplies are obtained, producing inefficiency in the public service."

And in *Winpenny v. French*, 18 Ohio St. 470, it was held that a contract with a broker employed to negotiate contracts with the government for the sale of baskets to the Army for a certain commission was not illegal. The court attempted to distinguish the case of *Providence Tool Co. v. Norris*, infra, from the case before them, upon the

is not thereby prejudiced by being deprived of an opportunity for rebuttal.

But testimony which the referee has eliminated from his consideration cannot be considered by the court in determining whether there was any evidence to sustain his finding. Here the findings and conclusions of the referee were couched in the most general terms, so that his precise theory of the case is not disclosed. This situation requires that a new trial be ordered.

Other questions are argued which will naturally arise at another trial, and therefore should be decided now. The appellant contends that public policy forbids a recovery upon such a contract as that testified to by Foley. There was some evidence that the

contract contemplated a payment for the exertion of personal and political influence upon members of the executive council, and that the services rendered were of that character. If that was the case, the contract was of course void. But there was also testimony that Foley was employed simply as an ordinary salesman, because of his experience in using and buying paper and other material handled by the plaintiff, and that his efforts were in accordance with that employment, and were confined to exhibiting samples and "talking up" the goods and the responsibility of the house. If that was the case, the contract was valid. In this aspect the question is merely one of fact, proper to be decided by a tribunal which sees and hears the witnesses.

ground that there was a contingency involved in the case referred to which was not an element in the case before them. In considering this point they said: "The case of *Providence Tool Co. v. Norris*, 2 Wall. 45, 17 L. ed. 868, is relied upon by counsel for plaintiff in error. It does not sustain them. That case was essentially different from the present, not only in the character of the means resorted to by the agent,—which counsel seems to argue is the only point of difference between the cases,—but also in the nature of the contract of employment. Here there was a simple authorization to make a contract,—a specified, and well-defined contract; no contingent fee; no special agreement as to mode or amount of compensation. There was to be a public letting to the lowest bidder, and Winpenny merely employed an agent to put in his bid, and, if you please, to guarantee his performance. French was not employed to 'procure' a contract, as a mere matter of personal 'favor,' but to make the contract, as a matter of convenience and necessity. There is nothing to the nature of such an employment to require or suggest the use of improper influences, and none such seem to have been resorted to by French. He seems to have acted openly, honestly, and at arm's length with the officer, resorting to no devices to prevent a free competition by others. Very different from this was the case in 2 Wallace. There was no public bidding in that case. No contract was defined. The fee was contingent upon success. It was not a case of authorization to make a contract as agent, but an undertaking to compensate a party for procuring one to be made. This is the sense in which the court understood it, for they speak of it as a contract 'to procure favors in the shape of contracts,' and from its very nature 'suggesting the use of sinister and corrupt means.' And the court, therefore, very properly class it with agreements for 'lobbying' legislative bodies, for 'procuring appointments to office,' and the like. It was simply an agreement to pay a party for 'personal solicitations and personal influences,' to be used in 'controlling the discretion of public officers,' and the court so 39 L.R.A. (N.S.)

denominate it. Such, also, was the construction put upon their contract by the parties themselves; for the measures employed for its fulfillment were properly denominated as mere 'lobbying' and 'solicitations for personal favors.'"

In *Providence Tool Co. v. Norris*, supra, referred to in the preceding case, it was held that an agreement for compensation to procure contracts from the government to furnish it with supplies was against public policy and void. The plaintiff claimed that his compensation was to be the difference between the contract price and a certain price named, while the corporation with which he contracted contended that it had simply promised a liberal compensation in case of sales. The court said: "Agreements for compensation contingent upon success suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception. There is no real difference in principle between agreements to procure favors from legislative bodies and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of improper elements to control the action of both is the direct and inevitable result of all such arrangements."

In *Hovey v. Storer*, 63 Me. 486, where the owners of a vessel authorized their agent to charter her to the government for \$100 per day and relinquished all over that amount to the agent, it was held that a contract made by the agent with the government, through the intervention of another, by which the government was to pay \$150 per day, was invalid as against public policy; but the court refused to disturb it in so far as it had been executed.

And in *Nash v. Kerr Murray Mfg. Co.* 19 Mo. App. 1, it was held that where one had advised commissioners of an asylum as a disinterested friend to employ a certain contractor to do a certain piece of work, it would be contrary to public policy to suggest to the contractor to covertly insert in his estimate an item as a bonus to the one suggesting his employment. J. T. W.

The evidence suggested, but perhaps did not absolutely determine, that Foley's compensation was to be contingent upon the procuring of the state contract. There is a conflict of judicial opinion as to whether that circumstance should stamp the contract as illegal. In *Providence Tool Co. v. Norris*, 2 Wall. 45, 55, 56, 17 L. ed. 868, 870, 871, it was said: "Agreements for compensation, contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception. There is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. . . . All agreements for pecuniary considerations to control the business operations of the government . . . are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country."

In that case, however, it was plainly shown that the services for which a recovery was sought consisted in bringing personal and political influence to bear upon the public officers charged with the duty of letting a contract for the purchase of supplies for the government. The language quoted was obviously used with that fact in mind. Substantially the same thing was said in the recent case of *Russell v. Courier Printing & Pub. Co.* 43 Colo. 321, 95 Pac. 936. But there, too, the contract involved was clearly bad upon other grounds than that it provided for contingent compensation. We find no case in which an agreement to pay for services in selling goods to a public body, which was found to be otherwise fair and unobjectionable, has been held void because payment was to be made only in the event of a sale being effected. If the fact that payment is made to depend upon results renders such an agreement void, it must be because the salesman who has a pecuniary interest in the success of his efforts will be presumed to resort to methods which he would otherwise avoid. This is recognized by a text writer in these words: "We know the sinister influences that are being constantly employed, and what willing ears are lent to corrupt propositions; and, when men have every motive for the advancement of such propositions, it is safe to say that any contract which leaves any opportunity for the tender of such propositions cannot be too

forcibly condemned. Let men who seek dealings with the government employ men who are prompted by no motives except the desire to fulfil their duty. The inconvenience attending such a restriction is so much counterbalanced by the obvious benefits, that the seeming injustice has no place worthy of notice." *Greenhood*, Pub. Pol. p. 365.

That test, however, seems to be repudiated in *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539, where stress is laid upon the question, not whether the amount of compensation depends upon the result, but whether it is unusual or excessive; the court saying; "And here it may be observed, in answer to some authorities cited, that the percentage allowed by established custom of commission merchants and brokers, though dependent upon sales made, is not regarded as contingent compensation in the obnoxious sense of that term, which has been so often the subject of animadversion by this court, as suggesting the use of sinister or corrupt means for accomplishing a desired end. They are the rates established by merchants for legitimate services in the regular course of business." 103 U. S. 276, 26 L. ed. 545.

The fact that the compensation of a salesman, employed to sell goods to the public, depends upon his success, may tend to show a purpose to use illegal means, or a probability that such means will be used; but we do not think that it should be regarded as conclusive on either point, nor that in and of itself it should be deemed to characterize the employment as illegal. *Barber Asphalt Paving Co. v. Botsford*, 56 Kan. 532, 44 Pac. 3; *Howland v. Coffin*, 47 Barb. 653; *Bergen v. Frisbie*, 125 Cal. 168, 57 Pac. 784; *Beal v. Polhemus*, 67 Mich. 130, 34 N. W. 532; *Stanton v. Embrey*, 93 U. S. 548, 23 L. ed. 983. We believe this view accords not only with sound reason, but with what has actually been decided by the courts. Cases bearing more or less directly on the matter are collected in various text-books and notes. 15 Am. & Eng. Enc. Law, 974; 9 Cyc. 490; 121 Am. St. Rep. 726; 6 Ann. Cas. 218; 4 L.R.A.(N.S.) 213. Many of the cases in these collections involve contracts for influencing legislation, which are not entirely analogous to those for the sale of goods, and may well be regarded as subject to a more stringent rule.

Foley testified that he talked with a member of the executive council, showed him the samples, and went over the matter with him so that he would understand the questions that would come up. That these representations were made to an individual, instead of to the council as a body, might

afford a reason for believing that illegal methods were pursued, but does not of itself compel that conclusion. To give information regarding a proposed contract to one of several members of a board charged with the letting of it is a means of getting the information before the board, and does not necessarily imply secrecy or concealment.

The judgment is reversed, and a new trial ordered.

OKLAHOMA SUPREME COURT.

RE JOHN F. THOMAS et al.

(20 Okla. 167, 93 Pac. 980.)

Bail — capital offense — burden of proof.

1. Upon an application to the supreme court for bail, by writ of habeas corpus, after commitment for a capital offense by a justice of the peace, the burden is upon the petitioner to show that he is illegally deprived of his liberty.

Same — evidence of guilt — reasonable doubt.

2. If, after hearing the whole evidence introduced on the application for bail, it is insufficient to generate in the mind of the court a reasonable doubt whether the ac-

cused committed the act charged, and in doing so they were guilty of a capital offense, bail should be refused.

Same — conflicting evidence.

3. It is not all conflicting exculpatory evidence that will have the effect to raise a reasonable doubt of guilt, and destroy or impair the force of "evident proof" made by inculpatory evidence. It is for the judge or court who hears the testimony to consider the evidence as a whole, and if, by the entire evidence, a reasonable doubt of the applicant's guilt of a capital offense is not generated, the proof is evident and bail should be denied.

(Williams, Ch. J., and Hayes, J., dissent in part.)

(February 4, 1908.)

APPPLICATION for writ of habeas corpus to secure the petitioners' release on bail from custody to which they had been committed for the crime of murder, by a justice of the peace sitting as an examining magistrate. Denied.

The facts are stated in the opinion.

Messrs. T. J. McMurray, Al J. Jennings, and John H. Burford for petitioners.

Messrs. Charles West, Attorney General, W. C. Reeves, S. M. Cunningham, Fain & Young, and W. Poindexter for the State.

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I. Scope.

This note is limited to a consideration of the rules applicable to the granting or refusal of bail in capital cases, under the 39 L.R.A. (N.S.)

common law and under constitutional provisions of the various states, which provisions are similar in form. Cases arising under special statutory provisions applicable to a single state are not considered.

II. Bail as a matter of right.

a. Common-law rule.

The rule of the common law is that bail may be granted in any case in the discretion of the court, but that the court's discretion will be controlled by certain well-defined and established rules.

By the early English common law, bail seems to have been a matter of discretion with all judicial magistrates and courts before whom offenders might be brought. By the ancient statute of Westminster, 1 C. 13, especially, the power to bail, as to the inferior courts and magistrates, was regulated and restricted; but the court of Kings bench and its judges were left unaffected by this statute, in possession of full common-law jurisdiction. The celebrated habeas corpus act of Charles II. conferred the power to bail on the judges of the superior courts of Westminster Hall and other superior judges. The court of King's bench and the judges authorized to hear and determine a case on habeas corpus have, according to the principles of the common law, the power and discretion to bail all persons whatsoever, and for all

Kane, J., delivered the opinion of the court:

This cause is here on a petition for writ of habeas corpus by John F. Thomas and Will Thomas, in which they contend they are unlawfully imprisoned and restrained at Lawton in the common jail of Comanche county, state of Oklahoma, by Rufe Le Fors, sheriff of said county, and one Julian, jailer of said Comanche county jail; that the cause of restraint, according to their best knowledge and belief, is that they have been committed to said Comanche county jail for the crime of murder, without bail by a justice of the peace sitting as an examining magistrate. Said petitioners further allege that they are innocent of the crime of murder, and that the proof, as

shown by the record of this cause in the examining trial under which they were committed, shows that the proof against them is not evident nor the presumption thereof great. On this petition a writ of habeas corpus was issued. For his return to the writ Rufe Le Fors, sheriff of Comanche county, state of Oklahoma, shows to the court that he holds the petitioners in his custody, and restrains them of their liberty, by virtue of a writ of commitment issued by S. Armstrong, justice of the peace in and for the city of Lawton, Comanche county, state of Oklahoma, to him issued and delivered on the 22d day of January, 1908, upon hearing before said S. Armstrong, justice of the peace, in a preliminary trial in said court, charging the petitioners

offenses whatsoever, without regard to the degree of the crime or the nature of the punishment. Their power to bail in a capital case was as unquestioned as when the punishment did not reach to the life of the accused. *Street v. State*, 43 Miss. 1.

The court of King's bench might and still may bail in any case whatsoever, even high treason or murder, for the court is held in law *coram ipso rege* (4 Co. Inst. p. 71, 2 Co. Inst. p. 186), but this is in the discretion of the court, and no one can challenge it *de jure*. And this bailment in the King's bench may be upon original indictment before them in the county where they sit or upon an indictment removed by certiorari or upon the prisoner's removal by habeas corpus before or after indictment taken. 2 Hale, P. C. 129.

The court of King's bench has discretionary power to bail. *Egerton v. Morgan*, 1 Bulstr. 69.

In *Rex v. Marks*, 3 East, 157, Grose, J., said that there was no doubt as to the power of the court of King's bench to bail in all cases of felony; even in cases of murder, though there should be no doubt as to the validity of the warrant of commitment.

"Herein," says Blackstone, "the wisdom of the law is very manifest. To allow bail to be taken commonly for such enormous crimes would greatly tend to elude the public justice; and yet there are cases, though they rarely happen, in which it would be hard and unjust to confine a man in prison though accused even of the greatest offense." 4 Bl. Com. 299.

By the common law all offenses, however high, including murder and other felonies, and treason, were and still are bailable before indictment found, though not as a matter of right in cases of capital felonies, but as matter of judicial discretion. The facts and circumstances of each particular case regulated in a large degree the exercise of the discretion. Judicial decision established it as a rule that one accused of a capital felony should be admitted to bail whenever, upon examina-

tion of the evidence, the presumption of guilt was not strong. *Ex parte McAnally*, 53 Ala. 495, 25 Am. Rep. 646. To the same effect, *Ex parte Bryant*, 34 Ala. 270.

The court of King's bench may bail any man according to their discretion, on the return of the habeas corpus, but in the rules which they observe they are guided by a series of decisions, for the discretion to be exercised by a court of justice is not a wild, but a sound, discretion, and to be confined within those limits to which an honest man, competent to discharge the duties of his office, ought to confine himself. 1 Chitty, Crim. Law, 129. To the same effect, *Ex parte Bryant*, 34 Ala. 270.

At common law, bail is a matter of discretion with the judges. The court of King's bench had an unlimited power of admitting to bail for all offenses, including treason and murder, but bail was not demandable as a right. Of course, the judicial discretion was exercised according to established rules. The object of the detention or imprisonment of the prisoner being to secure his forthcoming to abide the sentence of the law, the principle inquiry was whether a recognizance would effect that end. In seeking an answer to this inquiry, the matters chiefly considered were the seriousness of the charge, the nature of the evidence, and the severity of the punishment. Hence, when the offense was capital, and the evidence in support of it was strong, bail was denied, because no pecuniary consideration would be likely to secure the attendance of the prisoner, to the probable loss of his life. *Com. v. Lemley*, 2 Pittsb. 362.

In murder and manslaughter, where the prisoner was notoriously guilty, by his confession or otherwise, the almost unbroken practice was to refuse bail. Where there were circumstances in his favor, or where the evidence against him left reasonable doubts of his guilt, bail was generally allowed. *Ibid.*

Instead of committing the accused to prison, the examining justices may, in all cases except treason, admit him to bail to

with the crime of murder; that the petitioners were committed to the common jail of Comanche county, Oklahoma, and are being held by him, as the duly qualified and acting sheriff of Comanche county, under and by virtue of said commitment; and that he now produces said petitioners in person in this court in obedience to said writ of habeas corpus.

Upon agreement of counsel the case was heard in this court upon the record and testimony introduced at the preliminary examination before Hon. S. Armstrong, justice of the peace within and for the city of Lawton, Comanche county, Oklahoma. The question, then, before the court, is: Are the petitioners entitled to bail upon the showing made at the preliminary exami-

appear at the court at which his trial is to take place. In cases of treason, no person can be admitted to bail, except by order of one of the secretaries of state, or by the King's bench division of the high court of justice, or a judge thereof in vacation. All other crimes are, as regards bail, divided into two classes by statute. One class consists of felonies and certain specified misdemeanors; the other embraces all other misdemeanors. With respect to the first class, the justices have a discretion whether they shall admit to bail or not, but it is not usual to grant bail in cases of murder. 9 Laws of England (Halsbury) 323, citing indictable offenses act 1848 (11 & 12 Vict. chap. 42), § 23.

It is a rule of the common law that before indictment is found a defendant charged with murder will be admitted to bail, whenever, upon examination of the testimony under which he is held, the presumption of guilt is not strong; while on the other hand, bail is always refused after an indictment for murder has been found by a grand jury. *Ex parte Bryant*, *supra*.

The Kings bench may at its discretion bail one found guilty of manslaughter. *Armstrong v. Lisle*, 1 Salk. 60.

In *Rex v. Wyndham*, 1 Strange, 3, the prisoner, who was accused of treason, was admitted to bail where four terms of the court had passed since commitment.

In *Reg. v. Rumble*, 1r. Rep. 3 C. L. 271, where it appeared that an attachment of soldiers was pelted with stones, and two of them fired into the crowd without orders, one of them was discharged on habeas corpus proceedings, and the other was admitted to bail.

In *Rex v. Dalton*, 2 Strange, 911, it was held that if the depositions, before the coroner showed that the accused was guilty only of manslaughter, he would be bailed, though the coroner's inquest found the offense to be murder. This was not like a case on an indictment where the evidence is secret. Followed in *Rex v. Magrath*, 2 Strange, 1242.

Where the prisoner has been committed 39 L.R.A. (N.S.)

nation before the committing magistrate, under § 17, art. 2, of the Bill of Rights of the state of Oklahoma? which reads: "All persons shall be bailable by sufficient sureties, except for capital offenses when the proof of guilt is evident or the presumption thereof is great."

The first appearance of the above terms in American statutory or constitutional law seems to have been in a part of article 2 of an ordinance for the government of the territories of the United States north of the River Ohio, which reads as follows: "The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury, of a proportionate representation of the people in the legislature, and of judicial proceed-

upon a charge of wilful murder, found by a coroner's jury upon evidence sufficient to support the finding, the court of Queen's bench will not admit him to bail. *Re Bar-ronnet*, 1 El. & Bl. 1, *Dears*, C. C. 51, 22 L. J. Mag. Cas. N. S. 25, 16 Eng. L. & Eq. Rep. 361, 17 Jur. 184, 1 Week. Rep. 6.

Where the common law has not been changed by the Constitutions of the various states of the United States, the rule that capital offenses are bailable in the discretion of the court prevails.

In those states of our Union where there are no constitutional provisions or statutory enactments upon this subject, the English practice has been pretty closely followed. The right to admit to bail in felonies of death has scarcely been questioned and has been repeatedly recognized. In most of these states bail is not usually taken in cases of murder, but it seems to be generally conceded that it may be done, and in some of them it has been done. The power to bail in all offenses is regarded as an incident of the right and duty to hear and determine them. *Com. v. Lemley*, *supra*.

In New York in cases of felony the prisoner cannot be admitted to bail as a matter of right. *People v. Shattuck*, 6 Abb. N. C. 33.

The right to admit to bail is a matter of discretion. *People v. Beigler*, 3 Park. Crim. Rep. 316.

The power of the court to bail for all crimes is discretionary. *Ex parte Tayloe*, 5 Cow. 39.

The court has a right to admit the prisoner to bail even in case of murder. *People v. Cole*, 6 Park. Crim. Rep. 695, 4 Abb. Pr. N. S. 280.

The discretionary power of the court to bail is not arbitrary, but is judicial and governed by established principles and precedents. *People v. Perry*, 8 Abb. Pr. N. S. 27.

The power to bail may be exercised either before or after indictment. *Ibid*.

The power to bail may be exercised either before or after indictment. Whether the

ings according to the course of the common law. All persons shall be bailable, unless for capital offenses where the proof shall be evident or the presumption great." 1 Stat. 52. From this original this language has been copied into most of the state Constitutions and statutes. With the exception that some Constitutions contain only provisions as to "excessive bail," and that others use the words "before conviction," or words of like import, or the words "murder" and "treason," instead of the words "capital offenses," and other slight changes, the language used above is substantially that of all the Constitutions.

The only use of the term, "when the proof is evident or the presumption great," independent of statute or Constitution, we

have been able to find in the Reports, is in *Territory v. Benoit*, 1 Mart. (La.) 142, by the supreme court of Louisiana. The indictment was for a capital offense, and the motion was to have the defendant bailed. The court said: "It cannot be done. Bail is never allowed in offenses punishable by death, when the proof is evident or the presumption great." In *Hight v. United States*, reported in *Morris* (Iowa) 407, 43 Am. Dec. 111, Mr. Chief Justice Mason, speaking of this provision as it appears in the ordinance of 1787, says: "The ordinance of 1787, the benefits of which have been transmitted to us, declares that 'all persons shall be bailable, unless for capital offenses where the proof shall be evident or the presumption great.' . . .

prisoner is to be bailed or not rests in the discretion of the court. But this discretion is a judicial discretion, and the court should be guided in its exercise by the circumstances of the case, and the rules of law applicable to such circumstances. *People v. Van Horne*, 8 Barb. 168.

The courts possess the power to let to bail for murder, even after indictment, but they never exercise it unless, after a trial and a disagreement of the jury, there appears to be great doubt of a conviction ever being obtained. *Re Collins*, 11 Abb. Pr. 406.

Where the right to bail in capital cases has not been embodied in the fundamental law, the duty of affording protection in proper cases is nevertheless imperative, and in determining whether the particular case is proper or not, the constitutional principle of sister states in favor of liberty may be adopted, and bail be allowed unless the proof is evident or the presumption great. *People v. Perry*, supra.

The court will in all cases, capital or otherwise, exercise its discretionary powers, and admit to bail when, from the testimony under which the accused is held, it is indifferent whether he is innocent or guilty, —in other words when, upon an examination of the testimony, the presumption of guilt is not strong; and they are particularly called upon to bail in all cases when the presumptions are decidedly in favor of the innocence of the accused. *People v. Baker*, 10 How. Pr. 567; *People v. Hylar*, 2 Park. Crim. Rep. 570.

b. Constitutional rule.

In most of the states of the United States, the rule of the common law, as is pointed out in *Re Thomas*, has been materially modified in all except capital offenses, by constitutional enactments providing that all persons shall be entitled to bail unless for capital offenses where the proof is evident or the presumption great. Under such Constitutions the accused, even in a capital case, is entitled to bail as a matter of right, where the proof of his

guilt is not evident or the presumption not great.

The ordinance of 1787, the benefits of which have been transmitted to us, declares that "all persons shall be bailable, unless for capital offenses where the proof shall be evident or the presumption great." *Hight v. United States*, *Morris* (Iowa) 407, 43 Am. Dec. 111.

"All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great." Declaration of Rights, § 17. See also Code of 1876, § 4842." *Ex parte Nettles*, 58 Ala. 268.

The defendant is entitled to bail as a matter of right, unless the court is of opinion, on the evidence, that he is guilty of murder in the degree which may be punished capitally, that is, in the first degree. Ala. Const. art. I. § 17. *Ex parte Banks*, 28 Ala. 89.

The proof not being evident or the presumption great that the accused is guilty of the offense of murder punishable capitally, he is entitled to bail. *Ex parte Dykes*, 83 Ala. 114, 3 So. 306.

The 16th section of the Arkansas Declaration of Rights provides "that all prisoners shall be bailable by sufficient securities, unless in capital offenses where the proof is evident or the presumption great." *Ex parte White*, 9 Ark. 222.

Where the proof is not evident or the presumption strong of the guilt of the accused, he is entitled to bail in Indiana. *Ex parte Walton*, 79 Ind. 600; *Ex parte Kendall*, 100 Ind. 599.

In Kentucky the accused is entitled to bail on the charge of murder where the proof is not evident or the presumption great. *Ullery v. Com.* 8 B. Mon. 3.

One accused of a capital offense in Louisiana may be admitted to bail if the proof of the crime is not evident or the presumption great. *State v. Zummo*, 115 La. Ann. 456, 39 So. 442.

In Missouri every offense is bailable except capital offenses where the proof is evident or the presumption great. *Shore v. State*, 6 Mo. 640,

This is no new provision, but is in express terms incorporated into the Constitutions of at least one half of the states of the Union, and is the rule of action in all the rest. It is merely declaratory of the common law of the United States."

By the common law all offenses, including treason, murder, and other felonies, were bailable before indictment found. Certain restrictions were, however, enforced upon justices of the peace concerning their right to let to bail; but in the court of King's bench bail was not a matter of right in capital felonies, being limited by judicial discretion exercised according to the degree of proof of guilt. *Rex v. Marks*, 3 East, 157; *Ex parte Baronnet*, 16 Eng. L. & Eq. Rep. 361; 2 Hale, P. C. 129.

These principles of the common law are materially modified, in all except capital offenses, by our constitutional provision quoted above, and now, instead of all cases being bailable in the discretion of the court, and not as a matter of right, under § 17 of the Bill of Rights all persons shall be bailable by sufficient sureties, as a matter of right, except for capital offenses when the proof of guilt is evident or the presumption thereof is great. "If the offense is not shown by evident proof or great presumption to be one for the commission of which the law inflicts capital punishment, bail is not a matter of mere discretion with the court, but of right of the prisoner." *Ex parte Bryant*, 34 Ala. 270.

The policy pervading our jurisprudence

The 8th section of the Mississippi Bill of Rights introduces a material modification of the common law. It makes bailable all crimes "except capital offenses where the proof is evident or the presumption great." *Street v. State*, 43 Miss. 1.

Under the Bill of Rights, bail before conviction is a matter of right, and not of discretion, for all offenses except those that are capital "where the proof is evident or the presumption great." *Ibid*.

In Montana all persons are bailable by sufficient sureties except for capital offenses when the proof is evident or the presumption great. (Const. art. III. § 19.) *State ex rel. Murray v. District Ct.* 35 Mont. 504, 90 Pac. 513.

Any person charged with an offense punishable with death has the right, in Nevada, to be admitted to bail before conviction, if the proof of his guilt is not evident or the presumption of it is not great. *Ex parte Finlen*, 20 Nev. 141, 18 Pac. 827.

The Constitution of Ohio, in article 8, § 12, provides "that all persons shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident or the presumption great." *State v. Summons*, 19 Ohio, 139.

In § 8, article 2, of the Oklahoma Constitution, persons charged with capital offenses are bailable by sufficient sureties, except when the proof of guilt is evident or the presumption thereof is great. *Ex parte Westmoreland*, 2 Okla. Crim. Rep. 512, 103 Pac. 370.

In § 5770, Willson's Rev. & Anno. Stat. 1903, the accused in a capital case is entitled to bail on habeas corpus, where the evidence shows that the proof of guilt is not evident and the presumption of guilt is not great. *Ex parte Holland*, 2 Okla. Crim. Rep. 581, 100 Pac. 50.

All persons are bailable by sufficient sureties, except for capital offenses when the proof of guilt is evident or the presumption thereof is great. *Ex parte Watson*, 1 Okla. Crim. Rep. 595, 99 Pac. 161.

The clause in the Constitution of 1798, copied in the Pennsylvania Declaration of Rights, provides that "all prisoners shall 39 L.R.A. (N.S.)

be bailable by sufficient sureties, unless for capital offenses where the proof is evident or the presumption great." *Com. v. Lemley*, 2 Pittab. 362.

By the 9th section of the Bill of Rights in the Constitution of the state of Texas, it is provided that "all prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or presumption great." (O. & W. Dig. 14.) *McCoy v. State*, 25 Tex. 33, 78 Am. Dec. 520; *Ex parte Evers*, 29 Tex. App. 539, 16 S. W. 343.

In Texas, if it is not evident that the accused is guilty as charged, he is entitled to bail. *Re Wilson*, — Tex. App. —, 13 S. W. 609; *Ex parte Cosby*, — Tex. Crim. Rep. —, 54 S. W. 587.

The purpose of the constitutional provision that "all persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great," is to secure the right to bail in all cases except those in which the facts and circumstances show with reasonable certainty that the accused is guilty of a capital offense. *Ex parte Nathan*, — Fla. —, 50 So. 38.

If the proof is not evident and the presumption is not great that the defendant is guilty of the crime charged, he is entitled to bail as a matter of right. *State v. Crocker*, 5 Wyo. 385, 40 Pac. 681, 9 Am. Crim. Rep. 468.

Where, upon the evidence introduced at the hearing on the application for bail, the appellate court cannot say that the accused is guilty of murder in the first degree, he is entitled to bail as a matter of right, in Alabama. *Ex parte Banks*, 28 Ala. 89.

Under a constitutional provision that "all persons shall be bailable upon sufficient sureties, except for capital offenses where proof is evident or presumption great," the accused is entitled to bail as a matter of right where the proof is not evident or the presumption great. *State v. Kauffman*, 20 S. D. 620, 108 N. W. 246.

A constitutional provision that "all persons shall be bailable by sufficient sureties,

is to commit as little as possible to judicial discretion, presuming that "that system of laws is best which confides as little as possible to the discretion of the judge, —that judge is best who relies as little as possible upon his own opinion." In pursuance to this policy, even since the provisions, "that all persons shall be bailable by sufficient sureties, except for capital offenses where the proof of guilt is evident or the presumption thereof is great," became a part of the settled constitutional and statutory law of nearly all the states of the Union, the courts have endeavored, with more or less success, to formulate some stable rule to guide their judgment in cases like the one at bar. Thus it was said by the court of common pleas of Philadelphia

county in an early case, construing exactly the same provision in the Pennsylvania Constitution: "A safe rule, where a malicious homicide is charged, is to refuse bail in all cases where a judge would sustain a capital conviction if pronounced by a jury on such evidence of guilt as was exhibited to him on the hearing of the application to admit to bail." *Com. ex rel. Chauncey v. Keeper of Prison*, 2 Ashm. (Pa.) 227.

This doctrine is approved in a *per curiam* opinion in *Re Troia*, 64 Cal. 152, 28 Pac. 231, where the court adopts the above excerpt from the Pennsylvania case as part of its syllabus. Simrall, J., in *Street v. State*, 43 Miss. 1, cites the rule laid down in the same case, approvingly, saying:

unless for capital offenses when the proof is evident or the presumptions great," guarantees the right to bail before trial in capital cases, unless the proof of the commission of the capital offense is evident or the presumption thereof is great. *State ex rel. West v. Collins*, 10 N. D. 464, 88 N. W. 88; 12 Am. Crim. Rep. 41.

One charged with a capital offense is entitled to bail as an absolute right, "unless the proof of guilt is evident or presumption thereof great." *State v. Hartzell*, 13 N. D. 356, 100 N. W. 745.

Where, on the application for bail, the testimony on the subject of incentive was of such a character as to induce the belief that it was not a case in which proof was evident or the presumption great, the prisoner was held entitled to bail. *Zembrod v. State*, 25 Tex. 519.

Where an indictment against the accused is framed with reference to a statute under which the defendant cannot be convicted for a higher offense than murder in the second degree, although he may be guilty of murder in the first degree, and although he might have been convicted on that evidence under an indictment for murder framed according to common law or the Code, he is entitled to the bail as a matter of right. *Ex parte Howard*, 30 Ala. 43.

The accused is entitled to bail as a matter of right, when the only evidence against him is circumstantial, unless it excludes to a moral certainty every reasonable hypothesis but that of his guilt. *Ex parte Acree*, 63 Ala. 234.

In *Ex parte Rothschild*, 2 Tex. App. 560, the defendant was refused bail although the evidence against him was circumstantial.

A statute providing that "no person charged with the commission of an offense capitally punished shall be admitted to bail as a matter of right, when he is not tried at the first term of the court at which he was properly triable, if the failure to try his case proceeded from the nonattendance of the state's witnesses, where an affidavit is made satisfactorily accounting for their absence," etc., does not entitle the accused as a matter of right to admission to bail 39 L.R.A. (N.S.)

in the absence of such affidavit. *Ex parte Chaney*, 8 Ala. 424.

As stated in *Re Thomas*, where the proof of the defendant's guilt is evident or the presumption is great, although bail may still be granted, it is not a matter of right, but a matter of discretion.

If the proof is evident or the presumption great, if the evidence is clear and strong, leaving a well-guarded and dispassionate judgment to the conclusion that the offense has been committed, that the accused is the guilty agent, and that he would probably be punished capitally if the law is administered, bail is not a matter of right. *Ex parte McAnally*, 53 Ala. 495, 25 Am. Rep. 646.

All persons have the constitutional right to be bailed, except when the proof is positive or the presumption great that they have been guilty of a capital offense; and even when the proof against them is of this character, they may be admitted to bail within the sound discretion of the presiding judge, if there be exceptional circumstances that seem to demand it, such as serious and probably fatal injury to health, or unusual and protracted delay upon the part of the state in bringing the prisoner to trial. *Ex parte Bridewell*, 57 Miss. 39.

A constitutional provision that "excessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great" (Bill of Rights, § 8), makes the granting of bail mandatory in all cases not excluded by the exception, but does not prohibit it in cases falling within the exception. *Ibid*.

A constitutional provision that "all persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great," does not forbid bail in a capital case where the proof of guilt is evident or the presumption thereof is great. The Constitution is silent as to granting or withholding bail in a capital case where the proof of guilt is evident or the presumption thereof is great. On the one hand, the Constitution

"There is much force in the words of the Pennsylvania court in the case of *Com. ex rel. Chauncey v. Keeper of Prison*, 2 Ashm. (Pa.) 234." *Street v. State*, supra, was in the supreme court on a writ of error issued to the district court of Yazoo county, and Justice Simrall stated as a reason for adopting the Pennsylvania rule, that "it would be going very far in the appellate court to reverse the judgment of the court who saw, heard, and observed the witnesses." *Ohio*, in *State v. Summons*, 19 Ohio, 139, *Indiana*, in *Lumm v. State*, 3 Ind. 293, *California*, *Re Troia*, 64 Cal. 152, 28 Pac. 231, *Texas*, in *Ex parte Foster*, 5 Tex. App. 625, 32 Am. Rep. 577, and possibly one or two other cases, refer to the Pennsylvania case approvingly. But

most of these cases were in the supreme courts on appeal, and in others of them the rule has since been disapproved by the highest courts of the same states.

Another line of decisions hold that the terms, "when the proof of guilt is evident or the presumption thereof is great," are as definite to the legal mind as any words of explanation could make them. In the states where this rule prevails, the courts, when they refuse bail, do so with the statement "that bail should be refused where the proof of guilt is evident or the presumption thereof is great;" and when bail is granted, by the statement, "that where the proof of guilt is not evident, nor the presumption thereof great, bail should be allowed in capital cases." Thus, in Cali-

itself does not give the right to bail in the class of cases last mentioned; and on the other hand, the Constitution does not inhibit the legislature from doing so. *State v. Collins*, 10 N. D. 464, 88 N. W. 88, 12 Am. Crim. Rep. 41.

Although the facts presented to the court on the application for bail as a matter of right may not be sufficient to entitle the accused thereto, this does not mean that he may not present facts which might move the court to admit him to bail as a matter of discretion. *Ibid*.

In case the proof of guilt is evident or the presumption thereof is great, the granting or refusal of bail is a matter of judicial discretion. *State v. Hartzell*, 13 N. D. 356, 100 N. W. 745.

Prisoners charged with offenses punishable by death are not admitted to bail in Minnesota where the proof is evident or the presumption great. *State v. Bartlett*, 70 Minn. 199, 72 N. W. 1067.

A statute rendering the admission to bail a matter of discretion where the punishment is death, and forbidding admission to bail when the proof is evident or the presumption great, conflicts with a constitutional provision that "all persons shall be bailable by sufficient securities, unless for capital offenses where the proof is evident and the presumption great." *People v. Tinder*, 19 Cal. 539, 81 Am. Dec. 77.

III. Who may admit to bail.

As has been pointed out, it is the court of King's bench in England which has the power to grant or refuse bail. See supra, II. a.

In Arkansas, judges of the county courts, justices of the peace and sheriffs have no authority to admit to bail in capital cases after indictment. *Ex parte Kittrel*, 20 Ark. 499. The court said: "The finding of an indictment against a person after a capital offense raises such presumption of his guilt, for the purpose of capture and detention for trial, as to preclude him from the right of bail until the presumption thus 39 L.R.A.(N.S.)

raised against him is rebutted by an affirmative showing on his part. To hear the showing and determine upon the sufficiency in cases of so much magnitude is a matter of the greatest importance, both to the accused and to the state, and would seem to be the appropriate province of the court or judge intrusted, by the Constitution, with the trial of such causes; and in the absence of any clear and explicit act attempting to confer upon inferior officers authority to hear and determine a matter of so much consequence in the progress of capital cases, we are disposed to doubt that such was the intention of the legislature."

A judge of the circuit court only has power, after indictment for a capital offense, to grant bail, and he can make an order in term time or vacation. *State ex rel. Atty. Gen. v. Williams*, 97 Ark. 243, 133 S. W. 1017.

In *State v. Abbot*, R. M. Charl. (Ga.) 244, it was held that a judge of the superior court of Georgia may exercise all the powers in relation to bail which appertain to the court of King's bench of England or a judge thereof in vacation.

A circuit court commissioner has power to admit to bail a respondent committed for trial upon a charge of murder in the first degree, except in cases where the proof is evident or the presumption great. *Elder v. Garner*, 97 Mich. 617, 55 N. W. 460.

In *People v. Shattuck*, 6 Abb. N. C. 33, the court said that the power of the superior court of the city of Buffalo to bail in a capital case was undisputable, and that this power was incident to the power to hear and determine the case.

The power of the supreme court, or of a justice thereof, to bail in all cases, whether it be treason, murder, arson, or any other offense, is indisputable. *People v. Van Horne*, 8 Barb. 158; *People v. Perry*, 8 Abb. Pr. N. S. 27.

The court of general sessions, like the court of King's bench, has the power of bailing in all cases. *State v. Hill*, 3 Brev. 89.

The Supreme Court of the United States has power to admit to bail on a charge of

fornia, in *Ex parte Walpole*, 85 Cal. 362, 24 Pac. 657, Fox, J., without commenting on the rule laid down in *Re Troia*, supra, says: "On the question of admission to bail, the offense charged is punishable with death, unless the jury fix it at imprisonment for life. The defendant, therefore, cannot be admitted to bail if the proof of his guilt is evident or the presumption thereof great." Colorado, Kansas, Kentucky, and Texas in several cases have followed this rule.

This court does not look with favor on either of the above rules. The first one seems to us to be unmindful of the inherent right to life, liberty, and the pursuit of happiness of the citizen, and casts burdens upon those charged with capital offenses

high treason. *United States v. Hamilton*, 3 Dall. 17, 1 L. ed. 490.

The judiciary act of 1789 provides that the Supreme Court or a judge of a district court of the United States may, in any case, even in capital punishment, taking into consideration all the circumstances, admit to bail, exercising a sound discretion. If an indictment was found against the prisoner under a law by which he could not be punished with death, then, as a matter of right, he could give bail. *Re Davis, Chase*, Dec. 1, Fed. Cas. No. 3,821a.

In *Rex v. Fortier*, Rap. Jud. Quebec, 13 B. R. 251, 1 Ann. Cas. 10, a forgery case, it is said: "All superior courts of criminal jurisdiction or one of their judges, and also in this province a judge of the superior court, have authority and power to admit persons accused of any crime whatsoever (including treason and capital offenses), to bail; but, as respects indictable offenses which, before the enacting of the Criminal Code, were felonies, it is within their discretion to admit or refuse the application for bail; while with respect to indictable offenses which were formerly misdemeanors, it must be allowed, as the accused is entitled to it as a matter of right. In all cases except misdemeanors, the granting or refusing bail is a matter which rests in the sound discretion of the court or judge, and is not as of right."

An appeal does not lie from a judgment of the district court refusing bail. *Yarbrough v. State*, 2 Tex. 519.

A prisoner charged with an offense punishable by death cannot be admitted to bail by a justice of the peace, in Minnesota. *State v. Bartlett*, 70 Minn. 199, 72 N. W. 1067.

In Oklahoma, a justice of the peace is without authority of law to admit to bail upon arrests in criminal cases where the punishment may be death. Section 5770, *Wilson's Rev. & Anno. Stat. (Okla.)* 1903, provides: "Bail, by sufficient sureties, may be admitted upon all arrests in criminal cases where the punishment may be death, unless the proof is evident or the presumption great; and in such cases it shall be

not contemplated by the law. The second is too general to be useful as a guide to the judgment of the court in weighing the evidence when the liberty of the citizen is in the balance. Primarily a person charged with a capital offense cannot demand bail as a matter of right, since, upon ascertaining the character of the charge against the accused, the next question would be as to the degree of proof and the nature of the presumption of guilt. Upon an application to the supreme court for bail, by writ of habeas corpus, after commitment for a capital offense by a justice of the peace, the burden is upon the petitioner to show that he is illegally deprived of his liberty. *Ex parte Hammock*, 78 Ala. 414; *Ex parte Rhear*, 77 Ala. 92; *Ex parte*

taken only by the supreme court or a district court or by a justice or judge thereof. . . ." *Ex parte Westmoreland*, 2 Okla. Crim. Rep. 512, 103 Pac. 370.

IV. Bail before indictment.

On the question of bail before indictment, the examination before the coroner should be looked into to ascertain whether a crime has been committed, and, if so, the strength of the proof to support it. *People v. Beigler*, 3 Park. Crim. Rep. 316.

In all cases, on habeas corpus, previous to indictment, the court will look into the depositions before the magistrate, or before the coroner's inquest, and, though the commitment be full and in due form, yet, if the testimony proves no crime, the court will discharge or bail; and though the commitment be defective, yet, if the deposition contain evidence of an offense not bailable, the prisoner will be remanded. *Savage, Ch. J.*, in *Ex parte Taylor*, 5 Cow. 39.

Where the examination before the coroner shows that, although the defendant is charged with murder, his crime, if any, does not exceed the grade of manslaughter, and fair doubt exists whether the defendant has committed any felony, he should be admitted to bail. *People v. Beigler*, supra.

The court may refuse to admit to bail although the coroner's jury has failed to charge a felonious homicide. *State v. Abbot, R. M. Charlit. (Ga.)* 244.

The fact that the charge against the accused has been presented to the grand jury, which has failed to find an indictment, does not necessarily entitle him to bail. The court said: "Ordinarily, the fact that a grand jury has investigated the charge and refused to find a bill ought to be sufficient to satisfy a court that the proof is not evident nor the presumption great, but, notwithstanding such action upon the part of the grand jury, the court, in a case like this, would have the right, and it would be its duty, upon the application of petitioner, to hear the testimony and decide for itself whether the proof of the defendant's guilt was evident or the presumption great. This

Vaughan, 44 Ala. 417. On this question there is little conflict in the authorities. Alabama, California, Florida, Indiana, Nevada, New Jersey, New York, Utah, and Wyoming all support the proposition. Texas seems to be the only state placing the burden of proof upon the state to show that the offense is a capital one and that the proof is evident; but even there the doctrine of the text prevailed until it was upset in the case of *Ex parte Newman*, 38 Tex. Crim. Rep. 164, 70 Am. St. Rep. 740, 41 S. W. 628.

We believe that, with the burden of proof on the petitioners, if, after hearing the whole evidence introduced on the application for bail, it is insufficient to generate in the mind of the court a reasonable

doubt whether the accused committed the act charged, and in doing so they were guilty of a capital offense, bail should be refused. But we do not wish to be understood as laying this down as a hard and fast rule, to which there may be no exceptions. There may be exceptional circumstances, such as the serious and probably fatal injury to health, or unusual and protracted delay upon the part of the state in bringing the prisoner to trial, that may warrant the court hearing all the evidence to admit to bail, when the proof of guilt is evident or the presumption thereof is great. The admission to bail, however, under these circumstances, is not a constitutional right, but a matter resting in the sound judicial discretion of the trial judge, who should not

is a question upon which courts and judges are invested with a legal discretion, which is, at all time, to be exercised with sound judgment, upon a full consideration of all the facts and circumstances of each particular case; and when it appears that the presiding judge has acted, no other judge would be warranted in discharging the petitioner or admitting him to bail, unless it clearly appeared that the presiding judge had acted arbitrarily in the premises, and thereby abused his discretion. *Ex parte Isbell*, 11 Nev. 295.

V. Bail upon indictment.

Under the common-law practice, bail was generally refused after indictment, because the court could not know on what evidence the grand jury acted. Under Constitutions containing the usual provisions with reference to bail, some courts hold that the accused will be admitted to bail after indictment, the indictment rendering the presumption of the defendant's guilt sufficiently great to prevent him from demanding his release as a matter of right.

At common-law, bail, it appears, in all felonies, was a matter of discretion in the court of King's bench. The return of the officer holding the person in custody was conclusive of the facts stated in the return. Before indictment found, an inquiry was had based upon certain written testimony taken on preliminary examinations, but after an indictment for a capital offense, the accused was presumed guilty for all purposes, except that of a trial before a petit jury; and this presumption was so strong as to preclude the party to bail unless in very exceptional cases. The usual practice was to deny bail after a grand jury had returned an indictment for a capital offense, and this practice was based upon the consideration that the testimony before the grand jury was not preserved, and never permitted to be divulged. *Rigdon v. State*, 41 Fla. 308, 26 So. 711.

The practice of the courts and judges under the habeas corpus act of Charles II., and of the American courts and judges 39 L.R.A. (N.S.)

where the common law was not modified, was to remand to custody where the return showed that the prisoner was under indictment for a capital crime, and they would not hear affidavits or witnesses in exculpation. *Street v. State*, 43 Miss. 1.

The "usages of the law" had so shaped and regulated the discretion of the courts that generally bail was denied after indictment for a felony, unless some special motive was shown, though the felony was not capitally punished; and that in capital cases the motive or reason for bail must arise in point of time after indictment, such as the delay by the prosecution to bring on the trial, the danger to the life of the accused occasioned by the imprisonment, etc. *Ibid*.

According to the English practice, the court looks alone to the written evidence under which the defendant is held, and cannot receive extrinsic testimony; all offenses are bailable before indictment, unless from an examination of the depositions taken before the committing magistrate, it appears that the defendant is guilty of a capital felony; and after an indictment for an offense punishable capitally, the court cannot inquire into the merits, for the reason that the evidence on which the indictment was found is not in writing, and, if it were, could not be disclosed, and the court, having no means of ascertaining otherwise, will therefore always imply that the grand jury has not indicted on insufficient proof, and so refuse to bail. *Ex parte Bryant*, 34 Ala. 270.

At the present day, bail is usually refused in England after the grand jury have returned a true bill for murder. *Com. v. Lemley*, 2 Pittsb. 362.

The court will not admit the prisoner to bail after the grand jury has found an indictment against him for murder. *Reg. v. Chapman*, 8 Car. & P. 558.

In *Reg. v. Guttridge*, 9 Car. & P. 228, the court refused to bail the accused after indictment for rape.

After an indictment is found, the court will not go behind it, to inquire into the merits. *Ex parte Bryant*, 34 Ala. 270.

grant it save under extraordinary circumstances. The rule herein laid down is supported by an array of well-settled cases. Those we particularly rely on are *Ex parte McAnally*, 53 Ala. 495, 25 Am. Rep. 646; *Ex parte Bridewell*, 57 Miss. 39; *Ex parte Smith*, 23 Tex. App. 100, 5 S. W. 99. In *Ex parte McAnally*, Brickell, Ch. J., states the rule thus: "If the evidence is clear and strong, leading a well-guarded and dispassionate judgment to the conclusion that the offense has been committed, that the accused is the guilty agent, and that he would probably be punished capitally if the law is administered, bail is not a matter of right." In *Ex parte Bridewell*, Chalmers, J., states the rule as follows: "Upon an application for bail by writ of habeas

corpus, the burden is upon the relator to show that he is illegally deprived of his liberty. . . . If, upon the whole testimony adduced . . . [the court] entertains a reasonable doubt whether the relator committed the act, or whether in so doing he was guilty of a capital crime, he should admit him to bail in such sum and with such sureties as will in his opinion certainly insure his appearance."

We wish here to quote with approval the language of Chalmers, J., in rejecting the Pennsylvania rule laid down in *Com. ex rel. Chauncey v. Keeper of Prison*, 2 Ashm. (Pa.) 227: "The error of the Pennsylvania rule is in failing to give due effect to a verdict of conviction, or in overlooking the vast change it effects in

Admission to bail cannot be claimed as a matter of right under an indictment for a capital offense. *Ex parte White*, 9 Ark. 222.

An indictment furnishes no presumption of guilt against a prisoner when he is upon his trial; but so far as it regards all intermediate proceedings between the indictment and trial, it furnishes the very strongest possible presumption of guilt, if a grand jury is the appropriate organ of the law to decide in the first instance upon the guilt or innocence of the accused, and their finding of a true bill is conclusive, so far as to put him upon his trial and to control all the intermediate proceedings. *Hight v. United States*, Morris (Iowa) 407, 43 Am. Dec. 111.

A habeas corpus act providing that "the officer before whom the party shall be brought on such writ shall immediately after the return thereof proceed to examine into the facts contained in such return and into the cause of the confinement or restraint of such party; whether the same shall have been upon commitment for any criminal or supposed criminal matter or not," — was held to contemplate cases where no indictment had been found. *Ibid.*

In Louisiana the court will not go into the merits of the case after the finding of an indictment against a prisoner charged with a capital crime, except under circumstances of the most extraordinary character. *State v. Merrick*, 10 La. Ann. 424.

The constitutional provision that all persons shall be bailable, unless for capital offenses where the proof is evident or the presumption great, is common to every Constitution this state has had, and its uniform judicial interpretation has been that the finding of a bill for a capital offense creates a presumption of guilt sufficiently strong to preclude further inquiry into the merits of the prisoner's defense on an application for bail, and this presumption extends to all purposes except to that of a fair and impartial trial before a petit jury. *State ex rel. Hunter v. Brewster*, 35 La. Ann. 605.

The fact that a grand jury has found a

bill for a capital offense is of itself a sufficient presumption of guilt to preclude an inquiry into the merits of the prisoner's case upon a habeas corpus, or upon an application to be bailed. *Ibid.* To the same effect. *State ex rel. Rice v. Butler*, 40 La. Ann. 3, 3 So. 350.

In *Territory v. Benoit*, 1 Mart. (La.) 142, it was held that after indictment for a capital offense the prisoner could not be bailed. The court said: "Bail is never allowed in offenses punishable by death when the proof is evident or the presumption great. On a coroner's inquest finding a person guilty of a capital crime, the judges have often looked into the testimony which the coroner is bound to record, and when they have been of opinion that the jurors had drawn an illogical conclusion, admitted the party to bail. But as the evidence before the grand jury is not written, and cannot be disclosed, the same discretion and control cannot be exercised, and the judges cannot help considering the finding of the grand jury as too great a presumption of the defendant's guilt to bail him. We recollect no case in which it was done."

Affidavits or oral testimony as to the guilt or innocence of the accused cannot be received to repel the presumption of guilt arising from the indictment, unless special and extraordinary circumstances exist to require it. *People v. Tinder*, 19 Cal. 539, 81 Am. Dec. 77.

The granting of bail after indictment in the exceptional cases is a matter of discretion on the part of the court. *Territory v. McFarlane*, 1 Mart. (La.) 216, 5 Am. Dec. 706.

Bail will not be allowed after indictment, where the accused stood by and saw a companion beat the deceased with a stick, and urged him to beat the deceased well, it appearing that the accused and his companion were gamblers who had been informed against by the deceased, and it not being shown how the assailant's anger was excited. *Ibid.*

When the grand jury find a bill for a capital offense, the party charged lies, from the finding alone, under such a violent

the attitude of the party. By it the legal presumption of innocence is overthrown, all doubtful questions of fact are resolved in favor of the state, and the credibility or noncredibility of witnesses is conclusively established." "A verdict of conviction where no error of law has intervened will never be set aside unless manifestly wrong, or, as is sometimes said, if there be any evidence to support it. To say that bail will only be granted where there is no evidence showing guilt, or where the proof of guilt is so slight upon the whole testimony that a conviction would be manifestly wrong, is plainly inconsistent with the constitutional requirement that it shall be granted in all cases except where the proof is evident or the presumption great."

suspicion of guilt that the court will instantly commit him, if he be present, or direct a *capias* against him; and as the trial in the ordinary course is not long delayed, it is the practice of the court not to lend its ear to a motion for bail. *Ibid*.

Upon an application for bail, the court cannot go behind the indictment. *People v. McLeod*, 1 Hill, 377, 37 Am. Dec. 328.

The court cannot after indictment look beyond the minutes of the grand jury. *People v. Shattuck*, 6 Abb. N. C. 33.

Generally speaking, bail will be refused after indictment in any case where the punishment is death or a degrading imprisonment because the indictment makes a strong presumption of guilt, and experience teaches that in such cases the accused will attempt to elude the demands of justice. But where it stands indifferent, whether the prisoner be guilty or innocent, bail ought in most cases to be allowed. *People v. Perry*, 8 Abb. Pr. N. S. 27.

In *Burr's Trial*, Colonel Burr was admitted to bail before indictment; and after the grand jury had returned a bill against him for treason, he again moved to be admitted to bail, and after considerable discussion, Chief Justice Marshall said that the act of Congress, in express terms, enabled the court to bail a prisoner arrested for treason. That there was no distinction between treason and other criminal cases, as to the power to bail upon arrest; but that an arrest might be after a finding by a grand jury, in which case the finding of the grand jury would be evidence on which the court would have to judge whether the party arrested ought to be bailed. That they were to exercise their discretion "according to the nature and circumstances of the offense, and of the evidence and usages of law." That "usages of law" were to be found in the common law and the practice of courts; but that he doubted extremely whether the court had the right to bail any person after an indictment for treason had been found against him by a grand jury, especially in a case where the government was heard with its testimony, and there were no extraordinary cir-

Both of the foregoing cases were reviewed in *Ex parte Smith*, *supra*. Mr. Justice Willson, speaking of the rule laid down in the case of *McAnally*, *supra*, said: "With regard to the second rule, it is not, as we can perceive, objectionable. It is, as we understand it, in harmony with the constitutional requirement that bail shall be granted unless the proof is evident. It is, in effect, the same rule stated as a correct one in *Bridewell's Case*, *supra*, but in different language."

We approve the Alabama rule, as stated in the *McAnally Case*, in the main; but we believe that the part reading, "and that he would probably be punished capitally if the law is administered," is a little more liberal in favor of the accused than a fair

circumstances (as an alibi clearly proved) to repel the effect of the finding of the jury; and that he wished authorities produced to satisfy the court that it had the power.

The chief justice insisted on the production of authorities, and, none being produced by Colonel Burr or his counsel, the prisoner was committed. 1 *Burr's Trial*, 306, 312.

In a number of jurisdictions, however, the indictment does not furnish conclusive evidence that the proof of the defendant's guilt is evident or the presumption great.

The general rule is that bail will be refused after indictment in capital cases; for the indictment furnishes a strong presumption of guilt, and it is supposed the accused will almost always attempt to leave and elude the demands of justice. Hence, in all such cases there must be facts and circumstances which counteract or overcome this presumption, before bail will ever be admissible. *Re Alexander*, 59 Mo. 598, 21 Am. Rep. 393. To the same effect, *Ex parte Goans*, 99 Mo. 193, 17 Am. St. Rep. 571, 12 S. W. 635.

Under the Arkansas Constitution the court has the right to go behind an indictment for a capital offense to investigate the merits of the case with a view of letting the prisoner indicted to bail. *Ex parte White*, 9 Ark. 222.

The law requires the accused to make an affidavit of merits to warrant the court in going behind the indictment, and the affidavit must state the particular facts relied on. A general allegation of innocence is not sufficient. *Ibid*.

The court may in capital cases go behind the indictment on the application for bail. *State v. Hill*, 3 Brev. 89.

The petitioner is entitled, upon habeas corpus, where he is indicted for murder or other capital offense, to produce such evidence as may operate to convince the court that he is guilty, if at all, of an offense of such grade that he is entitled to be discharged on bail, or that there are such strong doubts that, upon the cases as presented, a jury should not convict of the capital offense. *Finch v. State*, 15 Fla. 633.

construction of the provision under discussion warrants. Under the statutes of Oklahoma the jury have the power in all cases of murder to determine whether the punishment shall be death or imprisonment for life; but this does not make the offense less capital. It would seem to us that a rule that would require the court to speculate as to what punishment a jury might probably inflict upon any given state of facts would be more harmful than helpful. Speaking of the rule of the Pennsylvania case, *supra*, Justice Willson, in *Ex parte Smith*, said: "With respect to the first rule, we are convinced that it is wrong and should no longer be recognized as a guide. It is ably and justly criticized in *Bridewell's Case*, 57 Miss. 39."

The indictment charging a capital offense is not conclusive upon such application, under the statute, as to the character of the testimony. *Holley v. State*, 15 Fla. 688, 2 Am. Crim. Rep. 250.

Until the decision in *Wray's Case*, 30 Miss. 681, the practice in that state was not uniform. In some of the circuits the judges held the indictment for a capital felony as raising conclusively the "presumption great," and declined to examine witnesses. Since *Wray's Case*, the practice has become uniform and evidence *abounds* the indictment is received and this has been considered as settled. *Street v. State*, 43 Miss. 1.

The accused is entitled to go behind the indictment to establish facts which he alleges, to show that his crime, if any, is not a capital offense, so as to entitle him to bail as a matter of right. *Ex parte Finlen*, 20 Nev. 141, 18 Pac. 827.

The prisoner may be admitted to bail after indictment, where the evidence produced at the hearing satisfies the judge that the offense is not capital. *Com. v. Lemley*, 2 Pittsb. 362.

An indictment for murder in the first degree is not conclusive against bail, especially where the grand jury have no right to distinguish between the degrees of murder, so that the court cannot know whether the grand jury record the crime as murder in the first or second degree. *Ibid*.

The great weight of authority is in favor of the view that an indictment for a capital offense is strong *prima facie* showing that the accused is rightly held in custody, and not entitled to bail. That the indictment is not conclusive has been decided and fully recognized by this court. *Rigdon v. State*, 41 Fla. 308, 26 So. 711.

An indictment for murder duly returned implies *prima facie* that the parties indicted have no right to bail. *Ex parte Kendall*, 100 Ind. 599.

Under a Constitution in the usual form, the legislature cannot make an indictment conclusive evidence that the proof is evident or the presumption great, although it may be made *prima facie* evidence of

And the doctrine of this case is not without support from the courts where the common-law rule prevails. The law is laid down to the same effect in 4 Bl. Com. 299; and in *Rex v. Marks*, 3 East, 165, the rule is advanced in these cautious and qualified terms: "The court will bail whenever there is any doubt on the law or the facts in the case." And again in New York, a state following the common-law rule, we find the following in relation to a case similar to the one at bar: "If there be no reasonable doubt of the prisoner's guilt, he ought not to be bailed." *Ex parte Tayloe*, 5 Cow. 39. The same doctrine is sanctioned in *State v. McNab*, 20 N. H. 160, and *State v. Rockafellow*, 6 N. J. L. 332. The rule is practically the same in the Federal

that fact. *State v. Crocker*, 5 Wyo. 385, 40 Pac. 681, 9 Am. Crim. Rep. 468.

The indictment, while not of itself conclusive against the right to bail, may be taken into consideration by the court, together with the evidence, in determining the question of admission to bail. It may, in a doubtful case, have the effect of turning the scale. It should not be entirely ignored, but it is a circumstance, like any other, to be taken into consideration for whatever effect in the light of the other facts, and together with them, it may have upon the mind of the court or judge. *Ibid*.

But where an indictment has been found, courts and judges should proceed with great caution in their examination of the facts, that the prisoner may not be improperly admitted to bail, and only in case he is clearly entitled to such relief. *Lynch v. People*, 38 Ill. 494.

The presumption is in favor of the correctness of the action of the grand jury. *State v. Herndon*, 107 N. C. 934, 12 S. E. 268.

An indictment returned by properly constituted authorities stands with all presumption in favor of its truth, until its force is broken by showing that the grand jury acted upon insufficient evidence. This showing may be made by fairly disclosing the knowledge of the witnesses of the state. *Brown v. State*, 147 Ind. 28, 46 N. E. 34.

On the application for bail after indictment, the inquiry should not be limited to determining the probable degree of the homicide. Such inquiry should include the determination of the character of the proof, or the strength of the presumption respecting whether or not the defendant did the killing or was connected with it as a guilty agent. *State v. Crocker*, *supra*.

Under a statute (Code § 1161) providing "that any justice of the supreme court or judge of the superior or criminal court shall have power to bail persons committed to jail charged with crime in all cases," the court has the right to go behind the indictment and examine the evidence. The court said: "It may happen,

courts: "On testimony given in court on the return of a writ of habeas corpus, if it is clear to the mind of the judge that a conviction for murder should not take place, he will order the prisoner to give bail for his appearance." *United States v. The Marshal, 2 Hayw. & H. 205, Fed. Cas. No. 15,725a.*

The point is made that, as there is a conflict in the testimony adduced at the hearing, the proof of guilt cannot be said

to be evident or the presumption thereof great. This contention cannot be sustained. "To the mind of the tribunal passing upon the evidence the guilt of the applicant of a capital offense may be evident, that is, clear, strong, not admitting of a reasonable doubt, and yet there may be evidence in conflict with such inculpatory evidence. It is not all conflicting exculpatory evidence that will have the effect to raise a reasonable doubt of guilt, and destroy or

and often does, that, upon hearing the state's evidence only, the conviction is ample to justify the grand jury in finding a true bill for murder; yet, upon the examination of the witnesses for both sides by a judge, upon the writ of habeas corpus, it may appear that there was no probable cause as to the charge of murder, but that it is a case of manslaughter, and therefore bailable, or excusable homicide, or it may be that there is no probable cause, upon the whole evidence, that the defendant was the guilty party. The defendant should not be deprived of this right guaranteed to him by the Constitution, and be compelled to lie in jail, probably for months, when an intelligent judge, upon hearing the whole evidence, the benefit of which is denied to a grand jury, might properly adjudge that there was no probable cause as to the capital offense at least, and admit the defendant to bail." *State v. Herndon, supra.*

The reasons for the English rule that bail should be refused after indictment, — that is, that the testimony before the grand jury is not obtainable, — is inapplicable in the United States, where the testimony before the grand jury is written and obtainable by the court; but the court may still deem the presumption of guilt raised by the indictment so strong as to bring the accused within the exception to the constitutional rule that all persons are entitled to bail. The strongest reason for not going behind the indictment seems to be that it practically necessitates a double trial. Texas furnishes many cases of this kind. See *infra*, VIII. c.

In *Reg. v. Andrews, 2 Dowl. & L. 10, 1 New Sess. Cas. 199, 13 L. J. Mag. Cas. N. S. 113, 8 Jur. 779*, bail was refused after indictment for murder, on the ground that the court could not discover upon what evidence the jury acted.

In *Mohun's Case, 1 Salk. 104*, it is said that if a man be found guilty of murder by the coroner's inquest, the court sometimes bails him, because the coroner proceeds upon depositions taken in writing which the court may look into. Otherwise if a man be found guilty by the grand jury, because the court cannot take notice of their evidence, which they by their oaths are bound to conceal.

The prisoner cannot be admitted to bail after indictment, on affidavits tending to show that he was not guilty of the crime charged. *State v. Dew, 1 N. C. 88 (Taylor, 142)*. The court said: "When a man is 39 L.R.A. (N.S.)

found guilty by a coroner's inquest, the court may look into the depositions returned; and if it appear that the jury have drawn wrong inferences, may admit the prisoner to bail; but the secrecy which accompanies the evidence delivered to the grand jury precludes the court from knowing its amount."

Even before indictment the right of inquiry is limited to the depositions and proofs on which the commitment was ordered. *People v. McLeod, 1 Hill, 377, 37 Am. Dec. 328.*

Where the court has access to the minutes of the grand jury, the question of bail is open to consideration to the same extent as it would be if applied for before indictment, for the court can know on what testimony the indictment was found. *People v. Hyler, 2 Park. Crim. Rep. 570.*

In *People v. Van Horne, 8 Barb. 158*, it is said: "The evidence taken by the grand jury is not now secret, and they are not by their oath required to conceal it. (2 Rev. Stat. 811, 3d ed. §§ 30, 31.) Grand juries now, under the provisions of the Revised Statutes (2 Rev. Stat. 811, § 30), appoint a clerk to take minutes of the evidence given before them, and these minutes are delivered to the district attorney. On an application to admit a prisoner to bail in a case of felony, after indictment, I see no more objection to the court's looking into the minutes of the evidence kept and preserved by the grand jury, and delivered by the district attorney, than there is in their looking into the depositions taken by a coroner or a committing magistrate, on a like application made before indictment. We therefore think that, under the Revised Statutes, an indictment should not, on an application to admit to bail, be regarded as any more conclusive as to the guilt of the prisoner, than the coroner's inquest or the adjudication of a committing magistrate."

In *Hight v. United States, Morris (Iowa) 407, 43 Am. Dec. 111*, it is said: "In the first place, the officer who issues the writ of habeas corpus, if he can look behind the indictment and go into original proof, to ascertain whether the grand jury had sufficient grounds for their action, may discharge the prisoner altogether. A judge would thus become an appellate tribunal to reverse or affirm the decisions of grand juries, and may thwart the action of that body all together, if he sees proper. Again, if the finding of a grand jury does not supersede the necessity of a reinvestiga-

impair the force of 'evident proof' made by inculpatory evidence. It is for the judge or court who hears the testimony to consider the evidence as a whole, and if, by the entire evidence, a reasonable doubt of the applicant's guilt of a capital offense is not generated, the proof is evident and bail should be denied." Ex parte Smith 23 Tex. App. 127, 5 S. W. 102.

We will not comment upon the evidence, lest our comments should influence the final

trial. To decline to do so seems to be the uniform practice, as it has always obtained in such cases. We will only say that, applying the rules herein enunciated to the facts as shown by all the evidence before us, we are of the opinion that the proof of guilt is evident and the presumption thereof is great. We do not wish to be understood as saying that the petitioners are guilty of murder, or that their innocence of the offense charged, or of a lower

tion of the original evidence by the judge, much less would a previous examination of the case under a writ of habeas corpus issued by that same judge, or one of his associates, have this effect. What then is to prevent a prisoner from having a new examination every day of his confinement, until, having wearied out the witnesses and the prosecutor, or for some other cause, there becomes a failure of evident proof, or great presumption of guilt? When that failure takes place, must not the prisoner be discharged, independent of all the knowledge which the officer has acquired by former examinations, for why require an examination of original testimony, unless the officer is to be governed thereby?"

An indictment, being an accusation based upon legal testimony of a direct and positive character, and requiring the concurring judgment of at least twelve of the grand jurors, furnishes of itself a presumption of the guilt of the accused too great to entitle him to bail under the Constitution as a matter of right, or as a matter of discretion under the statute. *People v. Tinder*, 19 Cal. 539, 81 Am. Dec. 77. The court said that it created a presumption of guilt for all purposes except trial before a petit jury. Indeed, if the affidavit did not create such presumption, the defendant held under it, or by virtue of a warrant based upon it, without other evidence of his guilt, would be entitled to his discharge absolutely. If it furnished no such presumption, it would not justify the exaction of bail, or the detention of the defendant.

Very strong reasons, however, have been advanced, why the indictment should not be held conclusive against the accused in the question of bail.

In *Re Losasso*, 15 Colo. 163, 10 L.R.A. 847, 24 Pac. 1080, it is said: "Most, if not all, of the state Constitutions, now contain provisions substantially similar to § 19 of our Bill of Rights, which reads as follows: 'That all persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.' It will be observed that this constitutional provision is entirely silent as to the status of the prosecution. It does not say that upon indictment for a felony or for a particular kind of felony, the beneficent privilege conferred is withdrawn. On the contrary, its terms are broad enough to include persons accused of any crime whatever, after as well as before indictment. The only exception

expressly made has reference to capital offenses, but this exception is wholly inoperative if the proof of guilt be not evident and the presumption great. Had the framers of the Constitution intended to provide that the indictment should be conclusive in capital cases, they would, in all probability have said so. A simple declaration to this effect would have avoided all doubt and embarrassment."

In the same case it is said: "The English cases, and the American cases adopting the English rule, all concede the right to be heard upon an application for bail after commitment by a coroner's inquest or an examining magistrate. The character and scope of the inquiry are in many instances circumscribed, yet the right to be heard is nevertheless unquestioned. But, under our practice, it would ordinarily accord more nearly with justice to hold the finding of a coroner's inquest or a committing magistrate conclusive as to the clearness of guilt, than the report of a grand jury. In the former cases the accused may appear in person and by counsel. He may be heard in argument, may produce evidence, and make his own statement. But the proceedings of a grand jury are inviolably secret and wholly *ex parte*, evidence for the state being alone received. The accused is not present, and in many instances is ignorant of the fact that charges against him are being considered. He cannot be represented by counsel, or be heard upon the legality or bearing of the evidence adduced. The officer employed by the state to prosecute exercises a large influence in the selection of witnesses to testify, gives the only legal advice, unless the court be called upon, and usually directs to a considerable extent the entire proceeding. The rule that the proof of guilt thus offered and weighed should be *pro forma* treated as 'evident,' and that the presumption thus arising should in the same manner be pronounced 'great,' is largely a legal fiction. It finds little support in reason."

In *Lynch v. People*, 38 Ill. 494, the court said: "We know that a party may, under an indictment for murder, be convicted of manslaughter, and doubtless grand juries are often controlled by that consideration, in refusing, as is generally the case, to find indictments for the lesser offense. It would be very hard, when the law declares that if the offense be of a lower grade than murder, it shall be bailable, that the accused should be concluded upon

degree of homicide, may not be made to appear most fully upon their final trial. We are only passing upon the sufficiency of the evidence exhibited in this record, and upon it alone is our opinion predicated.

It follows that bail must be refused.

Dunn and Turner, JJ., concur.

Hayes, J., concurs in the reasoning and the rules enunciated, but dissents from the conclusion refusing bail to petitioner John F. Thomas. Williams, Ch. J., dissents from some of the reasoning and some of the rules enunciated, but concurs in the conclusion refusing bail.

that question, until final trial, upon the mere finding of a grand jury, which is necessarily based, for reasons of public policy, upon a mere *ex parte* examination."

Every indictment for murder in the first degree includes several lesser offenses. Under it the accused may be convicted of murder in the second degree, or of voluntary or involuntary manslaughter. In legal effect, therefore, every such indictment charges four crimes, three of which are lawfully bailable. Why should not the prisoner be permitted to show, if he can, that his offense belongs to one of the lower grade? In *Re Losasso*, supra.

Indictments are found upon *ex parte* testimony, and hence often upon an incorrect understanding of the case; and further, upon an indictment for murder in the first degree, the accused may be convicted of murder in the first or in the second degree, or of manslaughter. An indictment for murder in the first degree is therefore in reality an indictment for some one of three offenses, upon either of which the defendant may, according to the evidence, be convicted. Prosecuting attorneys are consequently tempted, as a matter of policy, to draw their indictments covering the highest offense, — thus including the inferior, — rather than for either of the lower, which does not include the superior. The indictment, therefore, should not be taken as conclusive of the grade of offense, in determining the question of bail. *Lumm v. State*, 3 Ind. 293.

In *State v. Crocker*, 5 Wyo. 385, 40 Pac. 681, 9 Am. Crim. Rep. 468, in holding that an indictment is not conclusive evidence that the proof of guilt is evident or the presumption great, in an application for bail in a capital case, the court said: "The grand jury does not determine, and are not clothed with the power to decide, the question of bail in any case. The court or judge is to exercise that power in all cases; necessarily, then, the authority which fixes the bail and who is to settle that matter must determine the right to bail. That authority, then, must decide, and in that authority alone resides the duty and right to decide, as to whether or not the proof is evident or the presumption great. Is this to be determined for the court in all capital cases by a grand jury, generally unskilled in the law, incapable of judging as to the materiality or admissibility of testimony? We cannot so conclude. No doubt the finding of an indictment is *prima facie* evidence that the proof is evident, and that the presumption is great, and if not so, the legislature may well so provide, thus

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throwing the burden of proof upon the defendant to establish the contrary."

Certain exceptions to the common-law rule in relation to bail in capital cases are recognized. Among these exceptions may be mentioned serious illness of the prisoner; delay by the state in bringing him to trial; consent of the prosecuting attorney to the taking of bail; the existence of public excitement at the time of the finding of the indictment, likely to prejudice the grand jury; the confession of another that he did the killing, and the like. These exceptions are, in the main, prompted by considerations of actual or probable hardship. Courts sometimes exercise a sound judicial discretion, and admit to bail in such cases, even when the proof appears to be evident or presumption great. But it occasionally happens that, by means of malicious or of prejudiced or perjured testimony, or upon wholly insufficient proofs, indictments are procured charging the crime of murder, and a long period must elapse before a trial can be had. The same promptings of humanity, reinforced by strong considerations of justice, would also sanction the hearing of proofs on the question of bail, where such matters, or some of them, are allowed as a ground of the application. *Re Losasso*, supra.

In *Com. v. Lemley*, 2 Pittsb. 362, the court said: "Suppose after indictment found for a capital offense, circumstances render it perfectly apparent that the prisoner is innocent. Take a case which has actually occurred,—the man supposed to be murdered has only absconded and afterwards returns in full life, and stands before the judges as a witness upon the hearing, would it not be barbarous to keep the prisoner in jail until the trial, simply because an indictment has been found?"

VI. Bail after indictment.

a. Mistrial.

A mistrial does not establish *per se* that the accused is entitled to bail. Coupled with other circumstances it furnishes proper matter for the court to consider in exercising its discretion as to the admission of the prisoner to bail. *State ex rel. Vickers*, 47 La. Ann. 662, 17 So. 296.

Failure of a petit jury to find a verdict against the accused is not in itself sufficient to entitle him to bail. *Ex parte Pattison*, 56 Miss. 161.

A mistrial upon a disagreement of the jury as to a verdict in a capital case does not *per se* establish that the proof is not

evident. *Ex parte England*, 23 Tex. App. 90, 3 S. W. 714, 7 Am. Crim. Rep. 225.

The mere fact that the jury has failed to agree upon a verdict will not entitle the accused to bail, especially when bail has been refused after a hearing on evidence in a *habeas corpus* proceeding. *Webb v. State*, 4 Tex. App. 167.

One or even two mistrials will not furnish the accused the absolute right to give bail. *Ex parte Goans*, 99 Mo. 193, 17 Am. St. Rep. 671, 12 S. W. 635.

But if there has been a mistrial, that fact may be shown, as it is a matter to be considered in determining whether the court should exercise its discretionary power to admit to bail. *People v. Cole*, 6 Park. Crim. Rep. 695, 4 Abb. Pr. N. S. 280.

That a man has been indicted for murder in the first degree, and tried twice, and the jury has been unable to agree, though not conclusive, is a strong consideration towards removing the presumption existing against him. *Re Alexander*, 59 Mo. 598, 21 Am. Rep. 393. The court said: "The imprisonment of the accused before trial forms no part of the punishment affixed to the crime. The whole object and end of imprisonment before trial is to secure the forthcoming of a person charged with the commission of a crime. Where a jury has disagreed twice upon the question of guilt, a doubt may well be raised, and where it is satisfactorily shown that the attendance of the accused to stand his trial will certainly follow, in the exercise of a sound discretion, the court may admit bail."

In *People v. Perry*, 8 Abb. Pr. N. S. 27, where there had been two disagreements of trial juries, the accused was admitted to bail.

In *Ex parte McLaughlin*, 41 Cal. 211, 10 Am. Rep. 272, the application of the prisoner for bail was allowed where the jury had disagreed and had been discharged without the consent of the accused, where he had been subjected to a long imprisonment before the trial.

In *People v. Tinder*, 19 Cal. 539, 81 Am. Dec. 77, it is said *obiter* that bail may be taken where upon trial the evidence for the prosecution and defense has been produced, and there has been a disagreement among the jurors; or where, after verdict, a new trial has been obtained for the insufficiency of the evidence to warrant a conviction. Cases of this kind justify the allowance of bail in the discretion of the court, without hearing other evidence as to the guilt or innocence of the accused.

Where the prisoner had had a disagreement with the deceased, and had sent him a certain message which the latter thought demanded an explanation, and the deceased and certain of his friends armed themselves and went to meet the accused, and as soon as the deceased stepped up to the accused the latter struck the deceased and a fight ensued, the deceased receiving mortal wounds with the bowie-knife, the accused also attacking and killing a friend of 39 L.R.A. (N.S.)

the deceased who took hold of him during the struggle, and the accused had been tried on an indictment for killing one of the men, and the jury had disagreed, it was held that he was entitled to bail. *Beall v. State*, 39 Miss. 715.

Where the accused immediately surrendered after the offense, and there had been two mistrials, and the accused had refused to break jail when he had the opportunity to do so, and his whole conduct evidenced a determination to stand his trial, it was held that the court, in the exercise of a sound discretion, would admit him to bail. *Re Alexander*, *supra*.

Where the accused gave himself up immediately after the homicide, and the coroner's jury found that he killed the deceased in self-defense, and he was discharged on the preliminary examination by the justice, and two terms of the court intervened before the finding of an indictment, at each of which a grand jury was impaneled, and after indictment there was a mistrial, and where he had shown himself to be a model prisoner, refusing to break jail when he had an opportunity, it was held that he was entitled to bail, although it was shown by undisputed evidence that the accused went towards the deceased with his gun when he knew the deceased was in a great rage. *Ex parte Goans*, *supra*.

But where the evidence showed that the accused had provided himself with a pistol, and had gone to the office of a hotel and instantly killed the deceased, whom he believed to have been destroyer of his domestic peace, and there had been a protracted trial, which resulted in six of the jurors standing for conviction and six for guilt, the court refused to admit the prisoner to bail. *People v. Cole*, *supra*.

In *State v. Summons*, 19 Ohio, 139, the court, in refusing bail after a disagreement of the jury, said: "The fact that the testimony given on the trial did not produce full conviction of guilt in the minds of the twelve jurors would be a strong circumstance to urge to the court when invoked to the exercise of so high a discretion as that of admitting to bail a prisoner charged with the crime of murder; this fact would come with redoubled force, if, as in the present instance, a second jury should fail to agree upon a verdict, with the same evidence applied to another indictment for the same offense. But, however numerous such results, they could never amount to a rebuttal of the fact that 'the proof was evident or the presumption great.'"

In *State ex rel. Vickers*, 47 La. Ann. 662, 17 So. 296, the accused had a mistrial, and after his application for bail had been granted he escaped, and the order for bail was revoked. Upon subsequent confinement his trial was continued for five months against his objection, the court refusing an application for bail. The prisoner offered to show before the district court that he had voluntarily surrendered himself, but the court refused to hear the testimony, and no

attempt was made in the supreme court to show this fact, which was merely asserted. It was held that the bill of exceptions taken in the district court did not *per se* establish such fact.

Under a statute providing that "the judgment rendered on the first trial of any writ of habeas corpus shall be conclusive until reversed as hereinafter provided, and, whilst so in force, shall be a bar to any other proceedings to bring the same matter again in question, except by appeal," etc. (§ 1413, Code of 1871), the court has jurisdiction to entertain an application for bail, even after an adverse decision on one writ, where, since such decision, there has been a disagreement of a trial jury, and a serious impairment of the relator's health. *Ex parte Pattison*, 56 Miss. 161.

The object of imprisonment previous to trial is not punishment, but the security of the person of the alleged offender to await the judgment of the law. In ordinary cases this object is supposed to be attainable by the exaction of sufficient and reasonable bail. But, as a general proposition, in cases of murder, as conviction of the offense results in taking the life of the offender, the temptation to flee from justice is supposed to outweigh all inducements to remain growing out of pecuniary obligation, no matter to what amount. And often, perhaps generally, though not always, in the case of consciousness of guilt or of probability of conviction, this is so. This probability may be naturally supposed to decrease, though it is not always so, as the efforts to convict prove unavailing. Hence, the result of a previous trial is very proper to be considered in determining the probability of a future conviction, and in determining also the probability of the prisoner's guilt. *People v. Cole*, 6 Park. Crim. Rep. 695, 4 Abb. Pr. N. S. 280.

b. Delay, continuance, appeal

In *People v. Tinder*, 19 Cal. 539, 81 Am. Dec. 77, it is said *obiter* that bail may be allowed if the trial of the prisoner has been unreasonably delayed. And under the California statute, if the trial be postponed, even upon sufficient reasons, from term to term, the court may discharge the defendant on his own recognizance or on bail; and so, also, bail may be allowed where any event has happened postponing indefinitely the further prosecution of the action, as the repeal of the statute giving the jurisdiction of the court to try the indictment (where such jurisdiction depends upon statute) without provision for its transfer to any other tribunal. So also where the law creating the offense charged has been repealed without a reservation of the penalty for past offenses.

Where the accused is charged with assault with intent to kill, and it appears that the victim will die within such time as will raise the offense to murder, the prisoner is not entitled to bail because no indictment 30 L.R.A. (N.S.)

has been found against him, although two terms of the court at which he might have been indicted have passed, unless the facts of the case made by the prisoner are such that, in the event of the death of the person wounded, the prisoner would be entitled to bail. *Ex parte Andrews*, 19 Ala. 582.

The accused is not entitled to bail on the ground that his case has been continued at the instance of the state, where the trial has thereby been postponed only for a month. *State ex rel. Rice v. Butler*, 40 La. Ann. 3, 3 So. 350.

Failure to prosecute at the succeeding term is not ground for admitting the prisoner to bail, where it is not shown to have been the means of oppression. *State v. Abbot*, R. M. Charl. (Ga.) 244.

Under a statute providing that, "if a defendant in a capital case demand a trial, and it appeared that more than one continuance has been granted to the state, and that the defendant has not applied for a continuance, he shall be entitled to be admitted to bail, and unless it appear from the written statement of the district attorney, or by the oath of some credible person, that a material witness of the state had been prevented from attendance by the procurement of the defendant or some person acting in his behalf," the defendants are entitled to bail where the case has been twice continued on the application of the state, although the defendants have not made formal demand for trial. *Ex parte Walker*, 3 Tex. App. 668.

In *Territory v. M'Farlane*, 1 Mart. (La.) 216, 5 Am. Dec. 706, it is said: "In case of a mistrial or of a continuance at the instance of the territory, as the confinement may be extended to a considerable length, there would be no impropriety in listening to a motion for bail; but when the attorney general is ready for trial, the court, except in a very extraordinary case, will not admit the application."

The facts that the prisoner had a crop which needed his attention, and that he would be ruined financially by being confined and denied an opportunity to pursue his industrial vocation, and that his wife was frail and delicate, are not sufficient to warrant the court to release him on bail pending appeal. *Hill v. State*, 64 Miss. 431, 1 So. 494. The court said: "Manifestly the law does not tolerate bail after conviction of felony on any such ground as this. It denies bail to a convict of felony, except in the discretion of court or judge, 'to be exercised with the greatest caution, and only when the peculiar circumstances of the case render it proper in the opinion of such court or judge.'"

In *State v. Key*, 93 Miss. 115, 46 So. 75, in holding that bail was improperly granted to the accused on continuance of the case, the court said that unless the case was brought clearly within the rule laid down in the last-mentioned case, bail should have been refused.

Where the trial was set down a month from the date of the application for bail, the court refused to reverse the decision of the trial court, refusing to hear testimony on the application for bail, although the prisoner alleged a killing in self-defense and that he was confined in an unhealthy jail. *Martin v. State*, 17 Ohio C. C. 406, 9 Ohio C. D. 621.

If the prisoner is charged with a capital crime, and the cause is twice continued by the state, without the fault of the prisoner and without his assent, he is, as a matter of right, entitled to bail, under a statute which provides that "no person charged with the commission of an offense capitaly punished shall be admitted to bail as a matter of right, when he is not tried at the first term of the court at which he was properly triable, if the failure to try his case proceeded from the nonattendance of the states witnesses, where an affidavit is made satisfactorily accounting for their absence, or where there is an entire failure to hold the court, or where the trial is delayed in consequence of the sickness of the judge or some member of his family, or where there is a premature adjournment of the court for either of the last-mentioned or other sufficient cause, or where the judge from any cause is legally incompetent to try the accused, or where the term allowed by law is so short that the case of the accused, according to the accustomed course of proceeding, could not be tried, or where it was found impracticable to obtain a jury for his trial, or where the trial was not completed in consequence of the sickness of a juror, or where there was a mistrial for any cause, or where the delay proceeds from the fault or misfortune of the prisoner. But if the accused shall not be tried at the next stated term of the court, and the failure to try his case shall not be occasioned from his fault or misfortune, or on his application, or with his assent, he shall be discharged on giving good and sufficient bail." *Ex parte Stiff*, 18 Ala. 464.

When a trial for homicide has begun, the defendant is in the custody of the court, and must so remain until the verdict is rendered and the prisoner discharged by due course of law, unless it shall appear to the court during the trial, or the district attorney shall so state to the court, that the case is not one of murder, when it is in the discretion of the court to admit the defendant to bail. *Com. v. Rusk*, 7 W. N. C. 486.

In *Hull v. Reilly*, 87 Mich. 497, 49 N. W. 869, a conviction of the accused of murder having been reversed, the prisoner was admitted to bail, but on his second trial, was ordered into custody and the supreme court refused to interfere.

VII. Application for bail on special grounds.

a. In general.

In *People v. Smith*, 1 Cal. 9, the accused 39 L.R.A. (N.S.)

were charged with burning certain Indian lodges and with killing several Indians, but were admitted to bail on the ground that the district court was not yet organized, and that there was no secure place in which the prisoners could be kept until brought to trial.

A person charged with the crime of murder in the first degree, at a time when the statute prescribed the penalty of death for the offense, is not, where the proof is evident or the presumption great, entitled to bail, although the prosecution for the offense may have been commenced after the repeal of that penalty and the enactment of an amendment imposing the penalty of imprisonment for life. *Re Schneek*, 78 Kan. 207, 96 Pac. 43; *Re Stewart*, 78 Kan. 885, 96 Pac. 45.

In *Com. v. Trask*, 15 Mass. 277, the accused, having dangerously wounded another so that he was likely to die, was remanded until it should properly appear that the danger was over.

But in *Dunlap v. Bartlett*, 10 Gray, 282, 69 Am. Dec. 320, it was held that the fact that the person assaulted might die was not ground for refusing bail, but that there was danger that the assault might result in a homicide was to be considered in fixing the amount of bail.

In *People v. Van Horne*, 8 Barb. 158, the court admitted the accused to bail mainly on the ground that the prosecuting attorney consented thereto, saying that if there was no ground to apprehend the escape of the prisoner, the case came within that of *Lord Baltimore*, who was let to bail by the court of the King's bench on the charge of rape, then a capital crime, on the sole ground that he had indicated no intention of absconding from justice. The court declared that if it could be ascertained to a moral certainty that the accused would appear and stand his trial, there would be no valid objection to admitting him to bail, as the object of imprisonment before trial is not punishment, but to secure the appearance of the accused.

In *People v. Porter*, 8 Barb. 168 (note by reporter), the prisoner voluntarily appeared on the coming in of the indictment, and by his counsel offered to give bail for his appearance at the next oyer and terminer to be held in said county in June thereafter. The grounds, as disclosed in several affidavits, were a defense on the merits; the absence of material evidence; the feeble state of the prisoner's health, which would not endure a protracted imprisonment; and he proposed also to disclose the nature of his defense. The district attorney consented that the court might admit him to bail, if they had the power to bail after indictment for murder. He consented, also, that the court might look into the evidence taken before the grand jury, and the affidavits furnished by the prisoner disclosing his defense. The court, after examining the several documents submitted to them, decided that

they had the power to admit to bail, and accordingly let the prisoner to bail in the sum of \$5,000, to appear at the nextoyer and terminer.

The court or judge in vacation should proceed by hearing the evidence to determine the character of the proof and the extent of the presumption, where the defendant files in the cause, and presents to the court, his written and sworn application, alleging "that he is not guilty of any offense charged in the said indictment; that the proof against him . . . is not evident and is wholly insufficient to authorize or support a conviction for any crime or offense whatever; that there is not presumption of his guilt of any offense charged in such indictment arising from the proof or otherwise; that this cause is one in which the defendant is entitled to bail under . . . the Constitution, . . . and that . . . [he] is able and desirous to give bail herein with sufficient sureties in any reasonable sum or amount." *State v. Crocker*, 5 Wyo. 385, 40 Pac. 681, 9 Am. Crim. Rep. 468.

In those states and countries where the power to pardon may be exercised at any time, the court has sometimes admitted to bail accomplices who have testified fairly and fully against their confederates, in order that they might the more conveniently make application for that mercy to which, by their disclosures, they have become entitled. *Ex parte Birch*, 8 Ill. 134.

Since in Illinois the governor cannot pardon before conviction, one who has not been convicted or who does not admit his guilt cannot be admitted to bail on the theory that he is entitled to the privileges of an accomplice who has assisted the state in the trial of the other offenders. *Ibid*.

Prosecuting attorneys in Texas cannot make an agreement entitling one turning state's evidence to bail, and the fact that the court approves the agreement makes no difference. *Ex parte Greenhaw*, 41 Tex. Crim. Rep. 278, 53 S. W. 1024. The court said: "Where two parties are indicted for murder, one of whom turns state's evidence, this forms and constitutes, under our law, a continuous contract, the good faith of which must be kept by both parties. Being a continuous contract, the terms and conditions are not consummated until the final trial of the party or parties accused, against whom the accomplice agrees to testify. After he has testified against the parties and they have been convicted, and if appeals are prosecuted, and these appeals have been affirmed by this court, then the accomplice is entitled to his release under the terms of the contract; but not until then."

The accused, by waiving his preliminary examination, not only waives the right to be let to bail, but also to have the fact and circumstances of the alleged offense examined on a writ of habeas corpus. *Re Malison*, 36 Kan. 725, 14 Pac. 144.

Where, under well-grounded apprehen-

sion of personal violence, the preliminary examination is waived, no estoppel against the accused arises pursuant to such waiver. *Ibid*.

Where, at the time of the arrest of the accused, great excitement prevailed, and it appeared that large bodies of armed men were in town, that many threats of violence were made by the friends of the deceased, that, in fear of further bloodshed, the adjutant general went to the county where the defendants were, and he and other citizens counseled them to waive examination, and they did so,—it was held that this would not prevent them from afterwards having the charge investigated on an application for bail. *Ibid*.

In Indiana murder in the second degree is not bailable where the proof is evident or the presumption strong of the guilt of the accused. *Ex parte Colter*, 35 Ind. 109.

Where the prisoner is acquitted of the charge of murder in the first degree, and can no longer be tried for that crime, but only for a lesser degree, his offense ceasing to be capital, he is, of course, entitled to bail. *Ex parte Moore*, 46 Tex. Crim. Rep. 417, 80 S. W. 620.

One indicted for murder may be let to bail upon proof that he is guilty of a bailable homicide. *Lumm v. People*, 3 Ind. 293.

An accessory before the fact to murder is, in Florida, guilty of a capital offense, and therefore the rules with reference to the admission to bail of persons accused of capital offenses apply. *Ex parte Nathen*, — Fla. —, 50 So. 38.

And in Arkansas the crime of accessory before the fact is capital, and therefore not bailable where the proof is evident or the presumption great. *State ex rel. Atty. Gen. v. Williams*, 97 Ark. 243, 133 S. W. 1017.

The rules with reference to bail were held to apply in the case of a slave charged with a capital crime in *Ready v. Com.* 9 Dana, 38.

Capital punishment was abolished in Wisconsin in 1853, and under a Constitution in the usual form one charged with murder is entitled to bail. *Re Perry*, 19 Wis. 677.

b. Health of accused.

Bail should not be granted on the ground of bad health, unless it be rendered probable by testimony that confinement has produced, or is likely to produce, fatal or serious results. Slight sickness is not sufficient, since there are few persons who will not be injuriously affected by imprisonment. There must be strong grounds for apprehending a fatal result or permanent impairment of health. *Ex parte Pattison*, 56 Miss. 161.

In *Aylesbury's Case*, 1 Salk. 103, the accused was bailed where it appeared that he had been long in prison, where his trial had been delayed, and his life was in danger.

On an application for bail on the ground that the continued imprisonment would put the prisoner's life in great jeopardy, it was held that the court did not abuse its discretion in refusing bail where the certificate of the physicians who examined him only showed that he was "suffering from a deranged state of his heart, and his general health impaired." *Lester v. State*, 33 Ga. 192. The court said that to grant bail in such a case would be a most dangerous precedent, for there are few men whose health is not impaired by close confinement in a prison sufficiently strong and close to prevent their escape.

It is good cause for admitting to bail a prisoner confined to jail for a capital offense, that such prisoner is then suffering with pneumonia and other ailments caused by his imprisonment and likely to be aggravated by the continuance of such confinement, and that it will probably terminate fatally. *Ex parte Watson*, 1 Okla. Crim. Rep. 595, 99 Pac. 161.

On application to the criminal court of appeals for bail by writ of habeas corpus, after commitment of a capital offense by a justice of the peace, when it is made clearly to appear, by the testimony of competent, reputable physicians who have examined the physical condition of the prisoner at the time the application is made, that there is strong ground for the opinion that continued confinement would cause the disease from which the prisoner is then suffering to terminate fatally, he should be released on bail. *Ibid*.

If it is made clearly to appear, by the testimony of competent, reputable physicians who have examined the physical condition of the prisoner at the time the application is made, that there is strong ground for the opinion that continued confinement would cause the disease from which the prisoner is then suffering to terminate fatally, he should be released on bail. *Ex parte Smith*, 2 Okla. Crim. Rep. 24, 99 Pac. 893.

Where the accused contracted a painful and dangerous disease in consequence of having been for a long time in a small, damp, and badly ventilated room, which disease had reduced him to so low a state as to render the continuance of his case necessary, and he had since that time contracted another disease which, if the confinement was continued, would in probability result fatally, it was held that he should be admitted to bail. *Com. v. Semmes*, 11 Leigh, 865.

In *United States v. Jones*, 3 Wash. C. C. 224, Fed. Cas. No. 15,495, it was shown that the health of the accused was bad, his complaint pulmonary, and that further confinement would be dangerous. The court said: "The humanity of our laws, not less than the feelings of the court, favor the liberation of a prisoner upon bail, under such circumstances. It is not necessary, in our view of the subject that the danger which may arise from his confinement should be either immediate or certain. If, 39 L.R.A. (N.S.)

in the opinion of a skilful physician, the nature of his disorder is such that confinement must be injurious, and may be fatal, we think he ought to be bailed."

But affidavits of physicians stating that, in their opinion, confinement in jail will result disastrously to the petitioner, and which state no facts upon what such opinion is based, make no sufficient showing for the admission of the prisoner to bail. *Re Fraley*, 3 Okla. Crim. Rep. 719, 139 Am. St. Rep. 988, 109 Pac. 295.

That the accused is suffering more or less from melancholia, and that this is produced by his confinement, together with the charge against him, does not bring his case within the provision of a statute which authorizes bail if he is so diseased that further confinement will necessarily endanger his life. *Ex parte Johnson*, 60 Tex. Crim. Rep. 50, 31 L.R.A. (N.S.) 916, 131 S. W. 316.

In Texas under statutes entitling the prisoner to a writ of habeas corpus in cases of necessity, as when the party is in legal custody and is inflicted with a disease rendering his removal necessary, and giving the prisoner a second writ in case of newly discovered important testimony which it was not in his power to produce at the first hearing if the first writ is heard before indictment, the party is entitled to the second writ after indictment, but only in a case coming under such statute. *Ex parte Wilson*, 20 Tex. App. 498.

c. Discretionary penalty.

The mere fact that a crime punishable by death may also be punishable by imprisonment does not entitle the defendant as a matter of right to be admitted to bail.

A capital offense is one that may be punished by death. *Ex parte Dusenberry*, 97 Mo. 504, 11 S. W. 217.

A capital offense, within the meaning of the constitutional provision with reference to bail, is an offense punishable by death. *Com. v. Lemley*, 2 Pittsb. 362.

Under a statute providing that "in all cases where any person or persons, upon conviction of crime, shall or may be punishable with death, the jury may, in their discretion, in their verdict, declare that the penalty or punishment shall be imprisonment for life; but if the jury shall omit to so declare the penalty in their verdict, then the court shall pronounce the death penalty," an indictment for an offense theretofore capital must be still regarded as a capital offense, so as to prevent the accused from demanding bail as a matter of right. *Ex parte Fortenberry*, 53 Miss. 428.

So the crime of rape, under a statute providing that every person convicted of this charge "shall suffer death or be punished by imprisonment in a penitentiary not less than five years, in the discretion of the jury," is a capital offense, and therefore not bailable as a matter of right. *Ex parte Dusenberry*, supra.

The fact that the jury has the power to fix the penalty for murder in the first degree as death or imprisonment for life does not render it bailable as an offense not capital. *Ex parte McCrary*, 22 Ala. 65. The court said: "The nature of the inquiry before the magistrate, on a question of bail, is in no respect changed. It was, before the adoption of the Penal Code, and still is, whether the offense charged is one which may be capitally punished; and if it may, and the proof is evident or the presumption great, it is not bailable. Juries have always had the power, although not the right, to reduce murder in the first degree to manslaughter; but because they had this power, and chose at times to exercise it, it does not follow that the offense, when the charge was first preferred, was bailable."

This power conferred upon the jury, of deciding whether or not a homicide shall be punished capitally, undoubtedly increases the chances to the murderer of escaping capital punishment. But until he is tried, the offense, in law and in the eye of the Constitution, is as much capital as it was before the adoption of the Penal Code. As long as it may be punished capitally, it must be considered a capital offense. *Ibid*.

Where it cannot be known until after conviction whether death will be the punishment, the question in legal contemplation on the application for bail is whether the offense is of a character that may be punished capitally. *Ex parte McAnally*, 53 Ala. 495, 25 Am. Rep. 646.

VIII. Burden of proof.

a. General rules applicable thereto.

In most jurisdictions the burden of proof is on the accused on an application for bail. *Rigdon v. State* 41 Fla. 308 26 So. 711; *Ex parte Jones* 55 Ind. 176; *Ex parte Kendall* 100 Ind. 559; *Brown v. State*, 147 Ind. 28, 46 N. E. 34, *Re Fraley*, 3 Okla. Crim. Rep. 719, 139 Am. St. Rep. 988, 109 Pac. 295.

On habeas corpus application for bail in a capital case after commitment upon examination before a justice of the peace, the burden of proof is on the defendant to show that he is illegally restrained of his liberty. *Ex parte Smith*, 2 Okla. Crim. Rep. 24, 99 Pac. 893.

Upon an application for bail by writ of habeas corpus after commitment for a capital offense, the burden is upon the petitioner to show facts sufficient to entitle him to bail, when those facts do not appear from the evidence adduced on the part of the prosecution. *Ex parte Dykes*, 6 Okla. Crim. Rep. 162, 117 Pac. 724. To the same effect, *Ex parte Belville*, 6 Okla. Crim. Rep. 145, 117 Pac. 725; *Re Fraley*, 3 Okla. Crim. Rep. 719, 139 Am. St. Rep. 988, 109 Pac. 295.

Upon the hearing after indictment the burden of proof is on the defendant, and 39 L.R.A. (N.S.)

both parties are entitled to compulsory process to secure the attendance of witnesses. *State v. Crocker*, 5 Wyo. 385, 40 Pac. 681, 9 Am. Crim. Rep. 468.

Where the accused admits that he killed the deceased, the burden of proving that he acted in self-defense and that the proof of his guilt of the charge of murder is not evident or the presumption strong is upon him. *Ex parte Richards*, 102 Ind. 260, 1 N. E. 639.

The early decisions in Texas are in favor of the rule as to the burden of proof adopted in other states; but at present the rule in that state is that the burden of showing that the defendant is not entitled to bail is on the people.

The burden is upon the accused to show that he is entitled to bail. *Ex parte Johnson*, 30 Tex. App. 279, 17 S. W. 410.

The rule is the same whether the indictment charges the offense severally or jointly against the parties. *Ibid*.

The burden is upon the accused after indictment to show himself entitled to bail on the ground that the proof is not evident. *Ex parte Randon*, 12 Tex. App. 145.

After indictment for a capital offense, the burden is upon the accused to show that he has a constitutional right to bail because the proof of his guilt is not evident. *Ex parte Jones*, 31 Tex. Crim. Rep. 422, 20 S. W. 983.

When a person is brought before a court of competent jurisdiction on a writ of habeas corpus, if it appear by the return of the papers attached that he is indicted for a capital offense, it is incumbent on him to show that he is entitled to bail: if he declines to introduce any evidence, bail should not be allowed him. And the same rule applies when the return to the court shows that he is held by virtue of a commitment from an examining court, for a capital offense. *Ex parte Scoggin*, 6 Tex. App. 546.

But in *Ex parte Newman*, 38 Tex. Crim. Rep. 164, 70 Am. St. Rep. 740, 41 S. W. 628, it was held that the indictment furnishes no proof of the guilt of the accused, and the burden is on the state to show that the proof is evident.

In this case the earlier decisions were overruled, the court saying: "We hold that the general rule is in favor of bail, but that there is an exception to this general rule, and that the party relying upon the exception must prove it. The exception is in favor of the state. Unless the case be a capital one, and the proof is evident of this fact, and unless the proof is evident that the prisoner is guilty of a capital crime, he is entitled to bail. He stands upon the Constitution of this state, which grants bail to all prisoners with sufficient sureties; and, as before stated, the party relying upon the exception must prove it."

It does not follow because the legislature gives the relator in a habeas corpus proceeding the right to open and conclude the argument, that the burden of proof is upon him. The statute merely guarantees

to the applicant an additional advantage as an exception to the general rule, for if the burden were upon him, he would have the right independently of statute. *Ibid.*

An indictment raises a presumption against the accused for all the purposes of his capture and custody, and for such purposes it is conclusive until rebutted. *Ex parte White*, 9 Ark. 222.

On an application for bail by a prisoner who is shown to be under indictment for murder, he is presumed to be guilty of the charge in the highest degree, and that presumption must be overcome by proof. *Ex parte Vaughan*, 44 Ala. 417.

In proceedings to obtain bail, it is well settled that the production of an indictment found by a grand jury makes a prima facie case of guilt in the highest degree of which the defendant could be convicted under the indictment. *Ex parte Hammock*, 78 Ala. 414.

An indictment for murder duly returned implies prima facie that the prisoner has no right to bail. *Ex parte Jones*, 55 Ind. 176.

In *Ex parte Smith*, 23 Tex. App. 100, 5 S. W. 99, the court said: "If an indictment for a capital offense does not prima facie establish a nonbailable offense, the accused party would be entitled to bail the moment he was arrested, and the officer who would have the temerity to refuse him bail when tendered, would be guilty of false imprisonment, and liable to prosecution and punishment for that offense, as well as liable in a civil suit for damages. An indictment for a capital offense, for all the purposes of a habeas corpus proceeding, carries with it the presumption that it is founded upon proof evident. For reasons apparent to the legal mind, no presumption of guilt arises from an indictment when the case comes to be heard upon the final trial. Then the presumption of innocence attaches and continues throughout the trial, because then the state, and not the accused, is the plaintiff, the actor, the party who holds the affirmative of the issue, and who must assume the burden of proving the offense alleged."

In the same case *Hurt, J.*, dissenting, said: "What presumptions, then, it is again asked, arise from the indictment? As none arise upon final trial, so do none upon a hearing for bail; for the presumption of innocence follows the accused until his guilt is fixed by legal evidence beyond a reasonable doubt. The officer having the accused in custody should look to the nature of the charge, whether his prisoner be indicted or not, with a view of regulating the care and means to be used for his safe-keeping. What presumption he or others may draw from the existence of an indictment can never be a practical matter bearing upon the subject. Whether indicted by a grand jury, charged by complaint, or committed by a magistrate, the prisoner's right to a hearing remains the same. And upon the hearing of the evidence 39 L.R.A. (N.S.)

his right to bail is determined; determined by the testimony heard, and not by the indictment or the nature of the charge. Presumptions of guilt before hearing for bail may or may not be drawn, for they are comparatively innocuous; but when the hearing begins they must step aside and give way to the evidence."

Where the charge is of a capital felony, which is prima facie not bailable, the courts are very show to admit to bail, for there is shrewd authority that "all that a man hath will he give in exchange for his life," and after indictment found, it is only in a clear case and with great caution that a judge will admit to bail, for, while the indictment is no presumption of guilt on the trial before the petit jury, it is otherwise in the application for bail. *State v. Herndon*, 107 N. C. 934, 12 S. E. 268.

This, however, is but a presumption in the absence of all other proof. *Ex parte Hammock*, supra.

When exculpatory evidence is produced, such testimony must be weighed, together with the presumption raised by the indictment; and the decision must be pronounced on the entire case as thus presented. *Ibid.*

Prima facie, under an indictment for murder, the offense is not bailable, and this presumption is not overcome by any order made on a preliminary trial. Where a party under indictment for murder in the first degree sues out a writ of habeas corpus, upon production of the indictment the defendant must overcome the presumption of the law by legitimate evidence and the order of the magistrate prescribing bail is not legal evidence in the case. *Ex parte Robinson*, 108 Ala. 161, 18 So. 729.

The court will not indulge the presumption, in the absence of evidence warranting it, that the accused were rightfully in the place of conflict which resulted in the death of the deceased, that they acted in their proper self-defense, that the killing was unintentional, or in the mistaken belief that the deceased was another; nor can the court presume from the absence of evidence that any of the elements of the charge are not subject to proof which is strong. *Brown v. State*, 147 Ind. 28, 46 N. E. 34. The court said that if it were otherwise, the case of the accused would be made stronger by the least searching inquiry into the state's evidence.

When the homicide is proved or admitted the court on an application for bail, will not presume for the prisoner either justification or mitigation merely because the evidence for the prosecution fails to show their absence. Unless the evidence for the prosecution shows the presence of facts tending to justify, excuse, or mitigate the offense, the burden is on the petitioner to show them. *Re Fraley*, 3 Okla. Crim. Rep. 719, 139 Am. St. Rep. 988, 109 Pac. 295.

On the application for bail on the ground that the case was continued without the consent of the accused, because of the ab-

sence of a material witness for the prosecution, on an affidavit which did not satisfactorily account for the absence of the witness, the court will not presume that the affidavit did not satisfactorily account for the absence of the witness in the absence of anything in the record to show it. *Ex parte McCrary*, 22 Ala. 65. The court said that if the affidavit did not contain all that the law required, it should have been incorporated in the record and made a part of the petitioner's case.

It being clear from the weight of authority that the burden is upon the accused, under a capital charge, to show that the proof is not evident nor the presumption great, a pertinent inquiry is, What proof is it that he must show is not evident or what presumption is it that must appear not to be great? The section in the Florida Bill of Rights does not declare what proof it is, and in its application consideration must be had to the nature of the inquiry before the judge and the character of the proceedings. After indictment found for a capital offense, and on application for bail, the judgment of the court is that it devolves upon the accused to take the initiative, and show from the testimony in the case, including that of the state, that the proof is not evident nor the presumption great. There may be exceptional cases recognized by the courts, such as extreme sickness, caused or increased by imprisonment, and the like, that will not be concluded by this rule, and the rule as to them need not now be stated. *Rigdon v. State supra*.

When names of state witnesses are placed upon the indictment, the presumption is that all of the witnesses relied on by the state are named and the accused should not be required to produce the testimony of any other witnesses on behalf of the state. Where no witnesses are placed on the indictment, it is incumbent on the state attorneys, on application for bail, to furnish the accused with a list of the witnesses relied on by the state in due time to secure their presence or testimony; otherwise he could not know what was the testimony upon which the state relied. In case no witnesses are placed upon the indictment and a list is duly furnished by the prosecuting officer, the accused should produce the witnesses for the state in connection with his own, if he had any, in order that the judge may determine from all the testimony in the case whether the proof was not evident or the presumption not great. *Ibid*.

Under a Constitution in the usual form, when an application is made for bail in a capital case, the county attorney, if he resists the application, should make some showing that the proof is evident or the presumption great, thus bringing the case within the exception mentioned in the Constitution. On failure to make such showing, the defendant is entitled to bail in all cases; but, if such showing is made, the court or judge should refuse bail without

hesitation. *State ex rel. Murray v. District Ct. 35 Mont. 504, 90 Pac. 513.*

Upon the application to the supreme court for a writ of habeas corpus for the purpose of securing bail the petitioner will not, in addition to the report of evidence taken in the police court, be allowed to introduce testimony of witnesses not examined, in order to impeach some of the witnesses of the people, and to prove facts otherwise tending to his exculpation. *Ex parte Curtis*, 92 Cal. 188, 28 Pac. 223. The court said that there may be cases in which new facts have been developed or new evidence discovered after the conclusion of the preliminary examination, in which it would be proper to hear additional testimony on the application for bail. But in such case the petitioner should set out the discovery of such new facts or evidence among the grounds of the application, and the application itself should be addressed to the superior court or a judge of the proper county.

In *People v. Hyler*, 2 Park. Crim. Rep. 570, upon an application based on the testimony taken before the coroner and grand jury it was held that the prisoner would not be allowed to furnish proof by affidavit or oral testimony. The court said: "It has not been the practice heretofore either in this country or in England, nor can such a precedent be established without making an application for bail substantially a trial upon the merits; for if the prisoner can produce such evidence in his own behalf, the public prosecutor should be permitted to controvert it, which in effect would transform a motion to bail into an examination into the guilt or innocence of the prisoners. The rule seems to be well settled to the contrary, and with reason, because, to open the whole question of guilt or innocence to proof, on a motion to admit to bail, would be attended with most serious public inconvenience. In most cases there will be extant on the files of the court the preliminary examination of the accused, or the testimony before the coroner, or that before the grand jury; in some cases all. True, as in this case, a party may sometimes by casualty be deprived of the benefit of a preliminary examination, but the hardship in a particular instance should not induce the establishment of a precedent which would prove of great public inconvenience.

On the application for bail, the indictment is all the state is required to produce on the hearing unless in rebuttal. It is not required to introduce evidence to show on what state of facts the indictment was found, or to show whether the indictment was found on a state of facts constituting murder in the first degree or in the second degree, and the defendant must take the initiative and show by evidence that the offense was less than murder in the first degree. *Ex parte Rhear*, 77 Ala. 92.

The application will be denied where the prisoner offers no evidence in his own behalf, and there is a finding of the grand

jury against him and his admission that he did the killing. *Ex parte Vaughan*, 44 Ala. 417.

Upon the hearing it is proper to require the prisoner to begin the evidence, although it imposes upon him the necessity of producing evidence upon which the state intended to rely for his conviction on the final trial. But the accused will not by this procedure be denied the opportunity of cross-examining the people's witnesses. *Ex parte Heffren*, 27 Ind. 87. To the same effect, *Rigdon v. State*, 41 Fla. 308, 26 So. 711; *Ex parte Nathan*, — Fla. —, 50 So. 38.

Evidence of a witness of the prisoner that the deceased, a saloon keeper, sold liquor to the witness on various occasions, of such a poisonous character that it fired his brain and made him wild was held inadmissible on the hearing for admission to bail. *Ex parte Halpine*, 30 Ind. 254.

The right of the prisoner to bail established on the hearing, or refusal of the state to introduce testimony in rebuttal of that offered by the accused, cannot be denied on review of the application by the introduction of additional testimony. The prosecution, having failed to introduce testimony on the trial, must abide by its election. The only question open is the amount of bail. *Ex parte Hammock*, supra.

The proof of the guilt of the accused may be evident although the testimony is in conflict. *Ex parte Jones*, 31 Tex. Crim. Rep. 422, 20 S. W. 983.

A mere conflict of testimony, even upon a vital issue, does not of itself entitle a defendant held for murder to be admitted to bail. The evidence must be considered as a whole; and when so considered, unless a reasonable doubt of the defendant's guilt of murder is generated, bail should be denied. *Re Ballin*, 3 Okla. Crim. Rep. 725, 109 Pac. 288.

On a conflict of evidence as to the condition of the mind of the accused at the time of the homicide, it was held that the court could not say that the proof of the guilt of a capital offense was evident, and the accused was therefore admitted to bail. *Ex parte Miller*, 41 Tex. 213.

To the mind of the tribunal passing upon the evidence, the guilt of the applicant of a capital offense may be evident—that is, clear, strong, not admitting of a reasonable doubt,—and yet there may be evidence in conflict with such inculpatory evidence. It is not all conflicting, exculpatory evidence that will have the effect to raise a reasonable doubt of guilt, and destroy or impair the force of "evident proof" made by inculpatory evidence. *Ex parte Evers*, 29 Tex. App. 539, 16 S. W. 343.

Where the evidence was such that, standing by itself, it made a case of "evident proof" within the letter of the Constitution, which would deny to the defendant the privilege of bail and there was testimony which, if believed, tended strongly to show that the defendant could not have

committed the murder, the refusal of the judge of probate to admit the accused to bail will not be set aside. *Ex parte Weaver*, 55 Ala. 250.

Where the evidence is conflicting, the prisoner should have the benefit of such reasonable doubt as arises in the mind of the court when it attempts to reconcile the testimony. In case a reasonable doubt is entertained, the accused should be admitted to bail. *Ex parte Jones*, 20 Ark. 9.

Where, from the transcript of the evidence heard before the committing magistrate, a judge of the superior court of the state, the appellate court could not say that the refusal of the lower court to admit to bail was not correct, the prisoner was remanded. *Ex parte Walpole*, 85 Cal. 362, 24 Pac. 657.

Where the admission to bail was demanded on the ground that the deceased was killed in a mutual combat which would make the crime manslaughter, and there was great conflict of evidence as to whether there was such a fight, and as to whether the deceased had fought at all, bail was refused. *Ex parte Finlen*, 20 Nev. 141, 18 Pac. 827.

Where there are favorable circumstances in the case, and there is a presumption that the prisoner is guilty only of manslaughter, the court will exercise its discretion by admitting the accused to bail. *State v. Wicks*, R. M. Charl. (Ga.) 139.

Under the 17th section of the Alabama Bill of Rights, which declares that "all persons shall, before conviction, be bailable by sufficient securities, except for capital offenses where the proof is evident or the presumption great," and under the Alabama statutes upon the hearing of applications for bail, either before or after indictment, the court is not, as according to the practice in England, confined to the written evidence taken down before the committing magistrate; but the case is heard *de novo* the solicitor and prosecutor are notified to attend, and witnesses are subpoenaed both for the state and for the defendant, and examined before the court, which is to decide the application upon the evidence produced. Code §§ 3721, 3722, 3732, 3733, 3745, 3746, 3669, 3673. *Ex parte Bryant*, 34 Ala. 270.

In forming an opinion as to the guilt or innocence of any one of the persons accused, we, of course, look alone to so much of the evidence as, according to legal rules, would be admissible against him, if tried separately from his codefendants. *Ibid*.

b. Tests for determining whether burden has been sustained.

It is a question of some difficulty to determine what test should be applied in deciding whether the prisoner has made out a case for bail.

An examination of the decided cases as to what is meant by the expressions "proof is evident," "presumption is great," says

the court in *Ex parte Curtis*, 92 Cal. 188, 28 Pac. 223, discloses a wide variance of opinion upon this point, some courts and judges holding that the prisoner is entitled to bail unless the evidence against him is such as ought to satisfy a trial jury of his guilt beyond any reasonable doubt; others, that bail should be denied when the evidence is sufficient to warrant a grand jury in bringing in an indictment, or, which practically amounts to the same thing, when the evidence is sufficient in law to sustain a capital conviction.

On the return of a writ of habeas corpus to determine whether the accused shall be admitted to bail, the issue is not whether he is guilty or innocent, but whether the presumption of his guilt is great or the proof evident. *Street v. State*, 43 Miss. 1.

In *Rex v. Fortier*, Rap. Jud. Quebec 13 B. R. 251, 1 Ann. Cas. 10, a forgery case, it is said: "The propriety of admitting to bail for indictable offenses, which were formerly classified as felonies, should be determined with reference to the accused person's opportunities for escape, and to the probability of his appearing to take his trial, which is the object of bail, and not with reference to the supposed guilt or innocence of the party. In determining whether or not to admit an accused person to bail, the principal thing to be considered is therefore the probability of his appearing for trial, and to determine this question, it is proper to consider the nature of the offense charged and its punishment, the strength of the evidence against the accused, his character, his means, and his standing. Where a serious doubt exists as to the guilt of the accused, and he is entitled to the benefit of every reasonable doubt, his application for bail should be granted. Then, again, if, on the evidence, it stands indifferent whether the accused is guilty or innocent, the rule generally is to admit him to bail; but if, on the contrary, his guilt is beyond dispute, the general rule is not to grant the application for bail, unless the opportunities to escape do not appear to be possible, and the probability of his appearing for trial is consequently considerable, if not sure."

In *Com. ex. rel. Chauncey v. Keeper of Prison*, 2 Ashm. (Pa.) 227, where the evidence showed that the deceased was killed in an attempt to procure an abortion, it was held insufficient under this rule to support a conviction of murder in the first degree, so that the accused was entitled to bail, where the right to bail exists in all cases not capital. The court said: "It would seem a safe . . . [rule,] to refuse bail in a case of malicious homicide, where the judge would sustain a capital conviction, pronounced by a jury, on evidence of guilt such as that exhibited on the application to bail; and to allow bail, where the prosecutor's evidence was of less efficacy. This appears to afford a practical test, by which the question of admitting to or refusing bail in malicious homicide may be readily

solved." This test has been frequently approved.

We think that the best rule in ultimately determining whether the prisoner should be admitted to bail or not is that bail should be refused in all cases where a judge would sustain a conviction for murder in the first degree, if pronounced by a jury, on such evidence of guilt as is exhibited on the hearing for bail; and where the evidence is of less efficacy to admit to bail. *State v. Crocker*, 5 Wyo. 385, 40 Pac. 681, 9 Am. Crim. Rep. 468.

To the same effect, *People v. Baker*, 10 How. Pr. 567, s. c. *People v. Hyler*, 2 Park. Crim. Rep. 570; *Ex parte Bonner*, 100 Ala. 114, 14 So. 648; *Ex parte Allen*, 55 Ala. 258; *Ex parte Warrick*, 73 Ala. 57; *Ex parte Sloane*, 95 Ala. 22, 11 So. 14; *Re Losasso*, 15 Colo. 163, 10 L.R.A. 847, 24 Pac. 1080; *Thrasher v. State*, 26 Fla. 526, 7 So. 847; *Ex parte Claunch*, 71 Mo. 233; *Ex parte Beacom*, 12 Tex. App. 318; *Ex parte Jones*, 31 Tex. Crim. Rep. 422, 20 S. W. 983.

This rule applies where the evidence on the part of the people tends to show that the accused is guilty as charged, and the evidence on the part of the accused tends to show an alibi. *Ex parte Richardson*, 96 Ala. 110, 11 So. 316.

Where it is clear to the mind of the court that a conviction for murder should not be had, the accused should be bailed. *United States ex rel. Herbert v. The Marshal*, 2 Hayw. & H. 205, Fed. Cas. No. 15,726 A.

In *Re Troia*, 64 Cal. 152, 28 Pac. 231, in refusing bail, the court said: "We ought not to anticipate the action of the jury by discharging the prisoner from actual custody, with or without bail, upon evidence which we are not prepared to say is so insufficient as that a verdict requiring a capital sentence, based upon it, should not be permitted to stand."

In *People v. Shattuck*, 6 Abb. N. C. 33, application for bail was refused where the testimony before the grand jury, if believed, was sufficient to warrant a conviction for murder.

In *Moore v. State*, 36 Miss. 137, the court said: "We wish it understood that, on application for bail, we may grant the application even in cases where the jury might, and perhaps ought, on the same evidence, to render a verdict of guilty for murder. So much depends on the incidents of a trial by jury, the manner of the witnesses, their intelligence, their seeming bias or fairness, that cannot be brought before this court, which yet should have a material bearing on the weight of evidence, that we deem it unsafe that the opinion of the high court in granting or refusing bail should be adopted as a criterion for the jury by which to determine the guilt or innocence of the accused."

This is a proper rule to follow, especially in a court of the last resort. *Ex parte Claunch*, 71 Mo. 233.

The Pennsylvania rule was criticized in

Ex parte Bridewell, 57 Miss. 39, in which the court said: "A verdict of conviction where no error of law has intervened will never be set aside unless manifestly wrong, or, as is sometimes said, if there be any evidence to support it. To say that bail will only be granted where there is no evidence showing guilt, or where the proof of guilt is so slight upon the whole testimony that a conviction would be manifestly wrong, is plainly inconsistent with the constitutional requirement that it shall be granted in all cases except where the proof is evident or the presumption great. The error of the Pennsylvania rule is in failing to give due effect to a verdict of conviction, or in overlooking the vast change it effects in the attitude of the party. By it the legal presumption of innocence is overthrown, all doubtful questions of fact are resolved in favor of the state, and the credibility or noncredibility of witnesses is conclusively established. As before remarked, where no error of law has been committed to the prejudice of the accused, the verdict will not be set aside, unless the court can say that it is without evidence to support it, or that, upon a review and inspection of all the evidence, the finding is plainly erroneous. To apply such a test to a proceeding for bail, and to declare that it will be denied unless the relator has demonstrated that the evidence against him is of a like unsatisfactory character, is to reverse the constitutional requirement that it shall be granted unless the proof of guilt be evident or the presumption great."

Referring to the statement in Moore's Case, supra, and Beall v. State, 39 Miss. 715, that the court might admit to bail "even in cases where the jury might, or perhaps ought, on the same evidence, to render a verdict of guilty for murder," the court in Ex parte Bridewell, supra, said that, "if by this it was meant that this court or the presiding judge, on the hearing of a writ of habeas corpus, might, in its discretion and under the exceptional circumstances alluded to above, grant bail, even though the relator had not made out a case by which he was constitutionally entitled to demand it, we approve the remark; but if it was meant that the applicant, in the absence of such exceptional circumstances, can ever be said to have established a legal right to demand enlargement by testimony which would make it the duty of a jury to convict him of a capital crime, we dissent from it. A jury ought not to convict if there is a reasonable doubt of guilt, and therefore, to say that the accused is constitutionally entitled to bail, when there is no reasonable doubt of his guilt, is manifestly to nullify the provision of the Bill of Rights, which limits the absolute right to cases where the proof is not evident nor the presumption great. It would be difficult to give a meaning to these words, if they do not embrace a case where guilt has been established beyond all reasonable doubt."

The Pennsylvania rule is also said in RE 39 L.R.A. (N.S.)

THOMAS to be unmindful of the inherent right to life, liberty, and the pursuit of happiness of the citizen, and to cast a burden upon those charged with capital offenses not contemplated by the law.

The criticism of the rule in the Bridewell Case, supra, was also approved in Ex parte Smith, 23 Tex. App. 100, 5 S. W. 99.

If, when all the testimony is weighed, the court can satisfactorily affirm that "the proof is evident or the presumption great," that the petitioners are guilty of the offense charged in that degree which is not bailable, bail should be denied. If, on the other hand, the testimony is such as to disprove the defendant's guilt of the offense in the nonbailable degree, or if, when duly weighed, it is such that a fair-minded man would entertain a reasonable doubt of guilt in such degree, then the petitioner is entitled to bail. Ex parte Hammock, 78 Ala. 414.

Upon an application for bail by writ of habeas corpus, the burden is upon the relator to show that he is illegally deprived of his liberty; and the officer hearing the case should require the production of all the available testimony for the prosecution, and should if necessary, postpone the hearing until it can be obtained. If, upon the whole testimony adduced before him, he entertains a reasonable doubt whether the relator committed the act, or whether in so doing he was guilty of a capital crime, he should admit him to bail. Ex parte Bridewell, supra.

The same rule will be applied by the appellate court in keeping in mind the prima facie legal presumption that the action of the judge below was correct. Ibid.

If, upon the consideration of all the evidence introduced on the application for bail, the court is of opinion that it is insufficient to create a reasonable doubt of the petitioner's guilt of a capital offense, bail will be refused. Ex parte Dykes, 6 Okla. Crim. Rep. 162, 117 Pac. 724; Ex parte Smith, 2 Okla. Crim. Rep. 24, 99 Pac. 893.

In order to deny bail it is not necessary that the evidence should be so convincing as to justify a verdict against the suspected party; but it is sufficient if it points to him and induces the belief that he may have committed the offense charged. Ex parte Winthrop, — Cal. —, 40 Pac. 751.

Under a Constitution in the usual form, where the proofs go no further than to establish a "probability" of guilt, the accused is entitled to bail. Gainey v. State, 42 Fla. 607, 29 So. 405, 12 Am. Crim. Rep. 32.

In an application for bail for a person charged with a capital offense, the burden is upon the accused to show that he or she is entitled to bail. The *quantum* of proof required is a sufficiency to show from a fair consideration of all the evidence that the proof is not evident and the presumption is not great that the accused is guilty of a capital offense. The character and

extent of the proof to make the necessary offense depend upon the circumstances of each case. *Ex parte Nathan*, — Fla. —, 50 So. 38.

Where the testimony is of less probative force than is necessary under the circumstances of the case to show evident guilt or a great presumption of guilt of a capital offense, the accused is entitled to bail. Where the proofs establish only a probability of guilt, bail should be allowed. *Ibid*.

On a charge of capital felony, the rule is, "When the guilt is manifest or the presumption strong, the party should be committed to jail; when the evidence does not produce entire conviction, but makes in the mind a belief of the party's guilt, security to answer the charge should be required." *State v. Wiley*, 64 N. C. 821.

If there is probable cause for charging the accused with murder, he will not be admitted to bail after commitment by the coroner, and pending the hearing before the grand jury. *Re Collins*, 11 Abb. Pr. 406.

Where circumstantial and contradictory statements of the accused pointed strongly to his guilt of the charge of murder, the court refused to admit him to bail. *Ex parte Corriveau*, 6 Lower Can. Rep. (Dec. des Tribunaux) 249.

Upon an application for bail before an indictment, if the prosecuting attorney resisting the application, makes no showing that the proof is evident or the presumption great of the guilt of the accused, he is entitled to bail. *State ex rel. Murray v. District Ct.* 35 Mont. 504, 90 Pac. 513.

In Texas the testimony must make it evident that the accused is the guilty party or he is entitled to bail. *Ex parte Jasef*, — Tex. Crim. Rep. —, 24 S. W. 421.

The court believing the evidence to show a deliberate, wanton killing of the deceased by the accused, bail was refused. *Cash v. State*, — Tex. Crim. Rep. —, 24 S. W. 408.

Where the record did not show that sedate mind and deliberate, preconceived purpose, which indicate express malice, and the court did not discover those circumstances which point with unerring certainty to malice express, the accused was admitted to bail. *Ex parte Cooper*, 31 Tex. 185.

The terms, "proof is evident or presumption great," are as definite to the legal mind as any words of explanation could make them; and are intended to indicate the same degree of certainty, whether the evidence be direct or circumstantial. The design is to secure the right of bail in all cases except in those in which the facts might show, with reasonable certainty, that the prisoner is guilty of a capital offense. *McCoy v. State*, 25 Tex. 33, 78 Am. Dec. 520.

The rule in Texas for determining whether or not bail should be granted is as follows: "If the evidence is clear and strong, leading a well-guarded and dispassionate

judgment to the conclusion that the offense has been committed; that the accused is the guilty agent; and that he would probably be punished capitally if the law is administered, bail is not a matter of right." *Ex parte Evers*, 29 Tex. App. 539, 16 S. W. 343. To the same effect, *Ex parte Foster*, 5 Tex. App. 625, 32 Am. Rep. 577; *Ex parte Smith*, 23 Tex. App. 100, 5 S. W. 99; *Ex parte Coldiron*, 15 Tex. App. 464.

Stated in another form, it is thus laid down: "If, upon the whole testimony adduced, the court or judge entertains a reasonable doubt whether the relator committed the act, or whether in doing so he was guilty of a capital crime, bail should be granted." *Ex parte Evers*, supra.

This rule applies when the case is considered on appeal, the court keeping in mind the prima facie legal presumption that the action of the trial judge was correct. *Ibid*.

Unless it plainly, clearly, and obviously appears by the proof that the accused is guilty of the charge against him, he is entitled to bail, by virtue of the Texas Constitution providing, "All persons shall be bailable by sufficient sureties unless for capital offenses when the proof is evident." (Bill of Rights, § 11.) *Ex parte Boyett*, 19 Tex. App. 17.

So, where robbery committed by the exhibition and use of fire arms is made a capital offense, if the proof is evident that the robbery was committed, and that the accused are the guilty parties, and that fire arms were used in its commission, they are not entitled to bail. *Ex parte Epps*, 35 Tex. Crim. Rep. 406, 34 S. W. 113.

A case of murder in the first degree having been made against the accused beyond any controversy, bail was held properly refused. *Ex parte Wright*, 39 Tex. Crim. Rep. 193, 45 S. W. 593.

In *Ruston v. State*, 15 Tex. App. 324, although the prosecuting witness charged the accused with rape, the court said that the evidence was not of that satisfactory, evident, and conclusive character which authorized it to deny bail.

It not being evident from the facts presented to the court on the application for bail, that the accused is guilty of murder in the first degree, he is entitled to bail. *Ex parte Cook*, 2 Tex. App. 388.

When the facts show with reasonable certainty, that a murder, with express malice, has been committed, bail should be refused. *McCoy v. State*, 25 Tex. 33, 78 Am. Dec. 520; *Drury v. State*, 25 Tex. 45.

c. Illustrative cases.

1. Bail granted.

The following cases will illustrate circumstance under which bail has been granted.

Where, on the hearing for admission to bail, the state introduced the indictment and then the prisoners gave oral exculpatory evidence, and the state refused to

introduce evidence in rebuttal, it was held that the accused should have been admitted to bail in such reasonable sum as would be likely to insure their appearance. *Ex parte Hammock*, 78 Ala. 414.

In *Ex parte King*, 86 Ala. 620, 5 So. 863, the accused was held entitled to bail, although it appeared that previous to the homicide he was heard to say that if the deceased "ever made a break at him he would kill him," where the testimony showed clearly and unmistakably that the accused did not provoke the difficulty, but that to all appearances he desired to avoid it; that the deceased was the aggressor; that he was both violent and boisterous; that he struck the accused with sufficient force to stagger him, when the accused immediately shot and killed the deceased. The court said that under this state of the evidence, it was unable to say that the proof was evident or the presumption great that there had been a deliberate, premeditated killing.

Although the accused was indicted for murder, where it appeared that the alleged crime was committed in an attempt to procure an abortion, and there was no evidence of an intent to kill, it was held that the prisoner was entitled to bail. *Ex parte Wolff*, 57 Cal. 94.

Where the testimony showed merely that the body of a murdered person was found; that a few days before the discovery of the crime the person charged as principal was with the deceased when she left a house where she boarded; that the principal took deceased's clothes from her boarding place early the morning after she left; that some of the clothes were found in petitioner's home, near where the body was found; that the actions of petitioner after the discovery of the crime were such as to arouse suspicion; that something resembling blood was found on the floor of petitioner's home, and the floor was scoured soon after the discovery of the crime; that the petitioner is a married woman living with her husband and others in the same house, it indicates a probability that the petitioner knew something of the crime; but it is not evident proof, nor does it justify a great presumption, that the petitioner, as an accessory before the fact, aided, counseled, hired, or otherwise procured the murder to be committed. Under such circumstances bail is proper. *Ex parte Nathan*, — Fla. —, 50 So. 38.

The evidence being that the accused shot the deceased in a saloon; that no one had shot the accused before he went into the saloon, but that when he came out he had two pistol balls in his head, ranging backwards and slightly upwards; that there was no one in the saloon except the deceased, his father, and brother, who could have done the shooting; that just as the accused left the saloon, he was fired at and returned the fire; that he immediately exclaimed: "They shot me," and, "Who would not shoot who had been shot at twice?" that the accused had fired only

four shots, and that at least five shots were heard by several disinterested witnesses; that a ball extracted from the head of the accused was of the same weight as that used for a pistol such as the deceased, or his father or brother, used, and of too small a caliber for the weapon of the accused,—it was held that the accused was entitled to bail. *Ex parte Heffren*, 27 Ind. 87.

Where the evidence showed that there had been no quarrel between the deceased and the accused, until one had broken out while they were together in a saloon; that the deceased, who was the stronger man, had perpetrated violence and indignity on the accused, who was intoxicated, in such a manner as to provoke him to extreme anger; that the accused, as soon as he could, left the saloon and returned within five minutes with a revolver, and immediately, on re-entering the saloon, shot the deceased,—it was held that it could not be fairly said that it was clear that there was sufficient time between the provocation and the act for the passion to cool and the reason to resume control, or that the proof was evident or the presumption strong that the killing was malicious. *Ex parte Moore*, 30 Ind. 197.

Where the killing was shown to have been the result of a combat entered into upon a sudden quarrel, and without any previous acquaintance between the petitioner and the deceased, it was held that the petitioner was entitled to bail. *Ex parte Hock*, 68 Ind. 206.

In *State v. Start*, — Kan. App. —, 54 Pac. 22, the evidence was that the deceased saw the accused holding another man whom he supposed to be his son, and, upon going to his assistance, was shot by the accused when within four or five steps of where the two men were struggling, there being no enmity between the deceased and the accused, and no reason shown for the killing. It was held that the defendant was entitled to bail.

Where it appeared that the deceased and the accused had quarreled, and that the accused, while walking in the street with a friend, met the deceased and a friend, the deceased remarking: "This is the young man who was going to whip me;" that the deceased then said to the accused that if he would take the rocks out of his pocket, he would fight him; that after some remarks of this nature the accused drew a revolver and shot the deceased, it was held that he was entitled to bail. *State v. Bell*. — Kan. App. —, 54 Pac. 504.

Where the evidence showed that the prisoner, who was greatly agitated over the punishment of his brother by the deceased, a school teacher, had armed himself, and had then sought the deceased for an explanation, and had met him after school on the latter's way home; that they had engaged in an angry conversation, and that the deceased, who was a larger man than the accused, began beating the latter with a whip; that the accused retreated,

and that the deceased followed up his attack, until the accused drew a bowie-knife from his pocket and stabbed the deceased to death, it was held that the prisoner was entitled to bail. *Ex parte Wray*, 30 Miss. 673.

Where the evidence was that the accused shot the deceased while the latter was advancing on him, threatening to use a heavy board, and that the deceased was much superior in strength to the accused, and was infuriated at him because he had attempted to interfere with the deceased when the latter threatened to beat his son, and that the accused happened to have a gun at the time because he had been out hunting, it was held that he was entitled to bail. *Ex parte Majors*, — Miss. —, 34 So. 151, 12 Am. Crim. Rep. 37.

Where, on the hearing of an application for bail, seven of the nineteen witnesses whose names were indorsed on the indictment, and seven others, failed to testify to anything inculcating the accused, and there was nothing to suggest that the witnesses not in attendance had any knowledge of the case not possessed by those examined, it was held that the prisoner's application should have been granted. *Ex parte Floyd*, 60 Miss. 913.

Upon the simple showing that the accused stood indicted for the crime of rape, a capital felony, together with the proof that he had property of the value of \$500, the court held that he was entitled to bail. *Ex parte Arthur*, — Tex. Crim. Rep. —, 47 S. W. 365.

Where the testimony of accomplices made out a case of coldblooded murder against the accused, but the evidence corroborating them was circumstantial, consisting of declarations and conduct of the accused, the proof of the prisoner's connection with the crime not being absolutely clear and conclusive beyond a reasonable doubt, it was held that he was entitled to bail. *Ex parte Locklin*, — Tex. Crim. Rep. —, 72 S. W. 585, 12 Am. Crim. Rep. 35.

The evidence showing that the cause of the killing was an insult to a female relative, which would require a charge of manslaughter, it was held that the accused was entitled to bail. *Ex parte Proctor*, — Tex. Crim. Rep. —, 99 S. W. 1010.

The evidence failing to show conclusively that the deceased died from wounds inflicted by the accused, it was held that the prisoner was entitled to bail. *Ex parte Pettis*, 60 Tex. Crim. Rep. 288, 131 S. W. 1081.

The judge below is in far better situation to determine the credibility of witnesses on the application for bail than the appellate court, and therefore great deference must be paid to the construction placed upon the testimony by him. *Drury v. State*, 25 Tex. 45.

The evidence showing that the shooting was probably the result of a sudden affray, the accused was held entitled to bail. *Ex parte Dickson*. 20 Tex. App. 332.
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Where upon the hearing the prisoner procured as many of the witnesses whose names were indorsed on the indictment as he was able to, and they failed to identify him as the murderer, or to connect him with the homicide, it was held that he was entitled to bail. *Ex parte Randon*, 12 Tex. App. 145.

The accused is entitled to bail after indictment, where there is nothing in the testimony to connect him in any manner with the crime. *Ex parte Bomar*, 9 Tex. App. 610.

2. Bail refused.

The following cases show circumstances under which bail has been refused:

In *Ex parte Nettles*, 58 Ala. 268, the defendant shot the deceased at his place of business, and accosted him there, the tendency of the testimony being that the accused had an open knife in his hand. There was short quarrel, followed by a fatal stab with the knife. Under one construction of the evidence the offense was not bailable, under the other, that is, that the killing was not capital, the offense was bailable. The primary court having refused bail, the appellate court refused to disturb its ruling.

Upon an application for bail, exculpatory circumstances related by the accused in his confession of the homicide, not supported by other testimony or by a strong presumption of their truth arising from the confession itself, are not in themselves sufficient ground for admitting the prisoner to bail. *State v. Abbot*, R. M. Charl't. (Ga.) 244.

The evidence establishing without conflict that the accused shot and killed the deceased, that there were previous threats by the prisoner to do so, that the weapon used was one of a dangerous and deadly character, and that, in addition to such threats and the character of the weapon used, there were circumstances clearly manifesting the existence of malice, it was held that the accused had not discharged the burden of showing that the proof was not evident and that the presumption of guilt was not strong. *Schmidt v. Simmons*, 137 Ind. 93, 36 N. E. 516.

In *Brown v. State*, 147 Ind. 28, 46 N. E. 34, it was held that the prisoners were not entitled to bail, the evidence showing that they went to the house where the deceased was just before daybreak, claiming to be United States marshals in search of a man; that after they called one man, the deceased, who was in the house, took a shotgun and went out of the kitchen door to a smoke house; that the accused, when they heard the opening of the door, went around the rear of the house and saw the deceased, whom they could not recognize on account of the darkness, standing in the smokehouse door holding a shotgun in his hand; that he raised it up; that the prisoners said: "Hands up!" that the deceased said: "I haint, I haint;" that immediately

a shot was fired by one of the accused which killed the deceased,—the court saying that the evidence did not warrant the conclusion that the accused were not trespassers, or that, at the time the shot was fired, they or either of them were in imminent peril of life or of great bodily harm, or that they might reasonably have believed themselves to be in such peril.

Where the facts established to the satisfaction of the court that the two prisoners accused of killing the deceased were riding, together with others, in a wagon, when one of them, seeing the deceased, who was his enemy, and, finding an opportunity to confront him alone, attacked and killed him without the assistance of any of the others and without legal justification, it was held that the assailant should be denied bail, but that the other prisoner should be admitted to bail. *Ex parte Hamilton*, 65 Miss. 147, 3 So. 241.

In *Re Bell*, 113 Mo. 506, 21 S. W. 221, the supreme court refused bail before indictment, where the only evidence was that offered at the preliminary examination, at which the accused gave no evidence, the facts presented by the prosecution being without explanation or extenuation.

Where the evidence of guilt was strong and the prisoner had been retaken after an escape, the court refused to exercise its discretionary powers to bail. *State v. Rockefeller*, 6 N. J. L. 332.

Where the evidence showed that the deceased, while in conversation with a man in front of a store, was approached by the accused, who said, "Hello, Dan," and without other warning fired two shots into the deceased in quick succession; that the deceased fell, and the accused fired four more shots into him; that the accused then walked off, came back, and putting his pistol close to the head of the deceased, snapped it once or twice, and with an oath said: "I told you I'd kill you. You killed my boy;" it was held not sufficient to show that the killing was in the heat of passion, so as to entitle the prisoner to bail. *Re Fraley*, 3 Okla. Crim. Rep. 719, 139 Am. St. Rep. 988, 109 Pac. 295.

The evidence showing that, in a dispute over a fence, the deceased and accused had violent words, that the prisoner walked off a few steps, opened his knife, and came back and made a remark to the deceased, who started for the prisoner, but stopped 3 or 4 feet from him, and made no further advance; that the accused said, "Come on with it, and if you are going to do it, do it," and immediately stabbed him in the heart, it was held that he was not entitled to bail. *Re Rollin*, 3 Okla. Crim. Rep. 725, 109 Pac. 288.

The testimony indicating that the killing was done in a riot by a body of men who had a common understanding or agreement that they should resist all who opposed them, to the extent of taking life if necessary to accomplish their purpose; that the defendant was a party to this combination, and that he was present upon the

ground with full knowledge of the proceedings of the rioters, giving them his encouragement, it was held that bail was properly refused. *Com. v. O'Donnell* (O. & T.) 12 Pa. Co. Ct. 142.

It appearing that there had been bitter feelings between the deceased and the accused, owing to the fact that the accused had dunned the deceased for pay for certain cigars he had sold him, and that they met in a saloon and quarreled over the matter, and the accused shot the deceased under circumstances which made it improbable that he acted in self-defense, it was held that bail was properly refused. *Randle v. State*, — Tex. Crim. Rep. —, 22 S. W. 49.

Where the accused claimed to have shot the deceased in self-defense, but his account of the affair made after the shooting, and that told on the application for bail, were materially different, and certain physical facts made it certain that the shooting could not have occurred as the accused said, he was refused bail. *Ex parte Pace*, — Tex. Crim. Rep. —, 20 S. W. 922.

Where the only question on the application for bail was as to the identity of the person committing the murder, which was with express malice, the court refused to reverse the judgment refusing bail. *McKinney v. State*, — Tex. Crim. Rep. —, 20 S. W. 363.

Where the testimony of one witness made it doubtful whether or not the case was one in which the accused was entitled to bail, while the testimony of another, if true, made it evident that the killing was upon express malice, and the salient points in the latter's narrative were not contradicted, and where if untrue, it was in the power of the accused to show it, bail was refused. *Price v. State*, — Tex. Crim. Rep. —, 26 S. W. 624.

The testimony for the state being positive and unequivocal that the accused, in company with another, killed the deceased by shooting him through a window at night, the defense being an alibi, it was held that the prisoner was properly refused bail. *Ex parte Cabrera*, 53 Tex. Crim. Rep. 466, 110 S. W. 898.

Where the accused and the brother of the deceased had a dispute, and the accused called the brother, "A d—d liar," and while the brother, unarmed and in his shirt sleeves, was in the act of dismounting from his horse, the accused shot at him, and the deceased, who was unarmed, seeing the danger of his brother, started toward the accused with hands uplifted in an imploring attitude, and the accused shot him, and then fired another shot at the brother, it was held that the accused was not entitled to bail. *Moore v. State*, 31 Tex. 572.

Where the accused was the seducer of the wife of the deceased, and had been implored by the latter to leave the neighborhood, the deceased saying that unless he did go one or the other of them must die, and it appeared that the accused armed

himself with three pistols and a double-barreled shotgun, and waylaid and killed the deceased, it was held that he was not entitled to bail. *Ex parte Mosby*, 31 Tex. 566, 98 Am. Dec. 547.

Where the evidence was that the deceased and a companion were riding on horseback, and were stopped by several persons who were armed, and the deceased was ordered to give up his pistol, and he gave it to his companion, who, in obedience to orders from the assaulting party, laid it on the ground, and afterwards escaped and was fired on several times in so doing, and that soon afterward he heard four shots, it appearing that the body of the deceased was found a few hours later on the ground with four bullets in it, and that a short distance away one of the assailants was found severely wounded, shot, according to the companion of the deceased, by another of the assailants, it was held that the proof of the defendant's guilt was evident and the presumption great, so that they were not entitled to bail. *Herrin v. State*, 33 Tex. 638.

That the accused was drunk at the time of the homicide does not entitle him to bail on the theory that there must arise doubt as to whether the proof is evident of a sufficient intent to justify a capital conviction. *Ex parte Evers*, 29 Tex. App. 539, 16 S. W. 343.

Where several persons met at the house of the deceased at night, and while the accused was engaged in beating the deceased with a pistol, another shot and killed him, it was held that notwithstanding the facts did not in terms show an actual agreement to kill, and did not show that the parties to the killing went to and left the place of the homicide in company with each other, the court would not presume that their meeting was accidental, and that, while there, they acted with different intents in committing the homicide, and that, because the accused did not shoot the deceased when he had an opportunity to do so, he was not the principal offender. The burden of showing this was held to be on the accused in order to entitle him to bail. *Ex parte Johnson*, 30 Tex. App. 279, 17 S. W. 410.

Where the accused killed the deceased because of the fact that his wife told him she had been raped by the latter twenty years before, at a time when she was not the wife of the accused, the defense being that the killing was done under uncontrollable passion, it was held that bail was rightfully refused. *Ex parte Jones*, 31 Tex. Crim. Rep. 422, 20 S. W. 983.

The accused is not entitled to bail on mere proof that threats were made by the deceased against his life, which threats he had good reason to believe would be carried into execution. *Ex parte Taylor*, 33 Tex. Crim. Rep. 531, 28 S. W. 957.

IX. Amount of bail.

In determining the amount of bail to be demanded in capital offenses, the courts 39 L.R.A.(N.S.)

endeavor to fix upon such sum as is deemed sufficient to secure the presence of the accused at the trial, and in doing so they will take into consideration the pecuniary ability of the defendant.

In *Re Losasso*, 15 Colo. 163, 10 L.R.A. 847, 24 Pac. 1080, it is said: It must be borne in mind that the legal penalty for crime is inflicted only upon conviction, and that the object of imprisonment before trial is safe-keeping, not punishment. If the presence of the accused for trial could be otherwise assured, imprisonment would doubtless be entirely dispensed with. So anxious were the framers of the Constitutions, state and Federal, to guard against abuses in this direction, that they prohibited the exaction of "excessive bail." i. e., more than will be reasonably sufficient to prevent evasion of the law by flight or concealment. It is likewise to be remembered that trial does not and cannot, as a rule, so speedily follow presentment, in this and other rapidly growing western commonwealths, as in England, where the common-law doctrine under consideration had its origin.

In *State v. Crocker*, 5 Wyo. 385, 40 Pac. 681, 9 Am. Crim. Rep. 468, it is said: "It must be borne in mind that our laws are intended to be framed upon the humane idea that no man is to be punished until he has been convicted; that an accused is only confined in jail before trial and conviction to secure his presence at the trial, and, if convicted, that he may be compelled to undergo sentence; that, however, if, by sureties, his presence can as well be secured, it is deemed wise and just that he shall, until trial and conviction, be allowed his liberty, except in capital offenses where the proof is evident or the presumption great, in which cases it is deemed that the offense is so grave that it is not safe to allow the presence of the accused to be secured by bail."

The bail must be fixed at such sum as will be likely to secure the attendance of the accused at the trial. *Ex parte Heffren*, 27 Ind. 87; *Ex parte Bridewell*, 57 Miss. 39.

The amount of bail should be graded somewhat by the pecuniary ability of the prisoner. *Ex parte Hammock*, 78 Ala. 414.

This should be determined in the county from which the case comes, and not by the appellate court. *Ibid*.

In *Ex parte Banks*, 28 Ala. 89, it is said that the fact that the prisoner is a man of fortune may be taken into consideration in fixing the amount of bail. The bail in this case was fixed at \$20,000.

The record should furnish the court with information as to the pecuniary circumstances of the accused. *Ruston v. State*, 15 Tex. App. 324; *Ex parte Coldiron*, 15 Tex. App. 464.

Upon a record showing that the accused had property of the value of \$500, the court fixed his bail at \$5,000. *Ex parte Arthur*, — Tex. Crim. Rep. —, 47 S. W. 365.

In *Moore v. State*, 36 Miss. 137, where

it was shown that the prisoner had very little property and was in bad health, bail was fixed at \$2,000.

In *Ex parte Wilson*, 20 Tex. App. 498, the accused being very poor and having few friends, bail was reduced from \$7,000 to \$3,500.

There being nothing in the record to show the ability of the accused to give bail, the court declared that it was not proper to say that a \$3,000 bond was excessive. *Ex parte Hanson*, 27 Tex. App. 591, 11 S. W. 641.

Where bail was fixed in a certain sum on preliminary examination, it was held that after indictment the accused had no right to demand admission to bail in the sum fixed at the preliminary hearing. *Ex parte Robinson*, 108 Ala. 161, 18 So. 729.

In *Ex parte Cochran*, 20 Tex. App. 242, the record showing that the prisoner charged with murder, and being entitled to bail, could give a bond in the sum of \$2,500, bail was fixed at that amount.

Bail has been fixed in various amounts, ranging from \$100,000 to \$500. The following cases will illustrate the practice of the courts in this respect:

In *Davis's Case*, Chase, 1, Fed. Cas. No. 3,621a, where the charge was treason, bail was fixed at \$100,000.

In *Com. v. Semmes*, 11 Leigh, 665, where the condition of the prisoner's health was such as to render his further imprisonment dangerous to his life, he was admitted to bail in the sum of \$25,000.

Where the proof on the application for bail was not considered strong enough by the court to justify the conviction against certain defendants, they were admitted to bail in the sum of \$20,000. *People v. Baker*, 10 How. Pr. 567, 2 Park. Crim. Rep. 570.

In *People v. Perry*, 8 Abb. Pr. N. S. 27, after two disagreements of trial juries, the prisoner was admitted to bail in the sum of \$20,000.

Bail fixed at \$15,000. *Ex parte Coldiron*, 15 Tex. App. 464; *Re Alexander*, 59 Mo. 598, 21 Am. Rep. 393 (after two mistrials).

Bail fixed at \$13,000. *Ex parte Matlock*, 18 Tex. App. 227.

Bail fixed at \$12,000. *Ex parte Strange*, 59 Cal. 416.

Bail fixed at \$10,000. *State v. Bell*, — Kan. App. —, 54 Pac. 504; *State v. Start*, — Kan. App. —, 54 Pac. 22; *Ex parte Jack*, — Miss. —, 22 So. 188; *Ex parte Holland*, 2 Okla. Crim. Rep. 581, 100 Pac. 50; *Ex parte Westmoreland*, 2 Okla. Crim. Rep. 512, 103 Pac. 370; *Ex parte Hay*, 23 Tex. App. 585, 5 S. W. 98; *Thompson v. State*, 25 Tex. Supp. 395; *Ex parte Miller*, 41 Tex. 213 (upon agreement); *Ex parte Callaher*, 25 Tex. App. 455, 8 S. W. 481 (murder of two persons); *People v. Baker*, 10 How. Pr. 567, 2 Park. Crim. Rep. 570 (where the court did not consider the evidence sufficient to have warranted the finding of an indictment against the accused); *Ex parte Goans*, 99 Mo. 193, 17 Am. St. 39 L.R.A. (N.S.)

Rep. 571, 12 S. W. 635 (after discharge by coroner's jury and the committing magistrate, and after one mistrial); *United States v. Jones*, 3 Wash. C. C. 224, Fed. Cas. No. 15,495 (charge piracy).

Bail fixed at \$8,000. *Ex parte Hayes*, — Tex. Crim. Rep. —, 38 S. W. 1149; *Ex parte Lochlin*, — Tex. Crim. Rep. —, 72 S. W. 585, 12 Am. Crim. Rep. 35; *Ex parte Rice*, 26 Tex. App. 343, 9 S. W. 615; *Ex parte Rankin*, 30 Tex. App. 71, 20 S. W. 202; *Ex parte Wolff*, 57 Cal. 94.

Bail fixed at \$7,500. *Ex parte Wilson*, — Tex. Crim. Rep. —, 110 S. W. 66.

Bail fixed at \$6,000. *Ex parte Bice*, — Tex. Crim. Rep. —, 90 S. W. 505; *Ex parte Duncan*, 27 Tex. App. 485, 11 S. W. 442.

Bail fixed at \$5,000. *Ex parte Patterson*, — Miss. —, 22 So. 186; *State v. Wiley*, 64 N. C. 821; *People v. Van Horne*, 8 Barb. 158; *People v. Porter*, 8 Barb. 168, note; *Ex parte Dickson*, 20 Tex. App. 332; *Ex parte Terry*, 20 Tex. App. 486; *Ex parte Allen*, 22 Tex. App. 201, 2 S. W. 588; *Ex parte McDowell*, 23 Tex. App. 679, 5 S. W. 187; *Ex parte Henson*, 24 Tex. App. 305, 5 S. W. 684; *Ex parte Suddath*, 25 Tex. App. 426, 8 S. W. 479; *Ex parte Smith*, 26 Tex. App. 134, 9 S. W. 359; *Re Puryear*, — Tex. App. —, 11 S. W. 32; *Ex parte Hanson*, 27 Tex. App. 591, 11 S. W. 641; *Re Foulk*, — Tex. App. —, 13 S. W. 746; *Ex parte Bates*, 29 Tex. App. 138, 15 S. W. 406; *Ex parte Albitz*, 29 Tex. App. 128, 15 S. W. 173; *Ex parte Hope*, 29 Tex. App. 189, 15 S. W. 602; *Ex parte Thompson*, — Tex. App. —, 15 S. W. 912; *Ex parte Moore*, — Tex. App. —, 16 S. W. 764; *Ex parte Jasef*, — Tex. Crim. Rep. —, 24 S. W. 421; *Ex parte Fatherree*, 34 Tex. Crim. Rep. 594, 31 S. W. 403; *Ex parte Winters*, — Tex. Crim. Rep. —, 32 S. W. 897; *Ex parte Dartner*, — Tex. Crim. Rep. —, 38 S. W. 770; *Ex parte Spencer*, — Tex. Crim. Rep. —, 138 S. W. 703.

Bail fixed at \$4,000. *Ex parte Pettis*, 60 Tex. Crim. Rep. 288, 131 S. E. 1081; *Ex parte Kunde*, 22 Tex. App. 418, 3 S. W. 332.

Bail fixed at \$3,000. *Ex parte Catron*, — Miss. —, 21 So. 1029; *Ex parte Schamberger*, 19 Tex. App. 572.

Bail fixed at \$2,500. *Ex parte Proctor*, — Tex. Crim. Rep. —, 99 S. W. 1010; *Ex parte Bryant*, 21 Tex. App. 639, 2 S. W. 891; *Ex parte Jones*, 26 Tex. App. 597, 10 S. W. 114; *Ex parte Cosby*, — Tex. Crim. Rep. —, 54 S. W. 587.

Bail fixed at \$2,000. *Ex parte Williams*, 18 Tex. App. 653.

Bail fixed at \$1,000. *Ex parte Majors*, — Miss. —, 34 So. 151, 12 Am. Crim. Rep. 37; *Ex parte Manley*, — Miss. —, 20 So. 1023.

Bail fixed at \$500. *Ruston v. State*, 15 Tex. App. 324 (charge rape).

In *Reg. v. McNaughten*, 14 Cox. C. C. 576, where it appeared that a homicide was committed by officers in repelling an unlawful assembly or riot, the accused were admitted to bail on their own recognizances in the sum of £100.

In *Ex parte Bryant*, 34 Ala. 270, where four persons were accused of murder in the first degree, and the proof not being evident or the presumption great as to three of the prisoners, they were admitted to bail in the sums of \$3,000, \$1,000, and \$500 respectively.

In *Re Wilson*, — Tex. App. —, 13 S. W. 609, bail was fixed for various defendants at \$5,000, \$3,000 and \$2,000.

In *People v. Smith*, 1 Cal. 9, the defendants, who were charged with burning several Indian lodges and killing several Indians, were each permitted to enter into a recognizance in the sum of \$3,000.

X. Rules governing appellate court on application for bail.

The appellate courts in some states will not interfere with the action of the lower court upon an application for bail, unless there has been a manifest abuse of its power or discretion. In others the appellate court will weigh the evidence, but in all courts great deference is paid to the decision of the lower court, on the ground that the judge has had the opportunity to see and hear the witnesses.

Whether based on a *prima facie* case of murder, on evidence of probable guilt, on the sickness or physical condition of the defendant, or on other cause, the granting or refusal of bail in capital cases is peculiarly within the discretion of the judge of the superior court, and will not be controlled unless it has been manifestly and flagrantly abused. *Jernagin v. State*, 118 Ga. 307, 45 S. E. 411, 12 Am. Crim. Rep. 45.

When the right to bail depends upon the hearing of testimony, the rule of the appellate court is not to reverse the finding of the primary court. *Ex parte Allen*, 55 Ala. 258.

If, after indictment, there is no doubt from the evidence offered at the hearing on habeas corpus that a murder has been committed, that the issue is as to the guilty complicity of the relator with the perpetrator, and that issue has been passed upon in the court below on the credibility of witnesses, the appellate court will not reverse the judgment of the lower court refusing bail. *Street v. State*, 43 Miss. 1.

The granting or refusal of bail being a matter in the sound discretion of the court below, an appellate court will not control that discretion, unless it has been flagrantly abused. *Lester v. State*, 33 Ga. 192.

When the appellate court sits in revision of a judgment of the lower court, it acts on the conviction made upon it by a perusal of the testimony in the record giving to the judgment of the inferior court that *prima facie* presumption of correctness which attaches to all courts of competent jurisdiction, strengthened in this class of cases by the fact that the judge of the lower court has seen the witnesses and heard them testify under circum-

stances which made it his duty to attend to their bearing and determine their credibility. *Ex parte Bridewell*, 57 Miss. 39.

When the question is presented to a revisory court, much is due to the judgment of the primary tribunal. The witnesses are personally before it, and the examination is usually had near the scene of the alleged offense, and in the midst of the circumstances attending the transaction. In all investigations of criminal accusations, much depends upon the manner in which the witnesses testify, the feeling of partiality or prejudice they may manifest, and their general demeanor. These the primary court has the opportunity of observing, and it should be clear that it has erred in its judgment, or a revisory court shall abstain from interference. *Ex parte Sloane*, 95 Ala. 22, 11 So. 14.

Where the evidence on the part of the people tends to show that the accused is guilty as charged, and that on the part of the prisoner tends to show an alibi, the appellate court will not grant bail where it has been denied by the primary magistrate on oral evidence, unless such denial appears from the record to have been manifestly and clearly erroneous. *Ex parte Richardson*, 96 Ala. 110, 11 So. 316.

The appellate court will not interfere after the district court has acted, unless it clearly appears that the defendant is entitled to bail. *State v. Zummo*, 115 La. Ann. 456, 39 So. 442.

If the appellate court cannot say that it is convinced that the probate court clearly erred in refusing bail, the renewed application of the prisoner in the higher court for admission to bail will be refused. *Ex parte McAnally*, 53 Ala. 495, 25 Am. Rep. 646.

In *Re Troia*, 64 Cal. 152, 28 Pac. 231, the court said: "If, on habeas corpus, we are ever authorized to determine the credibility to be accorded to the testimony of witnesses whose material statements conflict, it is only when the testimony of the material witnesses for the people is clearly shown to be false that we can be justified in discharging the prisoner with or without bail."

But the rule that the appellate court will not set aside a decision of the circuit judge refusing to admit the accused to bail, where he has had the opportunity to see and hear the witnesses, does not apply where the denial of bail is made on the record of the evidence before the committing magistrate. *Ex parte Jones*, 20 Ark. 9.

In Indiana, the appellate court, upon an application for bail, will weigh the evidence. *Ex parte Moore*, 30 Ind. 197; *Ex parte Sutherland*, 56 Ind. 595; *Ex parte Walton*, 79 Ind. 600; *Ex parte Kendall*, 100 Ind. 599; *Ex parte Richards*, 102 Ind. 260, 1 N. E. 639.

It is the duty of the appellate court to weigh the evidence and pass upon its conflict as a trial court. *Brown v. State*, 147, Ind. 28, 46 N. E. 34.

Upon the appeal of the accused from a decision of the court below, the appellate court, will not treat the finding of the judge below as having the same legal effect as if it had been a finding on the final trial on an ordinary cause, but the judges of the higher court will consider and weigh the evidence. *Ex parte Heffren*, 27 Ind. 87.

The appellate court in Texas examines the evidence on appeal from a judgment in habeas corpus proceedings denying bail. *Ex parte McKinney*, 5 Tex. App. 500. To the same effect. *Ex parte Williams*, 18 Tex. App. 653.

In *Ex parte Matlock*, 18 Tex. App. 227, the evidence was examined by the appellate court, and the applicant admitted to bail after indictment, the decision of the lower court being reversed.

While great deference will be paid to the judgment of the court below, it will not be binding on the appellate court in any state of the case, where the court might be impressed with reasonable doubt, or could not willingly concur in its correctness. *Ex parte Moore*, 5 Tex. App. 103.

It would only be in an extreme case in which it was evident that the judge below erred, that the appellate court would reverse his judgment upon a matter of the conflict of evidence and the credibility of witnesses. *Ex parte Beacom*, 12 Tex. App. 318.

The appellate court, in passing upon the applicant's right to bail, will not comment on the evidence. *Ex parte McKinney*, 5 Tex. App. 500.

In *State ex rel. West v. Collins*, 10 N. D. 464, 88 N. W. 88, 12 Am. Crim. Rep. 41, the court said: "We have also reached the further conclusion that any extended presentation or discussion of the evidence at the hands of this court, in advance of the trial of the case upon the merits, would be manifestly improper. In capital cases the question of whether the homicide resulted from the premeditated act of the accused is ordinarily one of fact, to be determined by the jury under proper instructions to be given to the jury by the trial court. In such cases the pivotal question of the grade of the homicide ought not, in our judgment, to be made the subject of collateral inquiry and determination in advance of the trial, except in cases where there is little or no ground for a difference of opinion as to the grade or degree of the homicide. In our opinion this court would be trenching upon delicate and dangerous ground should it attempt to pass upon the crucial question to be determined hereafter by the jury impaneled to try and decide upon the entire matter of the guilt or innocence of the accused, including the matter of the nature and the degree of the homicide. Upon such considerations we are constrained to refrain from any discussion of the evidence or the law applicable thereto."

In Louisiana, whether a prisoner charged

with a capital crime shall be admitted to mail is discretionary with the judge empowered to issue a writ of habeas corpus, and a mandamus will not therefore be issued to compel the district court to admit the accused to bail. *State v. Merrick*, 10 La. Ann. 424. H. C. S.

LOUISIANA SUPREME COURT.

THOMAS J. ADAMS

v.

J. W. PORTER, Plff. in Certiorari.

(129 La. 1085, 57 So. 526.)

Vendor and purchaser — deficiency — supply.

When there is a deficiency of land in a sale *per aversionem*, the court cannot order the vendor to supply the deficiency out of land not included in the tract intended to be sold.

(January 15, 1912.)

CERTIORARI to the Circuit Court of Appeals for the Parish of Caddo to review a judgment modifying a judgment of the Judicial District Court in a suit brought to recover possession of certain real estate. Reversed.

The facts are stated in the opinion.

Messrs. Hall & Jack and Liverman, & Pollock for applicant.

Messrs. Lee, Pegues, & Atkinson for respondent.

Breaux, Ch. J., delivered the opinion of the court:

This suit was brought by plaintiff to recover the following described tract of land, to wit: Commencing in the center of Wilson's Ferry, and running in a southeasterly direction along Bayou Pierre, to a dry bayou south of a cabin, at or near the east and west line of section 5, divid-

Headnote by BREAUX, Ch. J.

Note. — *May vendor be required to make good deficiency in tract sold out of other lands.*

The decision in *ADAMS v. PORTER*, to the effect that where lands are sold *per aversionem* or in gross, the vendor cannot be compelled to supply the deficiency out of other lands, even where it is assumed that some remedy exists, is supported by the authorities. Thus, in *Gladstone Realty Co. v. Currie*, 126 La. 115, 52 So. 237, as is set out in the *ADAMS CASE*, it was held that the right of action by a purchaser for a deficiency of acreage was not for a supplement of area, but that, in case of a shortage, the remedy was for a diminution of price, under Civ. Code, Art. 2494, en-

ing the N. $\frac{1}{2}$ and the S. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of section 5, and running thence east between parallel lines to the east boundary of the section, containing 80 acres, more or less.

The facts are slightly complicated. They are in the main that on the 22d day of December, 1908, Thomas J. Adams, the plaintiff, sold to Joseph W. Porter, the defendant, a tract of land of 33 acres for the price of \$1,200, represented by the note of J. W. Porter in favor of the plaintiff, payable on January 1, 1910, secured by a vendor's mortgage and privilege. On the face of the papers, this was a complete deed.

Subsequently the parties by their agreements beclouded the issues. The defendant, Porter, agreed with plaintiff to transfer

to the latter, Adams, the land described (which was mortgaged at the time to a Mr. Marsden) in exchange for plaintiff's land, sold as above mentioned, and for the price for which a note had been executed. In order to enable Porter, the defendant, to make title to Adams to the 80 acres of land above described, a note secured by mortgage and vendor's privilege, as above mentioned, was assigned to Porter to enable him to pay the vendor's privilege and mortgage due by him (Porter) on the land which he promised to transfer to the plaintiff in exchange. The note was placed in the hands of Mr. K. M. Reeves to pay the note and vendor's privilege due by Porter to Marsden. The note was taken up by Reeves for account of Adams, and

titling the purchaser thereto, in case of a shortage of $\frac{1}{20}$ part or more of the measure expressed in the contract. So, in *Clark v. Farnsworth*, 7 Kan. App. 167, 53 Pac. 93, it was held that a party purchasing lots on the margin of a town site purchases only the land contained within such lots, and that he cannot recover from the grantor a sufficient amount of land owned by such grantor adjoining the purchased lots, and outside the limits of the town site, to make up a deficiency in the area of the purchased lots, but that the remedy, if any, lay in other directions.

In *Wright v. Wright*, 34 Ala. 194, where the deed contained a complete description of government surveys and metes and bounds, followed by a designation of a number of acres as mere matter of description, the court, in holding that the purchaser was not even entitled to an abatement in the purchase money, said that "the vendor in the absence of fraud, is not bound to make good the deficiency, and the vendee is not required to surrender any excess. In sales made in gross this rule is of more general application than when the sale is made per acre."

And the general rule is not only that the vendor cannot be compelled to make up any deficiency from other lands, where the sale is in gross, but that the vendee cannot be compelled to take land not lying within the purchased tract in lieu of a deduction for a deficiency. Thus, in *Barton v. Bird*, 1 Overt. 66, where a certain tract estimated to contain a certain number of acres was sold with a stipulation that a deduction should be made at a certain rate for any deficiency, it was held that the vendee could not be compelled to take lands not lying within the tract sold, as delineated on a plat with reference to which the sale was made.

But where the sale is by the acre, and not in gross, or, as it is sometimes stated, one of hazard, it seems that, in some instances at least, the vendee is entitled to have a deficiency made up from adjoining lands. Thus, in *Norfolk Trust Co. v. Foster*, 78 Va. 414, where a tract supposed 39 L.R.A. (N.S.)

to contain a certain number of acres was sold at a specified sum per acre, with provision that the boundaries set forth in the deed were not accepted as strictly correct, and reference was made to a survey to be made, and with the further provision that if the land conveyed contained more than the estimated acreage, such excess should be paid for at a certain rate, it was held that equity would decree the purchaser the deficiency of land from the adjoining land, or, at his option, the value thereof.

And where the sale is of a specified part of a larger tract, it has been held that the deficiency must be made up. Thus, in *Lee v. Durret*, 4 Bibb, 20, where A purchased a specified number of acres from a larger tract, and B subsequently, and with notice of the prior purchase of A, purchased the residue of the original tract, it was held, the part set off to A falling short of the purchased acreage, that B must convey to him sufficient of the residue to make up the deficit. But in *Lebeau v. Bergeron*, 14 La. Ann. 494, where adjoining tracts with an established dividing line were purchased from a common vendor, it was held that if either purchaser has not the amount of land called for by his deed, he cannot recover the deficiency from the purchaser of the adjoining tract.

In Quebec the question seems affected by statute. Thus, in *St.-Aubin v. Brunet*, Rap. Jud. Quebec, 40 C. S. 83, where the vendor of one parish lot owned an adjoining lot, and the statutes required the vendor to deliver the amount mentioned in the contract, it was held that he could be compelled to deliver the amount called for by the deed, by taking the shortage from the adjoining unsold lot, and that he could not limit the vendee to a reduction in price for the deficiency.

And the vendee of realty may expressly contract that, in case a certain tract of land sold does not contain a specified number of acres, the deficiency will be made up from adjoining lands, and such a contract will be enforced at the suit of the purchaser. *Latimer v. Marchbanks*, 57 S. C. 267, 35 S. E. 481.

G. J. C.

it remained in the hands of Reeves to guarantee the faithful performance on the part of Porter according to the terms of the contract; that is to say, to guarantee the valid deed and title to the tract of land which he had promised to exchange with plaintiff for the land sold as first above mentioned.

It appears on the face of the papers as a sale, but in reality this sale was a step toward the exchange. Some time after these agreements, defendant, Porter, delivered two mules to the plaintiff, for the value of which he received 45 acres of land, the very land that he had under private signature agreed to make title to plaintiff in exchange of the first land above described, but which he had not yet delivered in accordance with the agreement. The mules transferred for the land had been in plaintiff's possession and use several months when this suit was brought. There is no question but that the transaction between the plaintiff and the defendant involving the two mules and 45 acres of land is complete and irrevocable. The judge of the district court so considered this part of the transaction, and so did the circuit court of appeal.

Plaintiff, in bringing this suit, ignored entirely the exchange of land for mules; made no allegation in that respect. We are of opinion that we must give effect to this part of the exchange between the parties. Had the defendant undertaken, instead of the transaction about lands, to pay the \$1,200 note, and had transferred the two mules in part payment, observing the proportion of the 45 acres to the 80 acres as the basis of value, the defendant would then have paid $\frac{11}{20}$ of the note; that is, in the proportion of $\frac{9}{20}$ to $\frac{11}{20}$, the value of the land. The defendant informed the plaintiff that he would take possession of the 45 acres. He had them surveyed, and became the owner of a separate tract of the east side of the tract he had promised to transfer to plaintiff in exchange.

But the transaction took another shape, and from it grew the difference between the parties. The plaintiff, we have seen, was to receive 80 acres of land in exchange for the \$1,200 note, which is the same thing in this case as an equivalent for the 33-acre tract of plaintiff, as before mentioned. But this transfer of the 80-acre tract was impossible for the reason that the tract as described contained only 50 acres. It was not possible to carve out of 50 acres two tracts—one of 45 acres, and another of 35 acres, the last number being the number of acres plaintiff now claims as due him as a balance of land on 39 L.R.A. (N.S.)

the exchange made. The number of acres remaining is 5 acres.

Defendant's contention is that the tract was to be transferred by metes and bounds, and that, when the agreement was signed, it was expressly understood that the plaintiff would accept the number of acres without the reference to the actual number described in the deed. This is not denied by the plaintiff. On the contrary, it is admitted by him as a witness. The circuit court of appeal undertook to settle this difference between the parties by decreeing that the 35 acres of land should be taken from the 45 acres for which defendant had conveyed two mules, as before stated. In this opinion we are unable to agree with our learned brothers of the circuit court of appeal. Defendant had acquired as absolute right, and title, and the land was not subject to any further claim in the part of plaintiff. He could not be made to supplement a deficiency of measurement in that way. It would have been taking other land to supply an alleged deficiency.

A very similar question was decided in *Gladstone Realty Co. v. Currie*, 126 La. 115, 52 So. 237, in which it was decided that lands other than those included in the metes and bounds of the tract sold could not be taken and applied in satisfaction of any deficiency.

These 45 acres of land by effect of the agreement between the parties were taken out of the metes and bounds of the tract which defendant had promised to convey to the plaintiff in exchange. The same principle applies here which was laid down in the cited case. We do not think we would be justified in undoing that which the parties had done in recalling a complete transaction for the purpose of adjusting misunderstandings (if there was misunderstanding). As this was an important point, that relating to the consent of plaintiff, we will transcribe here the evidence upon the subject. The defendant in testifying said: "That plaintiff understood what he was getting, and that the description covered, and that he would take what there was according to lines from one point to the other on Bavou Pierre, extending back east to the section line."

We infer that one of the principal objects of plaintiff, as stated by him, was to become the owner of Wilson's Ferry, which it appears is a part of the remaining 5 acres. When plaintiff was questioned as a witness on cross-examination, he was asked if defendant, Porter, advised him that he was falling into a mistake against his interests. His answer was that he was so advised by the defendant. The question was then propounded to him: "Did

you not tell him that you did not care if you got 30 acres so you got the land you wanted?" The answer was: "Just as I got the land I showed him. I did not care." That he wanted the land from one point of the bayou to the other. Witness concludes by stating that he made an exchange with defendant for a certain number of acres on the Douglas place for the land described in the contract. The action should be for an amount in money representing the deficiency.

From any point of view, plaintiff would not be entitled to relief in this case. It is therefore ordered, adjudged, and decreed that the judgment of the circuit court of appeal, sitting in the parish of Caddo, is avoided, annulled, and reversed, the costs in that court to be paid by plaintiff. It is further ordered, adjudged, and decreed that the judgment of the district court, the decretal part of which reads, in substance, as follows: That defendant, J. W. Porter's, deed to plaintiff, Thos. J. Adams, conveys the land contained within the metes and bounds as described in said contract, less 45 acres on the east boundary, being stiff land, accepted from plaintiff for a pair of mules delivered to and accepted by plaintiff, plaintiff to pay all the costs of this suit. It follows from the foregoing that plaintiff is the owner of the 5 acres mentioned, and that, in case the defendant neglects or refuses to make deed to these 5 acres, then this judgment to be considered equivalent to a title between parties from the date of its rendition and among all parties after it will have been recorded as required.

The judgment of the District Court is reinstated, and made the judgment of this court, at the costs of plaintiff, and it is remanded to the District Court for execution.

Petition for rehearing denied February 12, 1912.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL. JOHN KINSELLA

v.

ADOLPH O. EBERHART, Governor.

(116 Minn. 313, 133 N. W. 857.)

Certiorari — removal from office — decision of governor.

1. Certiorari is the proper remedy to review the decision of the governor in removing a county official from office.

Headnotes by LEWIS, J.
39 L.R.A. (N.S.)

Officer — removal — malfeasance.

2. The specifications charging relator with malfeasance and nonfeasance in the office of county attorney constitute legal and substantial grounds, and the evidence reasonably tends to sustain the decision of the governor in removing him from office.

(December 22, 1911.)

CERTIORARI to review the action of respondent in removing relator from the office of county attorney for nonfeasance and malfeasance in office. Writ discharged. The facts are stated in the opinion.

Mr. John B. Richards, Jr., for relator: An act essentially "judicial," within the definitions, vitally affecting private right,

Note. — Power of court to review action of governor in removing officer.

The cases make it plain that the courts will not review the governor's determination that the incumbent's neglect or misconduct is such as is made a ground for removal. But it seems that the courts will look into the questions of the governor's power and jurisdiction, and of the legality or existence of the ground assigned by the governor.

Thus, it has been held that the governor, in removing an officer, as authorized by the legislature, does not act in a judicial capacity within the meaning of the Constitution, and that the exercise of the power by him cannot be inquired into by a court in a proceeding in quo warranto, although he may have erred in exercising the power. The only question which the court can consider is whether charges involving official conduct have been preferred, whether the parties had notice, and whether the governor acted upon the charges, and removed the respondent for the reason stated in the charges. State ex rel. Atty. Gen. v. Hawkins, 44 Ohio St. 98, 5 N. E. 228.

But attention is directed to a holding that the action of the President of the United States, under a statute authorizing him to remove a justice of the peace of the District of Columbia for cause, cannot be reviewed by the supreme court of the District for the purpose of determining the sufficiency of the causes which induced the removal; and that the court cannot presume that the President acted without cause simply because none is specified in the order of removal. United States ex rel. Garland v. Oliver, 6 Mackey, 47.

The action of the governor in suspending a railroad commissioner until the next meeting of the general assembly, as authorized by statute, upon giving him notice to appear and answer, is due process of law, and the courts cannot go behind the governor's action. State ex rel. Caldwell v. Wilson, 121 N. C. 425, 28 S. E. 554.

And since a governor, in refusing to reinstate a military officer relieved by him

cannot, under our system of government, be beyond review by the judicial department of our government.

McConaughy v. Secretary of State, 106 Minn. 392, 119 N. W. 408; Cooke v. Iverson, 108 Minn. 388, — L.R.A.(N.S.) —, 122 N. W. 251; Bagg's Case, 11 Coke, 93; Chamberlain v. Sibley, 4 Minn. 309, Gil. 228; State ex rel. Banning v. Berry, 3 Minn. —, Gil. 190; Hayne v. Metropolitan Trust Co. 67 Minn. 245, 69 N. W. 916; State ex rel. Hart v. Duluth, 53 Minn. 238, 39 Am. St. Rep. 595, 55 N. W. 118; Townsend v. Sauk Centre, 71 Minn. 379, 74 N. W. 150; State ex rel. Hardy v. Clough, 64 Minn. 380, 67 N. W. 202; State ex rel. Clapp v. Peterson, 50 Minn. 239, 52 N. W. 655; State ex rel. Childs v. Dart, 57 Minn.

in his official capacity as commander in chief of the state troops, acts, not in a merely ministerial capacity, but in a matter involving the exercise of judgment and discretion in respect of the efficiency of the military service, the course of the governor cannot be controlled by a writ of mandamus directing the reinstatement of the officer. State ex rel. Higdon v. Jelks, 138 Ala. 115, 35 So. 60.

The power of the governor to remove an officer for cause upon his own investigation is, in its proper sense, an administrative function, and not judicial in the sense that the officer is entitled to have the question of cause determined by the courts in the first instance, or by appropriate appellate proceedings. State ex rel. Churchill v. Hay, 45 Neb. 321, 63 N. W. 821.

And the power of the governor under a statute providing that certain officers shall hold office for a certain time "unless sooner removed by the governor" is not a judicial function, and the mere fact that an officer exercises judgment in deciding a matter does not make his decision of a judicial character, so that it may be reviewed by certiorari. The power conferred is essentially a political, governmental, and executive duty, and therefore beyond the control of the judiciary. State ex rel. Rawlinson v. Ansel, 76 S. C. 395, 57 S. E. 185, 11 Ann. Cas. 613.

In determining whether charges against a public officer are worthy of credit, so as to warrant his dismissal, a governor exercises judgment and discretion; and since, therefore, in such circumstances, he acts officially, and not in a purely ministerial matter, he cannot be compelled by mandamus to revoke an order suspending an officer upon charges preferred. Householder v. Morrill, 55 Kan. 317, 40 Pac. 664.

The following language was used in Dubuc v. Voss, 19 La. Ann. 210, 92 Am. Dec. 526: "That the power to remove is incident to the power to appoint, we are not aware has ever been contended for as appertaining to the governors of states. The character of their functions is not, in all respects, analogous. Their power of re-

261, 59 N. W. 190; State ex rel. Childs v. Griffen, 69 Minn. 311, 72 N. W. 117; State ex rel. Douglas v. Megardien, 85 Minn. 41, 89 Am. St. Rep. 534, 88 N. W. 412; Throop, Pub. Off. §§ 379, 398; Dullam v. Willson, 53 Mich. 392, 51 Am. Rep. 128, 19 N. W. 112; People ex rel. Metevier v. Therrien, 80 Mich. 187, 45 N. W. 78; Page v. Hardin, 8 B. Mon. 648; State ex rel. Police Comrs. v. Pritchard, 36 N. J. L. 101; Honey v. Graham, 39 Tex. 1.

The court will look into the evidence to determine the question as to whether there was a "legal cause" and a "substantial basis" for an order of removal.

State ex rel. Hart v. Duluth, 53 Minn. 238, 39 Am. St. Rep. 595, 55 N. W. 118; Townsend v. Sauk Centre, 71 Minn. 379,

removal, we apprehend, is generally limited to particular cases provided for by statutory enactments. It would seem to derogate from the efficiency of the chief executive officer of a state, and to lower the dignity of his office, if the grounds upon which he makes removals should be needlessly subject to the scrutiny of the courts, and liable for slight reasons to be annulled by judicial decrees. But there must somewhere be protection to the honest and faithful incumbent, if, unhappily, his right to hold office should be recklessly violated by the head of the executive department. To the judiciary, in such a case, would attach the delicate and ungrateful duty of inquiring whether the executive had infringed the law. Such cases, we may hope, will be of rare occurrence." It was held in this case that where the governor issued a commission for an office which recited that a person holding a previous commission was removed, the presumption was that the removal was effected for causes provided by the statute, and that, in the absence of evidence to overcome the presumption, the later commission would supersede the former one. The same result was reached in State ex rel. Dayries v. Yoist, 25 La. Ann. 396; and it was reiterated in State ex rel. Richardson v. Graham, 25 La. Ann. 73, that the mere removal of the incumbent raises the presumption that it was effected for a proper cause specified by the statute; and in Evans v. Populus, 22 La. Ann. 121, that the presumption prevails in the absence of countervailing evidence.

Where the governor has authority to remove an officer for specified causes, his action must be deemed conclusive as to the existence of the cause in so far as the right to the office is concerned. Whether correct or not, there is no authority to revise it, and consequently it is not reversible by the court. Keenan v. Perry, 24 Tex. 253.

So the Louisiana court holds that the legislative grant of power to the governor to remove an officer for a certain cause implies authority to judge of the existence of that cause; and that, however erroneous the decision of the governor as to that

74 N. W. 150; *People ex rel. Haines v. Smith*, 45 N. Y. 777; *People ex rel. Metevier v. Therrien*, 80 Mich. 187, 45 N. W. 78; *People ex rel. Dumahaut v. Fire Comrs. 96 N. Y. 672*; *Triplett v. Munter*, 50 Cal. 644; *Smith v. Ling*, 68 Cal. 324, 9 Pac. 171; *Ponting v. Isaman*, 7 Idaho, 581, 65 Pac. 434; *State ex rel. Bradford v. Scates*, 43 Kan. 330, 23 Pac. 479; *Com. v. McPeck*, 14 Ky. L. Rep. 215, 20 S. W. 220; *Re Adam*, 113 App. Div. 534, 99 N. Y. Supp. 273; *People ex rel. Trayer v. Bingham*, 120 App. Div. 350, 110 N. Y. Supp. 414; *People ex rel. Lathers v. Raymond*, 129 App. Div. 477, 114 N. Y. Supp. 365; *State ex rel. Herod v. Pidgeon*, 8 Blackf. 132; *Minnesota C. R. Co. v. McNamara*, 13 Minn. 508, Gil. 468; *Throop*, Pub. Off. § 392.

Messrs. B. F. Fowler, John Dwan, and Alfred W. Mueller, with Mr. George T. Simpson, Attorney General, for respondent:

The action of the governor was not a judicial act.

23 Am. & Eng. Enc. Law, 2d ed. 428; *Wilcox v. People*, 90 Ill. 186; *Donahue v. Will County*, 100 Ill. 94; *Lynch v. Chase*, 55 Kan. 367, 40 Pac. 666; *McMaster v. Herald*, 56 Kan. 231, 42 Pac. 697; *Keenan v. Perry*, 24 Tex. 255; *Murphy v. Webster*, 131 Mass. 482; *State ex rel. Atty. Gen. v. Hawkins*, 44 Ohio St. 98, 5 N. E. 228.

Proceedings neither judicial nor quasi judicial in their nature cannot be reviewed on certiorari.

Re Wilson, 32 Minn. 145, 19 N. W. 723;

question may be, it is not subject to examination by the court. *State ex rel. Atty. Gen. v. Doherty*, 25 La. Ann. 119, 13 Am. Rep. 131, indorsed in *State ex rel. Weber v. Fisher*, 26 La. Ann. 537, and *State ex rel. Atty. Gen. v. Barrow*, 29 La. Ann. 243; *State ex rel. Atty. Gen. v. Lamantia*, 33 La. Ann. 446; *State v. Abbott*, 41 La. Ann. 1096, 6 So. 805; *State ex rel. Winder v. Cahen*, 28 La. Ann. 645. This principle has been recognized in cases disposed of on other grounds. *State ex rel. Kuhlman v. Rost*, 47 La. Ann. 53, 16 So. 776 and *State ex rel. Keller v. Rost*, 47 La. Ann. 61, 16 So. 663. And the appointment of a person to an office by a paper reciting that the previous incumbent is removed is the proof of the existence of sufficient cause for removal, the finding of which is discretionary with the governor. *State ex rel. Atty. Gen. v. Barrow*, 29 La. Ann. 243.

For, since the law does not specify the manner of or form for removing an officer, the judiciary is without power to prescribe one, and if in the commission for the office words are used which make it plain that the previous incumbent is or has been removed, and that the party appointed is to act in the place of such previous incumbent, this is sufficient to operate as a removal, and to entitle the party to take possession of the office. So held in *State v. Abbott*, 41 La. Ann. 1096, 6 So. 805, holding that a commission appointing a certain person to an office "vice" the previous incumbent was a sufficient removal of the latter.

In *Atty. Gen. ex rel. Taylor v. Brown*, 1 Wis. 513, holding that the courts cannot inquire into the motives of the governor when he removes an officer under a statute authorizing him to do so "when he shall believe that the best interests of the state demand such removal," the court had this to say: "The policy of our Constitution and laws has assigned to the different departments of the state government distinct and different duties, in the performance of which it is intended that they shall be entirely independent of each other; so that whatever power or duty is expressly given

to, or imposed upon, the executive department, is altogether free from the interference of the other branches of the government. Especially is this the case where the subject is committed to the discretion of the chief executive officer, either by the Constitution or by the laws. So long as the power is vested in him, it is to be by him exercised, and no other branch of the government can control its exercise. But it would be alike unbecoming and unwarranted on our part, to inquire into the motives of the governor, in the exercise of a discretion given to him alone, in any case. He is responsible for his acts in such case, not to the courts, but to the people; and whenever experience shall have demonstrated the impolicy or impropriety of clothing the chief executive officer of the state with a power of removing inferior officers, at his discretion, or 'when he shall believe the best interests of the state demand such removal,' it may then be the time for the people, in whose hands alone is the remedy, to eradicate the supposed evil. But courts are created to construe the laws as they are, not to declare what they should be."

Power conferred by a provision of the state Constitution, that the governor may remove a public officer after "giving to such officer a copy of the charges against him and an opportunity of being heard in his defense," is executive, and not judicial, and was intended to be vested exclusively in the governor; and when these two requirements are complied with, the courts cannot inquire into the merits of the removal. *Re Guden*, 171 N. Y. 529, 64 N. E. 451.

The courts are without power to inquire into the sufficiency of the proof of charges in the governor's hearing, and his findings are not reviewable by any court so long as his action is within the limit of the power conferred upon him by the statute. *Cameron v. Parker*, 2 Okla. 277, 38 Pac. 14.

A similar declaration in *State ex rel. Atty. Gen. v. Johnson*, 30 Fla. 433, 18 L.R.A. 410, 11 So. 845, was placed upon the grounds not only that the courts were not given such power to review, but also

Lemont v. Dodge County, 39 Minn. 385, 40 N. W. 359; Christlieb v. Hennepin County, 41 Minn. 142, 42 N. W. 930; Moede v. Stearns County, 43 Minn. 312, 45 N. W. 435; State ex rel. Hardy v. Clough, 64 Minn. 378, 67 N. W. 202; Minnesota Sugar Co. v. Iverson, 91 Minn. 30, 97 N. W. 454; Mayor v. Morgan, 7 Mart. N. S. 1, 18 Am. Dec. 232; State ex rel. Holden v. Lamber-ton, 37 Minn. 362, 34 N. W. 336; State ex rel. St. Louis County v. Dunn, 86 Minn. 301, 90 N. W. 772.

Certiorari is not the proper remedy, but the relator should have proceeded by quo warranto.

Burke v. Leland, 51 Minn. 355, 53 N. W. 716; Delahanty v. Warner, 75 Ill. 185, 20 Am. Rep. 237; State ex rel. Addison v.

Williams, 25 Minn. 340; State v. Sibley, 25 Minn. 387; State ex rel. Bryant v. Guiney, 26 Minn. 313, 3 N. W. 977; State ex rel. Railson v. Sanderson, 26 Minn. 333, 3 N. W. 984; State ex rel. Probstfield v. Sharp, 27 Minn. 38, 6 N. W. 408; Barnum v. Gilman, 27 Minn. 466, 38 Am. Rep. 304, 8 N. W. 375; State ex rel. Simpson v. Dowlan, 33 Minn. 536, 24 N. W. 188; State ex rel. Bend v. Harrison, 34 Minn. 526, 26 N. W. 729; State ex rel. Derusha v. McMartin, 42 Minn. 30, 43 N. W. 572; Taylor v. Sullivan, 45 Minn. 309, 11 L.R.A. 272, 22 Am. St. Rep. 729, 47 N. W. 802; Burke v. Leland, 51 Minn. 355, 53 N. W. 716; State ex rel. Childs v. Holman, 58 Minn. 219, 59 N. W. 1006; Trautmann v. McLeod, 74 Minn. 110, 76 N. W. 964; State ex rel. Douglas v.

that the state senate had been granted such power. In commenting upon the nature of the power of the governor under the provision of the state Constitution that certain officers might be suspended from office by the governor for malfeasance or misfeasance or neglect of duty in office, or the commission of any felony, or for drunkenness or incompetency; that the cause of suspension should be communicated to the officers and to the senate at its next session; that the governor, by and with the advice of the senate, might remove any officer not liable to impeachment for any cause above named; and that if the senate should refuse to remove, or fail to take action before its adjournment, the officer suspended should resume the duties of his office,—the court said: "It is, however, entirely unnecessary to ascertain whether the nature of the power is strictly judicial, or quasi judicial, or administrative, or what is its precise classification, since we are altogether satisfied that it is not a power given to the courts by the fourth, or judiciary, article, which provides that the judicial power of our state shall be vested in the courts there designated. If the power is judicial in its character, the fact, nevertheless, is that it has been given to the governor by the section of the executive article under discussion, and not to the courts, and the governor exercises it as a member of the executive department of the government, and not as a court, or member of the judiciary department; and the courts enumerated in the judiciary article, §§ 1 and 34, as the depositories of the judicial power of the state, cannot exercise it any more than they can the power of trying an officer under impeachment; and for any such court to attempt it would be a no less bald usurpation of the constitutional power of the chief executive, than an attempt to entertain an impeachment trial would be a lawless assumption of the exclusive functions of the senate, under the 29th section of the legislative article, to try impeachments."

And it was held in Gray v. McLendon, 134 Ga. 224, 67 S. E. 859, that where the 30 L.R.A. (N.S.)

legislature creates an office and provides that the incumbent may be suspended by the governor and removed by the general assembly for such causes as to them may seem satisfactory, the court is powerless to review the action of the governor in suspending, or that of the general assembly in removing, the incumbent, the court saying that where the power of removal rests in the discretion of any officer or body of officers, the exercise of such discretion will not be controlled by the courts, since the officers charged with the duty of determining the sufficiency of the causes of removal and fitness of the party removed to continue in office are presumed best qualified to pass upon these questions, unless by statute their power is limited to removal for due cause.

Power conferred by the state Constitution upon the legislature to provide by law for the removal of county officers in such manner as to it shall seem just and proper is in its nature political, and has reference exclusively to the polity of government, which would be inherently defective if no remedy of a summary nature could be had to remove from office a person who, after his election, had been convicted of crime, or who neglected his duty, or who was guilty of malversation in the administration of his office. Under such a constitutional provision, the legislature is to prescribe the mode in which it shall be done, and this includes everything necessary for the accomplishment of the object. The causes, the charges, the notice, the investigation, and the determination, and by whom these shall be conducted and the removal adjudged, are all in the discretion of the legislature, and the power to exercise these functions may by it be conferred upon the governor. People ex rel. Clay v. Stuart, 74 Mich. 411, 16 Am. St. Rep. 644, 41 N. W. 1091; People ex rel. Metevier v. Therrien, 80 Mich. 187, 45 N. W. 78. It appears in the latter case, however, that the legislature not only vested the governor with power of removal, but provided that before removal, the charges must be made in writing by affidavits and exhibited to

Wilder, 75 Minn. 547, 78 N. W. 83; State ex rel. Douglas v. Ritt, 76 Minn. 531, 79 N. W. 535; State ex rel. Getchell v. O'Connor, 81 Minn. 79, 83 N. W. 498; State ex rel. Olsen v. Board of Control, 85 Minn. 165, 88 N. W. 533; State ex rel. Douglas v. Westfall, 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175; State ex rel. Douglas v. Grabarkiewicz, 88 Minn. 16, 92 N. W. 446; State ex rel. Murphy v. Bernier, 98 Minn. 1, 38 N. W. 368; State ex rel. Young v. Hayes, 105 Minn. 399, 117 N. W. 615.

Lewis, J., delivered the opinion of the court:

In response to a petition filed in the office of the governor, charging relator with mal-

faisance and nonfeasance in the office of county attorney of Lake county, a special commissioner was appointed under the provisions of § 2668, Rev. Laws 1905, the evidence was taken and reported, and relator was removed from office by the governor. Thereupon relator sued out a writ of certiorari, directed to the governor, requiring him to return and certify to this court all the files and proceedings in the matter, to the end that his action be reviewed. Without admitting the jurisdiction of the court, the governor complied with the order, made complete return of the proceedings, and at the hearing moved to quash the writ, on the ground that the court was without jurisdiction. The questions thus presented are: Has the court the power to review the governor, and that the attorney general or prosecuting attorney, who may be directed by the governor to make the inquiry, shall give certain notices to the accused. The court declared that such an officer cannot be deprived of the office without due process of law, and that this requires notice, a hearing, and a determination. The court went on to say: "It is claimed by respondent's counsel that, the governor having passed upon the sufficiency of the charges, his jurisdiction thus assumed cannot be questioned by this court. This is not so. The governor cannot, by any act of his own, enlarge the power granted him by the legislature; nor can the legislature, by any act, deprive a person of a right to hold an office to which he had been elected or appointed, and whose duties he has assumed, except by constitutional methods, by due process of law. The governor cannot foreclose the right of the courts to preserve to such officers their constitutional rights. He cannot order an inquiry upon charges of misconduct not embraced within the statute granting him power to act; nor can he act upon a general charge of official misconduct, as is the third charge here, without any specifications under it, informing the executive or the accused in what particular thing or things this official misconduct consists. And while he had authority, under the charges filed with and exhibited to him, to order an inquiry into the habitual drunkenness of Metevier, and the fact of his laboring at that time under delirium tremens, caused by excessive drink, he could not, because he entertained jurisdiction for this purpose, and had a right to do so, extend his jurisdiction further, and go outside of the charges made to him in the statutory way; nor could he supplement and aid defective and imperfect charges by the act of the prosecuting attorney, or other officer conducting the inquiry, in serving upon the accused at the inquiry, or any number of days before, less than eight, more complete and specific allegations of wrongdoing."

Where the state Constitution simply
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gives to the governor the power to remove in case of incompetency, any officer whom he may appoint, it rests with him to determine for himself whether the cause of removal exists; and no mode of inquiry being prescribed for him to pursue, it rests with him to adopt that method of inquiry which his judgment may dictate, acting under his official responsibility; and it is not for the courts to dictate to him in what manner he shall proceed, as his action is not subject to their revision; and therefore, it is no proper objection to the removal to contend that it should have been exercised according to judicial methods; that is, by way of a specific charge, notice, opportunity for defense, hearing, and proof. Wilcox v. People, 90 Ill. 186.

A statute vesting the power of removing officers in the governor, under a constitutional provision that the legislature may provide for the removal of officers for malfeasance or nonfeasance in the performance of their duties, is not open to the objection that it unconstitutionally confers upon the executive powers which should have been vested in the judiciary. State ex rel. Clapp v. Peterson, 50 Minn. 239, 52 N. W. 655.

The governor's power to remove police, fire, and excise commissioners of a city whom he is authorized to appoint by a statute providing that all such appointments shall be made "with power of suspension or removal at any time for cause" is derived from the provision of the statute itself, and not from the provision of the state Constitution, that the governor shall nominate and appoint all officers whose offices are established by the Constitution or which may be created by law, and whose appointment or election is not otherwise provided for, "and may remove any such officer for incompetency, neglect of duty, or malfeasance in office;" and therefore, the governor is not confined to the causes of removal specified in the Constitution, and is at liberty to adopt such mode as to him shall seem proper, without interference on the part of the court. The act of removal is not judicial or quasi

the action of the chief executive of the state in proceedings of this character? And, if it has, does the record show a legal and substantial basis for the action taken?

1. The uncertainty as to what the rule is in this state with reference to the control by the judiciary over the executive department of the government was noted in *Cooke v. Iverson*, 108 Minn. 388, — L.R.A. (N.S.) —, 122 N. W. 261, and the decisions on that subject were reviewed and analyzed. That was an action to enjoin the state auditor from issuing warrants under a law claimed to be unconstitutional, and the governor was not a party, and hence it may be claimed that what was said with reference to the chief executive was unnecessary to the decision. This makes it necessary to

briefly review the history of this question, for the purpose of determining the scope of the decision in *Cooke v. Iverson*.

The law under consideration in *Rice v. Austin*, 19 Minn. 103, Gil. 74, 18 Am. Rep. 330, authorized the governor to convey certain swamp lands to commissioners when satisfied that the commissioners had constructed the road as provided by law. The court held that this duty was imposed on the governor in his official capacity, and the decision was based on the broad ground: of noninterference by the judicial department with the executive, whether ministerial or otherwise, although, as noted in *Cooke v. Iverson*, the duty imposed on the governor was not of purely ministerial character. In *State ex rel. County Treasurer*

judicial in character, for no mode of inquiry being prescribed, the cause that may be sufficient for removal is to be determined by the governor as he shall see fit, and he is not bound to examine witnesses under oath, nor is his refusal to allow counsel fatal to his action, since he might have proceeded *ex parte*. *Trimble v. People*, 19 Colo. 187, 41 Am. St. Rep. 236, 34 Pac. 981. Subsequently the same court refused, in an *ex parte* proceeding in response to an executive question, to inquire into the right of the police commissioner to retain his office notwithstanding the governor's attempted removal, in *Re Fire & Excise Comrs.* 19 Colo. 482, 36 Pac. 234. In rendering this decision, the court used the following language by way of explaining the *Trimble* Case: "The words 'without interference on the part of the courts,' as the context shows, have reference to the procedure only; that as to this, the executive could adopt such mode as he might deem proper and suited to the occasion; that it was not contemplated by the act that he should be required to institute an inquiry in its nature judicial. No question was then mooted as to the power of the courts to entertain any appropriate proceeding to ascertain the title to the office in case the incumbent should attempt to hold over in opposition to the executive order. On the contrary, in that case, the jurisdiction of the court was invoked by the removed official, and his right to the seat was denied as a result. So, also, the following language, used in the *Trimble* Case, *viz.*: 'The governor having determined that a sufficient cause for removal existed, and having exercised the power confided to him, relator is without remedy in this proceeding,' had reference to the facts then before the court. The contestants, by petition and answer, had brought the facts relied on fully to the attention of the court for its judgment thereon; there was no pretense that anything further could be shown material to the issue. The court did not say to the petitioner, 'You had no right to test the validity of the removal in this proceeding;' but it did 39 L.R.A. (N.S.)

say, in effect, 'The facts shown by the record are not sufficient to warrant a decision in your favor, and the judgment of ouster entered by the district court was unwarranted and must be set aside.' That no further doubt may exist upon this question, we say, without hesitancy, that if the executive order of removal is questioned by the incumbent, the courts have the power, and it is exclusively within their province, to pass upon such objections, and determine, as between the respective claimants, the right to the office in question; and the law provides a plain and adequate procedure for that purpose; and a speedy determination of such question is insured by express statute. *Mills's Anno. Stat. (Colo.)* p. 830. All law-abiding citizens will, and all others should be required to, submit such controversies to these tribunals for settlement. The district attorney is empowered by statute to bring an action for that purpose. Code, 289." The decision of the court was, as already noted, that it would not, in an *ex parte* proceeding in response to an executive question, determine who was entitled to the office.

In still another case involving the same situation, the Colorado court held that the words forbidding the removal of officers "for political reasons" in the charter authorizing the governor to make such removals "at any time for cause, to be stated in writing," could not be given any practical effect except by operating on the conscience of the executive, and did not permit the court to review his action on the ground that a removal was in fact made by him for political reasons, where, in his written statement of the case, he disclaimed such reasons. *People ex rel. Engley v. Martin*, 19 Colo. 565, 24 L.R.A. 201, 36 Pac. 543. In this case, the court said: "While it is easy to perceive the purpose of the additional words in the charter of 1893, forbidding removals for political reasons, it is not so easy to determine how to give practical effect to such additional words. It is a presumption of law that every public officer does his duty. This presumption is especially strong in the

v. Dike, 20 Minn. 363, Gil. 314, the writ of mandamus was directed to the state treasurer and the secretary of state. Rice v. Austin was followed, and jurisdiction was refused, on the ground that courts could not control the actions of any member of the executive department. The decision in *St. Paul & C. R. Co. v. Brown*, 24 Minn. 517, was based on the same general principle, and the court held that the duties sought to be enforced were duties belonging to the governor as an executive, and that the court had no jurisdiction over him. Again, in *Western R. Co. v. De Graff*, 27 Minn. 1, 6 N. W. 341, the action was in part to enjoin the governor from selling certain lands, and

the court applied the same principle; and Cornell, J., writing for the court, said: "Every act done or attempted to be done by any officer of the executive department in his official, and not in his individual, capacity, is shielded from all judicial interference or control, either by mandamus or injunction, even though such act may be founded in an error of judgment, or an entire misapprehension of the official duty under the law." To the same effect are *State ex rel. Thompson v. Whitcomb*, 28 Minn. 50, 8 N. W. 902, and *State ex rel. Tuttle v. Braden*, 40 Minn. 174, 41 N. W. 817.

In *State ex rel. Tuttle v. Braden* it was

case of the governor,—the chief executive officer of an independent state. If any court should attempt to institute an inquiry into the reasons or motives which have controlled the official action of the governor, great difficulties would be encountered. These difficulties are all the greater in cases where improper political motives are charged; and this, for the reason that that the persons making such charges may themselves be actuated by improper political motives. Charges of improper motives are easily made, are often untrue, and are always hard to prove. When such charges are made in respect to an act not wrong in itself,—an act expressly authorized for cause to be determined by the officer performing the act,—an act which is wrong only when prompted by an improper reason or motive,—it is practically impossible to determine judicially that the act done was illegal, on the sole ground that it was prompted by an improper motive or unlawful reason; and this is especially true where the officer is required by law to state in writing the cause for his act, and his written statement shows no unlawful reason."

Thus it is held that the limit of judicial interference in such cases is to protect the officer in his right to a hearing on specific charges; or, in other words, to require the governor claiming the right of removal to keep within his jurisdiction. *State ex rel. Churchill v. Hay*, 45 Neb. 321, 63 N. W. 821.

And the opinion in *State ex rel. Atty. Gen. v. Johnson*, supra, was referred to in a subsequent opinion in the same case (30 Fla. 499, 11 So. 855) as settling the proposition that there is but one inquiry which the court can make, and that is, whether or not the act for which the alleged suspension was made is, as a matter of law, a ground for removal within the grant of power made to the governor. In this case the court added that where the governor, in pursuance of his constitutional power, had suspended a tax collector, questions such as the proper office hours for the collector, the law having established none, and the bona fides of a tax debtor's tender of taxes for refusing to accept which

the officer was suspended, are considerations which address themselves exclusively to the governor in forming his judgment as to suspension, and that the senate, and not the court, has the power to consider them and review his judgment thereon.

With respect to this question the court said in *Page v. Hardin*, 8 B. Mon. 648, that where the governor has a discretionary power, or where on any ground his act is made conclusive as to all rights involved, it is not within the province of a court to inquire into the propriety or impropriety of the act; but that the question whether there is such a power in a given case, or whether any particular power or act is of the character referred to, is a judicial question whenever the right in litigation before a judicial tribunal depends upon it and requires its decision. "If any office," says the court, "be held at the will of the governor, the appointee could not complain of the violation of any legal right by the revocation of his appointment, however sudden or groundless. But if the governor were to attempt to displace any officer at his mere will, he might undoubtedly make the question in a legal contest with a proper party, whether the governor had such power, and whether his right to the office was terminated. The question of right on his part, and of power on the part of the governor, would be the same. And as he might unquestionably assert this right by appropriate legal remedy, the question of power would necessarily be brought within the cognizance of the court. And so any power claimed or exercised by the governor may be brought in question before a judicial tribunal, if it be relied on and material, either in opposition to any right asserted by legal remedy, or in support of it."

Generally as to mandamus to the governor, see the notes in 6 L.R.A.(N.S.) 750, and 32 L.R.A.(N.S.) 355.

As to whether mandamus will issue to restore to office one who has been illegally removed, see the note to *State ex rel. Moyer v. Baldwin*, 19 L.R.A.(N.S.) 49, and particularly subdivision III. thereof, relating to the immunity of heads of the state.

L. A. W.

attempted to compel the state auditor to issue a permit to the highest bidder at a public land sale. Demurrer to the petition was sustained, on the broad ground that the courts had no jurisdiction to control the auditor in the performance of his official duties. Chief Justice Gilfillan wrote the opinion, and announced the rule as follows: "In *Chamberlain v. Sibley*, 4 Minn. 309, Gil. 228, it was held otherwise in respect to official acts which the court styled 'not necessarily pertaining to the duties of the executive,' and which, if the law so provided, might as well be done by one officer as another. The court, however, decided in *Rice v. Austin*, supra, that because the Constitution makes the different departments of the government distinct and independent of each other, neither being responsible to the other for the performance of its duties, neither can enforce the performance by the other of its duties; and it was also decided that where a duty, even such as may be called ministerial, is cast by law upon an executive officer *eo nomine*, the performance of it is an official act, although its performance might have been intrusted to some other officer. This has ever since been accepted as the law of this state, and was followed in *State ex rel. County Treasurer v. Dike*, and *Western R. Co. v. De Graff*, supra.

The next case in point of time is *Hayne v. Metropolitan Trust Co.* 67 Minn. 245, 69 N. W. 916. It is important, in that it marks a radical departure from the broad principle upon which the previous decisions were based. Up to that time no distinction was made between the governor and other members of the executive branch of the government. All stood upon the same ground, and were considered absolutely immune by constitutional segregation from judicial control. In the *Hayne Case* a peculiar situation was presented. The state auditor declined to turn over to the court certain funds which he held in trust for private parties. Justice Mitchell expressed the views of the court, and called attention to the previous cases, and stated that this court had undoubtedly gone further than any other in holding executive officers of the state exempt from the control of the courts in the performance of their official duties, especially as to executive officers other than governor. But it was deemed unnecessary to consider whether the rule should be modified, since the case could be distinguished upon the ground that the state had no interest in the fund.

In *Cooke v. Iverson* the present chief justice calls attention to this change of position, and, after referring to certain cases wherein this court entertained pro-

ceedings against the secretary of state to direct him with reference to the making up of the official state ballot, says: "These election cases and the case of *Hayne v. Metropolitan Trust Co.* necessarily hold that such officer may be controlled by the courts in the discharge of purely ministerial duties. They well illustrate the necessity and justice of such control." This line of thought was emphasized by calling attention to the power of the secretary of state to determine whom the electors may or may not vote for, if the Constitution placed his action beyond the control of the courts. And the conclusion reached was stated as follows: "Upon principle, and a full consideration of the previous decisions of this court relevant to the question, we hold that courts cannot, by injunction, or mandamus, or other process, control or direct the head of the executive department of the state in the discharge of any executive duty involving the exercise of his discretion; but where duties purely ministerial in character are conferred upon the chief executive, or any member of the executive department, as defined by our Constitution, and he refuses to act, or when he assumes to act in violation of the Constitution and laws of the state, he may be compelled to act, or restrained from acting, as the case may be, by the courts, at the suit of one who is injured thereby in his person or property, for which he has no other adequate remedy."

"Official duty" is no longer the criterion which absolves members of the executive branch of the government from judicial control. The courts of last resort in this country have been radically divided on the question. As this court formerly stood, it was in line with Arkansas, Florida, Georgia, Illinois, Indiana, Louisiana, Maine, Michigan, Mississippi, Missouri, New Jersey, New York, Tennessee, Texas, and Massachusetts. The fundamental principle upon which the decisions holding that view rests is that, under the provisions of the Constitutions of the several states, the executive and judiciary are absolutely independent of each other within the sphere of their respective powers. This court is now in accord with the courts of last resort in Alabama, California, Colorado, Kansas, Kentucky, Maryland, Montana, Nebraska, Nevada, North Carolina, and Wyoming. In these jurisdictions, duties imposed by law upon the chief executive, which are purely ministerial in their nature, and which do not necessarily pertain to the functions of the office, and which might have been imposed upon any other state officer, are subject to judicial control. Note to *State ex rel. Irvine v. Brooks*, 6 L.R.A. (N.S.) 750. The difference is radical. One line of

cases recognizes no such thing as purely ministerial duties, as distinguished from political duties, and Judge Cooley's remarks in *People ex rel. Sutherland v. The Governor*, 29 Mich. 320, 18 Am. Rep. 89, are often quoted in support of this line of reasoning. On the other hand, reasons of public policy and adequacy of remedy have been considered sufficient to indicate that a complete separation of the judiciary and the executive was not contemplated by the Constitution. As expressed by Justice Field in *People ex rel. McCauley v. Brooks*, 16 Cal. 11: "No officer, however high, is above the law, and when duties are imposed upon him in regard to which he has no discretion, and in the execution of which individuals have a direct pecuniary interest, and there is no other plain, speedy, and adequate remedy, he can be required to perform these duties by the compulsory process of mandamus." And again, in speaking of the independence of the departments of the state government: "There is no such thing as absolute independence. Where discretion is vested in terms, or necessarily implied from the nature of the duties to be performed, they are independent of each other, but in no other case. Where discretion exists, the power of each is absolute; but there is no discretion where rights have vested under the Constitution or by existing laws."

Much controversy has arisen over the difficulty of distinguishing between so-called political or executive duties, which may be exercised in the discretion of the executive, and those which are definitely defined to be performed in some particular manner. We realize the delicacy of the task which may be presented to the courts in some cases in concluding when jurisdiction should be assumed, but the difficulty of so doing is not conclusive that no jurisdiction lies for the purpose of determining the doubt. It has been suggested that the judiciary should not assume jurisdiction in any case involving the action of the governor, for the reason that the court might not be able to enforce obedience to its orders. By virtue of his position as the commander in chief of the state's military forces, the governor might possibly successfully resist enforcement of the court's writs; but, as stated in *State ex rel. Irvine v. Brooks*, supra, the jurisdiction of the court does not rest upon its physical ability to enforce its judgments. Jurisdiction depends upon the right of the court to hear the matter in controversy and to declare the law. The governor, under his oath of office, is bound to enforce the law, and it will not be presumed that he would refuse to perform duties which the court of last resort declared to be imposed upon him. On the contrary, it will

be presumed that, in doubtful cases, he would desire to be enlightened and guided by the judgment of that tribunal charged with the duty of declaring the law. The wisdom of such a course is illustrated in the present case. Being doubtful as to the extent of the powers conferred upon him by law, as defined by the decisions of this court, the chief executive responded to the writ and moved that it be quashed, for the purpose of securing the judgment of the court.

Although the governor was not a party to the action in *Cooke v. Iverson*, and the question was not directly raised, there is no substantial distinction between the governor and other members of the executive department in the application of the principle. The Constitution imposes certain duties and powers upon the governor, while the duties of the other members of the executive [department] are left for legislative enactment. But additional duties to those prescribed by § 4, art. 5, may be imposed on the governor by the legislature. *State ex rel. Clapp v. Peterson*, 50 Minn. 239, 52 N. W. 655. In either case immunity from judicial direction depends upon the nature of the act to be performed. The distinction is marked between the nature of those duties which necessarily pertain to the office of the chief executive, as defined by the Constitution, and those additional duties which are imposed by law upon the governor, but which might have been delegated to some other official. But it is not necessary at this time to determine whether any of the constitutional duties of the governor may be of such a nature in their execution as to be subject to judicial review. The present case does not call for a consideration of that question. Although the chief executive was selected as the official to cause removals from office, that duty might have been delegated to some other proper official, such as the attorney general. Was such duty judicial in character and subject to review by the court?

Section 2668, Rev. Laws, 1905, authorizes the governor to remove any county attorney from office whenever it appears to him by competent evidence that he has been guilty of malfeasance or nonfeasance in the performance of his official duties, first giving to such officer a copy of the charges against him and an opportunity to be heard. Section 2669 provides that, when charges are preferred against any such officer, the governor shall appoint a special commissioner to take and report the testimony. The governor then has before him the evidence bearing upon the question, and he is called upon to consider it and pass judgment upon

the issues presented. It is apparent, therefore, that the discretion exercised in this instance was not in the performance of an official duty as defined by the Constitution; but it does not follow that every act of the chief executive which involves the exercise of discretion is final, and not subject to review by the courts. The general test to determine whether such acts are final or subject to review is whether they are judicial or quasi judicial in their nature. In *State ex rel. St. Louis County v. Dunn*, 86 Minn. 301, 90 N. W. 772, it was held that the construction and application by the state auditor of the personal property tax law amounted to the exercise of judicial functions, and that his action was subject to review. So in *Minnesota Sugar Co. v. Iverson*, 91 Minn. 30, 97 N. W. 454, we held that the action of the state auditor in refusing to allow certain sugar bounties was quasi judicial and reviewable by writ of certiorari. Proceedings for the removal of a public official by the governor are clearly of judicial character.

2. We now come to the second question, and will proceed to consider whether the governor was justified in the action taken. The rules by which the court is guided in such proceedings are fully stated in *State ex rel. Hart v. Duluth*, 53 Minn. 238, 39 Am. St. Rep. 595, 55 N. W. 118, and other cases, and it will only be necessary to briefly refer to them. It is sufficient if the charges are stated with substantial certainty, and appraise the officer of the grounds upon which the charges are based. The specifications and evidence must relate to the administration of the office,—must relate to something of a substantial nature directly affecting the rights and interests of the public. Charges which directly involve the qualifications of the officer as a fit person to hold office involve the rights and interests of the public. The decision will not be reversed if there is any evidence of a legal and substantial basis reasonably tending to support it. Rulings on evidence may be considered, but a strict compliance with legal procedure is not required. The charges are, in brief: (1) That the relator refused and neglected to advise the board of county commissioners in reference to certain specified matters; (2) that he failed and neglected, when requested by the sheriff, to prosecute violations of the liquor laws; (3) that seven indictments had been returned against the relator, for libel and for circulating obscene literature. The statute does not authorize removal of a county attorney simply because of his ignorance of the law, for, strange as it may seem, the Constitution does not require such officers to be attorneys at law, or that they be

learned in the law. *State ex rel. Knappen v. Clough*, 23 Minn. 17. There is nothing to prevent a layman, absolutely unqualified from the standpoint of knowledge and experience, from holding the office of county attorney, and then securing the necessary legal assistance from an attorney. The statute and Constitution, however, do not justify the election and retention in office of a county attorney disqualified in other respects. The officials of the county are entitled to legal advice from that source in the performance of their duties. The prosecution of offenders against the law is placed in his hands, and to a certain extent, at least, by virtue of his standing as the legal adviser of the county and public prosecutor, the county attorney should be a man of fair standing as a citizen and fully in sympathy with the proper administration of his office and the enforcement of the laws. The terms "malfeasance" and "non-feasance" have no technical meaning in the sense in which they are employed. Conviction of a crime is not essential. General incompetency and neglect of duty constitute sufficient ground for removal.

We do not propose to consider each specification in detail. There is some evidence reasonably tending to show that relator refused and neglected to give personally, if he were able, or to furnish, proper legal advice for the benefit of the county commissioners. The evidence tends to show that he wholly failed to comprehend the duties required of him in the prosecution of liquor cases, and that he neglected and refused to take the proper steps to see that the laws were properly enforced. The fact that indictments had been returned against him, standing alone, did not constitute sufficient evidence of incompetency, or stamp him as an offender against the laws; but we are not prepared to state that the return of the indictments, together with the obscene pamphlet circulated by him, were not proper for the consideration of the governor in passing upon the relator's attitude as a defender of the laws. However that may be, there was other sufficient evidence upon that point, and its introduction cannot be considered as prejudicial. The evidence in a proceeding of this character must necessarily take a wider range than permissible in a court of law under the technical rules of pleading.

While some of the instances relied on at the hearing to prove neglect of duty were not particularly specified in the petition, it does not appear that the relator was prejudiced. He was given ample opportunity to place before the governor all the facts which might tend to explain his conduct.

Writ discharged.

NEBRASKA SUPREME COURT.

FARMERS & MERCHANTS IRRIGATION
COMPANY, Appt.,

v.

S. J. HILL.

(90 Neb. 847, 134 N. W. 929.)

**Water — irrigation ditch — grantee of
land — maintenance fee.**

A purchaser of land from one who holds a water right contract thereon with an irrigation company, and who takes title thereto by a deed containing the ordinary covenants of warranty, with no reference to the question of water rights, and who refuses to accept water from the company, is not personally liable for the maintenance fee mentioned in the water right contract

Headnote by HAMER, J.

Note. — Personal liability of purchaser of land on contract under which it is supplied with water.

The question here presented is whether a purchaser of land necessarily assumes personal liability upon contracts entered into by his grantor with reference to supplying water to the land; it does not include the question whether, by taking one parcel of land which is subject to an easement or servitude apparent and continuous in favor of another parcel, the grantee assumes the burden of such easement.

By the limitations of this subject, cases are excluded which deal with the personal liability of a purchaser of land on a contract under which his grantor was to supply water to other land, or under which the land purchased was subject to water privileges in favor of other land.

No other case has been found passing upon this precise point. The general principle involved was discussed, however, in *Cole v. Hughes*, 54 N. Y. 444, 13 Am. Rep. 611, which was a case of a party wall. The grantor, one Voorhees, had contracted with an adjoining owner, named Dean, that the latter might erect the wall for their common benefit, one half on each lot, and that whenever he [the grantor], his heirs or assigns, should use the same, he or they would pay Dean, his heirs or assigns, for such part of the wall as should be thus used. The court held that since Voorhees conveyed no land, and no interest in land, Dean's right of compensation was in no way charged upon the Voorhees lot; and there was consequently no privity of estate between them, but simply privity of contract; and that under such conditions the burden of the covenant did not run with the Voorhees lot. "There is a wide difference between the transfer of the burden of a covenant running with the land, and of the benefit of the covenant; or, in other words, of the liability to fulfil the covenant, and of the right to exact its fulfilment. The benefit will pass with the land to which it is incident, but the burden of liability will

between his grantor and the irrigation company; and an action cannot be maintained against him to recover a personal judgment therefor.

(February 29, 1912.)

A PPEAL by plaintiff from a judgment of the District Court for Dawson County in defendant's favor in an action brought to recover the maintenance fee for an irrigation ditch to use water from which land granted to defendant was entitled. Affirmed.

The facts are stated in the opinion.

Mr. E. A. Cook, for appellant:

The water right attaches to the land, and thereby passes with the transfer of the land.

Farmers' Canal Co. v. Frank, 72 Neb. 138, 100 N. W. 286.

be confined to the original covenantor unless the relation of privity of estate or tenure exists or is created between the covenantor and covenantee at the time when the covenant is made. The obligation of all contracts is ordinarily limited to those by whom they are made, and if privity of contract be dispensed with, its absence must be supplied by privity of estate."

The court, in *Cole v. Hughes*, supra, quotes from 2 Washburn on Real Property, § 1205, to the effect that when one who makes a covenant with another in respect to land, neither parts with nor receives any title or interest in the land, at the same time with and as part of making the covenant, it is at best a mere personal one, which does not bind his assignee; and that such covenants, and such only, run with the land as concern the land itself, in whosoever hands it may be, and become united with and form a part of the consideration for which the land or some interest in it is parted with between the covenantor and covenantee.

A covenant that no one should be allowed to erect a gristmill upon a water privilege conveyed was held to be a personal covenant, and binding only the covenantors and their personal representatives. It granted no interest in the premises, and created no charge thereon. The covenantees did not derive title from the covenantors, but the covenant was an independent and personal contract, made upon and for a money consideration, in no way connected with the title. It was not a covenant running with the land, charging an unnamed assignee. *Harsha v. Reid*, 45 N. Y. 415.

Where several adjacent mill owners contracted for themselves, their heirs and assigns, that they would use wheels of a certain kind, it was held that since there was no grant of any interest in the real estate of either party to which the covenant could be annexed, the covenant did not run with the land so as to bind the grantee of one of the mills. *Hurd v. Curtis*, 19 Pick. 459.

H. C. Sh.

The water right being attached to the land at the time of the conveyance, and being of record, the appellee had knowledge of such water right, and when he bought the land he took it charged with all obligations created by the water right deed.

Kinney, Irrigation, § 267; 2 Devlin, Deeds, § 863; 3 Cyc. 565; Frey v. Drahos, 6 Neb. 2, 29 Am. Rep. 353.

Messrs. H. M. Sinclair and W. A. Stewart, for appellee:

This contract is for the payment of money only, and purports to be a personal contract between the appellant on the one hand and appellee's grantor on the other. The personal promise of the maker of the contract did not pass and attach its obligations to the appellee by operation of law.

Cole v. Hughes, 54 N. Y. 444, 13 Am. Rep. 611; Brewer v. Marshall, 18 N. J. Eq. 337; Plymouth v. Carver, 16 Pick. 183; Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335; Kettle River R. Co. v. Eastern R. Co. 41 Minn. 461, 6 L.R.A. 111, 43 N. W. 469; Miller v. Noonan, 83 Mo. 343; Wheeler v. Schad, 7 Nev. 204; Mygatt v. Coe, 124 N. Y. 212, 11 L.R.A. 646, 26 N. E. 611; Pendleton v. Fodick, 6 Ohio Dec. Reprint, 795; Middletown v. Newport Hospital, 16 R. I. 319, 1 L.R.A. 191, 15 Atl. 800; Columbia College v. Lynch, 47 How. Pr. 273; Fresno Canal & Irrig. Co. v. Rowell, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53; Fresno Canal & Irrig. Co. v. Dunbar, 80 Cal. 530, 22 Pac. 275.

The ground of privity of estate is property, not personal relation.

Bailey v. Sundberg, 1 C. C. A. 387, 1 U. S. App. 101, 49 Fed. 583; Educational Soc. v. Varney, 54 N. H. 376; Mygatt v. Coe, 124 N. Y. 212, 11 L.R.A. 646, 26 N. E. 611; Pool v. Morris, 29 Ga. 374, 74 Am. Dec. 68; Patton v. Pitts, 80 Ala. 373; Kettle River R. Co. v. Eastern R. Co. 41 Minn. 461, 6 L.R.A. 111, 43 N. W. 469.

Hamer, J., delivered the opinion of the court:

This in an appeal from the judgment of the district court for Dawson county, dismissing the plaintiff's action. A trial was had to the court, and the result was a judgment for the defendant. The plaintiff filed a motion for a new trial upon the ground that the findings and judgment were not supported by sufficient evidence, that they were contrary to the evidence, and that the court erred in dismissing the action.

The plaintiff, the Farmers and Merchants Irrigation Company (appellant in this court), commenced an action in the district court of Dawson county against the defendant, S. J. Hill, to recover a judgment for \$750 and interest for a water maintenance

fee for the years 1907, 1908, and 1909.

The plaintiff alleged that it owned and operated an irrigation canal and furnished water to lands upon which water rights were held, and that the defendant owned section 5 in township 10 N., of range 21 W., in Dawson county, and that one of the main ditches of the plaintiff passed through said land; that there was attached to said land a water right which was evidenced by a "water right deed" for 500 acres of said land lying under said ditch, which deed was of record at the time the defendant purchased the land; that in this water right deed there was a provision which required the payment of 50 cents an acre as an annual maintenance fee; that the plaintiff was engaged in furnishing water to water users under its said canal; that the land of the defendant was susceptible of irrigation; that no part of said maintenance fee had been paid; and that there was due the plaintiff from the defendant \$750 and interest. The defendant answered that he was the present owner of the land, but denied all the other matters alleged.

Upon the trial the plaintiff offered in evidence the deed for the land described in the petition, together with the indorsements thereon, all of which were received without objection. There was also offered and received in evidence a "water right deed" containing the covenants upon which plaintiff predicates its right of action. The deed for the land is one of general warranty running from the Nikaniss Company to the defendant, and contains only the ordinary and usual covenants in such a deed. The water right deed from the plaintiff to the Nikaniss Company contains the following conditions: "That the said party of the first part [The Farmers & Merchants Irrigation Co.], for and in consideration of the sum of \$1,750 to it in hand paid, the receipt whereof is hereby acknowledged, and of the further annual payment hereinafter mentioned and provided for, to be made at the times named in this deed, have sold subject to the limitations and conditions hereinafter named, and by these presents does sell and convey, unto the said party of the second part [Nikaniss Company], and to its heirs, assigns, and legal representatives, the right to use water from the canal of the said party of the first part, during the irrigation season of each and every year, in an amount not exceeding the rate of one cubic foot per second of time for each 70 acres of land hereinafter described, to be used upon and for the purpose of irrigating the said land, only, the same being situated in the county of Dawson, state of Nebraska, to wit: All that part of section 5, in township 10 north, of range 21 west, lying south

of the main canal of the party of the first part (except that part taken up by slough), containing 500 acres. The said party of the second part, its heirs, assigns, and legal representatives, agree to pay to the party of the first part, its successors and assigns, as a part of the consideration of this grant, annually in advance, on or before the 1st day of March in each and every year, the further sum of \$250, the same being in addition to the consideration above expressed, and the amount named is hereby agreed upon as a liquidated sum as compensation to the first party for maintaining and operating said canal which it hereby promises and agrees to do, and the said party of the second part agrees to make said payments well and truly, at the times herein named, and it is hereby expressly agreed that in case the second party shall fail to make said payments promptly, then the first party may, at its election, collect said sum or sums with 8 per cent interest thereon from and after default in payment of the same by suit in law or equity. It is further agreed that if the first party shall elect to take judgment in a court of law for any sum or sums due on said annual payments, that the same shall not be a bar to a suit in equity to foreclose the lien herein given. . . . It is further stipulated and agreed, and this conveyance is made upon the express condition, that if the said party of the second part, its heirs, assigns, shall at any time fail, neglect, or refuse to make any of the annual payments hereinbefore provided for at the time the same shall become due and payable, according to the terms hereof, the said first party shall have the election, without notice, to furnish the supply of water, and to sue for said annual payment in law or equity, at its election, or upon such default to shut off such supply and to cease to furnish water, under the provisions of this deed, until payment is made of all such defaulted annual payments to the party of the first part, with 8 per cent interest thereon, from the date of default until the date of payment, and upon such payment, said second party shall be reinstated, with all the rights and privileges theretofore conferred by this deed, and it is expressly stipulated and agreed that said second party shall not maintain any suit at law nor in equity against the party of the first part, based upon the provisions of this contract, while in default of any of the annual payments hereinbefore referred to, the payment of such annual payments being a condition precedent to the performance on the part of the first party." The deed from the Nikaniss Company to Silas J. Hill is of the date April 6, 1906, and was filed for record 39 L.R.A. (N.S.)

May 10, 1906, The "water right deed" from the Farmers & Merchants Irrigation Company to the Nikaniss Company is of the date February 13, 1904, and was filed for record February 24, 1904. On the trial it was stipulated that the plaintiff was a corporation, and that the defendant had paid no part of the maintenance fee claimed by plaintiff in the petition, that the defendant owned the land at the time of the commencement of the action, and that he has owned it at all times since he purchased the same. It was also stipulated, for the purposes of the case, that at all times mentioned in the petition the plaintiff has been willing and able to furnish water as provided in the "water right deed," but that the defendant at all times refused to recognize any rights or liabilities by reason of such deed, and refused to ask for water or to accept water thereunder. It was also agreed that the "water right deed" was duly indexed against the land therein described at the time the same was filed for record.

It is the contention of the plaintiff that the "water right deed" attached to the land and passed with the change of title, and that therefore the defendant was liable to pay the maintenance fee for each year as it matured. It is said in plaintiff's brief that under the rule established by this court, the water right deed attached to the land, and cannot be severed from it. The appellee, the owner of the land, is the only person who can receive any benefit from this water right, and he, in turn, should be held liable to pay the annual maintenance fee." Counsel for the plaintiff contends in his brief "the sole question in this case is, Can appellant maintain a cause of action against appellee to recover this maintenance fee, there having been no expressed assumption of the obligation in the deed conveying the land to the appellee?" The defendant contends that he cannot be held personally liable, and the district court adopted that view and dismissed the case.

The question to be determined is whether the defendant has assumed the obligations of the contract entered into between the irrigation company and the Nikaniss Company, the original owners of the land. The defendant bought the land and received a deed which was in the ordinary form of a warranty deed, and did not mention or refer to the contract sued upon. By the purchase of the land and by receiving the deed does the defendant assume the contract of his grantor, and is he personally charged with the obligations of such grantor?

It is argued that § 6825, Anno. Stat.

1909, obligates the ditch company to keep its canal in repair, and that therefore the duty which the legislature fixes upon the ditch company creates an obligation on its patrons to provide the funds necessary for the performance of the duty. The contract sought to be enforced is executory. The suit brought is *in personam*. It is brought against the person instead of against the thing, and is not a suit against the land to enforce an alleged lien, but it is an action against the defendant; and the theory upon which it is sought to be maintained of necessity would seem to imply the personal promise of the defendant to pay the money. The conveyance made by the Nikaniss Company to the defendant, Hill, may have transferred to him all the property rights which the Nikaniss Company had in the land conveyed, but, if the grantee did not promise in any manner to assume the obligation of his grantor, how can he be bound?

The argument of counsel for plaintiff is that "there was no reservation or suggestion of reservation in the deed from the Nikaniss Company to appellee, Hill. That deed, 'Exhibit B,' it is submitted, carried with it the water right attached to this land as an appurtenance to the land. The acceptance of the deed by appellee, Hill, from the Nikaniss Company was an acceptance of all the incidents attached to or belonging to the land transferred to appellee (defendant), and charged him with the conditions written therein." The defendant, Hill, is a stranger to the original contract made between the Farmers & Merchants Irrigation Company and the Nikaniss Company. If it may be properly said that the defendant, Hill, received the deed to the land from the Nikaniss Company with notice that the ditch is an easement, and with notice of all the rights of the ditch company (Arterburn v. Beard, 86 Neb. 733, 126 N. W. 379), and therefore he is charged with such notice, as is said in Seng v. Payne, 87 Neb. 812, 128 N. W. 625, yet it would seem that that does not in any way tend to establish the personal liability of the defendant. Counsel for the plaintiff seems to have been unable to find any case directly in point which supports his contention.

We have attempted to carefully examine each of the several irrigation acts passed by the legislature, and in not one of these acts do we find any attempt to charge the grantee of land purchased under an irrigation ditch with the obligation of his grantor to personally pay for the maintenance of the ditch. The first irrigation law passed was approved February 19, 1877, and is entitled, "An Act to Enable Corporations Formed for the Construction and Operation

of Canals for Irrigation and Other Purposes, to Acquire Right of Way, and to Declare Any Such Canals Works of Internal Improvement." Laws 1877, p. 168; Comp. Stat. 1881, chap. 16, §§ 158, 159. The next irrigation act is chapter 68, Laws 1889. This was followed by chapter 40, Laws 1893. In 1895 a comprehensive irrigation act was passed. Laws 1895, chap. 69. Section 46 of this particular act is the section referred to in appellant's brief as § 6825, Anno. Stat. 1909. In that section it is said: "It is hereby made the duty of the owner or owners of any such ditch or canal to keep the same in good repair and to cause the water to flow through the said ditch or canal to the extent of its capacity during the period between April 15 and November 1 each year, if the same be demanded and the supply at its source be sufficient." We call attention to the language of the statute to the effect that the water is only to be furnished by the ditch owner when "the supply at its source be sufficient." In Crawford Co. v. Hathaway (Crawford Co. v. Hall) 67 Neb. 325, 60 L.R.A. 889, 108 Am. St. Rep. 647, 93 N. W. 781, this court held that the act of 1877 was an implied recognition of the right to appropriate the waters of the public domain according to the custom prevailing in the arid states immediately west of us, and that the irrigation acts of 1889 and 1895 expressly recognized and prescribed the rights of those who had appropriated the public waters and applied them to agricultural uses. By §§ 42, 43, chap. 69, Laws 1895 (Comp. Stat. 1911, chap. 93a, art. 2, §§ 42, 43), it is provided: "The water of every natural stream not heretofore appropriated, within the state of Nebraska, is hereby declared to be the property of the public, and is dedicated to the use of the people of the state, subject to appropriation as hereinbefore provided." And in the next section it is said: "The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied." These sections would seem to make the water in the natural streams of the state the property of the public; that is, the property of the state, subject, however, to appropriation for beneficial uses. This would seem to be specifically said by Judge Sedgwick in Castle Rock Irrig. Canal & Water Power Co. v. Jurisch, 67 Neb. 377, 93 N. W. 690. Section 6924x2, Anno. Stat. 1911, provides: "Irrigation works constructed under the laws of this state are hereby declared to be common carriers." The further provision contained in the section is: "The owner or operator of any works for the storage, carriage, or diversion of water, except irrigation districts, must deliver all water legal-

ly appropriated to the parties entitled to the use of the water for beneficial purposes, at a reasonable rate, to be fixed by the state railway commission, according to the law in such cases relating to common carriers."

From the statutes and decisions referred to it would seem that the waters in the running streams of the state are public property, subject to be diverted and applied for beneficial uses. That ditches may be constructed to carry the water to agricultural lands for a reasonable compensation would seem proper, and the owner of the land may undoubtedly obligate himself to assist in the construction and maintenance of the ditch. If the owner of the land, after incurring an obligation of this kind, sells and conveys it, is there any obligation upon the part of his grantee to keep up a maintenance fee, although he has not undertaken to do so by any personal promise? We think that the following authorities tend to show that the defendant is not personally liable, and some of these decisions perhaps tend to show that he is not liable as grantee for any burden unless he and the plaintiff in the case are privies in estate. 17 Vin. Abr. of Law and Equity (Privy) p. 534; 2 Bouvier's Law Dict.; Hurd v. Curtis, 19 Pick. 459; Educational Soc. v. Varney, 54 N. H. 376; 2 Washb. Real Prop. 6th ed. §§ 1203, 1205; Cole v. Hughes, 54 N. Y. 444, 13 Am. Rep. 611; Scott v. McMullan, 76 N. Y. 141; Nesbit v. Nesbit, 1 N. C. 90 (Taylor, 57); Webb v. Russell, 3 T. R. 393, 1 Revised Rep. 725; Keppell v. Bailey, 2 Myl. & K. 517, Coop. t. Brougham, 278; 4 Kent, Com. *473; Mygatt v. Coe, 124 N. Y. 212, 11 L.R.A. 646, 26 N. E. 611; Pool v. Morris, 29 Ga. 374, 74 Am. Dec. 68; Patton v. Pitts, 80 Ala. 373; Kettle River R. Co. v. Eastern R. Co. 41 Minn. 461, 6 L.R.A. 111, 43 N. W. 469; Bloch v. Isham, 28 Ind. 37, 92 Am. Dec. 287; Weld v. Nichols, 17 Pick. 538; Bally v. Wells, 3 Wils. 25. In Fresno Canal & Irrig Co. v. Rowell, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53, it was held: "Where a grantee of the covenantor had notice of the water right when he purchased the land, but did not know its terms, such knowledge was sufficient to put him upon inquiry; and a failure to do so will not relieve him of the obligation upon the land." In the same case it was held: "Under Civil Code (Cal.) §§ 1460-1462, specifying what covenants run with the land, the covenants under the contract in question do not run with the land, not being contained in the grant of the estate, and no personal judgment can be had against defendant, but the lien must be foreclosed against the land; he not being a bona fide purchaser without notice of the

lien." An examination of the Civil Code of California shows that proceedings against the land by foreclosure of the alleged lien are dependent upon the Code of that state. Civil Code (Cal.) §§ 1460, 1462, 2882, 2884. It will be seen from the foregoing California case that, although the statutes of that state make the lien created by the contract follow the land, yet the court said: "There can be no judgment against defendant personally for money, but the lien can be enforced by foreclosure against the land, and every grantee who is not a bona fide purchaser without notice."

Counsel for the plaintiff cites *Farmers' Canal Co. v. Frank*, 72 Neb. 136, 100 N. W. 286. We think that case cannot properly be applied to the consideration of this one. It required in its determination the consideration of § 6782, Anno. Stat. 1903. It was a consideration of the statement required in an application to the state board of irrigation for a permit to appropriate water. This court held that it was necessary to state in such application a description of the land to be irrigated. The thing determined was not whether there was a personal liability for the maintenance of a ditch. It was merely directory concerning the method of appropriating water for irrigation purposes. If A. purchases a tract of land upon which there is a mortgage, he does not necessarily assume payment of the mortgage, nor does he become liable in an action at law upon the original note which the mortgage secures. Of course, if he does not pay the note and thereby satisfy the mortgage, he may lose his title to the land by foreclosure. Notwithstanding the fact that he may lose the land, he does not become personally liable upon the note. This is so plain that the citation of any authority would seem to be unnecessary. In *Lexington Bank v. Salling*, 66 Neb. 180, 92 N. W. 318, it is held that the conveyance of land subject to outstanding encumbrances imposes upon the purchaser no obligation to pay such encumbrances. In discussing the case the court said: "It has long been settled in this state that the acceptance of a deed which, in express terms, conveys land subject to an encumbrance, does not impose upon the grantee a personal obligation to pay the debt. He is in such case interested in discharging the encumbrance, but he owes neither the grantor nor the encumbrancer any duty arising *ex contractu*. The transaction being nothing more than the purchase of an equity of redemption, no implied agreement is deducible from it."

We approach the determination of this case with a full realization of the importance of irrigation to the state. While the

great bulk of farming in Nebraska is done upon agricultural lands which are not irrigated, yet a very considerable section must always depend upon the successful application of water to agricultural uses. This section of our state is already prosperous, and is destined to support a dense population. Irrigation is to be encouraged and protected in every legitimate way. While the plaintiff may be obliged to furnish the defendant with water for irrigation purposes if he demands it, and the plaintiff has it, yet the refusal of the defendant to accept the water does not create a personal liability against the defendant. It is contended by the plaintiff that the maintenance fee is, by the terms of the "water right deed," made a charge upon the land, and that the defendant by his purchase of the land became personally liable for the payment of such maintenance fee. The trouble with this contention is that neither the terms of his deed nor the several irrigation acts impose upon him any such personal liability. We are of opinion that the trial court correctly determined the question before it.

The judgment of the District Court is right, and it is affirmed.

NORTH CAROLINA SUPREME COURT.

POCOMOKE GUANO COMPANY, Appt.,
v.

CITY OF NEW BERN.

(158 N. C. 354, 74 S. E. 2.)

Tax — inspection — license — statutory conflict.

1. A statute imposing a tonnage tax for purposes of inspection on fertilizers, and forbidding "any other tax to be levied by county, city, or town," does not forbid a municipality from imposing a license tax on the business of dealing in such products.

Note. — *Warehouse used exclusively for owner's goods or products as subject of license tax.*

There appears to be little authority upon the question of whether the maintenance of a storehouse for one's own convenience is a trade or occupation upon which a license tax may be imposed.

In *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423, it was held that the requirement of a license for a warehouse by a statute regulating elevators and warehouses on railroad rights of way, or lands used in connection with a railway at stations and sidings, was not forbidden by the 14th Amendment 39 L.R.A. (N.S.)

Same — license — storage warehouse.

2. Charter authority to impose a tax on trades permits the imposition of a tax on the maintenance by a foreign manufacturer of a warehouse for the storage, within the municipality, of its products pending deliveries by agents, to whom the orders are forwarded from the home office in another state.

(Brown and Allen, JJ., dissent.)

(March 13, 1912.)

A PPEAL by plaintiff from a judgment of the Superior Court for Craven County holding it liable in an action submitted without controversy to determine the liability of plaintiff for a license tax which had been imposed by the defendant city. Affirmed.

The facts are stated in the opinion.

Messrs. Peatross & Savage and Moore & Dunn, for appellant:

The designation of the objects of taxation is a limitation of the objects that could be taxed.

Plymouth v. Cooper, 135 N. C. 1, 47 S. E. 129.

The commissioners of an incorporated town have no right to impose any tax, except such as are expressly authorized by the acts of incorporation.

Asheville v. Means, 29 N. C. (7 Ired. L.) 406.

Mr. R. A. Nunn, for appellee:

Plaintiff is not exempt from the payment of the privilege tax for doing business in the city.

F. S. Royster Guano Co. v. Tarboro, 126 N. C. 71, 35 S. E. 231; *Holland v. Isler*, 77 N. C. 1; *Wilmington v. Macks*, 86 N. C. 88, 41 Am. Rep. 443; *State v. Worth*, 116 N. C. 1007, 21 S. E. 204; *State v. Irvin*, 126 N. C. 989, 35 S. E. 430.

Clark, Ch. J., delivered the opinion of the court:

This is an action submitted without controversy to determine whether the plaintiff,

of the Federal Constitution, in case of a warehouse used exclusively for the storage of the grain of the owner, where the warehouse was used for the purpose of buying grain from the public and was a sort of a public market, and the warehouseman acted as a market master, weighmaster, inspector, and grader of the grain. The court quoting from the opinion of the state court, which upheld the constitutionality of the act, said: "If the business carried on at this warehouse consisted of nothing more than storing defendant's own grain, we would concede that such business would warrant but little interference or regulation of it by the state. But that business does consist of something more. It was conceded

Guano Company, is liable for the license tax of \$50 prescribed by the board of aldermen of the city of New Bern, for carrying on business as fertilizer agents or dealers, for twelve months succeeding the date of the levy. Rev. § 2924, authorizes any municipal corporation to "annually lay a tax on all trades, professions, and franchises carried on or enjoyed within the city, unless otherwise provided by law."

Such license tax upon a trade or profession is not forbidden because a tonnage tax for purposes of inspection has been levied by the state under a statute which forbids "any other tax to be levied by county, city, or town." That provision simply forbids any other tonnage tax. It does not forbid an ad valorem tax upon the goods stored in town, nor a license tax upon the calling or occupation of manufacturing or dealing in fertilizers. *F. S. Royster Guano Co. v. Tarboro*, 126 N. C. 68, 35 S. E. 231; *Pocomoke Guano Co. v. Biddle*, 158 N. C. 212, 73 S. E. 996.

The power of the legislature to authorize the levy of license taxes upon trades, pro-

fessions, and franchises has been discussed and sustained also in *Wilmington v. Macks*, 86 N. C. 88, 41 Am. Rep. 443; *State v. Worth*, 116 N. C. 1007, 21 S. E. 204; *State v. Irvin*, 126 N. C. 989, 35 S. E. 430; *State v. Hunt*, 129 N. C. 686, 85 Am. St. Rep. 758, 40 S. E. 216. The only question that arises, therefore, is whether the occupation or calling exercised by the plaintiff comes within the terms of the ordinance which levies a tax of \$50 upon callings and professions, naming among others, "fertilizer manufacturers, agents, or dealers."

The facts agreed on are that the plaintiff is a company engaged in manufacturing and selling fertilizer and fertilizer material; that it has no factory in New Bern, and that the orders for the goods are received solely at Norfolk, Virginia, and from thence are sent to its agents, who maintain a warehouse in the city of New Bern, where its fertilizers and fertilizing material are stored, and thence are shipped out upon the orders thus sent to them from the general office in Norfolk, Virginia; no sales being made in New Bern.

on the argument, and is fairly to be inferred from the findings and stipulation of facts, that the grain is purchased, weighed, graded, and delivered at the warehouse, and that defendant, with its own scales and appliances, weights and grades the grain. Under these circumstances, the warehouse is a sort of public market place, where the farmers come with their grain for the purpose of selling the same, and where the purchaser, a party in interest, acts as market master, weighmaster, inspector, and grader of the grain. Surely such a business is of a public character, and is sufficiently affected with a public interest to warrant a very considerable amount of regulation of it by the state. The business carried on by defendant at its warehouse is similar to that carried on at a large number of other warehouses and elevators in this state. The grain crops of this state constitute by far the most important part of its commerce and its greatest resource. It is important to see that correct weights are had; that uniform grades are given; that the proper amount of dockage and no more is taken; that no dishonest practices are allowed, and no undue advantage is permitted to be taken. Said chapter 148 requires the person operating such an elevator or warehouse to procure a license to be issued by the state railroad and warehouse commission, for which a fee of \$1 per year must be paid. The act also provides that such license may be revoked by the commission if the warehouse or elevator is operated in violation or in disregard of the laws of this state. Section 2 provides that any person attempting to run such an elevator or warehouse without a license may be enjoined in a suit for that purpose. Section 3 provides that the commission may 39 L.R.A. (N.S.)

make suitable and necessary rules and regulations for the government of public country warehouses and elevators. Then follow other provisions. There are undoubtedly many provisions in the act which apply only to warehouses and elevators in which grain is stored for others or for the public, and which provisions do not and cannot apply to such warehouses as the one here in question. There are, perhaps, provisions in the act which it would be unconstitutional to apply to such a warehouse as this. But such matters need not be considered at this time. The provision requiring a license is not one of these. This disposes of the only question argued which it is necessary to consider."

In *Arlington v. Central of Georgia R. Co.* 127 Ga. 721, 56 S. E. 1015, where the municipality had no power to tax a railroad as a common carrier, it was held that a warehouse used only to store goods which were in its custody as a common carrier was a mere incident to its business as such, and could not be segregated and made subject to an occupation tax.

In *State v. Walker*, 28 La. Ann. 636, it was held that where a statute required a license tax to be paid by "each keeper of a warehouse, cotton or lumber yard, or other place of public storage for hire," the tax could not be exacted of one who had the usual appendage of all sawmills doing a considerable amount of business, upon which the lumber sawed at the mill was stacked for sale, where it appeared that he did not keep lumber on storage for hire.

For a note on power of municipality to make consistent elements or operations of a business independent subjects of license tax, see note to *Southern Exp. Co. v. R. M. Rose Co.* 5 L.R.A. (N.S.) 619. J. T. W.

Upon these facts, it is clear that the plaintiff is a manufacturing company maintaining an agency in the city of New Bern, through which it deals in fertilizers and fertilizing material, storing the same and shipping out and distributing the fertilizers and fertilizing material upon receipt of orders which are taken and accepted at Norfolk, Virginia. It is not material that no fertilizers are manufactured in New Bern and that no sales are made there. The dealing consists in storing and keeping the goods on hand, and shipping them out from time to time to the parties who have brought the same. The tax is upon the occupation or calling or business, whatever it may be termed, from which it is reaping a profit. Like other businesses, professions, and callings that are taxed because carried on there, this plaintiff, being protected in the exercise of such occupation or calling by the city, is subject to this license tax as the *pro rata* which the city is authorized to levy upon it in return for such protection. *Holland v. Isler*, 77 N. C. 1.

We concur in the judgment below.

Brown, J., dissenting:

I am unable to agree with the conclusions of the court that the tax levied by the city of New Bern upon the plaintiff was valid. The facts, as I gather them from the records, are that the plaintiff, a corporation doing business in the city of Norfolk, leases a warehouse in the city of New Bern for the storage of its own goods only, consisting of fertilizers and fertilizing material. None of these goods are sold in the city of New Bern, but the sales offices of the plaintiff are outside of the state of North Carolina, at which offices it receives orders from the purchasers of fertilizer through traveling salesmen, and in some instances by mail. The plaintiff is not engaged in the selling of fertilizer in New Bern, or in the business of a warehouseman. A "warehouseman" is one whose storage facilities are open to the public. Whereas, the warehouse of the plaintiff is used exclusively for the storage of its own property.

I do not gainsay the right of the general assembly to tax trades, professions, and franchises; but, according to the facts of this case, the plaintiff is not engaged in the exercise of either within the city of New Bern. The case came before the superior court in the form of a controversy submitted without action, in which it appears affirmatively that the plaintiff is not engaged in the sale of fertilizer in North Carolina, but that the warehouse in question is used exclusively for the private storage of its own material, and that deliver-

ies are made from that upon orders received from the company's offices in Norfolk.

We have at this term held that this company is liable for the ad valorem tax upon the value of its fertilizers stored in the city of New Bern, which tax the company will be compelled to pay, but upon the facts agreed I find no warrant whatever to tax it either as trader or as warehouseman. In addition to the heavy ad valorem tax adjudged against this plaintiff as this term, it is well to remember that it also pays a tonnage tax of 20 cents per ton upon this very fertilizer. To permit the city to tax this plaintiff as dealer or warehouseman, when in fact it is not engaged in either capacity in this state, is piling Pelion on Ossa in the matter of taxation.

Allen, J., concurs in dissent.

NORTH CAROLINA SUPREME COURT.

E. H. CHEWNING et al.

v.

F. C. EASON et al., Appts.

(158 N. C. 578, 74 S. E. 357.)

Will — power of disposal — estate created.

A devise of property to one for life, and then "to dispose of as she sees proper," does not convey a fee.

(April 3, 1912.)

Note. — Power to create remainder after life estate with absolute power of disposal.

This note is supplemental to one in 6 L.R.A. (N.S.) 1186, bearing the same title, to which reference is made for the earlier decisions on the question.

The question as to what intention in regard to the nature of the estate to be taken by a devisee may be deduced from a power of disposition is considered in a note to *Re Weien*, 18 L.R.A. (N.S.) 463.

Rule where power of disposal is not considered to be property.

In *Cross v. Hendry*, 39 Ind. App. 246, 79 N. E. 531, where testator gave all his property to his wife, "to be hers during her lifetime," adding, "and at her death I wish what property is left to be applied" in a certain manner, it was held that as a life estate was given in certain and express terms, the power of disposition annexed did not operate to create an estate in fee.

In *Beatson v. Bowers*, — Ind. App. —, 88 N. E. 966, affirmed in 174 Ind. 601, 91 N. E. 922, it was held that under a deed by which property was conveyed to the

APPPEAL by defendants from a judgment of the Superior Court for Anson County in plaintiff's favor in an action brought to determine ownership to certain lands under the will of Thomas Chewning, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. Gullledge & Boggan, F. J. Cox, and W. E. Brock, for appellants:

The law strongly favors the creation of a fee or an estate of inheritance, especially by will, instead of a life estate in the first taker.

Leeper v. Neagle, 94 N. C. 338; Re Whitney, 69 Misc. 131, 124 N. Y. Supp. 909; Terhune v. Commercial Nat. Safe Deposit Co. 245 Ill. 622, 92 N. E. 532; Hoxie v. Chamberlain, 228 Pa. 31, 76 Atl. 423; Mc-

Knight v. McKnight, 120 Tenn. 431, 115 S. W. 134; Hale v. Marsh, 100 Mass. 468.

Messrs. Robinson & Caudle, for appellees:

The devise created a life estate only.

Harrison v. Battle, 21 N. C. (1 Dev. & B. Eq.) 214; Alexander v. Cunningham, 27 N. C. (5 Ired. L.) 433; Bass v. Bass, 78 N. C. 375; Patrick v. Morehead, 85 N. C. 62, 39 Am. Rep. 684; Jackson ex dem. Livingston v. Robins, 16 Johns. 537; Long v. Waldraven, 113 N. C. 337, 18 S. E. 251; Parks v. Robinson, 138 N. C. 269, 50 S. E. 649; 31 Cyc. 1089; 22 Am. & Eng. Enc. Law, 1097; Morgan v. Morgan, 60 W. Va. 327, 55 S. E. 389, 9 Ann. Cas. 943; Steiff v. Seibert, 128 Iowa, 746, 6 L.R.A. (N.S.) 1186, 105 N. W. 328; Gardner, Wills, p. 476;

grantee during her life, with power of disposition, the limitation for life controlled the operation of the power, and prevented the estate from enlarging into a fee.

And in Foudray v. Foudray, 44 Ind. App. 444, 89 N. E. 499, it was held that as a will by which testator devised to a daughter certain real estate for and during her natural life, with full power of disposition, gave the devisee a life estate by certain and express terms, the vesting of the power of disposition would not enlarge the estate given into a fee.

In Paxton v. Paxton, 141 Iowa, 96, 119 N. W. 284, a will devising to testator's wife all his property, "to be used by her and enjoyed as she may choose during her natural life, and at her death, if any property is remaining, to be divided equally among my children," was held not to give her a fee-simple title, the court saying: "A devise which passes only a life estate may nevertheless be coupled with a provision giving the devisee unlimited power of disposal. The devise in remainder vests at once in the devisees thereof a fee-simple title to whatever may remain undisposed of under this power, subject only to the life estate of the first devisee."

In Hamilton v. Hamilton, 149 Iowa, 321, 128 N. W. 380, it is said that the doctrine that a life estate may be created with a power annexed authorizing the life tenant to defeat or extinguish the remainder over by sale and conveyance of the fee, is too well settled in Iowa and in most of the states to admit of serious argument.

In McCormick v. McCormick, — Ky. —, 121 S. W. 450, it was held that a power of sale given by a will to a tenant for life in no wise enlarged her life estate.

In Woodward v. Anderson, 145 Ky. 134, 140 S. W. 57, it is held that although where property is devised absolutely, with power of unlimited disposition, and by a subsequent part of the will the testator undertakes to devise over an undisposed-of remainder of the property, the limitation over is void, yet where a life estate only is devised, with power of disposition, then the limitation over of such of the devised 39 L.R.A. (N.S.)

property as should remain undisposed of at the death of the life tenant is valid.

In Marden v. Leimbach, 115 Md. 206, 80 Atl. 958, the court, in holding that there was no inconsistency between the granting clause of a deed conveying an estate for life and the habendum clause which gave the grantee the right during life to convey absolutely, said that the power of disposition annexed by the latter provision does not enlarge the estate conveyed to a fee, it being a well-settled doctrine of law, sustained by all the authorities, that where an estate is given to a person generally or indefinitely, with power of disposition, such gift carries the entire estate; but where the property is given expressly for life, and a power of disposition of the reversion is annexed, the rule is different, and the first taker has but an estate for life with the super-added power.

In Warren v. Ingram, 96 Miss. 438, 51 So. 888, Ann. Cas. 1912 B, 422, it is said that the authorities are uniform to the effect that a devise of land to one indefinitely, and to do with the same at his discretion, will invest him with the fee; but if the devise is for life only and to do with at his discretion, the devisee is invested with a life estate only, with an added power.

In Tisdale v. Prather, 210 Mo. 402, 109 S. W. 41, it is said to be well settled that a conveyance which confers an absolute power of disposition creates a fee-simple estate in the grantee if by deed, or in the devisee if by will, in the absence of an expressed intention to devise a life estate only.

In Threlkeld v. Threlkeld, 238 Mo. 459, 141 S. W. 1121, it is held that an absolute and unrestricted power of disposition is not inconsistent with a life estate, and that a limitation over is good, although the first taker has such power.

And in Romjue v. Randolph, — Mo. App. —, 148 S. W. 185, it is said that the power of absolute disposal over property will not operate as the devise of a fee in realty, and of an absolute title in personality, where a life estate only is devised; and that in such case the life estate is not enlarged by an unrestrained power of sale, but such

Mansfield v. Shelton, 67 Conn. 390, 52 Am. St. Rep. 288, 35 Atl. 271; *Peckham v. Lego*, 57 Conn. 553, 7 L.R.A. 419, 14 Am. St. Rep. 130, 19 Atl. 392.

Walker, J., delivered the opinion of the court:

This is a controversy between the parties to this action, arising out of the following facts: Plaintiffs, who are the heirs of Thomas Chewning, claim that they are the owners of the tract of land which is the subject of the controversy; and defendants, who are the heirs of Martha Chewning, dispute this claim and assert ownership in themselves. The land was owned by Thomas Chewning, who, by his will, devised it to his wife, Martha Chewning, in these words: "I

give and bequeath (after all my just debts shall have been paid) all of my real and personal property, together with all debts owing my estate, to my wife, Martha Chewning, during her natural life, and then to dispose of as she sees proper." If, under this clause of the will, Martha Chewning acquired a life estate only, with power of disposal, the plaintiffs are entitled to the land, as she failed to exercise the power; but if the grant of the power enlarged the estate for life, which is expressly given, into an estate in fee, then the defendants are the owners of the land. The court below was of opinion with the plaintiffs, and rendered judgment accordingly, from which the defendants appealed.

There is a marked distinction between

power is merely one of appointment, which, if not exercised, leaves the estate in remainder.

In *Loosing v. Loosing*, 85 Neb. 66, 25 L.R.A. (N.S.) 920, 122 N. W. 707, the court said: "While cases are not lacking to sustain the proposition that a power of sale added to a life estate in real property vests the donee with an estate in fee simple, we think the weight of authority is to the contrary."

In *Parker v. Travers*, 74 N. J. Eq. 812, 71 Atl. 612, it is said that the rule is well established in New Jersey that when to a life estate with a remainder over of what may be undisposed of, there is added a power of disposition, the property right or interest of the life tenant is not thereby enlarged, but the devisee takes a life estate only, with a power of disposal, to be exercised by the devisee during the continuance of the estate, for his benefit.

In *Southern Pine Lumber Co. v. Arnold*, — Tex. Civ. App. —, 139 S. W. 917, and in the same case on former appeal, 123 S. W. 1162, it is held that under a deed conveying land to a husband in trust for his wife for life, and in trust to hold the remainder in fee for such persons as she might appoint by will or deed, and giving her a power of disposition during life, the wife acquired a life estate which was not enlarged by her power of disposal.

The rule that an absolute power of disposition may be annexed to a life estate without enlarging it into a fee is also recognized and acted upon in *Pool v. Napier*, 145 Iowa, 699, 124 N. W. 755; *Ironside v. Ironside*, 150 Iowa, 628, 130 N. W. 414; *Greenwalt v. Keller*, 75 Kan. 578, 90 Pac. 233; *Sutton v. Johnson*, — Ky. —, 127 S. W. 747; *Huerkamp v. Huerkamp*, 145 Ky. 144, 140 S. W. 182; *Park v. McCombs*, 146 Ky. 327, 142 S. W. 401; *Richards v. Morrison*, 101 Me. 424, 64 Atl. 768; *Reed v. Reed*, 194 Mass. 216, 80 N. E. 219; *Murdoch v. Murdoch*, 97 Miss. 690, 53 So. 684.

It makes no difference in the application of this doctrine that the subject of the gift is personal property. *Park v. McCombs*, 146 Ky. 327, 142 S. W. 401. 39 L.R.A. (N.S.)

Rule where power of disposal and life estate are considered incompatible.

On the other hand, in *McKnight v. McKnight*, 120 Tenn. 431, 115 S. W. 134, the court, following the doctrine laid down in the earlier Tennessee decisions, stated it to be a well-established rule of property that where a life estate is conveyed or devised, coupled with the absolute and unqualified power of disposition in the conveyee or devisee, the law converts the estate into a fee because of the incompatibility and inconsistency of the estate given and the power of disposition of it; but that where the power of disposition is dependent upon a contingency, is qualified, limited, or restricted, only a life estate is vested, the obnoxious incompatibility not being in such cases.

And in *Randall v. Harrison*, 109 Va. 686, 64 S. E. 992, it was held, in accordance with the doctrine of the earlier Virginia decisions, that a gift of a life estate with absolute power of disposal vests in the first taker a fee simple in lands, and an absolute estate in personalty, and that a gift over of "what may be left" is void.

The doctrine that if the first taker is given an estate for life, coupled with an unlimited power of disposition, the fee or absolute estate vests in the first taker, and the limitation over is void, is also recognized in *Emert v. Blair*, 121 Tenn. 240, 118 S. W. 685, and *Newman v. Newman*, 60 W. Va. 371, 7 L.R.A. (N.S.) 370, 55 S. E. 377.

Rule as modified by statute.

The word "purchaser," as used in the Wisconsin statute of 1898, which provides that when an absolute power of disposition is given to the owner of a life estate, such estate shall be changed into a fee absolute as to the rights of creditors and purchasers, but subject to any future estates limited therein in case the power shall not be executed or the land sold for the satisfaction of debts,—is not used in its technical sense, but must be understood, according to the common and approved usage of the language, as meaning a purchaser for a valu-

property and power. The estate devised to Mrs. Chewing is property; the power of disposal, a mere authority, which she could exercise or not, in her discretion. She had a general power annexed to the life estate, which she derived from the testator under the will. If she had exercised the power by selling the land, the title of the purchasers would have been derived, not from her, who merely executed the power, but from the testator, or the donor of the power. "The appointor is merely an instrument; the appointee is in by the original deed. The appointee takes in the same manner as if his name had been inserted in the power, or as if the power and instrument executing the power had been expressed in that giving the power. He does not take from the donee, as his assignee." 2 Washb. Real Prop. 320; 1 Sugden, Powers, 1856 ed. 242; 2 Sugden, Powers, 22; Doolittle v. Lewis, 7 Johns Ch. 45, 11 Am. Dec. 389. "In the execution of a power, there is no contract between the donee of the power and the appointee. The donee is the mere instrument by which the estate is passed from the donor to the appointee, and, when the appointment is made, the appointee at once takes the estate from the donor as if it had been conveyed directly to him." Norfleet v. Hawkins, 93 N. C. 392. It does not follow, because she could sell and convey the land under the power, that she thereby became the owner in fee. We must ascertain the intention of the testator, for that is the prevailing consideration and the su-

preme rule of interpretation, keeping in mind, of course, the rules of construction as our guide, and looking at the will in its entirety. If the testator, in this case, intended to devise the fee to his wife, it is strange that he should have expressly and definitely limited the estate to one for her life. Naturally, he would have given it to her without restriction. The reasonable meaning of the clause is that she should have and enjoy the property for the term of her life, with a general power of appointment or disposal of the reversion by her will, or, at least, subject to her life estate, if she chose to exercise it, and the great weight of authority sustains this construction. The doctrine was clearly expressed by Chancellor Kent: "If an estate be given to a person generally or indefinitely, with a power of disposition, it carries a fee, unless the testator gives to the first taker an estate for life only, and annexes to it a power of disposition of the reversion. In that case the express limitation for life will control the operation of the power, and prevent it from enlarging the estate to a fee." 4 Kent, Com. 520, 521; Jackson ex dem. Livingston v. Robins, 16 Johns. 537. It has been held that a devise to A., with power to dispose at pleasure, is considered as conveying property, not as conferring power; for the words of power will not be permitted to take away what, without them, is expressly given. 2 Preston, Estates, 81, 82; Bradley v. Westcott, 13 Ves. Jr. 453. But where there is an express and inconsistent estate for life

able consideration. *Perkinson v. Clarke*, 135 Wis. 584, 116 N. W. 229.

Extent of life tenant's power.

The power of disposal given by a will devising property to one for life, with full power of disposition, and further providing that at the death of the devisee, should any property be left or remain, such remaining property should go to others, cannot be considered as applying only to the disposition of the life estate, as such construction would not only require that the language of the testator be given a forced and unnatural meaning, but also would make the power meaningless, since, in the absence of restriction therein, the owner of a life estate may sell it as other interests in land are sold. *Foudray v. Foudray*, 44 Ind. App. 444, 89 N. E. 499.

Under a will by which testator bequeathed to his widow all his real estate and personal property, "to have and to hold during her life, and to do with the same as, in her judgment, she may deem best," the power conferred is a power to dispose of the fee, and not the life estate only. *Warren v. Ingram*, 96 Miss. 438, 51 So. 888, Ann. Cas. 1912 B, 422.

On the other hand in *Brady v. Fuller*, 78 39 L.R.A. (N.S.)

Kan. 448, 96 Pac. 854, a power of disposition contained in a deed reserving a life estate in the grantor, and further reserving "the power to mortgage, encumber, sell, lease, convey, or otherwise dispose of said real estate at any time," was held to be limited to a control and disposition of the life estate, as otherwise it would be a nullity.

And in *Wardner v. Seventh Day Baptist Memorial Board*, 232 Ill. 606, 122 Am. St. Rep. 138, 83 N. E. 1077, where testator provided that his wife should "have all that remain of the property which I shall die seised, and after paying . . . [certain legacies] is to use, dispose of, and control according to her own judgment during her natural life, and if she shall have children by me they shall have at their majority, or their survivors of them, the same amount each as is bequeathed to my son. . . . At the decease of my said wife . . . [name] all that remains after paying the legacies made to my children and grandchildren shall be divided among the three societies as named in my will," it was held that there being no words in the will clearly indicating that a larger power was intended, the wife was given only a power of disposition coextensive with her life estate.

E. S. O.

given, the construction of the instrument is altogether different; for the express estate for life negatives the intention to give the absolute property, and converts these words into words of mere power, which, standing alone, would have been construed to convey an interest. This appears to be very clearly established by the cases which further lay it down, that where an interest, and not a mere power, is conferred, the absolute property is vested, without any act on the part of the legatee; but, where a power only is given, the power must be executed, or it will fail. We may therefore take the rule to be settled that where lands are devised to one generally, and to be at his disposal, this is a fee in the devisee; but where they are devised to one expressly for life, and afterwards to be at his disposal, only an estate for life passes to the devisee, with a bare power to dispose of the fee. Anonymous, Leon. pt. 3, p. 71; *Leife v. Saltingstone*, 1 Mod. 189; *Tomlinson v. Dighton*, 1 Salk. 239, 1 P. Wms. 149, 10 Mod. 31, *Comyn's Rep.* 194; *Burleigh v. Clough*, 52 N. H. 267, 13 Am. Rep. 23 (where many of the cases are collected and reviewed and there is a learned discussion of the question); *Stuart v. Walker*, 72 Me. 145, 30 Am. Rep. 311; *Collins v. Wickwire*, 162 Mass. 143, 38 N. E. 365; 31 Cyc. 1089; 22 Am. & Eng. Enc. Law, 1097; *Steff v. Seibert*, 128 Iowa, 746, 6 L.R.A.(N.S.) 1186, 105 N. W. 328.

The text writers thus state the general rule: "A devise of a life interest in express terms, coupled with a power in the life tenant to dispose of the fee simple in the property by his will, either absolutely and at his full discretion among a class of objects to be selected by him, or among a class of objects pointed out by the testator, gives the first taker a life estate only, but with a power to appoint the fee simple by his will." 2 Underhill, Wills, § 688. "A general power of disposition includes a power to dispose of the property by deed or will, and practically clothes the donee with all functions of ownership. In view of this fact, it has occasionally been provided by statute, and a few courts have reached the conclusion, without the help of the legislature, that the devisee of a life estate, with a general power of disposition, takes a fee simple, and that a limitation over is void. But, by the overwhelming weight of authority, no fee results from the union of the life estate and the power, but both remain distinct, and the limitation over is good unless defeated by the exercise of the power by the life tenant." Gardner, Wills, p. 476. This doctrine 39 L.R.A.(N.S.)

has been adopted and applied by this court in several cases. It is stated in *Patrick v. Morehead*, 85 N. C. 62, 39 Am. Rep. 684, to have been settled upon unquestionable authority that, if an estate be given by will to a person generally, with a power of disposition or appointment, it carries the fee; but if it be given to one for life only, and there is annexed to it such a power, it does not enlarge his estate, but gives him only an estate for life. The case of *Long v. Waldraven*, 113 N. C. 337, 18 S. E. 251, seems to be directly in point. The property, in that case, was given to the testator's wife during her natural life, and after her death to be divided among the heirs of her brothers and sisters, except as to one third thereof, which was left "at the disposal of his wife, to be left as she may will." The court held that she acquired but an estate for life, and "that an express estate for life to the wife, with a power to dispose of the fee, shall not turn her estate for life into a fee," citing *Shermer v. Shermer*, 1 Wash. (Va.) 266, 1 Am. Dec. 460, *Bass v. Bass*, 78 N. C. 374, *Patrick v. Morehead*, 85 N. C. 62, 39 Am. Rep. 684, and *Second Reformed Presby. Church v. Disbrow*, 52 Pa. 219, and stating that the principal case should be added to the long line of those which established the same doctrine. See also *Harrison v. Battle*, 21 N. C. (1 Dev. & B. Eq.) 214; *Alexander v. Cunningham*, 27 N. C. (5 Ired. L.) 433; *Parks v. Robinson*, 138 N. C. 269, 50 S. E. 649; *Morgan v. Morgan*, 60 W. Va. 327, 55 S. E. 389, 9 Ann. Cas. 943; *Mansfield v. Shelton*, 67 Conn. 390, 52 Am. St. Rep. 288, 35 Atl. 271. Revisal, § 3138, manifestly has no application. It appears in our case that the testator intended to pass an estate of less dignity than a fee. That section only establishes a rule between the heir and the devisee, in respect to the beneficial interest of the latter. *Alexander v. Cunningham*, 27 N. C. (5 Ired. L.) 430.

The case of *Herring v. Williams*, 158 N. C. 1, 73 S. E. 218, decided at the last term, did not involve the question now presented. The question there was whether there was a power of appointment or a power of disposal, while here the question is, the power being conceded, whether it enlarged the life estate into a fee. In the *Herring Case*, the donee had sold and conveyed the land by deed, or attempted to do so, while in this case she failed altogether to exercise the power.

The reversion in the land belongs to the heirs of Thomas Chewning, and not to the heirs of the donee of the power, and the judgment of the court is therefore correct.

OKLAHOMA SUPREME COURT.

MCALISTER-EDWARDS COAL COMPANY et al., Plffs. in Err.,
v.

STATE OF OKLAHOMA EX REL. SAM J. MARSHALL et al.

(31 Okla. 629, 122 Pac. 194.)

Mandamus — to compel official action.

The proper function of a writ of mandamus is to compel the doing of a specific thing, something which can be neither diminished nor subdivided, and is not an appropriate remedy to compel a general course of official conduct or a long series of continuous acts, as it is impossible for the

Headnote by DUNN, J.

Note. — Mandamus to compel performance of continuous acts or control general course of official conduct.

For a note on mandamus to compel public officials to enforce the liquor law, see *People ex rel. Bartlett v. Busse*, 28 L.R.A. (N.S.) 246.

The present note does not cover the question whether mandamus is a proper remedy to compel public service or quasi public corporations to perform their respective duties.

The decision in *MCALISTER-EDWARDS COAL CO. v. STATE*, to the effect that a writ of mandamus is not an appropriate remedy to compel a general course of official conduct or a series of continuous acts, is in accord with the weight of authority, although there are decisions to the contrary. The reason upon which these cases are founded is the practical impossibility of the courts overseeing the performance of a long series of continuous acts, and the fact that a course of conduct extending over a considerable period necessarily involves the exercise of discretion which is vested in an official.

Thus, in *People ex rel. National Cigar Co. v. Dulaney*, 96 Ill. 503, it was held that mandamus was not a proper remedy to compel the commissioners of a penitentiary to perform executory contracts for convict labor for a number of years. The court said: "It is only practicable by mandamus to compel the performance of specific acts where the duty to discharge them is clear and well defined, and when no element of discretion is involved in the performance. In the case in hand the duties to be coerced, if this writ is allowed, arise out of a contract that requires a series of years for its performance, and must of necessity involve in some degree the exercise of discretion, or, what is the same thing, judgment in the management of the business to which the contract refers. In such cases mandamus is not an appropriate remedy."

And a writ of mandamus will not be issued to compel aldermen to attend meetings of the common council and perform

court to oversee the performance of such duties.

(March 12, 1912.)

ERROR to the District Court for Pittsburg County to review a judgment in favor of relators in a mandamus proceeding to compel defendants to furnish to relators such timbers, props, and cap pieces as are necessary to keep their working places in safe condition. Reversed.

The facts are stated in the opinion.

Messrs. Stuart, Gordon, & Liedtke, for plaintiffs in error:

'The writ of mandamus did not lie in this cause, for the reason that it was not a proper remedy.

their general official duties. *People ex rel. Fitzgerald v. Whipple*, 41 Mich. 548, 49 N. W. 922. The court said: "Mandamus would be entirely ineffectual in reaching the mischief complained of, as no court by such means could keep up a continuous or repeated attendance. Courts are not created to conduct the municipal affairs of cities, and nothing short of any such general supervision would reach such cases as the present. The remedy, if there is one, is not judicial. This is not a case where there is some specific right involved, but is a general violation of public duty."

And in *People ex rel. Cady v. Ihnken*, 129 Mich. 466, 89 N. W. 72, it was held that mandamus would not lie to compel a village clerk to attend the meetings of the council.

So, a writ of mandamus will not be issued at the instance of the owner of half of the stock of a corporation, against one who owns the remainder, commanding the latter to allow the former at all times free and unrestrained access to all the books, papers, accounts, mills, offices, and other property of the company in his possession or under his control, and to permit the applicant at all times to have a share and control in the management and direction of all the affairs and business of the company. *State ex rel. Rosenfeld v. Einstein*, 46 N. J. L. 479. The court said: "The proper province of writs of mandamus is to enjoin the doing of particular specified acts, and not to constrain a person to regulate his whole course of conduct according to some general principle. The latter, however, seems to be the design which the relator has in view."

And the court will not compel a press association by mandamus to enter into a contract for the supplying of news to a newspaper, since it cannot compel the making of a contract, because the element of the specific act to be performance is lacking, and for the further reason that a contract of this kind would necessarily involve and require for a long time the exercise of judgment, continuous supervision, special experience, and business discretion. *State ex rel. Star Pub. Co. v. Associated Press*,

Atlanta v. Wright, 119 Ga. 207, 45 S. E. 995; Ward v. Beaufort County, 146 N. C. 534, 125 Am. St. Rep. 489, 60 S. E. 418.

Mandamus is not proper to be used as a means of enforcing a continuous line of action, or for carrying on, through the agency of the court, the conduct of a general business.

19 Am. & Eng. Enc. Law, 2d ed. 724; Ward v. Beaufort County, 125 Am. St. Rep. 496, note; State ex rel. Hawes v. Brewer, 4 Ann. Cas. 197, and note, 39 Wash. 65, 109 Am. St. Rep. 858, 80 Pac. 1001; Diamond Match Co. v. Powers, 51 Mich. 145, 16 N. W. 314; People ex rel. Bartlett v. Dunne, 219 Ill. 346, 76 N. E. 570; State ex rel. Bross v. Carpenter, 51 Ohio St. 83, 46 Am. St. Rep. 556, 37 N. E. 261.

159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91.

And a writ of mandamus will not issue at the suit of one of the newly elected bailiffs of a militia district, to compel the justice of the peace elected in that district to make an apportionment of the papers, writs, and other processes issuing from the justice's court or returnable, thereto, and to turn over any particular part of them to the constable. Jackson v. Cochran, 134 Ga. 396, 67 S. E. 825, 20 Ann. Cas. 219. The court said: "While the writ of mandamus will issue to compel a due performance of official duties, it will not be granted to compel the performance of such a series of acts as that, in enforcing the observance of the writ, the court issuing the same would have to undertake to oversee and control the general course of official conduct of the party to whom the writ is directed."

Under the well-established doctrines set forth above, relative to the scope of the writ of mandamus, it is clearly not a remedy appropriate to the wrongs of which the applicant in the present case makes complaint. In the first place, he is not asking that the magistrate against whom he seeks the writ be compelled to perform some specific act or fulfil some specific official duty; but it is manifest that, if he were entitled to the writ on his petition, he would obtain a writ regulating and controlling the magistrate in his general course of official conduct. Not only would a long series of official acts upon the part of the magistrate be ordered, but the acts sought to be compelled are of such a character that the magistrate has a very large discretion relatively to the demand of the defendant in error in regard to them. For, even of no exigency has arisen which would authorize the appointment of special constables under § 4085 or 4086 of the Civil Code, certainly, as between the applicant for the writ of mandamus and the other regularly elected constable for the district, the magistrate would have a large discretion in apportioning the writs and processes to be served."

In Mossy v. Harris, 25 La. Ann. 623, where 39 L.R.A. (N.S.)

Messrs. Lester & Hammond for defendants in error.

Dunn, J., delivered the opinion of the court:

This case presents error from the district court of Pittsburg county. September 13, 1909, defendants in error, as plaintiffs, filed their petition, in which it is alleged that the defendant the McAlester-Edwards Coal Company is a corporation, and that Jones Keener and Arthur Craig are mine foremen thereof; that the said coal company is engaged in the business of mining coal, and has employed the plaintiffs as coal miners; that, in order to perform their duties in safety, it is necessary to have sufficient props, caps, and timbers of suit-

a writ of mandamus was sought to compel the tax collector to accept certain warrants in payment of license taxes, the court said: "It is the province of courts to pass on real contests between parties, enforce or protect specific rights, and redress actual wrongs, and not to issue general orders regulating or defining the duties of public officers. Certainly, this last is not the purpose of the writ of mandamus. To authorize it there must appear a specific ministerial duty which the applicant has a direct right or interest in having enforced. The relator does not show any such right, nor that he will suffer any particular wrong by the alleged refusal of the defendant to receive the said warrants."

In State ex rel. Broussard v. Henderson, 117 La. 209, 41 So. 496, where the sheriff denied that the district attorney was entitled to a commission on fines in criminal cases, and refused to pay such commission on certain fines already collected, and declared his intention not to pay a commission on future fines, it was held in a mandamus suit to compel the payment of the commission, that the only amount in dispute was the commission on the fines already collected, and that, for determining the jurisdiction of the court, the commission on future fines could not be taken into consideration, since courts can decide only actual controversies, and mandamus will not lie to compel a general course of official conduct.

In Diamond Match Co. v. Powers, 51 Mich. 145, 16 N. W. 314, where an application was made for a writ of mandamus to compel the holder of the county office of register of deeds to permit the agent of a foreign corporation to have access to the records of the office, in order to ascertain and state the character of the titles of all the real estate in the county, and to construct a complete abstract of such title for the benefit of the corporation, the court said: "A single consideration of a practical nature may be suggested here. Granting that no other difficulties appear, it seems evident that in any case where the claim is for a continuous use of the record

able size and length at the face of their respective working places, with which to timber the mine and make it safe; that under the law it is made the duty of the said coal company to employ a competent, practical mine foreman to see that plaintiffs have props, caps, and timbers of suitable size and of proper length sent into the mine and delivered to the working face; that they have requested the said coal company and Keener and Craig to perform this duty, which they have failed to do. The prayer is as follows: "Wherefore relators

pray that the court grant an alternative writ of mandamus requiring the said McAlester-Edwards Coal Company and Jones Keener and Arthur Craig to furnish to your relators, and all other miners working in their said mine, at Edwards, Oklahoma, at all times, such timbers, props, and cap pieces as are necessary to keep their working places in a safe condition, and that they be required to deliver them at the face of their working places, in said mine," etc.

On this petition, an alternative writ of mandamus was issued, to which the de-

office and its public contents from day to day and week to week, and not merely for a single occasion, with all its material facts defined, there must be great, if not insuperable, difficulty in enforcing the claim by mandamus. The register has rights and duties which must be respected; so the general public have rights, as well as the claimant; and the conditions are not steadily the same. They are subject to variation. On every occasion each must act reasonably, and with proper regard for the rights and duties of the others. As the circumstances vary the conduct must vary, so as to secure conformance to the rule of reasonable action by which the right is to be regulated. When the case presents a single occasion, and calls for an act which is presently determinate, it is entirely practicable to direct the act by mandamus. But where the case contemplates something continuous, yet variable in its conditions and aptitudes, the remedy by that process seems an unfit one. It is the office of mandamus to direct the will, and obedience is to be enforced by process for contempt. It is therefore necessary to point out the very thing to be done; and a command to act according to circumstances would be futile."

And in *Webber v. Townley*, 43 Mich. 534, 38 Am. Rep. 213, 5 N. W. 971, where a writ of mandamus was sought by abstracters to compel the register of deeds to allow them to inspect and copy the public records, it was refused; and it was held that no right to use the records for speculative purposes existed, the court pointing out the inconvenience and need of additional facilities which would probably arise if all persons were allowed such use of these offices.

But in *Burton v. Tuite*, 78 Mich. 363, 7 L.R.A. 73, 44 N. W. 282, a writ of mandamus was issued at the instance of an abstract maker against the city treasurer to compel him to permit the inspection and examination of the records and files of his office, which were by statute public records. The court said that they did not agree with the opinion of the court in *Webber v. Townley*, supra, nor anticipate that hardly any, if any, of the results imagined by the writer of that opinion, would ever occur; and the case of *Diamond Match Co. v. Powers*, supra, was distinguished upon the ground that the relator in that case was not a citizen nor an inhabitant, or even a domestic corporation, of the state, but a foreign

corporation whose capacity to buy lands or hold them or deal in them was not shown.

In *Barber v. West Jersey Title & Guaranty Co.* 53 N. J. Eq. 158, 32 Atl. 222, 371, it was held that an individual or a corporation has the right of access to the public records of the county clerk's office for the purpose of examining any title in which he is interested without paying fees to the clerk, and that the right might be enforced by mandamus. The court said: "The proper province of writ of mandamus is to enjoin the doing of particular acts, and not to constrain a person to regulate his whole course of conduct according to some general principle. . . . In this case the duty of the clerk being restricted to the performance of a specific act, a complete remedy will be afforded by the writ of mandamus; the rights of the parties being settled, if the clerk refuses to accede to a proper demand made upon him, the court of law may impose such a penalty as will command obedience to the law."

And in *State ex rel. Milwaukee v. Milwaukee Electric R. & Light Co.* 144 Wis. 386, 140 Am. St. Rep. 1025, 129 N. W. 623, it was held that mandamus would issue to compel a street railway company to sprinkle the street between and on either side of its track, where such a duty is required by a city ordinance. The court said: "Neither do we see any good reason for saying that relief should not be afforded by mandamus because the duty to sprinkle is a continuous one. If the legal duty on the part of the appellant is clear, the relator should not be denied an appropriate remedy because the right sought to be enforced is not of a temporary nature. There can be no more objection to a court of law granting permanent relief by mandamus in an appropriate action, than there is to a court of equity granting relief in a proper case by a mandatory injunction. The cases of *State ex rel. Star Pub. Co. v. Associated Press*, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91; *Diamond Match Co. v. Powers*, 51 Mich. 145, 16 N. W. 314; *State ex rel. Rosenfeld v. Einstein*, 46 N. J. L. 479; and *People ex rel. National Cigar Co. v. Dulaney*, 96 Ill. 503, cited by the appellant, are for the most part cases where, under the established facts, the right to the continuous or perpetual relief sought was not sufficiently clear to warrant the judgments prayed for."

J. T. W.

fendants filed answer setting up, among a number of other defenses, that the matters and things set out in the petition were not sufficient to justify or authorize the issuance of the writ of mandamus against them. After trial had, the court issued its peremptory writ, and the case, after motion for new trial was filed and denied, has been brought, on appeal, to this court for review.

Conceding that all claims made by plaintiffs are found in their favor, and all the other defenses presented by the defendants are adjudged against them, the determination of the issue presented by that portion of the answer of the defendants above noted, in our judgment, is conclusive of the entire proceeding.

Is the writ of mandamus available to plaintiffs to compel the defendants to furnish them, at all times, such timbers, props, and caps as are necessary to keep their working places in safe condition, and to require them to deliver the same at the face of their working places?

The statute relied upon by plaintiffs, and which, for the purpose of this hearing, is assumed to be valid, is found in the Session Laws of Oklahoma for the year 1909, at pages 383, 384, and is § 2 of article 1 of chapter 23, and reads as follows: "The mine foreman shall see that all miners in said mine are supplied at all times with such timbers, props, and cap pieces as are necessary to keep his working place in a safe condition. Such timber to be sawed square as near as possible, in proper length to fit the working place. All such timbers, props, and cap pieces shall be delivered at the face of the miners' working place in said mine by company men. Timbers in this section shall mean all wood to be used by said miner, and if from any cause, the timbers cannot be supplied where required, the said mine foreman shall instruct the person to vacate all said working places until supplied with the timber needed, and shall see that all water be drained or hauled out of all working places before the miner enters, and as far as practicable, kept dry while the miner is at work. The term, 'company men' as used in this act shall mean those employed regularly as day hands and paid by shift wages."

The penalty for the violation of any of these duties is made a misdemeanor. Under the foregoing statute, it will be noted that the timbers, props, and cap pieces which are to be furnished are such as are necessary to keep the miners' working place in a safe condition; and that the same are to be sawed square, as nearly as possible, and 39 L.R.A. (N.S.)

of proper length to fit the working place. And that if from any cause the timbers cannot be supplied where required, it is made the duty of the foreman to instruct the persons to vacate the working places until supplied with the timber which is needed. It will be seen at a glance that the performance of the duties required by this act would be as varying in their measure, quantity, and necessity, as all the different conditions in the various mines might or would present; and that there is no definite, certain, specific act to be done, upon which the court may place its judicial finger and say that herein is a definite duty owed, and a thing to be done, which has been neglected. If any writ could be made effective, it would be essential to determine in every instance, first, whether or not there was a necessity for the props and timbers to keep any particular working place in a safe condition, and second, what should be considered to be the proper length and size to fit the working place, so as to make it safe; and these varying and uncertain elements would of necessity further depend, not upon a specific mandate of the law, but upon the judgment and opinion of the different mine operatives as they might differently view these things at the time, both from their actual contact at the time and place, as well as from their experience. The writ would therefore virtually make of the court an overseer of all these contingent and varying duties, which, from the nature of things, it could not assume. Furthermore, it is to be noted that the duty demanded to be performed is a continuing one, for it is sought to require defendants to furnish these props and timbers at all times.

That mandamus is not the proper remedy, and is not available in this class of cases, is, we believe, declared by all of the courts. The rule is stated in 19 Am. & Eng. Enc. Law, p. 724, as follows: "Mandamus is not an appropriate remedy to compel a general course of official conduct or a long series of continuous acts, as it is impossible for the court to oversee the performance of such duties. The proper function of a mandamus is to compel the doing of a specific thing; something which can be neither diminished nor subdivided." See 13 Enc. Pl. & Pr. 497; State ex rel. Hawes v. Brewer, 39 Wash. 65, 109 Am. St. Rep. 858, 80 Pac. 1001, 4 Ann. Cas. 197; Jackson v. Cochran, 134 Ga. 396, 67 S. E. 825, 20 Ann. Cas. 219; State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W.

91; *People ex rel. Lehmaier v. Interurban Street R. Co.* 177 N. Y. 296, 69 N. E. 596; *People ex rel. National Cigar Co. v. Dunaney*, 96 Ill. 503; *Diamond Match Co. v. Powers*, 51 Mich. 145, 16 N. W. 314; *Iron Age Pub. Co. v. Western U. Teleg. Co.* 83 Ala. 498, 3 Am. St. Rep. 758, 3 So. 449.

The supreme court of Washington, discussing this question in the case of *State ex rel. Hawes v. Brewer*, 39 Wash. 65, 109 Am. St. Rep. 858, 80 Pac. 1001, 4 Ann. Cas. 197, says: "The demand is for a continuing course of action. The writ cannot be any more specific than the petition, and the writ, which must necessarily issue under a petition of this kind, and which was peremptorily issued, is no more effective than the statute. Each equally commands the officer to perform his duty. One is the announcement of the law by the lawmaking power; the other is the announcement of the law by the court. The remedy by mandamus contemplates the necessity of indicating the precise thing to be done. It is not adapted to cases calling for continuous action, varying according to circumstances. It is the office of mandamus to direct the will, and obedience is to be enforced by process for contempt. It is therefore necessary to point out the very thing to be done, and a command to act according to circumstances would be futile."

This case is distinguished from the case of *Oklahoma City v. Oklahoma R. Co.* 20 Okla. 1, 16 L.R.A.(N.S.) 651, 93 Pac. 48, in that therein there was a definite, specific, certain service to be performed, which was neither increased nor diminished nor rendered uncertain by the circumstances under which it was to be performed, and in such cases courts have held that the writ will issue.

The statute fixed its own sanction; it provided the violation of the act should be a misdemeanor. Such a trial is readily available in a court always open; while no court could keep a case open for months or, perhaps, years, to hear, from time to time, proceedings for contempt. *Iron Age Pub. Co. v. Western U. Teleg. Co.* 83 Ala. 498, 3 Am. St. Rep. 758, 3 So. 449.

And relators have a better and more available remedy within the statute than would be open to them through the writ. The decision of the courts are all against the use of the writ in a case of this kind.

The judgment of the trial court is accordingly reversed, and the cause remanded, with instructions to dismiss the same.

Turner, Ch. J., and Kane and Hayes, JJ., concur. Williams, J., absent.
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WEST VIRGINIA SUPREME COURT OF APPEALS.

T. C. JOPLING

v.

BLUEFIELD WATERWORKS & IMPROVEMENT COMPANY, Plff. in Err.

(— W. Va. —, 74 S. E. 943.)

Water — public supply — rules — effect on contract.

1. The rules of a waterworks company, adopted for the government of its relations with its patrons, do not become parts of a contract between it and a patron, made in terms and upon conditions not contemplated by such rules and regulations, and radically different therefrom.

Same — adoption — mode.

2. Such rules and regulations, to be applicable and effective, must enter into the contract by express or implied adoption at its inception. They cannot be ingrafted upon a contract, complete in itself and independent of them, except by the assent of both parties.

Damages — punitive — basis for.

3. To sustain a claim for punitive damages, the wrongful act must have been done maliciously, wantonly, mischievously, or with criminal indifference to civil obligations. A wrongful act done under a bona fide claim of right, and without malice in any form, constitutes no basis for such damages.

(April 16, 1912.)

ERROR to the Circuit Court for Mercer County to review a judgment in plaintiff's favor in an action brought to recover damages for the alleged wrongful act of defendant in cutting off the water supply from plaintiff's storeroom. Reversed.

The facts are stated in the opinion.

Messrs. Sanders & Crockett for plaintiff in error.

Messrs. Ross & Kahle and D. E. French for defendant in error.

Poffenbarger, J., delivered the opinion of the court:

On this writ of error, to a judgment against a waterworks company for damages for cutting the water off from plaintiff's storeroom, justification of the act com-

Headnotes by POFFENBARGER, J.

Note. — Right to shut off water from whole building because of one tenant's delinquency.

The earlier cases upon the question stated are treated in the note to *State ex rel. Hallauer v. Gosnell*, 61 L.R.A. 33, at pages 107 et seq.

Since the compilation of that note but one case, aside from *JOPLING v. BLUEFIELD*

plained of is asserted on the one side, and denied on the other, in the arguments to overthrow, and sustain the verdict, on the ground of sufficiency and insufficiency of the evidence, and as the basis for contentions respecting the propriety of rulings on instructions. Assuming the act to have been done without right, the motive of the defendant becomes an important inquiry in passing upon instructions respecting the award of punitive damages.

The plaintiff, occupying the ground floor of a certain building, had contracted with the defendant for a supply of water, and paid the rent therefor in advance, as required by a rule of the company. Another tenant having taken up his residence on the second floor of the same building, and refused to pay the water rent in accordance with the rule, the defendant cut off all the water from the building, whereupon this action was brought. The single service pipe, passing through the ground floor and on up to the second, was equipped with a cut-off, just above the spigot used by the ground floor tenant, and he gave the defendant permission to enter the room and there cut the water off from the second floor; but the appliance was such that any person could have turned the water on again without the knowledge of the company. Accordingly, it refused to turn it off there and continue the supply to the lower room, but offered to continue it, if the pipe should be disconnected above the spigot. This was not done,

by either the tenant or the owner, and the water was cut off agreeably to notice of intent to do so, after demand for the rental from both tenant of the ground floor and the owner of the building.

The company's rules 1, 8, and 22 are relied upon for justification of the act complained of, as being reasonably within the legal definition of the term, and as having entered into and become a part of the contract. Rule 1 required the owner of the property in every case to sign a permit, subject to the rules of the company. Rule 8 reserved right to render the bill to the owner of the property for the entire supply of water thereto, in case of occupancy by more than one person and consumption of water by all through a single tap, and to look to the owner for the entire rent for all water used in the building, and gave notice of intention not to attempt to collect rent from tenants, unless hydrants and pipes should be so arranged and supplied with stop keys as to give the agents of the company perfect and absolute control over the supply to each individual at all times; and then to shut off the water from all, if any refused to pay. Rule 22 required all flat rate rentals to be paid three months in advance, and all meter rentals within one month after the rendition of the service, and reserved the right to cut off the water for noncompliance.

As the contract here involved was made with a single tenant, and not with the

WATERWORKS & IMPROV. CO., seems to have passed directly upon the question. In that case, *Cox v. Cynthiana*, 123 Ky. 363, 96 S. W. 456, it was held that the regulation that when water shall be supplied to one or more parties through a single tap, the whole bill would be made to the owner of the estate, and that in case of nonpayment the water supply would be shut off notwithstanding one or more parties have paid their proportion of the cost of the supply,—was reasonable and valid, and warranted the city authorities in cutting off the whole supply of a building supplied through a single tap as against a tenant who had paid his rate to the city, the city returning or tendering back such payments, and there being other tenants in arrears. The decision was upon the ground that the single tap clause rendered the regulation valid, it being said that "in order to supply appellant [tenant who had paid], it would be necessary for the water to pass through the pipes which were also used by the other tenants, and which would have permitted them to have used the water therefrom without paying for it or complying with the city's regulations as to payment in advance. The court is of opinion that under these circumstances it was not an unreasonable regulation for the city to require that where the building is sup-

plied through a single tap, all of the water that passed through that tap into that building should be paid for as a condition precedent to supplying water to any of its occupants."

The general subject, "Establishment and regulation of municipal water supply," is extensively treated in the note to *State ex rel. Hallauer v. Gosnell*, 61 L.R.A. 33. And for a treatment of the general question of discontinuing service to compel payment of water bills, see note to *Mansfield v. Humphreys Mfg. Co.* 31 L.R.A. (N.S.) 301.

As to right to compel property owner to pay for water furnished to former occupant of premises, see *Linne v. Bredes*, 6 L.R.A. (N.S.) 707, *Covington v. Ratterman*, 17 L.R.A. (N.S.) 923, and the note appended to *Chicago v. Northwestern Mut. L. Ins. Co.* 1 L.R.A. (N.S.) 770. And as to right to discontinue service to compel payments of unpaid claim against former occupant, see note to *Mansfield v. Humphreys Mfg. Co.* 31 L.R.A. (N.S.) 303.

As to validity of statute holding property owner liable for water furnished tenant, see note to *East Grand Forks v. Luck*, 6 L.R.A. (N.S.) 198.

And as to right of water company to refuse to deal with tenant, see note to *Bourke v. Olcott Water Co.* 33 L.R.A. (N.S.) 1015.

G. J. C.

owner of the building, as contemplated by the rules, the position assumed for the plaintiff in error is untenable. There was no contract with the owner, no written contract with anybody, nor an agreement by any person to pay for water furnished to persons other than himself. The plaintiff may have had knowledge of the company's rules. Conceding this, he knew equally well the company could make a special contract with him. His money had been accepted and the water furnished. If the agent who made the special contract had no authority to make it, restoration of the money, or a portion of it equal to the unearned rental, was a condition precedent to release from its obligation; and it was neither refunded nor tendered.

To say these rules became a part of the contract, under the circumstances, would permit them to be used for a purpose wholly different from that for which they were made and promulgated. They require the owner to obtain a permit and agree to be liable for all rentals accruing against his tenants. The owner might be willing thus to bind himself for some tenants, but not for others, and he has the right to assume, in case water is furnished to his tenant without such an agreement, that the company looks to the tenant for the rental. To begin a supply of water under such circumstances, and then attempt to apply and enforce the rule, works surprise, injustice, and hardship. The rules do not contemplate action of that sort. If they are so burdensome upon property owners, or so inconvenient to the company, as to create confusion or make trouble in their application and enforcement, the remedy is a revision of the rules, not to put in water without any reference to them and then attempt to apply them. As the contract here involved was a separate, single, and complete contract, not within nor under the rules, breach thereof by the company is clear, and the rules are not at all involved. Hence there is no occasion to say whether they are reasonable, and such as the company could lawfully prescribe and enforce.

The jury found a verdict for \$126, reciting an allowance of \$1 for actual damages and \$125 for punitive damages. This finding and two instructions given by the court, over the objection of the defendant, on the subject of punitive damages, necessitate inquiry as to whether any evidence justifying a verdict for such damages was adduced. One of these instructions authorized the finding of such damages, if the jury should believe the action of the company was wilful, wanton, or in reckless disregard of the rights of the plaintiff; and the other instructed them not to find such damages

unless defendant's action was malicious, oppressive, wanton, or wilful, or its conduct reckless. There is no evidence of any violence or reprehensible conduct on the part of the defendant. It merely demanded from the plaintiff and the owner of the property the payment of rental in advance for water to be supplied to Johnson, tenant of the second floor, who had refused to pay, declining further to furnish water for the first floor with the water cut off from the second, as proposed by the plaintiff, and then cut off the water from the building. Nothing in the evidence indicates the action of the company was oppressive in any peculiar sense. Ample opportunity had been given the plaintiff to secure water by paying a small amount for a short time that it did not justly owe and for the benefit of a third party. Had he paid this, he would no doubt have been entitled to recover it back. On the whole, the evidence indicates nothing more than a purpose on the part of the company to test the validity of its claim of the right, under the circumstances of the case, to compel such payment as it demanded, or to cut off the water on refusal thereof. Nothing indicates any intent beyond this. In other words, nothing indicates intention to cut off the water merely to injure the plaintiff, or to enforce a right and also injure the plaintiff otherwise than incidentally. The sole purpose was the assertion of a claim of right on the part of the defendant. Under such circumstances, there is no right to a verdict for exemplary or punitive damages. To justify the recovery of such damages, there must be evidence in some form of malice. It may consist of abusive language, violence, invasion of another's right with knowledge thereof, or some other circumstance from which malice can be implied. *Fink v. Thomas*, 66 W. Va. 487, 66 S. E. 650, 19 Ann. Cas. 571, states the rule as follows in an action for assault and battery: "In an action for assault and battery, punitive damages cannot be found unless the act is unjustifiable, wilful, wanton, and reckless, manifesting malice." The court has thus stated the principle or basis of the allowance of such damages. In the opinion in that case, Judge Brannon said: "All the books say that, to warrant punitive damages, there must be malice, oppression, or wanton, wilful, and reckless conduct. . . . There must be gross fraud, malice, oppression, or wanton, wilful, or reckless conduct, or criminal indifference to civil obligation." All the decisions of this court on the subject are to the same effect. *Pollock on Torts*, pp. 185, 186, marks the distinction. This author says punitive damages are such as are intended to express indignation at

the defendant's wrong, and then proceeds as follows: "Damages awarded on this principle are called exemplary or vindictive. The kind of wrongs to which they are applicable are those which, besides the violation of a right or the actual damage, import insult or outrage, and so are not merely injuries, but *injuriæ* in the strictest Roman sense of the term." He then quotes the following as indicating the basis of such damages, from *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 23 L. ed. 374: "The tort is aggravated by the evil motive." *Cooley on Torts*, 3d ed. p. 1511, marks the distinction thus: "Motive generally becomes important only when the damages for a wrong are to be estimated. It then comes in as an element of mitigation or aggravation, and is of the highest importance." Numerous cases cited amply sustain the text.

In most of the opinions delivered by courts, and the text-books, the limits of the rule are defined by the principle of inclusion, stating what conduct will authorize recovery of such damages. In *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 37 L. ed. 97, 13 Sup. Ct. Rep. 261, the court went beyond this and applied the principle of exclusion, saying: "In this court the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive, or vindictive damages, sometimes called smart money, if the defendant has acted wantonly or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages." In *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 202, 16 L. ed. 73, a verdict was set aside for allowance of exemplary damages in the absence of malice, and the court said: "Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations." *Sutherland on Damages*, §§ 392, 393, reviewing the whole sub-
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ject, shows the weight of authority to be in accord with these decisions as well as those of our own court. As there was no evidence of malice or intent to bring injury upon the plaintiff beyond what was necessarily incident to the assertion of the claim of right in good faith, it was improper to give any instruction on the subject of exemplary damages, other than one inhibiting the finding of any.

A peremptory instruction to find for the defendant was properly refused for reasons stated. Instructions Nos. 2, 3, 4, 5, and 10, predicated defense upon the rules of the company, were also properly refused, since the rules are in no way involved. Instructions Nos. 6 and 7, limiting the right of recovery to actual damages, should have been given, and the court erred in refusing them. Instruction No. 9, limiting recovery to \$1, was properly refused, and the court erred in giving instruction No. 8, limiting the recovery to \$1 for actual damages. The *quantum* of damage is a question for the jury, not for the court.

For the errors noted, the judgment will be reversed, and the cause remanded for a new trial.

KANSAS SUPREME COURT.

PENALOSA STATE BANK

v.

JAMES F. MURRAY, Impleaded, etc.,
App't.

(86 Kan. 766, 121 Pac. 1117.)

Will — devise — lien of existing judgment.

Where a will contains a provision purporting to devise real estate to several persons, followed by a direction that it be

Headnote by MASON, J.

Note. — Conversion by directing sale after devising land.

There seem to be very few cases in which the effect, upon the operation of the doctrine of equitable conversion, of a direct gift of property to the persons who are to receive the proceeds of its sale, has been expressly considered. As the doctrine of equitable conversion is not a fixed rule of law, but proceeds upon equitable principles, so that its application is somewhat affected by the connection in which it is invoked, the ultimate question involved in

sold by the executor and that the proceeds be divided equally among them, the right with respect to such property acquired by one of them is subject to the lien of a judgment existing against him at the time of the testator's death.

(March 9, 1912.)

APPEAL by defendant from a judgment of the District Court for Reno County in plaintiff's favor in an action brought to enjoin the sale of the interest of a devisee in certain real estate which had been transferred to the plaintiff bank. Reversed.

The facts are stated in the opinion.

Mr. H. S. Lewis, with Mr. W. G. Fairchild, for appellant.

Messrs. F. F. Prigg and C. M. Williams for appellee.

Mason, J., delivered the opinion of the court:

Samuel Sallee died January 20, 1909, owning the tract of land hereafter referred to. He left a will, all the material part of which, aside from the appointment of executors, was comprised in these two paragraphs:

"I devise bequeath and give to my beloved children, Adresta Blanchet, Ellen Moore, Mary Devoe, Delilah Hafstrom, Emma Murrah and John J. Sallee all of my Homestead located on the S. W. $\frac{1}{4}$ Sec. 28 Town 26 Range 9 West Reno Co. Kans. To be disposed of by appraisalment or Sale

each of the following decisions has been indicated in the statement thereof, wherever the report of the case has made it possible to do so:

A conclusion directly opposite to that in *PENALOSA STATE BANK v. MURRAY* was reached in *Robison v. Botkin*, 181 Ill. 182, 54 N. E. 915, where a will provided: "The remainder of my property, both real and personal, to be equally divided amongst my beloved children [naming them] deducting, however, from the share of either any obligation or indebtedness they may owe the estate. In case the heirs can agree to divide the real estate I desire that they do so. If this cannot be done, it is my desire and wish that the executor sell the land,"—it was held that as the duty enjoined upon the executor to sell and distribute the proceeds was an absolute one, there was an equitable conversion by the will of real into personal property, and therefore that the children took no title to the land which was the subject of levy and sale. With reference to the feature of the case which brings it within the scope of this note, the court said: "It is contended, however, that by the third clause of the will, the land is in terms devised to Ira Botkin and the other four children of the testator therein named, and that that clause should prevail over the subsequent one in conflict with it. It is a cardinal rule that the entire will should be construed together and be made to harmonize, and effect be given to every part, if possible; and that the intention of the testator as expressed in the will should be ascertained and carried into effect. We find no necessary conflict between the two clauses. It is evident from the third clause that the testator intended that the indebtedness of any one of his children to the estate should be deducted from his share of the estate, and that they should thus be made equal; and from both the clauses together, that the division and distribution should be made in personal property altogether, unless they agreed among themselves that as to the land they would take it as land."

In *Wayne v. Fouts*, 108 Tenn. 145, 65 S. W. 471, in which the question before the 39 L.R.A. (N.S.)

court was whether the share of a beneficiary who had died before the sale took place passed as real property to her heirs, or to her husband as personalty, it was held that under the terms of the will, which follow: "I will, devise, and bequeath all the balance of my property, real and personal to [certain persons]. . . . Said property, real and personal, . . . shall be sold to the best advantage and on such terms as my executors shall deem advisable, and the proceeds paid over to the devisees and legatees hereinafter indicated,"—an equitable conversion took place at the time of the testator's death, notwithstanding the fact that in the disposing clause testator spoke of the property dealt with as both "real and personal" and the fact that the legal title and the beneficial interest passed to the same persons by the terms of the will, the court saying: "It is true that, in the disposing clause, he speaks of the property dealt with as both 'real and personal,' and that he gives a definite undivided part thereof to each of the beneficiaries, yet in the next sentence he provides that all of 'said property, real and personal, shall be sold' by his executor, and that the 'proceeds [be] paid over' to those indicated. If it be conceived that the two provisions are in conflict, the last named, being subsequent in position, will prevail.

. . . It certainly was not contemplated that the beneficiaries should take and hold the property in specie, but, on the contrary, that they should only receive the proceeds of its sale in money. . . . The fact that the legal title and the beneficial interest passed to the same persons by the terms of the will did not, of itself, prevent a conversion; for, notwithstanding that fact, it is entirely obvious that the testator intended the executor to convert the land into money; and that intention, being lawful, must prevail, unless and until it shall appear that those benefited made an election to retain the realty as such, thereby affecting as equitable reconversion. The coincidence of the legal title and beneficial interest in the same individuals until sale could be made, was a part of the testamentary scheme, and so long as they acquiesced in

and all moneys Received from Such disposition to be divided equally among the aboved Persons or their legal heirs.

"All the Rest and Residue of my Estate Real & Personal & mixed of which I shall die seized & possessed or to which I shall be entitled at my decease I give devise and bequeath to be equally divided among my above named children or their legal heirs."

Prior to the death of the testator, James F. Murray obtained a judgment against Emma Murray, under her present name of Emma Corley, which is still in force. In June, 1909, Mrs. Corley, transferred to the Penalosa State Bank all her rights of every character acquired under the will. In August, 1909, Murray caused an execution to be issued upon his judgment, under

which he sought to sell the interest of Mrs. Corley in the land described, claiming that at the death of her father she had become the owner of an undivided one sixth thereof, and that the lien of his judgment at once attached thereto. The bank procured an injunction enjoining the sale upon the ground that under the will Mrs. Corley acquired no title to the real estate, but merely a right to a share of the proceeds of its sale, which was to be made by the executors. Murray appeals.

Ordinarily, where land is directed by a will to be sold, the proceeds to be divided among several persons, it is regarded as converted into personalty at the instant of death, upon the principle that equity regards that which ought to be done as al-

the provision as made, the duty of converting the land into money rested upon the executor, and the notional change of the character of the property was effective for all purposes of transmission and descent. To hold that such coincidence of itself defeated the equitable conversion would be to destroy the most important feature in the scheme of the will, and reverse the universally acknowledged rule that the expressed intention of the testator must control, when not in contravention of some principle of law or sound public policy."

On the other hand, in *Eneberg v. Carter*, 98 Mo. 647, 14 Am. St. Rep. 664, 12 S. W. 522, where testator directed his residuary estate to be equally divided between his children, adding: "I desire that my executor will dispose of all of my real estate as soon as it can be done without loss to my estate,"—it was held that the fee not being devised to the executor, either directly or by necessary implication, it remained in the heirs at law, both by the devise to them as well as by the statute of descents, until it should be devested by a sale by the executor under the terms of the will; that until such sale no conversion could occur; and therefore that the son had such an interest in the land pending the exercise of the power of sale as was subject to levy and sale under an execution.

In *Wood's Estate*, 9 Pa. Co. Ct. 429, in which the ultimate question was as to the devolution of the share of a deceased beneficiary, the testator gave his residuary estate, both "real and personal," to his children and grandchildren, further giving his executors a power of sale, and authorizing and directing them "to have an appraisement of my estate made as soon as possible after my death, and that the Delaware Rolling Mill property may be taken at the appraisement by either of my said sons, the eldest having the first choice and so on down to the youngest, and if not taken by either of them then to be sold," it was held that, read in connection with what precedes, and especially in view of the clear gift, with appropriate words of inheritance, of the real estate, as real estate, 39 L.R.A. (N.S.)

contained in the residuary clause, the clause last above quoted would not be held to work a conversion.

In *Mellen v. Banning*, 72 Hun, 176, 25 N. Y. Supp. 542, where a testator devised all his real estate to his wife and children, and gave his executors a power of sale for the purposes of a division or distribution, or for any other purpose that they in their judgment should think proper, it was held that there was no equitable conversion of the land into personalty out and out, and that the power was no bar to an action for partition.

In *Re Bingham*, 127 N. Y. 296, 27 N. E. 1055, it was held that the language used in a will by which the testator gave the residue of his estate to his "heirs and next of kin in the same portions in which" it "would be divided or distributed" in case of his death intestate, directed it to be distributed and paid in cash in five years from his decease, and for that purpose gave to the executors a power of sale, did not import that the testator intended the real should be treated as personal property; but that the contrary was fairly indicated by his giving the property to his heirs as well as the next of kin, to be divided as if no will was made.

But in *Smith's Estate*, 4 Phila. 181, where a testator in one item of his will devised his estate, real and personal, to his children, their heirs and assigns forever, share and share alike, and in another item empowered his executors to sell and convey such parts of his estate as they might deem necessary for the payment of his debts, or to secure a fund for the support and education of his children, it was held that the legal estate did not vest in the children by the terms of the will, but that the direction to sell worked a conversion, broke the descent, and vested the legal estate in the executors.

Where the power to sell real estate specifically devised is discretionary, the doctrine of equitable conversion will not operate constructively to convert the real estate into money as of the time of the death of testator, so as to prevent a mechanics' lien attaching thereto before the execution of

ready accomplished, and the beneficiaries are conceived as taking personal property, instead of real estate. In that situation the doctrine has often been held to prevent the land being taken in execution upon a judgment against one of the legatees (9 Cyc. 851, 852), although that application of the rule is refused in Indiana (*Comer v. Light*, — Ind. —, 93 N. E. 660, Id. 94 N. E. 325). A distinction is sometimes made where the sale is directed to be postponed until the happening of some event, as until the death of the holder of a life interest. The cases bearing especially on that feature of the matter collected in a note in 20 L.R.A.(N.S.) 65, 69, illustrate the conflict of opinion upon other phases as well. A distinction has been made between a devise to an executor, with directions to sell and divide the proceeds, and the conferring on him of a mere naked power of sale, with directions to execute it in that manner. See *Williams v. Lobban*, 206 Mo. 399, 104 S. W. 58, and cases there cited. It is not necessary to attempt to reconcile or to choose between the various views that have received judicial support. The theory of equitable conversion is a fiction invented to promote justice by carry-

ing out the purpose of the testator, and it should be applied with that purpose in view. We think that here, upon a consideration of the entire instrument, it is evident that the testator intended that upon his death his children should become owners of the land devised, that they did so, and that the judgment lien attached to the interest of Mrs. Corley.

This case differs from any of those in which the provision of a will directing the sale of real estate has been held to effect an equitable conversion, in this: Here the testator expressly devised the land to the persons who are to receive the proceeds. While he may be regarded as having given a power of sale to his executors, with directions to exercise it, he gave them nothing more. He not only omitted explicitly to vest the title in them, he explicitly vested it in his son and daughters. His purpose in this regard was not expressed casually or incidentally, but in such a way as to characterize it as the matter holding the first place in his thoughts. The only question is how far his language in this regard is to be regarded as modified by what followed. The inquiry is, Just what did he mean by the addition, "To be dis-

the power, and to its proceeds thereafter (*Ness v. Davidson*, 49 Minn. 469, 52 N. W. 46); or so as to affect the rights of persons claiming through a deceased legatee. (*Re Tatum*, 169 N. Y. 514, 62 N. E. 580).

And in *Re Sollday*, 175 Pa. 114, 34 Atl. 548, where a will provided: "All the estate, real and personal, of which I may die seized, possessed, or entitled to, I give, devise, and bequeath to my four children," and appointed executors "with full power to settle up my estate. But my real estate shall not be sold until ten years after my death,"—it was held that as the power of sale given the executors was purely discretionary, and there being no bequest of the proceeds of sale specifically as such, and hence no implication of a necessity to sell for that purpose, there was no conversion; and therefore that the share of a devisee was subject to the lien of judgment against him.

And in *Sheridan v. Sheridan*, 136 Pa. 14, 19 Atl. 1068, where testator provided as follows: "I direct that all my estate, real, personal, and mixed (except as hereinbefore disposed of), and all the rest, residue, and remainder thereof, of whatsoever kind, and wheresoever situate, shall be divided into four equal shares or portions; and I give, devise, and bequeath unto," etc., and further authorized and empowered his executors to sell and dispose of the whole or any portion of his real and personal property "if they find it necessary to do so in order to make a fair and equitable division of my estate," it was held that the power of sale, being contingent, worked no such con-

version as to preclude the maintenance of a bill for partition.

So also, in *Dunshoe v. Dunshoe*, 234 Pa. 550, 83 Atl. 422, where a testator directed his residuary estate to be divided among his children, and further provided: "My executors may sell my real estate and make deeds to the purchasers, or divide the whole or what remains after this between my heirs," it was held that as the direction to sell was not absolute, and as there was no necessity therefor to carry out the provision of the will, and as there was nothing in the will to indicate an intention that the real and personal estate should be so blended as to create a fund to be bequeathed entirely as money, there was no such conversion of the realty as to preclude the maintenance of a bill for partition.

There are a number of instances involving the question of equitable conversion in which a direct gift of property was followed by a provision for its sale, but in which the fact of such gift seems to have played no part in the conclusion reached. Some of these are appended as being of possible interest in this connection.

In *Talbot v. Snodgrass*, 124 Iowa, 681, 100 N. W. 500, where the ultimate question was as to the rights of legatees under a will by which testator devised and bequeathed the remainder of his estate, real and personal, to his children, and in a subsequent paragraph provided: "If I should die seized of any real estate I authorize by executor or executors to sell the same at public or private sale as may be deemed best by him, and to execute conveyances therefor, and to

posed of by appraisement or Sale and all moneys Received from Such disposition to be divided equally among the aboved Persons or their legal heirs?" The use of the word "or" suggests that by "appraisement" he may have meant a partition by agreement, the respective shares to be made equal by appraisement. Assuming, however, that "or" should be read "and," the intention being that the sale should be made by the executors, the result is much the same. Even on the theory of an equitable conversion, the persons among whom the proceeds were to be divided, being the same persons who were entitled to the property if it were regarded as real estate, had a right by unanimous agreement to accept it in kind, and thus avoid a sale. 9 Cyc. 855. They could therefore by united action have divided the land, or sold it themselves and divided the money. The sole restraint placed upon them by the will, the only restriction that left their relation to the land short of a full ownership, was this: No one or more of them—fewer than all—could maintain an action for partition, and by that means compel either a division in kind or a judicial sale. Unless the par-

divide the proceeds as herein provided equally among my children after paying my debts," it was held that, for the purpose of determining the validity of a limitation over, the case would be regarded as relating entirely to the distribution of personal property.

In *Fisher v. Banta*, 66 N. Y. 468, where testator by his will directed his executors, after his youngest child should arrive at the age of twenty-three, to divide his real estate equally between two sons, and by codicil directed his executrix to sell and dispose of all his real estate, it was held that such direction operated as a conversion of the real estate into personalty from the time of testator's death; and therefore that upon the death of a son before actual sale his interest passed to his personal representatives.

In *Green v. Johnson*, 4 Bush, 164, where a testator provided: "All the rest and residue of my estate, not otherwise directed, I devise and require to be equally divided among my three above-named daughters," and further directed his executors to sell and convey all his lands, with certain exceptions, it was held that the will made an equitable conversion of the realty into money, and therefore that, upon the death of a legatee, her interest in the land was personalty, to which her administrator was entitled.

In *Goldsmith v. Cone*, 7 Ky. L. Rep. 520, where a testatrix devised her estate to her husband for life, and provided that after his death it should be divided into two portions "which are given, devised, and 30 L.R.A. (N.S.)

ties in interest should agree otherwise, a sale would have to be made by the executors. On account of this limitation, their control of the land fell by so much short of complete and absolute dominion. This was not enough to prevent their being properly regarded as the owners of the land. Holding under a will which in so many words devised it to them, their enjoyment of the devise being burdened by only so slight a condition, they could not fairly be said to have no title or interest in it.

The statute makes a judgment a lien upon the "real estate" of the debtor (Gen. Stat. 1909, § 6011 [Code Civ. Proc. § 416]), and that phrase includes "lands, tenements, and hereditaments, and all rights thereto and interest therein, equitable as well as legal." Gen. Stat. 1909, § 9037, subd. 8. We think the equitable if not the legal title to the land was in the testator's children, that the judgment was a lien upon Mrs. Corley's interest, and that by a sale thereunder her rights and obligations would be transferred to a purchaser.

The judgment is reversed and the cause remanded, with directions to deny the injunction against the sheriff's sale.

bequeathed in this my will as follows," and further directed a sale of all her real and personal estate "to secure a division and distribution thereof as in this section of my will provided," it was held that the gift was in equity one of personalty, and not of land, and therefore that upon the death of one of the remaindermen his portion passed as personalty.

In *Shaw v. Chambers*, 48 Mich. 355, 12 N. W. 486, where testator, after making a provision for his wife and any children that they might have, further directed that for the more efficient execution of the provisions of his will and for the purpose of securing a larger income for the beneficiaries, the property of the estate should be exchanged by the executor for money or interest-bearing securities, etc., it was held that the direction worked an absolute conversion for the purposes of the will; but did not render realty personal property so as to give equity jurisdiction of a controversy between one claiming it through a legatee and one claiming as heir at law of the decedent.

In *Dundas's Appeal*, 64 Pa. 325, where a testator provided: "All the remainder of my estate, real, personal, and mixed, I order and direct to be divided into 40 equal parts or shares, which I give and devise as follows;" and further gave to his executors full power and authority to sell the whole or any part of his estate, it was said, *obiter*, that the effect of such a power of sale was to convert the realty into personalty, leaving the legatees but an interest in the proceeds.

E. S. O.

KENTUCKY COURT OF APPEALS.

COMMONWEALTH OF KENTUCKY,
Appt.,
v.

PETER PAUL APKINS.

(148 Ky. 207, 146 S. W. 431.)

Jurisdiction — venue — murder — act done in another state.

The courts of one state have no jurisdiction to try one for the murder of a person who dies there as the result of an act done in another state after the performance of which the deceased removes from one state to the other.

(May 7, 1912.)

APPPEAL by the Commonwealth from a judgment of the Circuit Court for Jessamine County sustaining a demurrer to an indictment charging defendant with murder. Affirmed.

Note. — Jurisdiction of homicide where mortal wound is inflicted in one state or country and death occurs in another.

As to locality of crime committed by shooting or striking across state boundary, see note to State v. Hall, 28 L.R.A. 59.

At common law it was doubtful whether the killing of one who died in England of a blow received in foreign parts, and *vice versa*, could have been inquired of. But Parliament interposed, and put the question to rest by passing the statute of 2 Geo. II. chap. 21, which provides that when the stroke has been given in England and the death occurs out of England, or the reverse, the killing may be inquired of in that part of England where either the death or stroke shall happen respectively. 1 East, P. C. 366.

And now in England: "If a person is feloniously stricken, poisoned, or otherwise hurt upon the sea or at any place out of England or Ireland, and dies of such stroke, etc., in England or Ireland, or, being feloniously stricken, etc., in England or Ireland, dies of the same at sea or at any place out of England or Ireland, the offender, whether principal or accessory, may be indicted in the county or place in England or Ireland in which the death, stroke, poison, or hurt happened." 9 Laws of England (Halsbury) 289, citing offenses against the person act 1861 (24 & 25 Vict. chap. 100), § 10. But the foregoing law has no application where the injury which causes death is inflicted upon a foreigner, outside of the jurisdiction of the King, by another foreigner. Reg. v. Lewis, 7 Cox, C. C. 277, Dears. & B. C. C. 182, 3 Jur. N. S. 525, 28 L. J. Mag. Cas. N. S. 104, 5 Week. Rep. 572; Reg. v. Jameson [1896] 2 Q. B. 425, per Lord Russell of Killowen, Ch. J., at p. 430, 12 Eng. Rul. Cas. 227.

39 L.R.A. (N.S.)

The facts are stated in the opinion.

Messrs. James Garnett, Attorney General, and B. A. Crutcher, for the Commonwealth:

If one puts into operation a force, potion, or agent in another state or country on any person, for the purpose of producing death, and if said force, potion, or agent does not spend its force, and become latent or cease to operate upon said person before coming within our jurisdiction, it is a continuous offense and follows the one assaulted so long as the force or agent remains active.

Jackson v. Com. 100 Ky. 269, 66 Am. St. Rep. 336, 38 S. W. 422, 1091; Com. v. Parker, 108 Ky. 679, 57 S. W. 484; Com. v. Van Tuyl, 1 Met. (Ky.) 1, 71 Am. Dec. 455; Bishop, New Crim. Law, § 110; 12 Cyc. 208; Com. v. Macloon, 101 Mass. 1, 100 Am. Dec. 89; Simpson v. State, 92 Ga. 41, 22 L.R.A. 248, 44 Am. St. Rep. 75, 17 S. E. 984; State v. Hall, 114 N. C. 909,

In Parmele's Wharton on the Conflict of Laws, § 825 a, it is stated that the general principle is that an offense is deemed to be committed in the jurisdiction in which the acts, or series of acts, of which it is predicated, culminate or take effect.

But the mere fact that the death occurred in a particular state does not, in general, confer jurisdiction of the offense upon that state; nor withdraw the case from the jurisdiction of the state where the fatal blow was inflicted. Ibid. § 825 b.

"It is undoubtedly true that the courts of the latter place [place of death] do sometimes have jurisdiction. But we are satisfied that when this is so it is not because the crime is to be regarded as having been committed there, but because some rule of law, statutory or otherwise, expressly confers such jurisdiction. The modern and more rational view is that the crime is committed where the unlawful act is done, and that the subsequent death, while it may be sufficient to confer jurisdiction, cannot change the locality of the crime." State v. Kelly, *infra*.

It is well settled that the courts of the state where the mortal wound is inflicted, although the death occurs in another state, may indict and punish the criminal. State v. McCoy, 8 Rob. (La.) 545, 41 Am. Dec. 301; State v. Foster, 7 La. Ann. 255, reaffirmed in 8 La. Ann. 290, 58 Am. Dec. 678; State v. Garrison, 147 Mo. 548, 49 S. W. 508; Roberson v. State, 42 Fla. 212, 28 So. 427; Hunter v. State, 40 N. J. L. 495.

And the following cases, as additional authority in support of the rule, are sufficiently set out in Com. v. APKINS: United States v. Guiteau, 1 Mackey, 498, 47 Am. Rep. 247; Guiteau's Case, 10 Fed. 161; Green v. State, 66 Ala. 40, 41 Am. Rep. 744; Com. v. Ball, 126 Ky. 542, 104 S. W. 325; State v. Kelly, 76 Me. 331, 19 Am. Rep. 620, 5 Am. Crim. Rep. 343; Stout v.

28 L.R.A. 59, 41 Am. St. Rep. 822, 19 S. E. 602.

Mr. Alpha Hubbard, for appellee:

The crime of felonious homicide consists in the striking of the deadly blow, and the subsequent death of the deceased constitutes no part of the crime itself.

Com. v. Ball, 126 Ky. 542, 104 S. W. 325; State v. Carter, 27 N. J. L. 499.

The offender had to be tried in the county where the crime was committed.

Rex v. Hargrave, 5 Car. & P. 170; United States v. Guiteau, 1 Mackey, 498, 47 Am. Rep. 247; Green v. State, 66 Ala. 40, 41 Am. Rep. 744; Stout v. State, 76 Md. 317, 25 Atl. 299, 9 Am. Crim. Rep. 398; People v. Gill, 6 Cal. 637; State v. Gessert, 21 Minn. 369; State v. Kelly, 76 Me. 331, 49 Am. Rep. 620, 5 Am. Crim. Rep. 343; Ex parte McNeeley, 36 W. Va. 84, 15 L.R.A. 229, 32 Am. St. Rep. 831, 14 S. E. 436; State v. Carter, 27 N. J. L. 500; Robbins v. State, 8 Ohio St. 166.

State, 76 Md. 317, 25 Atl. 299, 9 Am. Crim. Rep. 398; State v. Gessert, 21 Minn. 369.

Under Florida Rev. Stat. § 2360, the circuit court of the county in which the homicide is commenced has jurisdiction, although it is consummated in another state. Davis v. State, 44 Fla. 32, 32 So. 822.

And the same conclusion is reached in State v. Bowen, 16 Kan. 475, upon an indictment for murder, where the statute was silent upon the question of jurisdiction where the wound is given in the state and death ensues without, or the reverse. It was said: "It seems to us . . . reasonable to hold that as the only act which the defendant does towards causing the death is in giving the fatal blow, the place where he does that is the place where he commits the crime, and that the subsequent wanderings of the injured party, uninfluenced by the defendant, do not give an ambulatory character to the crime; at least, that those movements do not, unless under express warrant of the statute, change the place of offense; and that while it may be true that the crime is not completed until death, yet that the death simply determines the character of the crime committed in giving the blow, and refers back to and qualifies that act."

Where the mortal wound was inflicted in Oklahoma territory it was held in Moran v. Territory, 14 Okla. 544, 78 Pac. 111, that the crime was committed there, and that the death, which occurred in Indian territory, merely determined the character of the crime, that is, referred back to and qualified the homicidal act, so that the jurisdiction of the crime was properly laid in Oklahoma territory. To the same effect see Havill v. United States, 5 Okla. Crim. Rep. 334, 115 Pac. 119, appeal dismissed in 113 Pac. 991.

But in an early case in Virginia, Com. v. Linton, 2 Va. Cas. 205, it was held that 39 L.R.A. (N.E.)

Lassing, J., delivered the opinion of the court:

Peter Paul Apkins was indicted by the grand jury of Jessamine county for the wilful murder of Lizzie Young Apkins by administering poison to her and also by striking her. While the indictment charged that the offense was committed in Jessamine county, it was conceded by the commonwealth that the evidence would show that the blows were struck and the poison administered in Cincinnati, Ohio; and therefore the case was submitted on an agreed statement of facts to the court with a view of determining whether or not the Jessamine circuit court had jurisdiction. Upon consideration the court entered the following order: "It is admitted by the attorney for the commonwealth that the blows inflicted and poison administered that caused the death of Lizzie Young Apkins were inflicted and administered to the said Lizzie Young Apkins in the city

where a person was fatally stabbed in Virginia and died in another state, he could not be tried for the murder in the former state. Now, however, this is not the law, as statute, Virginia Code, 3637, gives the courts of Virginia jurisdiction.

So it was held in United States v. Bladen, 1 Cranch, C. C. 548, Fed. Cas. No. 14,605, where the mortal stroke was given in the county of Alexandria, District of Columbia, and the death happened in Maryland, that the United States circuit court of the District of Columbia was without jurisdiction of the crime as homicide, since it was not completed in that county, but it possessed jurisdiction over the offense as an assault and battery.

And in Com. v. Linton, supra, while it was held that the defendant could not be tried in Virginia for the crime for which he was indicted, he could be examined, indicted, and tried for the felonious stabbing in the county where the blow was inflicted.

Where the indictment charged the defendant with inflicting the mortal blows in New York, and the death ensued in New Jersey, the court held that no act was done in that state by the defendant, inasmuch as he sent no missile or letter or message that operated as an act within the state, but the coming of the party injured into the state afterwards was his own voluntary act, and in no way the act of the defendant; and that therefore the prisoner was not triable in the courts of that state, there being no statute applicable to such a case. State v. Carter, 27 N. J. L. 499. Vredenburg, J., said: "It is said that if we do not take jurisdiction, the defendant will go unpunished, inasmuch as, the party injured not dying in New York, he could not be guilty of murder there. But New York may provide by law for such cases, and if she does not, it is their fault, and not ours. The act done is against their sovereignty,

of Cincinnati, in the state of Ohio, but the death resulted from the same in the state of Kentucky within a year and a day thereafter. In view of said admission by the attorney for the commonwealth, it is the opinion of the court that this court does not have jurisdiction and for that reason the demurrer is sustained, to which the commonwealth excepts and prays an appeal to the court of appeals, which is granted."

The commonwealth admits that if the agency or means used, to wit, the poison which appellee is alleged to have employed to do death, did all of its active work while the deceased remained in the state of Ohio, the offense would in legal contemplation have been committed in that state, and that the courts of this commonwealth would have no jurisdiction. It is further admitted that it is not enough to confer jurisdiction upon the courts of this commonwealth that death resulted from an unlawful act occurs in this state. But it is insisted that where one puts into operation a force in another state, having in view an unlawful purpose, and that such force does not manifest itself upon the person affected until such person has come within the jurisdiction of this state, but that it does thereafter manifest itself in this state by producing death to the one affected thereby, then the party setting said force in operation has committed a crime in contemplation of law within this commonwealth.

Applying this principle to the facts in the case at bar, it is the contention of the commonwealth that although appellee administered the poison in Cincinnati, in the state of Ohio, inasmuch as it did not take

effect and produce death until after the victim came to Kentucky, in legal contemplation the poisoning was in effect, if not in fact, done in this state, and the courts of this commonwealth have jurisdiction. It is admitted that no authority directly in point has been found in support of this theory. But it is urged that the case of *Jackson v. Com.* 100 Ky. 239, 66 Am. St. Rep. 336, 38 S. W. 422, 1091, which was cited with approval in *Com. v. Parker*, 108 Ky. 679, 57 S. W. 484, illustrates and supports this position. In that case two young men administered cocaine to Pearl Bryan in Cincinnati, Ohio; and, believing her to be dead, brought her over into Kentucky to a point back of Newport, and there severed her head from her body. It developed that she was not dead, so, of course, death was not due to the cocaine administered to her, although that of itself might later have caused death. But the immediate cause of death in her case was the severing of her head from her body. Hence the crime for which the defendants in that case were tried was the murder of this unfortunate girl in Kentucky, and not for the taking of her life by administering cocaine in Ohio.

Reliance is also had upon the case of *Com. v. Van Tuyl*, 1 Met. (Ky.) 1, 71 Am. Dec. 455. Van Tuyl was indicted for obtaining money by false pretense. It developed upon the trial that, while in the state of Ohio with a negro whom he represented to be a runaway slave belonging to him, he sold the negro to one Jenkins for \$500, which was to be paid when they arrived in Kentucky. After arriving in Kentucky, Jenkins paid the \$500 and took a receipt,

and if she does not choose to avenge it, it is not for us to step in and do it for them."

It has been held that the legislature of the state may extend its jurisdiction to embrace a case where the mortal injuries are inflicted without the state and the death occurs within. *Com. v. Macloon*, 101 Mass. 1, 100 Am. Dec. 89; *Tyler v. People*, 8 Mich. 320; *State v. Caldwell*, 115 N. C. 794, 20 S. E. 523; *Ex parte McNeely*, 36 W. Va. 84, 15 L.R.A. 226, 32 Am. St. Rep. 831, 14 S. E. 436.

State v. Carter, supra, however, sustains the point that the legislature is not invested with the ability to pass a law to punish foreign murder where the death of the person slain happens within the jurisdiction of the state. But in *Hunter v. State*, 40 N. J. L. 495, Chief Justice Beasley says that the view indicated by the justice in delivering the opinion in *State v. Carter* was "entirely extra-judicial," and he commends the courts sustaining statutes that give jurisdiction to states where the death may happen to take place.

And in *Com. v. Macloon*, 101 Mass. 1, 39 L.R.A. (N.S.)

100 Am. Dec. 89, Mr. Justice Gray, in answering the argument against the exercising of jurisdiction by the courts of the state where the death may happen, said: "The most plausible form of the argument against jurisdiction is, that the coming into the state is the act not of the wrongdoer, but of the injured person, and therefore should not subject the former to the jurisdiction, merely because the latter happens to die there. But it is the nature and the right of every man to move about at his pleasure, except so far as restrained by law; and whoever gives him a mortal blow assumes the risk of this, and in the view of the law, as in that of morals, takes his life wherever he happens to die of that wound; and may be there punished if the laws of the country have been so framed as to cover such a case."

And, of course, a statute like that presented in *Green v. State*, 66 Ala. 40, 41 Am. Rep. 744, which is sufficiently set out in *Com. v. Atkins*, is a proper exercise of legislative power and violative of no constitutional provision.

E. M. S.

in which Van Tuyl covenanted that he was the lawful owner of the negro, who was a slave for life. It developed that the negro was not a slave, but free. The lower court instructed the jury that, if the negro was sold and delivered to Jenkins in the state of Ohio, the defendant could not be convicted in this state. In reversing this ruling upon appeal here the court said: "The false pretense employed is only the means by which the offense is perpetrated. . . . The crime is not committed until the money is obtained. The fraud in this case was concocted in the state of Ohio, and the representations were there made which were designed to render it successful, but it became mature and took effect in this state; for here the scheme was consummated, the sale evidenced by writing, and the money obtained from the person defrauded. The crime was therefore committed in this state, and not elsewhere, and the defendant was properly indicted therefor in the county of Carroll, where the money was paid to him."

The gravamen of the offense in that case was obtaining money by false pretense. The transaction was had in Kentucky, although the scheme for carrying it out, as said by the court, was laid in Ohio.

In *Com. v. Ball*, 126 Ky. 542, 104 S. W. 325, this court had under consideration a question involving facts just the reverse of those here presented. In that case Ball and others were indicted by the grand jury of Bell county for killing Meade Cottrell. It was shown that the shooting occurred in this state, but that, after Cottrell was shot and wounded, he was put upon an engine and carried across the state line into Tennessee, where he died. It was insisted for the defendants that the Kentucky court was without jurisdiction, and the lower court adopted this view. The commonwealth appealed, and, upon consideration here, it was held that the lower court erred in instructing the jury to find for the defendants. The court in reaching this conclusion cited with approval the following excerpt from Robertson on Criminal Law, § 214: "At common law the state in which the mortal wound was given has jurisdiction in cases of homicide, so that, if a mortal wound be given in this state, and death ensues in another, the courts of this state have jurisdiction to try the offender; the going of the injured party into another state being his own voluntary act, and not the act of the defendant." The court also quoted from Bishop on Criminal Law, § 113, as follows: "The reader perceives that, according to these cases, the crime in felonious homicide consists in inflicting the blow,

while the act of dying, which is performed by the injured person, does not constitute any part of it, or at least such a part as to lay the foundation for a jurisdiction over the offense. This accords with what was before held in England, that a homicide is committed in a county if the blow is inflicted in it, though the death takes place elsewhere." The opinion then concludes by stating that these citations from Robertson and Bishop are "correct statements of the law." They are, in fact, but declaratory of the common law, which declared that the offender had to be tried in the county where the crime was committed, and that the crime was committed where the blow was struck.

In *Rex v. Hargrave*, 5 Car. & P. 170, decided in 1831, one Richard Dodd was indicted for the crime of manslaughter in the county of Kent. The indictment charged that he assaulted and beat one James Cox in the county of Middlesex, and that Cox afterwards languished and died in the county of Kent. The court, in holding that the accused must be tried in the county of Middlesex, where the blows were struck, said: "The giving of the blows which caused the death constitutes the felony. The languishing alone, which is not any part of the offense, is laid in Kent. The indictment states that the prisoners were then and there present, aiding and abetting in the commission of said felony. That must, of course, apply to the parish . . . where the blows which constitute the felony were given."

In Alabama there is a statute giving the state jurisdiction in felony cases, although the injured party may die in another state. In *Green v. State*, 66 Ala. 40, 41 Am. Rep. 744, one Green was indicted for murder. The question of jurisdiction was raised, and the court, in disposing of the matter, said: "We need not rest the decision of this question, however, on this particular construction of the statute. Our view is that the crime of murder consists in the infliction of a fatal wound, coupled with the requisite contemporaneous intent or design, which legally renders it felonious. The subsequent death of the injured party is a result or sequence, rather than a constituent, elemental part of the crime. This principle is correct, we think, so far as affects the question of jurisdiction."

In Tennessee there is a statute requiring all criminal cases to be tried in the county in which the offense may have been committed, and the supreme court of that state in *Riley v. State*, 9 Humph. 646, held that the offense was committed at the place where the blow was struck, though the death may have occurred elsewhere; the

court saying: "That [the blow] alone is the act of the party. He commits this act, and the death is only a consequence. Therefore, when the legislature enacts that the party shall be tried in the county where the offense may have been committed, they intended where the active agency of the perpetrator was employed."

In *People v. Gill*, 6 Cal. 637, the court held that the crime of murder is committed at the time when the fatal blow is struck.

In *Stout v. State*, 76 Md. 317, 25 Atl. 299, 9 Am. Crim. Rep. 398, the accused was being tried for murder committed by poisoning. The poison was administered in Maryland, and the victim died in Pennsylvania. The question of jurisdiction was raised, and the court said: "In such case it is the law of Maryland that is violated, and not the law of the state where the death may happen to occur. By the felonious act of the accused, not only is there a great personal wrong inflicted upon the party assaulted or mortally wounded while under the protection of the law of the state, but the peace and dignity of the state where the act is perpetrated is outraged; and, though death may not immediately follow, yet, if it does follow as a consequence of the felonious act within the year, the crime of murder is complete. In inflicting the mortal wound then and there the accused expends his active agency in producing the crime, no matter where the injured party may languish, or where he may die, if death ensues within the time and as a consequence of the stroke or poison given. The grade and characteristics of the crime are determined immediately that death ensues, and that result relates back to the original felonious wounding or poisoning. The giving of the blow that caused the death constitutes the crime."

In *State v. Gessert*, 21 Minn. 369, the accused was indicted for the murder of one Savazy. The evidence showed that the wound which produced death was given in Minnesota, but the death occurred in Wisconsin. The court held that the death in Wisconsin was only a consequence of the act committed against the law of Minnesota, and that the courts of Minnesota had jurisdiction to try the case.

In *State v. Kelly*, 76 Me. 331, 49 Am. Rep. 620, 5 Am. Crim. Rep. 343, the same rule is announced.

In *United States v. Guiteau*, 1 Mackey, 498, 47 Am. Rep. 247, it was held that the supreme court of the District of Columbia had jurisdiction to try the accused, charged with the murder of James A. Garfield, although the latter died in New Jersey. The shot was fired in Washington. The death 59 L.R.A. (N.S.)

occurred in New Jersey. The supreme court, in an elaborate opinion, held that the crime was committed where the shooting was done.

Thus it appears that, not only at the common law, but in states where the question of jurisdiction is regulated by statute, courts have, with a degree of uniformity, held that the crime is committed at the place where the act is done which results in the injury or death; and that the prosecution for such act is properly conducted at the place where the act is done, and not where the death may occur. Here it is conceded that the assault was made and the poison administered in the city of Cincinnati, state of Ohio. At that time both the victim and the wrongdoer were in the state of Ohio. The wrong was done there. It was a completed transaction so far as the appellee was concerned, as much so as though he had shot her or otherwise inflicted upon her person a mortal wound, and, according to the well-recognized rule, the courts of that state alone have jurisdiction to punish the offense. The trial court correctly so held.

Judgment affirmed.

LOUISIANA SUPREME COURT.

CHRISTOPHER ROUSSEL

v.

JOSEPH B. DORNIER et al

(130 La. 367, 57 So. 1007.)

Voter — primary election — eligibility of candidate.

1. A Democratic parish committee has no power to pass upon the eligibility of candidates for public office, as they are not charged with judicial functions nor clothed with juridical power.

Same — testing right — party plaintiff.

2. If one who is ineligible has received the majority of votes in a primary election, his right to hold office cannot be tested in a suit brought by an unsuccessful candidate,

Headnotes by BREAUX, Ch. J.

Note. — Power to determine eligibility to office of one nominated at primary election.

But two cases aside from *ROUSSEL v. DORNIER* have been found which have considered the question of the power to determine eligibility to office of one nominated at a primary election.

In *Fuller v. Corey*, 18 Idaho, 558, 110 Pac. 1035, the county auditor refused to place on the official ballot a nominee under the direct primary, on the ground that as he had failed to file an expense account

seeking to be declared entitled to the office, but the question of his eligibility must be tested in a suit brought in the name of the state.

3. As the Democratic parish committee is without legislative authority to decide question of eligibility, this court cannot order it to do so, and under the law regulating primaries this court is without authority to decide the question of eligibility of any candidate.

(March 11, 1912.)

APPPLICATION for writs of mandamus and certiorari to review the action of defendants in refusing to omit the name of Joseph B. Dornier from the primary ballot as candidate for the office of sheriff, and compel them to do so. Dismissed.

The facts are stated in the opinion.

Mr. B. R. Forman for relator.

Breaux, Ch. J., delivered the opinion of the court:

Relator and three other citizens were candidates for the Democratic nomination for the office of sheriff of the parish of St. James. Two of the candidates, Emile Dickey and Louis Le Bourgeois, withdrew as candidates for the office prior to the 23d day of January last. There remained two candidates,—relator, Christopher Roussel, and Joseph B. Dornier.

The relator, Roussel, timely objected to

the candidacy of the latter on the ground that he (Dornier) was a deputy registrar of voters, in the actual exercise of the duties of that office, and as such officer was in control of the registration of the parish of St. James; that he issued certificates of registration within three months previous to his becoming a candidate for the Democratic nomination of sheriff; that as Emile Dickey and Louis Le Bourgeois had withdrawn their candidacy before the 23d day of January, and as Dornier was ineligible for reason stated, he (Roussel) was the only eligible candidate.

Relator protested against the refusal of the Democratic committee to recognize him as the only candidate. Notwithstanding his protest, the committee permitted Joseph B. Dornier to become a candidate, and his name was accordingly printed on the official ballot, is substantially the statement of the relator for a writ of mandamus and certiorari; and, further, the complaint of relator is that, as Dornier was ineligible, he (Roussel) should have been declared the nominee by the committee, as he was the only eligible candidate, and that the refusal of the committee to grant his application to be thus declared was an illegal act on the part of the Democratic committee. He (Roussel) sought to have the alleged illegality corrected by applying to the district court for St. James parish.

Joseph B. Dornier filed an exception to

within ten days after the date of the primary election, he was, by provision of the nomination law, ineligible to become a candidate for the office for which he was nominated. The court held that as such candidate had been duly and regularly certified by the canvassing board to the county auditor as having received the nomination of his party, the auditor was without power to adjudge such nominee ineligible, and issued a peremptory writ of mandate, directing him to place such name on the official ballot as the nominee of his party. In rendering its opinion the court said: "The only question with which we have to deal at this time is that of the power of the county auditor to refuse to have the name of a candidate printed on the official ballot where he has been declared by the canvassing board to be the nominee of his party. On this question there can be but little doubt. The duty of the auditor is purely ministerial; he is vested with no judicial powers or functions in the matter. He cannot sit in judgment on the candidate, and, without a hearing, declare him guilty of a misdemeanor, and inflict the penalties. . . . It is clearly the duty of the auditor to perform the duties required of him by law, and until the candidate has been judicially declared ineligible to have his name placed upon the ticket, the auditor

has but one duty to perform, and that is to cause the candidate's name to be printed on the official ballot along with all the other nominees for the respective offices. If the candidate has violated the law and is subject to its penalties, that must be determined in the orderly and due process of law."

In *Whitaker v. Swanner*, 121 Ky. 281, 89 S. W. 184, a mandatory injunction was asked to compel the removal from the official ballot of the name of the one accorded the nomination at the primary on the ground that he had obtained the certificate of nomination by the use of money and whisky, and so being guilty of bribery, he was, under the statute, excluded from office and suffrage. In affirming the dismissal of the action by the circuit court for want of jurisdiction, the court said: "We think the circuit court was also without jurisdiction to determine in this action the further question raised by the petition, *viz.*, that in securing his nomination by the purchase of votes with money and whisky appellee Swanner disqualified himself for holding the office of sheriff, if elected, and forfeited his right to the nomination. If he secured votes at the primary election by bribery, and appellant in a contest before the county committee had made proof of that fact to the satisfaction of the commit-

the jurisdiction of the court; this exception was sustained, and relator Roussel's suit dismissed on the 29th day of February, 1912. On the 2d day of March, 1912, this court, on relator's motion, ordered the papers to be forwarded in order to examine into the legality and validity of the proceedings. Whether the courts have jurisdiction to decide the question now at issue is now before us for decision.

As relates to form, relator has complied with every requirement; he has timely protested and applied to the court, setting forth the rights he claims.

In the absence of jurisdiction conferred by legislative action, the political committee, appointed under the statute regulating primary elections, are without the power, and the courts are without the jurisdiction, to determine who shall be the candidate or who shall not be the candidate because of the eligibility of the one and the ineligibility of the other. The question is limited to authority conferred or not conferred by the primary election law, and is not before the court under the remaining laws (unrepealed) relating to contested elections.

The committee has enumerated powers; but not one relates to the power of passing upon the eligibility of a candidate, and of directing that his opponent shall be the candidate. A candidate may protest and assert many rights before the committee; but his protest cannot be made to serve the purpose of compelling the committee to pass upon the eligibility of his opponent, to the end that he may be declared the only candidate.

tee, it would have been their duty to determine to what extent the fairness and validity of the primary was affected thereby, or whether appellee Swanner should have been refused the nomination as the Republican candidate for sheriff by reason thereof. The question of whether or not he was guilty of the offense of bribery in connection with the primary election cannot be collaterally inquired into, as here attempted, but can be determined in a direct proceeding and trial by jury under indictment.

"As appellant's right to have his name placed on the ballots and under the Republican party device is dependent upon whether he received at the hands of his party the nomination for the office of sheriff at the primary election, and the statements of his petition make it certain that the governing authority decided and declared that appellee Swanner was, in that election, nominated by the Republican party as their candidate for that office, it follows that the general demurrer to the petition should 39 L.R.A. (N.S.)

To grant the protest here, the committee would have had to pass upon the ineligibility of the protestee, and at the same time rule that the protestant, a minority candidate, was the candidate. Such a declaration by the committee could only be made under the act to which it owes its existence. The committee not being invested with the power to pass upon the qualification of candidates, the courts are without jurisdiction to compel the committee to decide, or to assume jurisdiction of questions not within the committee's power to decide.

The candidate has certain personal rights, it is true; but they are not unlimited; at any rate, as relates to the eligibility of an opponent. The alleged ineligibility of the candidate raises a question in which the state is concerned. She cannot be entirely ignored. In her name, only, inquiry can be made into the eligibility of the one who seeks to be an officer. In case of ineligibility, in her name it may be ascertained whether the election is null, and that another election should be ordered, or whether the minority candidate was the legal candidate. It is not left to private action by private person. It must be sought by the state and private persons acting with the state. It does not lie with the committee to decide that a minority candidate shall be the local executive officer of the state, or, at any rate, not before a statute is adopted conferring the power of jurisdiction.

For reasons assigned, the order nisi is recalled and discharged, and relator's demand is denied and his petition dismissed.

have been sustained, and the action dismissed, as was adjudged by the lower court." Thus it would seem that the county committee would have had authority to adjudge as to the eligibility of the candidate on satisfactory proof alone of the facts alleged; and it would seem that the same proof ought to have been available in the action for injunction; otherwise, if a conviction cannot be had until after the election, and such nominee is successful, it will result either that the election will be declared void, or a minority candidate will be given the election, according as the statute may provide in such cases; either of which results could be avoided by having the question settled by the court before the election, when such question is presented. And the same might be said as to the result of the decision in *ROUSSEL v. DORNIER*, as it is apparent from that decision that power is vested nowhere to determine the eligibility of a nominee to office until after election, even though the non-eligibility is plainly disclosed. J. H. B.

MARYLAND COURT OF APPEALS.

GERMAN UNION FIRE INSURANCE
COMPANY, Appt.,

v.

FRED G. CLARKE COMPANY.

(116 Md. 622, 82 Atl. 974.)

Appeal — failure to raise question — statutory effect.

1. Failure to raise the question of the effect of failure to prove payment of premium in an action on an insurance policy is within a statute providing that in no case shall the appellate court decide any question which does not plainly appear to have been raised and decided below.

Insurance — cancellation — notice — sufficiency.

2. The mailing of a notice of an intention to cancel an insurance policy five days later, which is not received until two days after the mailing, is not, in case no notice

of cancellation is given, sufficient to render valid the cancellation on the day named, under a provision in the policy permitting cancellation upon giving five days' notice thereof.

Same — tender of unearned premium — necessity.

3. A tender or return of the unearned premium is necessary to effect the cancellation of an insurance policy, under a provision in a policy providing that when the policy is canceled by the company it shall retain only the *pro rata* premium.

(December 6, 1911.)

APPEAL by defendant from a judgment of the Court of Common Pleas of Baltimore City in plaintiff's favor in an action brought to recover the amount alleged to be due on a fire insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. Arnold L. Davis and George A. Finch, for appellant:

Note. — From what time does notice of cancellation of fire insurance become effective.

As to necessity that notice of maturity of premiums or assessments sent through the mail be received, see note to Kavanaugh v. Security Trust & L. Ins. Co. 7 L.R.A. (N.S.) 253.

On the question as to return of premium as condition of cancellation of insurance, see note to Davidson v. German Ins. Co. 13 L.R.A. (N.S.) 884.

As to waiver by the assured of the return of the premium upon a cancellation of the policy by the insurer, see note to Buckley v. Citizens' Ins. Co. 13 L.R.A. (N.S.) 889.

The majority of the fire policies used at present reserve the right to the parties to terminate the insurance at their option.

The usual provision for cancellation is that a certain number of days' notice must be given the insured of an intention on the part of the insurer to cancel the same.

The New York standard form of fire policy contains the following cancellation clause: "This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation."

In the absence of express stipulation as to the required notice, it has been held that reasonable notice must be given. *Karelsen v. Sun Fire Office*, 16 N. Y. S. R. 239, 1 N. Y. Supp. 387; *McLean v. Republic F. Ins. Co.* 3 Lans. 421; *Chadbourne v. German-American Ins. Co.* 31 Fed. 533; and see *Lipman v. Niagara F. Ins. Co.* 16 N. Y. S. R. 231, 1 N. Y. Supp. 384, where the reasons for this rule are forcibly presented, but which was reversed in 121 N. Y. 458, 8 L.R.A. 719, 24 N. E. 699.

But in *Lipman v. Niagara F. Ins. Co.* 121 N. Y. 454, 8 L.R.A. 719, 24 N. E. 699, it was held that the cancellation of an insurance policy which provides that it may be terminated on notice, is effected *eo instanti* on notice given in good faith by the insurer, if no premium has been paid. To the same effect is *Springfield F. & M. Ins. Co. v. McKinnon*, 59 Tex. 507.

In *Mueller v. South Side F. Ins. Co.* 87 Pa. 399, the policy contained a stipulation that for any cause "it shall be optional with the company to terminate the insurance after notice given the assured or his representative, of their intention to do so." The company gave notice that the policy was canceled for nonpayment of the premium. The court said: "The notice was sufficient, and the cancellation took effect from the service. Had the premium been tendered and refused, within a reasonable time, a question might exist which is not now in the case. There was no offer to pay."

In *Cain v. Lancashire Ins. Co.* 27 U. C. Q. B. 453, it was held, under a provision in the policy that, "if for any other cause the company shall so elect, it shall be optional with the company to terminate the insurance after notice given to the insured or his representatives of their intention to do so, in which case the company shall refund a ratable proportion of the premium," the notice to insured, together with a tender of the unearned premium, terminated the insurance. The trial court held that the notice and termination of the insurance could not be contemporaneous, that it was essential that some interval of time should elapse between the notice and termination of the risk; and the insured contended that the notice contemplated by the condition was a notice giving to insured a reasonable time to afford him an opportunity of effecting a new insurance previous to the termination of the defendants' policy; but the court said: "We cannot accede to that interpretation, for were we to do so we would be adding a term to the condition some-

insurance policy which provides that it may be terminated on notice, is effected *eo instanti* on notice given in good faith by the insurer, if no premium has been paid. To the same effect is *Springfield F. & M. Ins. Co. v. McKinnon*, 59 Tex. 507.

To make effective the written notice of cancellation sent by the insurer to the insured, it was not necessary that the same should be accompanied by a tender of the amount of the unearned premium.

Phoenix Mut. F. Ins. Co. v. Brecheisen, 50 Ohio St. 542, 35 N. E. 53; *Schwarzchild & S. Co. v. Phoenix Ins. Co.* 115 Fed. 653, 59 C. C. A. 572, 124 Fed. 52; *Davidson v. German Ins. Co.* 74 N. J. L. 487, 13 L.R.A. (N.S.) 884, 65 Atl. 996, 12 Ann. Cas. 1065; *Webb v. Granite State F. Ins. Co.* 164 Mich. 139, 129 N. W. 19; *Hopkins v. Phoenix Ins. Co.* 78 Iowa, 346, 43 N. W. 197; *Newark F. Ins. Co. v. Sammons*, 11 Ill. App. 230; *El Paso Reduction Co. v. Hartford F. Ins. Co.* 121 Fed. 937; *Waltheart v. Pennsylvania F. Ins. Co.* 2 App. Div. 328, 37 N. Y. Supp. 857; *Parsons v. Northwestern Nat. Ins. Co.* 133 Iowa, 532, 110 N. W. 907; *Vance, Ins. § 183*; *Backus v. Exchange F. Ins. Co.* 26 App. Div. 91, 49 N. Y. Supp. 877; *Stone v. Franklin F. Ins. Co.* 105 N. Y. 543, 12 N. E. 45.

what inconsistent with its object and intention, viz., the right to put an end to the risk at any time. The notice contemplated by the condition is a mere signification of the will and exercise of the option reserved to the defendants, and such notice, together with the refunding of the ratable proportion of the premium, terminates the insurance."

In the absence of any stipulation in the contract as to the manner in which notice shall be given, actual personal notice must be had. *Potomac Ins. Co. v. Atwood*, 118 Ill. App. 349; *Farnum v. Phoenix Ins. Co.* 83 Cal. 246, 17 Am. St. Rep. 233, 23 Pac. 869 (holding notice of cancellation sent by mail which was not received by the insured ineffective).

So, where the policy provides for a specified number of days' notice, the time begins to run from the receipt of the notice by the insured. *American Glove Co. v. Pennsylvania F. Ins. Co.* 15 Cal. App. 77, 113 Pa. 688; *Potomac Ins. Co. v. Atwood*, 118 Ill. App. 349; *Hartford F. Ins. Co. v. Tewes*, 132 Ill. App. 321; *Colonial Assur. Co. v. National F. Ins. Co.* 110 Ill. App. 471; *Citizens' Ins. Co. v. Henderson Elevator Co.* 123 Ky. 478, 124 Am. St. Rep. 371, 96 S. W. 601, rehearing denied in 123 Ky. 484, 124 Am. St. Rep. 375, 97 S. W. 810; *Continental Ins. Co. v. Daniel*, 25 Ky. L. Rep. 1501, 78 S. W. 866; *Rosen v. German Alliance Ins. Co.* 106 Me. 229, 76 Atl. 688; *American F. Ins. Co. v. Brooks*, 83 Md. 22, 34 Atl. 373; *Chrisman & S. Bkg. Co. v. Hartford F. Ins. Co.* 75 Mo. App. 310; *Scheel v. German-American Ins. Co.* 228 Pa. 44, 76 Atl. 507; *Philadelphia Linen Co. v. Manhattan F. Ins. Co.* 8 Pa. Dist. R. 261; *Emmott v. Slater Mut. F. Ins. Co.* 7 R. I. 562; *Schwarzchild & S. Co. v. Phoenix Ins. Co.* 59 C. C. A. 572, 124 Fed. 52, affirming 115 Fed. 53.

And this rule is also recognized in the 39 L.R.A. (N.S.)

No affirmative act of cancellation beyond the giving of the notice was necessary.

American Glove Co. v. Pennsylvania F. Ins. Co. 15 Cal. App. 77, 113 Pac. 688; *Philadelphia Linen Co. v. Manhattan F. Ins. Co.* 8 Pa. Dist. R. 261; *Emmott v. Slater Mut. F. Ins. Co.* 7 R. I. 562; 3 *Cooley, Briefs on Insurance*, 2794.

Messrs. Gans & Haman and Charles Markell, for appellee:

Cancellation of a New York standard form of fire policy cannot be effected, at the instance of the company, without a return or tender of the unearned premium.

American F. Ins. Co. v. Brooks, 83 Md. 22, 34 Atl. 373; *Runkle v. Citizens' Ins. Co.* 6 Fed. 143; *Mohr & M. Distilling Co. v. Ohio Ins. Co.* 13 Fed. 74; *Lattan v. Royal Ins. Co.* 45 N. J. L. 453; *Agricultural Ins. Co. v. Hamilton*, 82 Md. 91, 30 L.R.A. 633, 51 Am. St. Rep. 457, 33 Atl. 429; *Nitsch v. American Cent. Ins. Co.* 152 N. Y. 635, 46 N. E. 1149; *Tisdell v. New Hampshire F. Ins. Co.* 155 N. Y. 163, 40 L.R.A. 765, 49 N. E. 664; *Hartford F. Ins. Co. v.*

following cases: *National Conduit & Cable Co. v. Commercial Union Assur. Co.* 135 App. Div. 136, 120 N. Y. Supp. 7, affirmed without opinion in 203 N. Y. 580, 96 N. E. 1122; *Yoshimi v. Fidelity F. Ins. Co.* 99 App. Div. 69, 91 N. Y. Supp. 393; *Globe & R. F. Ins. Co. v. Emil Willbrandt Surgical Mfg. Co.* 128 Ill. App. 262; *Wicks Bros. v. Scottish Union & Nat. Ins. Co.* 107 Wis. 606, 83 N. W. 781; *Northern Pine Crating Co. v. Liverpool & L. & G. Ins. Co.* 143 Wis. 433, 128 N. W. 70; *Dominion Grange Mut. F. Ins. Asso. v. Bradt*, 25 Can. S. C. 164; *Bank of Commerce v. British America Assur. Co.* 18 Ont. Rep. 234.

The reason for this construction is that the notice is designed to give the insured an opportunity to procure other insurance. *Bard v. Fireman's Ins. Co.* 108 Me. 506, 81 Atl. 870; *Rosen v. German Alliance Ins. Co.* 106 Me. 229, 76 Atl. 688; *Hartford F. Ins. Co. v. Tewes*, 132 Ill. App. 321; *Continental Ins. Co. v. Daniel*, 25 Ky. L. Rep. 1501, 78 S. W. 866.

So, a letter containing a notice mailed November 29, but not received until December 2, the day before the fire, and not opened until the day thereafter, does not operate as a cancellation of the policy, under a provision that the policy may be canceled by the company by giving five days' notice of such cancellation. *Partridge v. Milwaukee Mechanics' Ins. Co.* 13 App. Div. 519, 43 N. Y. Supp. 632, affirmed without opinion in 162 N. Y. 597, 57 N. E. 119.

The stipulation in a fire policy for five days' notice of cancellation is governed by the general rule of law for computing time, by excluding the first day and counting the days as legal days beginning and ending at midnight, notwithstanding another stipulation in the policy that the insurance under it shall begin at noon and expire at noon of the days named. *Penn Plate Glass*

Cameron, 18 Tex. Civ. App. 237, 45 S. W. 158; Hartford F. Ins. Co. v. McKenzie, 70 Ill. App. 615; Hartford F. Ins. Co. v. Tewes, 132 Ill. App. 321; Chrisman & S. Bkg. Co. v. Hartford F. Ins. Co. 75 Mo. App. 310; Gosch v. Firemen's Ins. Co. 33 Pa. Super. Ct. 496; Cooley, Briefs on Insurance, 2801; Buckley v. Citizens' Ins. Co. 188 N. Y. 399, 13 L.R.A.(N.S.) 889, 81 N. E. 165; Baldwin v. Pennsylvania F. Ins. Co. 206 Pa. 248, 55 Atl. 970; Philadelphia Linen Co. v. Manhattan F. Ins. Co. 8 Pa. Dist. R. 261; Kinney v. Rochester German Ins. Co. 141 Ill. App. 543; Peterson v. Hartford F. Ins. Co. 87 Ill. App. 567, 187 Ill. 395, 58 N. E. 1095, 111 Ill. App. 466; Williamson v. Warfield, P. & H. Co. 136 Ill. App. 168; Phoenix Assur. Co. v. Munger Improved Cotton Mach. Mfg. Co. 92 Tex. 297, 49 S. W. 222; Taylor v. Insurance Co. of N. A. 25 Okla. 92, 138 Am. St. Rep. 906, 105 Pac. 354; Continental Ins. Co. v. Daniel, 25 Ky. L. Rep. 1501, 78 S. W. 866; Southern Ins. Co. v. Williams, 62 Ark. 382,

35 S. W. 1101; Davidson v. German Ins. Co. 74 N. J. L. 487, 13 L.R.A.(N.S.) 884, 65 Atl. 996, 12 Ann. Cas. 1065; Webb v. Granite State F. Ins. Co. 164 Mich. 139, 129 N. W. 19; Schwarzschild & S. Co. v. Phoenix Ins. Co. 115 Fed. 653; El Paso Reduction Co. v. Hartford F. Ins. Co. 121 Fed. 937.

The statement in the cancelation notice, that the premium due would be held subject to the order of the insured and the return of this policy, is not sufficient.

Tisdell v. New Hampshire F. Ins. Co. 155 N. Y. 163, 40 L.R.A. 765, 49 N. E. 664; Runkle v. Citizens' Ins. Co. 6 Fed. 143; Mohr & M. Distilling Co. v. Ohio Ins. Co. 13 Fed. 74; American F. Ins. Co. v. Brooks, 83 Md. 34, 34 Atl. 373; Hartford F. Ins. Co. v. Tewes, 132 Ill. App. 321; Cooley, Briefs on Insurance, 2801.

Stockbridge, J., delivered the opinion of the court:

This case involves no conflict of testi-

Co. v. Spring Garden Ins. Co. 189 Pa. 255, 69 Am. St. Rep. 810, 42 Atl. 138.

Accordingly it was held in the above case that an affidavit of defense was insufficient which averred that notice of cancelation was served on the 7th, where the loss occurred at 10:30 P. M. on the 12th of the same month; especially as the hour of the service of the notice was not given. Ibid.

Mailing a letter inclosing policies for cancelation under a provision in the policy that the "insurance may be terminated at any time, at the request of the assured," will effect such cancelation only when it is actually received by the insurer or his representative; and the policies will be binding in case of loss while the letter is in the mails. Crown Point Iron Co. v. Aetna Ins. Co. 127 N. Y. 608, 14 L.R.A. 147, 28 N. E. 653.

So, under a statutory provision that the insurance may be terminated by giving written notice to that effect to the insurer, a letter requesting that the insurance be terminated takes effect from the time of its receipt by the insurer, and not from the time of its being posted. Skillings v. Royal Ins. Co. 23 Can. Law Times Occ. N. 294, 2 Ont. Week. Rep. 123, 6 Ont. L. Rep. 401, affirming 22 Can. Law Times Occ. N. 258, 1 Ont. Week. Rep. 411, 4 Ont. L. Rep. 123.

In Arnfeld v. Guardian Assur. Co. 172 Pa. 605, 34 Atl. 580, it was held that the cancelation of a fire policy was effected immediately upon the taking by the insured of a policy in another company for the same amount, upon receiving notice that the first company intended to cancel their policy within five days in accordance with its terms, where his purpose in doing so was not to increase his insurance, but to substitute the policy for that in the first company, notwithstanding the loss occurred before the expiration of the five days after 39 L.R.A.(N.S.)

the receipt of the notice, and the first policy was still in the possession of the insured, and the insured had the right to take out additional insurance if he saw fit.

But the mere procurement of another policy on the same property and for the same amount, after the notice and within the five-day limit, does not disclose an intention on the part of the insured to cancel the earlier policy, or to relieve the company from liability thereon; but to have such effect the insured must have consented and agreed to the cancelation and the substitution of the later for the earlier policy. Scheel v. German-American Ins. Co. 228 Pa. 44, 76 Atl. 507.

So a delivery by the insured of a policy to an agent for the purpose of having a new policy issued in lieu thereof does not effect a cancelation until the new policy is issued, where it is clear that such was the intention of the parties. Hickey v. Hartford F. Ins. Co. 92 Hun, 192, 36 N. Y. Supp. 329.

Of course there may be an immediate cancelation by a subsequent agreement, though the policy provides for the giving of notice for a certain number of days. Home Ins. Co. v. Chattahoochee Lumber Co. 126 Ga. 334, 55 S. E. 11 (five days' notice); Cox v. Farmers' Mut. F. Ins. Co. 133 Ga. 175, 65 S. E. 409 (thirty days notice); Hartford F. Ins. Co. v. Tewes, 132 Ill. App. 321; Rosen v. German Alliance Ins. Co. 106 Me. 229, 76 Atl. 688 (ten days' notice); Springer v. Anglo-Nevada Assur. Corp. 33 N. Y. S. R. 543, 11 N. Y. Supp. 533.

And a reply letter accepting a proposition for the cancelation of the policy takes effect from the time it is sent. Home Ins. Co. v. Chattahoochee Lumber Co. 126 Ga. 334, 55 S. E. 11.

A. L. R.

mony, but raises three questions of law, upon the answer to which its determination depends. The suit is upon an insurance policy to recover the amount named in the policy; a loss having occurred of the property insured.

In the brief and at the oral argument, it was urged on behalf of the company that there could be no recovery, for the reason that the plaintiff had offered no affirmative proof of the payment of the premium, which constituted the consideration for the issuance of the policy. A careful examination of the record fails to disclose that any question of the payment of the premium was raised at the trial of the case below, though the payment of the premium is recited in the declaration to have been made by the plaintiff to the defendant, and the policy offered in evidence recites as the consideration for it "\$25 premium." This language in the policy and the recital in the declaration, in the absence of any pleading or evidence denying the payment of the premium, might fairly be assumed to be an admission of such payment, if the question were properly before us; but article 5, § 9, of the Code, expressly provides that in no case shall this court "decide any point or question which does not plainly appear by the record to have been tried and decided by the court below," and the numerous applications of this provision, of which the case of *Baltimore v. Austin*, 95 Md. 93, 51 Atl. 824, is but an illustration, clearly show that this defense to a recovery on the policy, not having been passed upon by the court below, cannot properly be considered upon an appeal.

The ground of defense upon the part of the company is the cancellation of the policy before the loss occurred, and presents two questions. The first of these is whether the notice, as given by the company, was a sufficient notice, and, if not, whether the notice was void *in toto*, or merely defective with regard to a matter which the period that intervened between the notice and the loss may have cured; and, secondly, whether a return or tender of the *pro rata* portion of the premium was a prerequisite to a valid cancellation of the policy. The clause providing for cancellation was what is known as the New York standard form, and reads as follows: "This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If the policy shall be canceled as hereinbefore provided, or becomes void or ceases, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal; this company retaining the customary short

rate; except that when this policy is canceled by this company by giving notice it shall retain only the *pro rata* premium."

The notice in this case bore date July 15, '09, and was as follows: "The German Union Fire Insurance Company herewith gives five days' formal notice of its intention to cancel policy No. 35,069 issued to owner and mortgagee for \$1,000, covering property located at 48-54 River street, Cleveland, Ohio, in accordance with the stipulations and provisions embraced in lines Nos. 51 to 55, both inclusive of the printed conditions of said policy, to wit." Then follows a transcript of the cancellation clause of the policy, after which the notice continues: "Please take notice that all liability of said company under said policy will absolutely cease at noon July 20, '09, unless surrender thereof to the company be made sooner, and that the unearned premium due, if any, will be held subject to your order and return of the policy."

This notice was mailed in Baltimore, by registered mail, on the day of its date, July 15, 1909, as appeared from the registration receipt issued by the Baltimore postoffice. The return card, showing the receipt of this notice by the addressee, offered in evidence, shows the date of delivery of the notice of cancellation to have been July 17, 1909. The insured, therefore, from the face of the papers, had not five, but three, days' notice of the intention of the appellant company to cancel the policy. What happened after that does not very clearly appear from the record, but apparently the policy was canceled at some date, presumably the 20th of July, 1909, upon the records of the company; but no notice of the fact of cancellation was ever communicated to the appellee. In this condition of facts, the relative positions of the parties are well defined by the opinion rendered by this court in the case of *American F. Ins. Co. v. Brooks*, 83 Md. 22, 34 Atl. 373, where, in a similar case, it was said that, "if it shall be canceled by the company, the clause further provides that if the premium has been paid the 'unearned portion shall be returned on surrender of the policy,' etc., 'except that when the policy is canceled by this company by giving notice it shall retain only the *pro rata* premium. These are conditions upon which the right of the company to cancel rests; they must be strictly construed and strictly performed. *Runkle v. Citizens' Ins. Co.* (C. C.) 6 Fed. 143; *Lattan v. Royal Ins. Co.* 45 N. J. L. 453. Five days' notice . . . is therefore a condition precedent. . . . It is clear that the mere service of such a notice as this, if the premium had in fact been paid or the insured was chargeable with its receipt, would not *ipso facto*

work a cancelation. The policy would have to be canceled by the insurer by some act clearly indicating that he had done so; . . . and this act could not be effectually performed under the provisions of the policy until the five days had expired."

In the Brooks Case, the notice was not received by the insured until one day before the time named for cancelation, and it is said that "this was not within the right reserved in the policy, and was an utterly void act. Had the attempt to cancel been made later on, another question would have arisen, upon which we have now no occasion to comment. No other attempt was made, and what was done . . . was nugatory and void."

This language is equally applicable in every respect with regard to the conditions contained in the policy and the notice given, or attempted to be given, in the case before us, and would of itself be necessarily conclusive of this case, without some evidence tending to show a cancelation in fact, not earlier than July 22, of which the insured had notice, or a waiver upon the part of the insured; and there is no evidence of any such waiver. To effect a valid cancelation of a policy, there must be a present purpose carried out, not a mere intent of future action (*Chrisman & S. Bkg. Co. v. Hartford F. Ins. Co.* 75 Mo. App. 310); or, as was said in *John R. Davis Lumber Co. v. Hartford F. Ins. Co.* 95 Wis. 226, 37 L.R.A. 131, 70 N. W. 84, "there must be an actual notice of cancelation . . . not a mere notice of a desire to cancel, or a notice that the policy will be canceled, or a notice to cancel; and the notice must be served on or given to the proper person."

There remains to be considered that which is probably the most important question in the case, to wit, whether a return or tender of the *pro rata* part of the premium was a prerequisite to any valid cancelation of the policy. In the very able argument and briefs submitted in this case, practically all of the authorities in this country in any way bearing upon this question have been presented to the court, and those authorities present some divergence of views. The cancelation clause has not been uniform in all policies, and in a number of cases which have passed upon this question the decision was rested upon a precise construction of the particular language of the policy before the court. In so far as the adjudicated cases have dealt with policies where the cancelation clause was different from that in the standard form, they afford but little real assistance upon this question. Reference will be made, therefore, only to cases where the provision for cancelation was identical with the contained in this policy.

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In the Federal courts, there has been a general uniformity of decisions to the effect that the return or tender of the *pro rata* portion of the premium, where the notice of the cancelation had been given by the company, is not a prerequisite or condition precedent to the termination of the policy, and the same view has been adopted in New Jersey, Iowa, and Michigan. *Davidson v. German Ins. Co.* 74 N. J. L. 487, 13 L.R.A. (N.S.) 884, 65 Atl. 996, 12 Ann. Cas. 1065; *Parsons v. Northwestern Nat. Ins. Co.* 133 Iowa, 532, 110 N. W. 907; *Webb v. Granite State F. Ins. Co.* 164 Mich. 139, 129 N. W. 19.

A contrary view was expressed by the court of appeals of New York in the case of *Nitsch v. American Cent. Ins. Co.* 152 N. Y. 635, 46 N. E. 1149, cited in *Davidson v. German Ins. Co.* 74 N. J. L. 487, 13 L.R.A. (N.S.) 886, 65 Atl. 996, 12 Ann. Cas. 1065, and this was followed later by the case of *Tisdell v. New Hampshire F. Ins. Co.* 155 N. Y. 163, 40 L.R.A. 765, 49 N. E. 664. This latter case is chiefly noteworthy for the dissenting opinion, filed by Parker, Ch. J., and which dissenting opinion has been the basis of most of the adjudication since, which have taken the view that the return or tender of the *pro rata* portion of the unearned premium was not a prerequisite to cancelation. The prevailing view in the *Tisdell* Case, however, that such return or tender was a condition precedent was reaffirmed by a unanimous court in the case of *Buckley v. Citizens' Ins. Co.* 188 N. Y. 399, 13 L.R.A. (N.S.) 889, 81 N. E. 165; and, while the inferior courts of New York have not always followed those cases, because of some slight variation of phraseology of the cancelation clause, as in the case of *Waltheur v. Pennsylvania F. Ins. Co.* 2 App. Div. 328, 37 N. Y. Supp. 857, they have never denied the principle, but have sought to distinguish the cases before them by reason of the varied phraseology.

The conclusion of the New York court of appeals, as announced in *Tisdell v. New Hampshire F. Ins. Co.* supra, and reaffirmed in *Buckley v. Citizens' Ins. Co.* supra, has been adopted in *John R. Davis Lumber Co. v. Hartford F. Ins. Co.* 95 Wis. 226, 37 L.R.A. 131, 70 N. W. 84; *Phoenix Assur. Co. v. Munger Improved Cotton Mach. Mfg. Co.* 92 Tex. 297, 49 S. W. 222; *Hartford F. Ins. Co. v. McKenzie*, 70 Ill. App. 619; *Hartford F. Ins. Co. v. Cameron*, 18 Tex. Civ. App. 237, 45 S. W. 158; *Peterson v. Hartford F. Ins. Co.* 87 Ill. App. 572; *Petoria M. & F. Ins. Co. v. Botto*, 47 Ill. 516; *Ætna Ins. Co. v. Maguire*, 51 Ill. 342; *Hollingsworth v. Germania*, N. H. & R. F. Ins. Cos. 45 Ga. 294, 12 Am. Rep. 579; *Taylor v. Insurance Co. of N. A.* 25 Okla. 92, 138.

Am. St. Rep. 906, 105 Pac. 354; Davison v. London & L. F. Ins. Co. 189 Pa. 132, 42 Atl. 2; Hartford F. Ins. Co. v. Tewes, 132 Ill. App. 321; Williamson v. Warfield, P. & H. Co. 136 Ill. App. 168; Kinney v. Rochester German Ins. Co. 141 Ill. App. 543; and the same view is adopted by such text writers as May, Wood, Joyce, and Cooley.

While some of these cases have been decided by divided courts, nevertheless the great weight of authority is in support of the view that the return or tender of the unearned premium is a condition precedent to the right of cancellation upon the part of the company, with which view we concur. Entertaining this view of the law applicable to the case, it does not seem necessary to consider in detail the several prayers presented to the trial court; and it will be sufficient to say that we find no reversible error in the rulings of the learned judge who heard this case. The judgment will therefore be affirmed.

Judgment affirmed, with costs to the appellee.

LOUISIANA SUPREME COURT.

J. C. PUGH et al.

v.

A. N. SAMPLE, Applicant for Certiorari.

(123 La. 791, 49 So. 526.)

Subrogation — judgment — claimant.

1. Where one, not the maker, places his

Headnotes by MONROE, J.

Note. — Merger of mortgage by conveyance from mortgagor to mortgagee or revival thereof after such conveyance, where there are intermediate encumbrances upon the property.

I. General rule, 834.

II. Merger as a question of intention.

a. In general, 837.

b. Where mortgage is discharged or surrendered.

1. Doctrine that discharge or surrender does not affect priority, 838.

2. Doctrine that priority is lost, 840.

3. Where discharge is procured by fraud, 841.

4. Where mortgage previously assigned as collateral, 841.

c. Where mortgagee gives or receives additional consideration, 841.

d. Where deed to mortgagee is invalid, 842.

e. Recitals in deed, 842.

f. Where intention is expressed, 843.

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name on a negotiable promissory note, without "clearly indicating, by appropriate words, his intention to be bound in some other capacity," his rights and obligations are those of an indorser, and the maker of the note is the primary and principal debtor. When, therefore, a party who is condemned by a judgment for a certain amount executes his note which is indorsed by other parties (who have been condemned by the same judgment as his sureties), for the purpose of borrowing money with which to pay such judgment, the proceeds of the discount must be regarded as loaned to the maker, and the payment as such proceeds in satisfaction of the judgment, as a payment by the maker.

Mortgage — destruction — merger — revival.

2. Whilst one cannot be, at the same time, owner and mortgagee of the same property, if the title which, apparently conveying perfect ownership, is supposed to destroy the mortgage by confusion, turns out to be no title or an imperfect title, the mortgage, which was suspended, and thus apparently destroyed, upon the assumption of perfect ownership, revives; the cause of its suspension and supposed destruction no longer existing. "The effect cannot have a longer duration than the cause."

(April 26, 1909.)

APPPLICATION for a writ of certiorari to review a judgment of the Court of Appeal, Second Circuit, reversing a judgment of the Judicial District Court for the Parish of Caddo in defendant's favor in an action brought to subject certain lands to a judgment lien. Reversed.

The facts are stated in the opinion.

I. General rule.

For a discussion of the question of revival of or subrogation to a discharged mortgage in favor of the assignee of the equity of redemption, who pays it as against junior lien, see note in 16 L.R.A. (N.S.) 470.

See also note in 58 L.R.A. 788, on right to reinstatement of mortgage when released or discharged by mistake.

The general rule is that the lesser estate in land will merge in the greater whenever the two estates are owned by the same person. This rule, however, does not apply where such merger would be inimical to the interests of the owner, hence, unless an intention to merge with knowledge of a junior lien or liens clearly appears, no merger results from the acquirement by the holder of the senior mortgage of the interests of the mortgagor, and the senior mortgage retains its priority as against all junior or intervening liens upon the mortgaged property; and this is true whether the interest of the mortgagor is the legal title to the land or the mere equity of redemption.

Messrs. Hall & Jack, for applicant:

Where a creditor holds a first duly recorded conventional mortgage upon real estate for much more than its value, and his debtor transfers the property to such creditor, the consideration being such first mortgage debt, and such creditor has to relinquish the property to be sold under execution made upon him at the suit of a junior mortgage creditor by hypothecary action against him as a third possessor, the mortgage rights of such creditor, which he held on the property before his possession of it, are renewed, after his relinquishment or after the sale under execution made upon him.

Millaudon v. Allard, 2 La. 547; Chaffe v. Morgan, 30 La. Ann. 1307; New Orleans Ins. Asso. v. Labranche, 31 La. Ann. 841;

Spencer v. Goodman, 33 La. Ann. 909; Gates v. Gaither, 46 La. Ann. 286; 15 So. 50; St. Charles Street R. Co. v. Fairrex, 46 La. Ann. 1030, 15 So. 421; Harrison v. Ottman, 111 La. 740, 35 So. 844; Merlin, Repertoire 13, Verbo, Subrogation de Personnes, § 4.

Messrs. T. Alexander, J. A. Thigpen, and S. L. Herold, for respondents:

The conventional mortgage was completely extinguished by the purchase by the mortgagee of the mortgaged property.

Copes v. Guillebeau, 34 La. Ann. 1036; Murphy v. Factor's & T. Ins. Co. 33 La. Ann. 463; Wilmot v. The Ouachita Belle, 32 La. Ann. 611; McIlvaine v. Legare, 34 La. Ann. 926; Chaffe v. Ludeling, 34 La. Ann. 967; Abbeville Rice Mill Co. v. Shambaugh, 115 La. 1047, 40 So. 453.

U. S.—Factors' & T. Ins. Co. v. Murphy, 111 U. S. 738, 28 L. ed. 582, 4 Sup. Ct. Rep. 679.

Ala.—Fouche v. Swain, 80 Ala. 151.

Ark.—Cohn v. Hoffman, 45 Ark. 376; Garretson v. White, 69 Ark. 603, 65 S. W. 115.

Cal.—Brooks v. Rice, 56 Cal. 428; Rump v. Gerkens, 59 Cal. 496; Scrivner v. Dietz, 84 Cal. 295, 24 Pac. 171; Davis v. Randall, 117 Cal. 12, 48 Pac. 906; Hines v. Ward, 121 Cal. 115, 53 Pac. 427.

Colo.—Fassett v. Mulock, 5 Colo. 466.

Fla.—McAdow v. Wachob, 45 Fla. 482, 33 So. 702.

Ga.—Woodside v. Lippold, 113 Ga. 877, 84 Am. St. 267, 39 S. E. 400; Coleman & B. Co. v. Rice, 115 Ga. 510, 42 S. E. 5.

Ill.—Campbell v. Carter, 14 Ill. 289; Jarvis v. Frink, 14 Ill. 398; Fitts v. Davis, 42 Ill. 391; Edgerton v. Young, 43 Ill. 464; Fowler v. Fay, 62 Ill. 375; Huebsch v. Scheel, 81 Ill. 281; Richardson v. Hockenhull, 85 Ill. 124; Worcester Nat. Bank v. Cheeney, 87 Ill. 602; Shaver v. Williams, 87 Ill. 469; Rogers v. Herron, 92 Ill. 583; Lowman v. Lowman, 118 Ill. 582, 9 N. E. 245; Watson v. Gardner, 119 Ill. 312, 10 N. E. 192; Moffet v. Farwell, 222 Ill. 543, 78 N. E. 925.

Ind.—Troost v. Davis, 31 Ind. 34; First Nat. Bank v. Essex, 84 Ind. 144; Hanlon v. Doherty, 109 Ind. 37, 9 N. E. 782; Coburn v. Stephens, 137 Ind. 683, 45 Am. St. Rep. 218, 36 N. E. 132; Chase v. Van Meter, 140 Ind. 321, 39 N. E. 455; Swatts v. Bowen, 141 Ind. 322, 40 N. E. 1057.

Iowa—Wickersham v. Reeves, 1 Iowa, 413; Vannice v. Bergen, 16 Iowa, 555, 85 Am. Dec. 531; Lyon v. McIlvaine, 24 Iowa, 9; Linscott v. Lamart, 46 Iowa, 312; Stimpson v. Pease, 53 Iowa, 572, 5 N. W. 760; Pike v. Gleason, 60 Iowa, 150, 14 N. W. 210; Weidner v. Thompson, 69 Iowa, 36, 28 N. W. 422; Smith v. Swan, 69 Iowa, 412, 29 N. W. 402; Gray v. Nelson, 77 Iowa, 63, 41 N. W. 566; Bush v. Herrington, 113 Iowa, 158, 84 N. W. 1036.

Kan.—Shattuck v. Belknap Sav. Bank, 63 Kan. 443, 65 Pac. 643, 39 L.R.A. (N.S.)

La.—Perret v. Sanarens, 26 La. Ann. 593.

Me.—Freeman v. Paul, 3 Me. 260, 14 Am. Dec. 237; Carll v. Butman, 7 Me. 102; Thompson v. Chandler, 7 Me. 381; Crosby v. Chase, 17 Me. 369; Campbell v. Knights, 24 Me. 332.

Mass.—New England Jewelry Co. v. Merriam, 2 Allen, 390; Tucker v. Crowley, 127 Mass. 402; Keith v. Wheeler, 159 Mass. 163, 34 N. E. 174.

Mich.—Snyder v. Snyder, 6 Mich. 470; Cooper v. Bigly, 13 Mich. 463; Tower v. Divine, 37 Mich. 443; Cook v. Foster, 96 Mich. 610, 55 N. W. 1019; Gibbs v. Johnson, 104 Mich. 120, 62 N. W. 145; Quick v. Raymond, 116 Mich. 15, 74 N. W. 189.

Mo.—Collins v. Stocking, 98 Mo. 290, 11 S. W. 750; Wilson v. Vanstone, 112 Mo. 315, 20 S. W. 612; Sieberling v. Tipton, 113 Mo. 373, 21 S. W. 4; Williams v. Brownlee, 101 Mo. 309, 13 S. W. 1049; Hayden v. Lauffenburger, 157 Mo. 88, 57 S. W. 721; Walker v. Goodwill, 54 Mo. App. 631.

Neb.—Miller v. Finn, 1 Neb. 254; Chapell v. Smith, 50 Neb. 116, 69 N. W. 748; Peterborough Sav. Bank v. Pierce, 54 Neb. 712, 75 N. W. 20; Topliff v. Richardson, 76 Neb. 114, 107 N. W. 114.

Nev.—Grellet v. Heilshorn, 4 Nev. 526.

N. H.—Stanton v. Thompson, 49 N. H. 272; Green v. Currier, 63 N. H. 563, 3 Atl. 428.

N. J.—Parker v. Child, 25 N. J. Eq. 41; Hoppock v. Ramsey, 28 N. J. Eq. 413; Mulford v. Peterson, 35 N. J. L. 127.

N. Y.—Vanderkemp v. Shelton, 11 Paige, 28; Sheldon v. Edwards, 35 N. Y. 279; Brockway v. Tayntor, 5 N. Y. S. R. 73; Zarowski v. Schroeder, 71 App. Div. 526, 75 N. Y. Supp. 1021; Townsend v. Provident Realty Co. 110 App. Div. 226, 96 N. Y. Supp. 1091.

Ohio—Bell v. Tenny, 29 Ohio St. 240.

Or.—Watson v. Dundee Mortg. & Trust Invest. Co. 12 Or. 474, 8 Pac. 548; Katz v. Obenchain, 48 Or. 352, 120 Am. St. Rep. 821, 85 Pac. 617.

Pa.—Hatz's Appeal, 40 Pa. 209; Pease v. Doane, 33 Pa. Super. Ct. 6,

Monroe, J., delivered the opinion of the court:—

It appears that the defendant, A. N. Sample, held a mortgage for nearly \$60,000 on Cotton Point Plantation, in Red river parish, executed by the owners, Mrs. Sophie R. Stringfellow, H. C. Stringfellow, and Miss Georgia Robinson; that in October, 1906, Samuel Light obtained judgment for \$1,000, with interest, against the parties last named as makers, and against the plaintiffs herein, J. C. Pugh and J. D. Wilkinson, as indorsers, of a promissory note; that H. C. Stringfellow furnished in cash part of the money needed to pay the judgment so obtained, and, in order to get the balance, executed another note, which was also indorsed by Pugh and Wilkinson, and

was discounted by one of the banks, the proceeds being placed to the credit of the account of Wilkinson, who thereupon drew his check in payment of the judgment. When the note last mentioned matured, Stringfellow paid the interest and substituted another note similarly indorsed, in its place, and the same thing was done, from time to time, until February, 1908, when Pugh and Wilkinson paid the note maturing at that time, amounting to \$791.38. In this connection, we make the following excerpts from the testimony of Mr. Wilkinson: After stating that Stringfellow furnished some cash for the payment of the judgment, he says: "The balance of the money was raised on a note

Tex.—Silliman v. Gammage, 55 Tex. 366.
Vt.—Belknap v. Dennison, 61 Vt. 520, 17 Atl. 738; Howard v. Clark, 71 Vt. 424, 76 Am. St. Rep. 782, 45 Atl. 1042.

Wash.—Hitchcock v. Nixon, 16 Wash. 281, 47 Pac. 412; Fitch v. Appelgate, 24 Wash. 25, 64 Pac. 147.

Wis.—Scott v. Webster, 44 Wis. 185.
Eng.—Forbes v. Moffatt, 18 Ves. Jr. 384, 11 Revised Rep. 222, 17 Eng. Rul. Cas. 380; Adams v. Angell, L. R. 5 Ch. Div. 634, 46 L. J. Ch. N. S. 352, 36 L. T. N. S. 334, Hayden v. Kirkpatrick, 34 Beav. 645, 11 Jur. N. S. 836, 13 L. T. N. S. 56, 13 Week. Rep. 1010.

Where a person holding the mortgage in trust for another receives a deed of the property in trust for a different person, there is no merger. *Scrivner v. Dietz*, 84 Cal. 295, 24 Pac. 171.

A distinction is made in *Weidner v. Thompson*, 69 Iowa, 36, 28 N. W. 422, between the doctrine of merger as applied to a mortgagee who accepts a deed of the mortgaged property, and a subsequent purchaser from such mortgagee, and while, as to the former, it is said that the estates are not merged as against a junior encumbrance, yet, as to the latter, they are held to be merged; and it is pointed out that the purchaser from the mortgagee does not stand in the position of a mortgagee acquiring the mortgaged land, since he did not purchase the mortgage debt, and the mortgage note and debt were not transferred to him, but were canceled. It is not intended in this note to consider the question of merger as to purchasers from the mortgagee, or as to subsequent purchasers or encumbrancers from the mortgagor, relying upon the recorded discharge of the encumbrance held by the senior mortgagee, since such cases as a rule raise the question whether purchasers or encumbrancers from the mortgagor have a right to rely upon the record, especially where the record also discloses a deed of the mortgaged property from the mortgagor to the mortgagee, and assume therefrom that the titles have met in the mortgagee and have merged.

Where the mortgagor executes a convey-

ance of the mortgaged land to the mortgagee, upon the latter's agreement to cancel the note and mortgage, the latter, after having been in possession of the property for sometime under the conveyance, is entitled to have his title cleared as to a junior encumbrance of which he had no knowledge at the time he released his note and mortgage, it appearing that the amount due on the senior mortgage exceeds the value of the lien. *Garretson v. White*, 69 Ark. 603, 65 S. W. 115.

A junior mortgagee cannot complain where the senior mortgagee takes a conveyance of the legal title to the mortgaged premises, where the amount due on the mortgage exceeds the value of the land. *Perret v. Sanarens*, 26 La. Ann. 593.

It does not constitute a merger where the mortgagor practises fraud and deceit on the mortgagee in inducing the latter to accept a conveyance of the mortgaged property. *Cook v. Foster*, 96 Mich. 610, 55 N. W. 1019.

Since a claimant cannot rely upon a mortgage though it is prior in date to a judgment, in a claim of title, to defeat the title of the judgment creditor based on an execution sale, a deed of the property to the mortgagee subsequently to the judgment is of no avail in behalf of the latter. *MacIntyre v. Ferst*, 101 Ga. 682, 28 S. E. 989.

It has been held that a mortgage is extinguished by the acquirement by the mortgagee of the mortgaged property at a trustee's sale in bankruptcy, and hence such mortgage is no defense to the lien of a junior mortgage. *Murphy v. Factors' & T. Ins. Co.* 33 La. Ann. 454.

In South Carolina a merger will be held to result from the acquirement by the mortgagee of the equity of redemption, unless there has been an express agreement to the contrary. *Agnew v. Charlotte, C. & A. R. Co.* 24 S. C. 18, 58 Am. Rep. 237. Applying this rule, it has been held to constitute a merger for the mortgagee to accept a conveyance of the mortgaged premises in satisfaction of the mortgagor's debt, where he formally delivers up the note and mortgage, although he accepts the conveyance and de-

signed by Judge Pugh and myself and H. C. Stringfellow, I think as agent."

Cross-examination:

Q. Have you any of those notes?

A. I have but one, and that is the last one.

Q. Mr. Wilkinson, they are all made the same way that this one is made?

A. Yes, sir; similar to that one. I would not be sure that Stringfellow signed them all as agent.

Q. This one appears to be signed as agent?

A. Yes, sir; the first note was for more than that amount, and that occurred [resulted?] in my overpaying the judgment \$100, and after I found it out Mr. Land

gave me his check, and that note had credit for that amount. I think it was \$100.

Q. The notes were all similar to this in form, and indorsed, unless some were signed H. C. Stringfellow, without saying "Agent?"

A. Yes, sir; The first note was indorsed by Judge Pugh himself. I indorsed some of the notes afterwards, per me.

There is no suggestion that Stringfellow was acting for anyone else than himself, his wife, and Miss Robinson. In the meanwhile (between the date of the payment of the judgment and the payment of the last note, that is to say, in March, 1907) the judgment had been recorded, and is said to have taken effect as a judicial mortgage,

livers up the instrument of indebtedness in ignorance of junior liens upon the land. *Bleckley v. Branyan*, 26 S. C. 424, 2 S. E. 319.

The doctrine of these cases is questioned in *Glenn v. Rudd*, 68 S. C. 102, 102 Am. St. Rep. 659, 46 S. E. 555, and it is said that this view is at variance with most other jurisdictions, and indeed not in accordance with the authorities cited with approval in the leading opinion in *Agnew v. Charlotte, C. & A. R. Co.*; and the court points out that "even in those states where, as in this state, the mortgagee has not title to the land, but merely a lien for the debt, it has been generally held that a merger will not result from conveyance of the land to the mortgagee, where there is an intervening encumbrance, even where there is no evidence of any agreement to that effect, because, unless there is actual proof of an intention to satisfy the mortgage, it is presumed the mortgagee does not intend to release his security when it is necessary for his protection against such intervening encumbrance."

II. Merger as a question of intention.

a. In general.

Although the mortgaged property is subject to junior liens, generally the question as to whether or not a senior mortgage is merged in a subsequently acquired equity of redemption or title to the mortgaged property is to be determined from the intention of the parties. *Brooks v. Rice*, 56 Cal. 428; *Huebsch v. Scheel*, 81 Ill. 281; *Richardson v. Hockenull*, 85 Ill. 124; *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Lowman v. Lowman*, 118 Ill. 582, 9 N. E. 245; *Chase v. Van Meter*, 140 Ind. 321, 39 N. E. 455; *Swatts v. Bowen*, 141 Ind. 322, 40 N. E. 1057; *Wickersham v. Reeves*, 1 Iowa, 413; *Lyon v. McIlvaine*, 24 Iowa, 9; *Linscott v. Lamart*, 46 Iowa, 312; *Pike v. Gleason*, 60 Iowa, 150, 14 N. W. 210; *Shattuck v. Belknap Sav. Bank*, 63 Kan. 443, 65 Pac. 643; *Williams v. Brownlee*, 101 Mo. 309, 13 S. W. 1049; *Hayden v. Lauffenburger*, 157 Mo. 88, 57 S. W. 721; *Walker v. Goodsill*, 54 39 L.R.A. (N.S.)

Mo. App. 631; *Mulford v. Peterson*, 35 N. J. L. 127; *Townsend v. Provident Realty Co.* 110 App. Div. 228, 96 N. Y. Supp. 1091; *Howard v. Clark*, 71 Vt. 424, 76 Am. St. Rep. 782, 45 Atl. 1042.

The mortgage will be kept alive in favor of the mortgagee if this appears to have been the intention of the parties, and justice is thereby subserved. *Mulford v. Peterson*, 35 N. J. L. 127.

In *Factors' & T. Ins. Co. v. Murphy*, 111 U. S. 738, 28 L. ed. 582, 4 Sup. Ct. Rep. 679, the doctrine is asserted that "where an encumbrancer by mortgage or otherwise becomes the owner of the legal title or of the equity of redemption, the merger will not be held to take place if it be apparent that it was not the intention of the owner, or if, in the absence of any intention, said merger was against his manifest interest."

Unless the intention to merge is expressly stated, in many jurisdictions, the rule obtains that where there is an intervening encumbrance, it will be presumed, as a matter of law, that no merger was intended by the mortgagee in accepting from the mortgagor a conveyance of the mortgaged premises. *Wilson v. Vanstone*, 112 Mo. 315, 20 S. W. 612; *Green v. Currier*, 63 N. H. 563, 3 Atl. 428; *Belknap v. Dennison*, 61 Vt. 520, 17 Atl. 738.

In *Campbell v. Knights*, 24 Me. 332, it is stated as a general rule that the mortgage may be considered as still subsisting when it is for the interest of the party that it should be, to protect himself against another charge or encumbrance upon the estate; when, however, this presumption would be inequitable, or contrary to the clear intention of the parties, or conducive to fraud, the mortgage is regarded as extinguished.

This rule is based upon the presumption, as a matter of law, that the party must have intended to keep on foot his mortgage title, when it is essential to his security against an intervening title, or for other purposes of security; and it is immaterial that the mortgagee, through ignorance of the intervening title, or through inadvertence, actually discharged the mortgage

inferior in rank to the special mortgage held by Sample on Cotton Point Plantation, and in January, 1908, the owners and mortgagors made a conveyance of the plantation to Sample, in consideration of the surrender and cancelation of the notes held by him and secured by the mortgage mentioned. In April following Pugh and Wilkinson brought this hypothecary action to subject the plantation to the alleged judicial mortgage resulting from the inscription of the Light judgment, to the extent of the \$791.38 which they had paid in February,—their position in the matter being that it was they who had paid the Light judgment: that, by virtue of such payment, they became subrogated to the judicial mortgage resulting from the in-

scription of that judgment; that upon the conveyance of the mortgaged property to Sample, the superior mortgage held by him became extinguished by confusion, and the judicial mortgage thus held by them was advanced to the first rank, and is now to be satisfied out of the property as though the Sample mortgage had never existed.

Defendant, Sample, for answer denies that plaintiff paid the Light judgment, and alleges that it was paid by the other judgment debtors, and ceased from that time to be a debt. In the alternative, and in case the court should hold that the judgment in question could, after thus being paid, operate as a judicial mortgage on the property of the judgment debtor,

and canceled the notes, and really intended to extinguish them; if it is made to appear that such intervening title existed, the law will presume conclusively that the mortgagee could not have intended to postpone his mortgage to the subsequent title. Indeed, it may properly be said that when there is an intervening estate, there can be no merger from the mere union of the equitable and legal estates, since the doctrine of merger springs from the fact that, when the entire equitable and legal estates are united in the same person, there can be no occasion to keep them distinct, for ordinarily it could be of no use to the owner to keep up a charge upon an estate of which he was seised in fee simple; but if there is an outstanding intervening title, the foundation for the merger does not exist, and as matter of law, it is so declared. Of course, if the purpose to extinguish the mortgage, notwithstanding an intervening title, is clearly manifested, as when the very object is to postpone the first to a second mortgage, and the mortgagor is willing to surrender his interest to effect that object, it would be unjust to the mortgagor to uphold the mortgage, and it would not be done. *Stanton v. Thompson*, 49 N. H. 272.

In the absence of an expressed intention to the contrary, the intention to keep the two estates separate will be implied and presumed when this is for the interest of the mortgagee, and there are many cases in which, in order to prevent injustice, equity will presume against a merger, although all the essential elements of a technical merger are present. *Katz v. Obenchain*, 48 Or. 352, 120 Am. St. Rep. 821, 85 Pac. 617.

So, in the absence of proof of actual intent on the part of the mortgagee that his mortgage lien be merged in the subsequently acquired equity of redemption, the court will presume against such merger, where the facts and situation of the parties render such presumption proper. *Grellet v. Heilshorn*, 4 Nev. 526.

Where, because of the interest of a junior lien upon the mortgaged property, it is advantageous for the holder of the senior

mortgage, who acquires the equity of redemption, to preserve his mortgage lien, and no actual intention is expressed, or, as in the case of an infant mortgagee, the mortgagee is incapable of expressing an intention, the court will consider what is the most advantageous to the mortgagee, and will hold the mortgage to be merged or not in accordance with such interest. *Forbes v. Moffatt*, 18 Ves. Jr. 384, 11 Revised Rep. 222, 17 Eng. Rul. Cas. 380; *Bell v. Tenny*, 29 Ohio St. 240.

In the absence of fraud and unfairness, equity will presume against the merger of a mortgage in a subsequently acquired equity of redemption, where such presumption is necessary for the security of the mortgagee. *Silliman v. Gammage*, 55 Tex. 356.

And an intention not to merge may be inferred from the fact that there are outstanding junior liens which would take precedence if the senior mortgage merged in the equity of redemption. *Townsend v. Provident Realty Co.* 110 App. Div. 226, 96 N. Y. Supp. 1091.

So, a deed by a mortgagor in satisfaction of a deed of trust does not constitute a merger entitling the holder of a junior encumbrance to priority over a subsequent purchaser from the grantee, where there is no evidence of any intention to merge any other interest of the holder, if the first trust deed would be prejudiced by a merger. *Collins v. Stocking*, 98 Mo. 290, 11 S. W. 750.

But this presumption is not conclusive; it may be rebutted by evidence that would warrant a jury in finding that a merger had been expressly agreed to, or that the mortgagee's conduct and action were such as could be only fairly ascribed to an intention to merge. *Pease v. Doane*, 33 Pa. Super. Ct. 6, *Stanton v. Thompson*, supra.

b. Where mortgage is discharged or surrendered.

1. Doctrine that discharge or surrender does not affect priority.

Where the intention of the parties as to whether the mortgage title shall merge in

then defendant alleges that such mortgage was inferior in rank to that held by him, which latter was recorded in 1905, and was the consideration of the transfer to him of the property affected by it; and he prays that his mortgage be recognized as superior to the other, and be enforced accordingly.

The note upon which the money was obtained with which the Light judgment was paid was made payable to the order of the bank, was signed by H. C. Stringfellow (either individually or as agent, we are unable to say), and bore the indorsement in blank of the plaintiffs. Under the law, as it now stands,—“a person placing his signature upon an instrument otherwise than as a maker, drawer, or acceptor, is

deemed to be an indorser, unless he clearly indicates, by appropriate words, his intention to be bound in some other capacity.” Act No. 64, p. 157, of 1904, § 63.

As plaintiffs placed their names on the note in question (not being the makers) without indicating that they intended to be otherwise bound, their rights and obligations were those of indorsers, and ordinarily they would have been liable to the payee or subsequent holders only on proof of presentment and demand for payment and notice of dishonor. It appears that they waived presentment for payment, demand, notice, pleas of division, and discussion, etc.; but the fact remains that, apart from such waiver (which is included in the printed form upon which

the title conveyed subsequently by the mortgagor is not expressly stated, it becomes a question of fact, although, as already seen, the very fact of the existence of a junior encumbrance raises a presumption against an intention to merge the title under the senior mortgage in that subsequently conveyed. The question has frequently arisen as to the effect of the circumstances or character of the transaction by which the title of the mortgagor passed to the mortgagee upon this presumption or in showing the intention of the parties. In considering these questions, the court has not always made it clear whether it was being considered as a question of fact or of law. The cases, however, are all grouped according to the character of the transaction or other circumstances, without reference to the manner in which the question was treated by the court.

By the weight of authority, a discharge by the mortgagee of his lien and the surrender of the evidence thereof to the mortgagor, in consideration of a conveyance of the interests of the latter to the former, does not operate as an extinguishment of the lien as against junior or intermediate encumbrances, and the senior lien still retains its priority. Different theories to sustain this doctrine are advanced by the cases, but with few exceptions they all reach this result.

It has been asserted that even though the mortgagee, through ignorance of the junior lien or through inadvertence, actually discharges his mortgage and cancels the notes secured thereby, with the intention to extinguish them, nevertheless, if it is made to appear that such intervening title exists, the law will presume conclusively that the mortgagee did not intend to postpone his mortgage to the subsequent title. *Stanton v. Thompson*, 49 N. H. 272.

In *Seiberling v. Tipton*, 113 Mo. 373, 21 S. W. 4, holding that merely satisfying of record a deed of trust on receipt of a conveyance of the mortgaged premises does not operate as a merger as against a junior encumbrance existing at the time, but unknown to the holder of the senior encum-

brance, it is said that, aside from giving notice, the statutory entry of satisfaction of a mortgage or deed of trust has no greater force or effect than a receipt acknowledging payment of the debt; the entry makes prima facie evidence of payment, but, like a receipt, it is open to explanation, and it may be shown by parol that the entry of satisfaction was made through some mistake of fact.

And the doctrine has been asserted that the holder of the purchase money mortgage does not waive satisfaction of or discharge his lien by taking a conveyance of the equity of redemption, although upon receipt of the conveyance he cancels the mortgage and note, since he previously held the mortgage to secure the debt, but afterwards he holds the land in place of the debt, which was satisfied. If the equity of redemption came to him burdened with a lien junior to the lien of his mortgage, he still holds the land with his prior preferred lien, notwithstanding the satisfaction of the debt by taking the equity of redemption. *Fitts v. Davis*, 42 Ill. 391.

And that, although a mortgagee releases his mortgage and cancels it of record on receipt of a conveyance of land in payment thereof, nevertheless the mortgage will be considered in existence as against a junior encumbrance of the existence of which the senior mortgagee had no knowledge at the time he released the mortgage. *Woodhurst v. Cramer*, 29 Wash. 40, 69 Pac. 501.

When there is nothing in a deed conveying the mortgaged premises from the mortgagor to the mortgagee showing an intention to merge the two estates, such intention is not proved by the surrender of the note and the release of the mortgaged property by the mortgagee, upon receipt of the deed. *Moffet v. Farwell*, 222 Ill. 543, 78 N. E. 925; *Farrand v. Long*, 184 Ill. 100, 56 N. E. 313; *Richardson v. Hockenhull*, 85 Ill. 124.

And merger is not established by the fact that the mortgagee accepted the deed in full satisfaction of his debt, and surrendered his note and mortgage. *Silliman v. Gammage*, 55 Tex. 366.

the note before us was executed), they were liable as indorsers only upon the failure of the maker to pay, and they acquired no rights against him until they did pay. The maker was therefore the principal debtor, and the circumstances that they aided him, by their signatures, to borrow the money from the bank, and bound themselves, as stated, for the debt, does not affect that question. The mortgage that was

obtained from the bank was not theirs to do with as they pleased. It was obtained for the purpose of paying a judgment for which all the parties were bound, and could not have been used for any other purpose, and, having been used for that purpose, the fact that plaintiffs were subsequently compelled, on Stringfellow's default, to make good their indorsement to the bank, did not make it any the less a

That the mortgagee, upon accepting a conveyance of the mortgaged premises from the mortgagor, surrendered to the latter the notes secured by the mortgage, is no evidence of an intention to merge the mortgage in the after-acquired title. *Hayden v. Lauffenburger*, 157 Mo. 88, 57 S. W. 721.

So, the fact that the mortgagee took the property in full for his mortgage, and entered a discharge of the mortgage upon the record, is not a material circumstance in determining the question of merger, and does not affect the rule that a senior mortgage does not merge as against a junior lien where it is clearly against the interest of the holder of the former to presume an intention to merge. *Stimpson v. Pease*, 53 Iowa, 572, 5 N. W. 760.

But see *Beacham v. Gurney*, *infra*, 2, as to effect of release of senior mortgage with knowledge of junior lien.

Where all the evidence shows that, on account of subsequent liens upon the land, the mortgagee intended to and did hold the mortgage to protect himself against their enforcement, there is no merger, although the deed to the mortgagee recites that the consideration thereof is a satisfaction of the mortgage, and the mortgage is surrendered. *Smith v. Swan*, 69 Iowa, 412, 29 N. W. 402; *Linscott v. Lamart*, 46 Iowa, 312.

As against a junior encumbrance, the lien of the trustee is not in equity extinguished by a conveyance of the encumbered land to the holder of the trust deed; and this is true although the lien is formally released on the record. *Sullivan v. Saunders*, 66 W. Va. 350, — L.R.A. (N.S.) —, 66 S. E. 497, 19 Ann. Cas. 480.

Although a mortgage is discharged of record, equity will keep it alive when justice so requires, and it is not the intention of the parties that the mortgage be merged in a subsequent executed deed. *Hanlon v. Doherty*, 109 Ind. 37, 9 N. E. 782.

It is not necessary to prove that the entry of satisfaction was by mistake, for merger in such cases does not take away the first lien, even though all the evidences of the debt are purposely destroyed. *Ibid*.

In *Lowman v. Lowman*, 118 Ill. 582, 9 N. E. 245, it is asserted as a general rule that the doctrine of merger will not apply where a mortgagee receives a conveyance of the mortgaged property and discharges the mortgage, if he retains possession of the mortgage.

2. Doctrine that priority is lost.

It has been held that, in the absence of 39 L.R.A. (N.S.)

any proof of fraud, when the mortgagee intentionally cancels his mortgage and accepts a deed from the mortgagor of the mortgaged land, he takes subject to a junior recorded encumbrance, although he had no actual knowledge of the same. *Frazee v. Inslee*, 2 N. J. Eq. 239. In this case the mortgage held entitled to priority was a renewal of a mortgage which was originally the senior mortgage, but the priority of lien of which had been lost by the execution of the renewal, being the mortgage in question. By the holding equity was done in that the original senior mortgage was restored to priority by holding the renewal thereof had gained priority by the discharge of what had formerly been the junior mortgage, but which had gained priority by the renewal of the senior mortgage. This fact undoubtedly influenced the opinion.

And although a mere conveyance of the mortgaged premises to the mortgagee will not constitute a merger of the estates, yet, where the mortgagee discharges his mortgage of record and surrenders up the mortgage indorsing the same satisfied, the estates are merged, although the mortgagee is laboring under the mistaken belief that the holder of the junior encumbrance made no claims upon the land; and equity will refuse to restore the lien, since the mortgagee was guilty of culpable and inexcusable negligence in not ascertaining whether or not the junior encumbrancer would enforce his mortgage. *Woodside v. Lippold*, 113 Ga. 877, 84 Am. St. Rep. 267, 39 S. E. 400.

The conclusion is also reached in *Errett v. Wheeler*, 109 Minn. 157, 26 L.R.A. (N.S.) 816, 123 N. W. 414, that a mortgagee who releases and discharges his mortgage upon receipt of the conveyance of the mortgaged premises, with knowledge of an outstanding adverse claim, is not entitled to have his mortgage reinstated or the release and satisfaction set aside, in order that it take priority over such outstanding title; and the rule is asserted that while there can be no doubt of the authority of a court of equity in a proper case, to reinstate a satisfied mortgage or other lien upon real estate when it appears to have been given under a mistake, inadvertence, or procured by fraud, nevertheless, when it is voluntarily given by the mortgagee or other lawful owner of the mortgage, without payment being made, or when not necessary to protect some other interest, the equitable doctrine of subrogation can have no particular application in proceedings to set it

payment with money borrowed by Stringfellow on their indorsement. Plaintiffs' position, so far as we can see, is no better, because of their having loaned their credit, than it would have been if they had loaned the money itself. And if they had taken the money from their pockets and loaned it to Stringfellow, and he and Mrs. Stringfellow and Miss Robinson had paid the Light judgment with it, that judgment

would have been satisfied, and would at once have ceased to be a debt against those by whom it was thus paid, and, not being a debt, it could not have operated as a mortgage on their property. The judgment obtained by Light, after condemning the different parties, reads: "And it is further ordered, adjudged, and decreed that sureties, J. C. Pugh and J. D. Wilkinson, be, and they are hereby, subrogated to all

aside, except perhaps by analogy. It is not entirely clear what theory the court adopted in reaching its conclusion, since the distinction is apparently in the mind of the court and is drawn between substitution or subrogation, and the right to have a discharge of the mortgage set aside and canceled; but the question whether a discharge or release of the mortgage under the circumstances presented would constitute an extinguishment of the lien so as to prevent the holder of the mortgage from relying thereon, as against the outstanding title, seems not to have been considered, and was apparently not presented, the case being tried upon the theory of the applicability of the doctrine of subrogation, which, as the court points out, is not applicable to such a case.

Where it is agreed that the debt to the mortgagee shall be in full for all claims against the mortgagor, including the mortgage debt, which is to be satisfied and the note and mortgage delivered up, and this agreement is made with the full knowledge of the existence of a junior encumbrance on the mortgaged property, the senior mortgage is merged in the deed, and no longer takes priority over the junior mortgage. *Beacham v. Gurney*, 91 Iowa, 621, 60 N. W. 187.

3. Where discharge is procured by fraud.

Equity will cancel and set aside a satisfaction of a mortgage, and foreclose the same in behalf of the mortgagee, who was induced to cancel the mortgage in reliance upon a deed of the premises, without knowledge of a judgment lien thereon, the title being represented as clear. *Hines v. Ward*, 121 Cal. 115, 53 Pac. 427.

And although it appears that the mortgagee intended to accept a deed of the equity of redemption in consideration of the discharge of the mortgagor's debt, nevertheless, if he was induced to accept the deed in payment and discharge of his debt, through fraudulent representations of the mortgagor that the premises were otherwise free from encumbrance, equity will relieve him from the unconscionable position in which this fraud has placed him, by reinstating him in his rights under his note and mortgage as they existed before the taking of the deed. *Howard v. Clark*, 71 Vt. 424, 76 Am. St. Rep. 782, 45 Atl. 1042.

And where the discharge of a mortgage and the acceptance of a deed of the mort-

gaged land is procured by the fraud of the mortgagor acting in connection with the holder of the subsequent encumbrance as against such encumbrance, equity will set aside the cancellation and reinstate the mortgage. *Young v. Hall*, 31 N. J. Eq. 429.

Even though the mortgagee receives a deed of the mortgaged property with the understanding and upon the agreement that the mortgage debt is thereby satisfied, yet where this agreement is based upon false representations and assertions and covenants in the deed that the property is unencumbered, the mortgagee, as against a subsequent judgment lien, in equity will be permitted to revive his mortgage, and recover thereon as though the deed had not been made and the mortgage released. *Vannice v. Bergen*, 16 Iowa, 555, 85 Am. Dec. 531.

4. Where mortgage previously assigned as collateral.

A conveyance from the mortgagor to the original mortgagee does not constitute a merger where the latter had previously assigned it to a third person as collateral security, even though he discharged the mortgage. *Brown v. Blydenburgh*, 7 N. Y. 141, 57 Am. Dec. 506. Cases are not included which pass upon the question of merger by a conveyance to the original mortgagee after he has parted with all title to the mortgage.

c. Where mortgages gives or receives additional consideration.

In Illinois if the mortgagee accepts from the mortgagor a deed in foreclosure of his mortgage, it does not constitute a merger. *Worcester Nat. Bank v. Cheeny*, 87 Ill. 602. Nor where the purpose of the deed is to give the mortgagee additional security. *Huebsch v. Scheel*, 81 Ill. 281. Nor where there is no additional valuable consideration accruing to the mortgagee (see Illinois cases, *supra*, I.); but where the mortgagee receives other valuable consideration in addition to the equity of redemption, as the relinquishment of a contingent right of dower of the wife of the mortgagor or covenants of warranty by the mortgagor, the intention to merge will be presumed. *Campbell v. Carter*, 14 Ill. 286; *Richardson v. Hockenhull*, 85 Ill. 124; *Shaver v. Williams*, 87 Ill. 469.

In *Campbell v. Carter*, 14 Ill. 286, the mortgagee, after having recovered judgment

the rights of plaintiff herein, on payment of the amount of this judgment, together with all costs."

In addition to which it appears that plaintiffs, a few days later, when the judgment was paid, obtained an instrument purporting to be a subrogation from the plaintiff. But the provision for the subrogation contained in the judgment was superfluous, since, upon payment of the judgment, they would have been subrogated by operation of law; and the instrument that they obtained from plaintiff was of no use, since plaintiff had no power to subrogate them to his rights in a judg-

ment which they were paying for, and with money borrowed by, the other plaintiffs. What plaintiffs have paid, and all that they have paid, was, not the judgment in question, but a debt represented by a note dated January 15, 1908, made payable in thirty days, and signed by H. C. Stringfellow, agent, due to the Commercial National Bank, upon which note they were indorsers. The judgment in question had been paid in the manner stated, nearly eighteen months before.

Even, however, were it conceded that the Light judgment survives and operates as a judicial mortgage, the most that plaintiffs

on his notes and the mortgage securing the same was endeavoring to enforce satisfaction thereof when he made arrangements with the mortgagor by which the latter conveyed to him by warranty deed the mortgaged premises, and in which the wife of the latter joined in order to bar her dower, this conveyance to be in satisfaction and discharge of the mortgage debt; and upon accepting the conveyance the mortgagee entered satisfaction of the judgment. This was held to be evidence of a merger, entitling the holder of a junior encumbrance to priority.

The fact that the mortgagee gave money consideration for the conveyance to him of the equity of redemption, and also surrendered the mortgage note, does not establish a merger as against the junior encumbrance, where the jury found as a matter of fact that the mortgage debt was not paid, and that the parties did not intend the transaction to operate in discharge of the mortgage. *New England Jewelry Co. v. Merriam*, 2 Allen, 390.

In the preceding case the court, after remarking that the finding of fact by a jury that there was no intention of merging a mortgage in a deed of the mortgaged property, although the mortgage was surrendered and a cash consideration also given for the deed, was conclusive on the question of merger, said that the mortgage and equity of redemption would not merge on account of the intervening junior encumbrance, and also that, as the mortgagee took possession of the premises after condition broken, his legal estate remained, notwithstanding the mortgage debt might have been afterwards paid or satisfied, unless discharged or reconveyed, and any remedy against him would be in equity, and not at law.

A deed to the mortgagee of the mortgaged premises, in consideration of some money and the release of the mortgage, does not merge the mortgage as against a junior lien. *Rumpp v. Gerkens*, 59 Cal. 496.

Nor does a conveyance by the mortgagor of the mortgaged premises to the assignee of the senior mortgage, in consideration of the sum due on the mortgage and a further sum paid, have the effect of extinguishing §9 L.R.A. (N.S.)

the mortgage debt and the lien of the mortgage. *Bell v. Tenny*, 29 Ohio St. 240.

And it does not constitute a merger for the mortgagee to purchase the equity of redemption, although he paid a valuable consideration therefor, but did not discharge the mortgage or surrender the same to the mortgagor. *Gray v. Nelson*, 77 Iowa, 63, 41 N. W. 566.

d. Where deed to mortgagee is invalid.

A mortgage is not merged where the deed conveying the equity of redemption to the mortgagee is invalid because fraudulent as to the creditors of the mortgagor. *Hoyt v. Dimon*, 5 Day, 479; *Coleman & B. Co. v. Rice*, 115 Ga. 510, 42 S. E. 5; *First Nat. Bank v. Essex*, 84 Ind. 144; *Ladd v. Wiggin*, 35 N. H. 421, 69 Am. Dec. 551. In the latter case it is said that avoiding the fraudulent conveyance revives the former lien and restores the parties to their original position.

Even though a mortgage would be merged in an unauthorized or fraudulent conveyance of the mortgaged property to the mortgagee, were the conveyance to stand, it would not merge where the conveyance is set aside. *Corwin v. Collett*, 16 Ohio St. 289.

e. Recitals in deed.

Where the intent to keep the mortgage alive appears upon the face of the instrument conveying the mortgaged property, this intent will be sustained. *Hatz's Appeal*, 40 Pa. 209. When not expressed, the question of intention is to be determined by the terms of the deed conveying the equity of redemption to the mortgagee, together with the surrounding facts and circumstances. *Adams v. Angell*, L. R. 5 Ch. Div. 634, 46 L. J. Ch. N. S. 352, 36 L. T. N. S. 334. But the mere recital in a deed conveying the mortgaged property to the mortgagee, that it is made subject to described junior encumbrances, does not operate to merge the senior mortgage as against such junior encumbrances. *Ibid*.

If no intention is expressed upon the face of the deed that the mortgage is to be

could claim would be that the property be sold, subject to Samples mortgage as it existed at the date of the conveyance to him, as in such case his mortgage, which had been in a condition of suspended animation, would revive, and, as it seems to be understood that the property would fall considerably short of satisfying it, plaintiffs would get nothing. This view seems to have been first expressed by this court in the case of *Millaudon v. Allard*, 2 La. 547, where Martin, J., said: "But the appellant's counsel urges that the mortgage creditor who purchases the premises is as if subrogated to himself, and preserves his

mortgage in regard of a posterior mortgage, and the confusion which results from the purchase suspends, indeed, his mortgage, but does not absolutely destroy it. He cannot have a mortgage on his own estate. This principle appears to us to be correctly established by Merlin. 13 *Repertoire, verbo subrogation de personnes*, § 4. He says the effect cannot have a longer duration than the cause. If the latter be temporary only, the former cannot be perpetual."

Which means that, whilst one cannot be, at the same time, owner and mortgagee of the same property, if the title which, apparently conveying perfect ownership, is

discharged, and there is nothing in the circumstances of the case requiring that such an intention be imputed to the parties upon equitable grounds, the mere conveyance of land to a person holding a senior encumbrance thereon will not operate to merge the latter's mortgage as against a junior encumbrance, although the deed recites that it is given subject to the latter mortgage. *Fowler v. Fay*, 62 Ill. 375.

The mortgage will not merge in the subsequently acquired title of the mortgagor where the deed recognizes the mortgage, and the situation of the parties clearly indicates that there is no intention to allow a subsequent lien to take priority. *Walker v. Goodsell*, 54 Mo. App. 631.

Although a deed from the mortgagor to the mortgagee recites that the consideration thereof is a satisfaction of the mortgage, and the mortgage is surrendered, the titles are not merged where it clearly appears that, on account of subsequent liens upon the land, the mortgagee intended to and did hold the mortgage to protect himself against their enforcement. *Smith v. Swan*, 69 Iowa, 412, 29 N. W. 402; *Linscott v. Lamart*, 46 Iowa, 312.

And although a deed recites that it is executed to cancel a mortgage, the mortgage is not merged therein as to a subsequent lien, where, by agreement between the mortgagor and mortgagee, the latter retains the note and mortgage as a protection against such lien. *Crosby v. Chase*, 17 Me. 369.

But where the first mortgagee purchases the mortgaged premises, and takes a deed in which he assumes and agrees to pay other mortgages thereon, and hold the grantor remediless with reference thereto, his mortgage is merged in his deed, and the junior encumbrance is no longer affected thereby. *Kneeland v. Moore*, 138 Mass. 198.

So, acceptance of a warranty deed of the mortgaged land containing a clause that the mortgagee assumes a junior mortgage and agrees to pay the same, and the cancellation of the note and mortgage and delivery thereof to the mortgagor, will operate as a merger as to the junior mortgage. *Ernst v. McChesney*, 186 Ill. 617, 58 N. E. 399.

39 L.R.A. (N.S.)

f. Where intention is expressed.

If the intention is expressed, that will control; if not, the intention of the mortgagee will be presumed in accordance with his interests. *Belknap v. Dennison*, 61 Vt. 520, 17 Atl. 738.

Although ordinarily the fact of the existence of a junior lien raises a presumption that the holder of the senior mortgage does not intend to merge the same in a subsequently acquired title in the lienor, yet this presumption may be rebutted by clear proof that it was the intention of the parties that the mortgage should merge in the subsequently acquired title, as where the very object is to postpone a senior to a junior mortgage, and the mortgagor, in order to effectuate that object, surrenders or conveys to the holder of the senior mortgage his interest in the mortgaged property. *Stanton v. Thompson*, 49 N. H. 272.

So, where the mortgagee takes a deed of mortgaged premises and agrees to pay both prior and subsequent mortgages on the property, his lien will be regarded as merged in his deed, and the subsequent encumbrance will take priority. *Brown v. Stead*, 5 Sim. 535, 2 L. J. Ch. N. S. 45.

The conveyance by the mortgagor to the mortgagee of the former's interest in the mortgaged premises does not merge the titles, where the parties have expressly stipulated that the conveyance shall not have that effect. *Agnew v. Charlotte, C. & A. R. Co.* 24 S. C. 18, 58 Am. Rep. 237; *Abbott v. Curran*, 98 N. Y. 665.

And a mortgage does not merge in a subsequently acquired title to the property, where it is expressly agreed that the mortgagee shall hold the note and mortgage for the protection and fortification of his title against a junior lien on the property. *Hulshoff v. Bowman*, 19 Ohio C. C. 554, 10 Ohio C. D. 343.

So, a special agreement between the mortgagor and the mortgagee made upon the latter receiving a conveyance of the mortgaged premises from the former, that the estates are to be kept separate in order to enable the mortgagee to foreclose his mortgage and thus cut off a junior encumbrance, precludes the merger. *Gibbs v. Johnson*, 104 Mich. 120, 62 N. W. 145.

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supposed to destroy the mortgage by confusion, turns out to be no title or an imperfect title, the mortgage, which was suspended and apparently destroyed, upon the assumption of perfect ownership in the mortgagee, is revived; the cause of the supposed destruction no longer existing. This principle, we take it, underlies the decisions: In *Judice v. Kerr*, 8 La. Ann. 462, in which it appears that, though a conveyance from the husband to the wife was set aside, the right of the wife to assert her legal mortgage on the property so conveyed was reserved. In *Wilson v. Curtis*, 13 La. Ann. 601, where, it having been found that a sale by one Blacketer to Wilson of certain property which had been attached by Curtis on a claim against Blacketer was simulated and fraudulent, it was held that Wilson was entitled to be heard in the assertion of certain mortgage and privileged claims on the same property. In *Chaffe v. Morgan*, 30 La. Ann. 1307, in which it was held (quoting from the syllabus): "The setting aside, for any cause of the sale of an immovable, made by a debtor to his creditor, who had a mortgage on the immovable, will not impair any legal rights on the property which the creditor had in virtue of his mortgage."

In *New Orleans Ins. Asso. v. Labranche*, 31 La. Ann. 841, where the court said:

"Our [Revised Civil] Code provides, in article 3409, which is similar to Code Napoleon 2147: 'The servitudes and incorporeal rights which the third possessor holds on the property, before his possession of it, are revived, after his relinquishment or after the sale made under execution against him.' Under this unambiguous provision were Montegut evicted, by the benevolence of the lawmaker, would come the *restitutio ad integrum*. The annulment or rescission of the sale would have the effect of placing the parties in the position they held before the sale; each party being restored to the rights he then had, and abandoning those which had, ineffectually, been transported [transferred] to him."

And in the cases of *Spencer v. Goodman*, 33 La. Ann. 909; *Dawson v. Thorpe*, 39 La. Ann. 366, 1 So. 686; *Gates v. Gaither*, 46 La. Ann. 289, 15 So. 50; *Harrison v. Ottman*, 111 La. 740, 35 So. 844. And so, in the instant case, if the defendant did not, by virtue of the conveyance to him, get a perfect, unencumbered title to the property in question, his mortgage was not destroyed by confusion.

If he did get such a title, then the property is not encumbered by the judicial mortgage set up by plaintiffs.
39 L.R.A. (N.S.)

We therefore conclude that there is error in the judgment of the Court of Appeal, reversing the judgment of the District Court in favor of the defendant, and it is accordingly ordered, adjudged, and decreed that said judgment of the Court of Appeal be avoided and reversed, and that the judgment of the District Court be affirmed; plaintiffs to pay all costs.

Petition for rehearing denied May 24, 1909.

LOUISIANA SUPREME COURT.

STATE OF LOUISIANA

v.

JOHN KEATINE, Appt.

(130 La. 434, 58 So. 139.)

Sunday — receiving verdict — validity.

There is nothing in act No. 6 of 1904 which adds to the pre-existing prohibitions against the performance of judicial acts on Sunday, and since the passage of that act, as before, though no judicial acts done on Sunday are valid, ministerial acts are. Hence, when a criminal case has been given to a jury, the verdict may be returned into, and received by, the court, on Sunday, though no judgment can be rendered thereon on that day.

(March 11, 1912.)

Headnotes by MONROE, J.

Note. — Receiving verdict on Sunday.

Earlier cases on this subject may be found in notes to *Parsons v. Lindsay*, 3 L.R.A. 658, and *Henderson v. Reynolds*, 7 L.R.A. 327.

By the common law Sunday was a non-judicial day, *dies dominicus non est dies juridicus*, and authorities which have looked upon the receiving of a verdict as a judicial act have held its reception on Sunday invalid. *Nabors v. State*, 6 Ala. 200; *Weldon v. Colquitt*, 62 Ga. 449, 35 Am. Rep. 128 (*obiter*); *Shaw v. McCombs*, 2 Bay, 232; *Harper v. State*, 43 Tex. 431.

But a distinction is made between judicial acts and those of a ministerial character; and it seems to be generally held that, in the absence of a statute, ministerial acts performed on Sunday are valid; consequently where a verdict is deemed a ministerial act, its reception on Sunday is held valid. *Hodge v. State*, 29 Fla. 500, 10 So. 556; *State v. Ford*, 37 La. Ann. 443; *State v. Cauty*, 41 La. Ann. 589, 6 So. 338; *Burrage v. State*, — Miss. —, 58 So. 217; *Territory v. Nichols*, 3 N. M. 103, 2 Pac. 78; *State v. Straub*, 16 Wash. 111, 47 Pac. 227.

So, some cases hold that a verdict may be received on Sunday on the ground of

A PPEAL by defendant from a judgment of the Judicial District Court for the Parish of St. John the Baptist convicting him of a felonious assault. Affirmed.

The facts are stated in the opinion.

Mr. H. N. Gautier for appellant.

Mr. G. A. Gondran, with Messrs. Walter Guion, Attorney General, and L. H. Marrero, Jr., for the State.

necessity (*State v. Ford*, 37 La. Ann. 443; *Burrage v. State*, — Miss. —, 58 So. 217; *Territory v. Nichols*, 3 N. M. 103, 2 Pac. 78; even though it is a judicial act (*Hiller v. English*, 4 Strobb. L. 486); and see note 7 L.R.A. 327.

And in some states the reception of a verdict is authorized by statute, either expressly (*State v. Wilson*, 121 Mo. 434, 26 S. W. 357; *State v. Crisp*, 126 Mo. 605, 29 S. W. 699; *State v. Rover*, 13 Nev. 17; *Pulling v. People*, 8 Barb. 384; *Ex parte Tice*, 32 Or. 179, 49 Pac. 1038); or by construction (*Meece v. Com.* 78 Ky. 586; *Miligan v. Territory*, 2 Okla. 164, 37 Pac. 1059).

Other cases, without discussing explicitly the grounds of their decisions, have held that verdicts were not invalid because received on Sunday. *Stone v. United States*, 167 U. S. 178, 42 L. ed. 127, 17 Sup. Ct. Rep. 778, affirming 12 C. C. A. 451, 29 U. S. App. 32, 64 Fed. 667; *Chamblee v. State*, 78 Ala. 466; *Simmons v. State*, 129 Ala. 41, 29 So. 929; *Rawlins v. State*, 124 Ga. 31, 52 S. E. 1, affirmed in 201 U. S. 638, 50 L. ed. 899, 26 Sup. Ct. Rep. 560, 5 Ann. Cas. 783; *Baxter v. People*, 3 Ill. 368; *Joy v. State*, 14 Ind. 139; *Jones v. Johnson*, 61 Ind. 257; *State v. Atkinson*, 104 La. 570, 29 So. 279 (*obiter*); *Tuttle v. Tuttle*, 146 N. C. 484, 125 Am. St. Rep. 481, 59 S. E. 1008; *State v. Penley*, 107 N. C. 808, 12 S. E. 455; *State v. Varnado*, 126 La. 732, 52 So. 1006; *Shearman v. State*, 1 Tex. App. 215, 28 Am. Rep. 402 (*obiter*); *McKinney v. State*, 8 Tex. App. 626; *Powers v. State*, 23 Tex. App. 42, 5 S. W. 153; *Brown v. State*, 32 Tex. Crim. Rep. 119, 22 S. W. 596; *Moore v. State*, 49 Tex. Crim. Rep. 499, 96 S. W. 321.

Where in a capital case a verdict is brought in and read on Sunday, in the presence of the associate judge, sheriff, jury, and defendant, and the jury discharged; and on the following Monday, the defendant being in open court, the verdict is there read and entered by the court and judgment pronounced,—such proceeding is regular. *Sanford v. State*, 143 Ala. 78, 39 So. 370.

So, where the court below commenced the final charge to the jury before 12 o'clock on Saturday night and concluded it after that hour, and the jury remained in their room until after the Sabbath had passed away and then returned their verdict, it was held in *Gholston v. Gholston*, 31 Ga. 625, that this did not vitiate the verdict, notwithstanding there may have been reason to believe that they had come to an

Monroe, J., delivered the opinion of the court:

Defendant was charged with felonious assault by shooting, and, having been convicted and sentenced, presents his case to this court by means of certain bills of exception and an assignment of error, from which latter and from the face of the record it appears that the trial was in prog-

reement on the Sabbath day, and notwithstanding the judge caused the jury, by consent of the parties, to come into court on the Sabbath, but, upon the withdrawal of the consent by one party, remanded them before the verdict had been read.

So, where claimant consented that a verdict might be returned into court in her absence, the fact that it was so returned on the Sabbath day is not cause for a new trial; it appearing that the jury had been previously sent out to make up their verdict and they did not agree upon the same until after the Sabbath began. *Bernstein v. Myers*, 99 Ga. 90, 24 S. E. 854.

And where in a justice's court a case on appeal was tried and submitted to a jury on Saturday, and, being unable to agree before the intervention of Sunday, the jury continued their deliberations until Sunday evening, when, having agreed, the court was opened, the verdict received, and the jurors discharged, such verdict so rendered and received was held legal. *Weaver v. Carter*, 101 Ga. 206, 28 S. E. 869.

In *Johnston v. People*, 31 Ill. 469, the court, in holding a recognizance taken on Sunday valid and binding, said that generally judicial acts cannot be performed on Sunday, yet, verdicts of juries have been received on that day and held valid.

Where the accused was tried at a special term of the court which expired Saturday night at 12 o'clock, and the jury, still being in the jury room, returned their verdict soon after that time, it was held in *Bales v. Com.* 11 Ky. L. Rep. 297, 11 S. W. 470, that the verdict was properly received, since the regular term having begun on the following Monday, the court did not lose jurisdiction of the case by the expiration of the special term.

Where the term legally expired at midnight Sunday, unless, in point of fact the court had adjourned earlier, the reception of the verdict on Sunday was, in *Taylor v. Ervin*, 119 N. C. 274, 25 S. E. 875, held legal.

In *Hoghtaling v. Osborn*, 15 Johns. 119, it was held proper to receive the verdict on Sunday, presuming that the jury were impeached before that day commenced.

So, in *Hiller v. English*, 4 Strobb. L. 486, it is held that where Sunday falls within a term, a verdict received on that day is valid.

In *Huffman v. State*, 28 Tex. App. 174, 12 S. W. 588, it was held not error to receive a verdict on Sunday, and in the absence of defendant's counsel, the defendant himself being present.

J. D. C.

ress on Saturday, June 17, 1911, and, save for two short recesses, continued, without interruption, until quite late that night, when the jury, having received the charge of the court, retired to deliberate upon their verdict, "and the court took a recess."

The minutes then continue as follows:

It being 12:15 A. M., the recess being over, the court resumed its business.

Present, counsel for the state; also present, the accused and his counsel. The jury came into court in charge of the sheriff, and, on being called and all present, through their foreman, presented the following verdict, to wit: "June 17, 1911—Guilty as charged. [Signed] J. N. Gaudet, Foreman."

The jury was then polled, the verdict on motion of the district attorney recorded, the accused remanded, and the jury discharged.

According to the minutes as we interpret them, the jury retired and found the verdict before midnight of Saturday, but the verdict was returned into and received by the court on Sunday morning, after a recess, which terminated at 12:15 A. M. The learned counsel for defendant contends that under the law as it now stands the verdict should be set aside, and he cites act No. 6 of 1904, which reads: "That, whenever the impaneling of a jury or the taking of evidence, on the trial of any case, shall have been begun, but not concluded, at the time at which there shall intervene any legal holiday or legal half holiday, it shall be lawful for the presiding judge, and within his discretion, to order said trial to be proceeded with upon said legal holiday, if not a Sunday or Christmas Day, or upon said legal half holiday, and all proceedings, thereafter had in the trial of said case, shall have the same force and effect as though had on a day not a legal holiday or legal half holiday."

And all laws in conflict are repealed.

We find nothing in the statute cited which adds to the pre-existing prohibitions against the performance of judicial acts on Sunday, the evident purpose being merely to allow such acts to be performed, under the conditions stated upon legal holidays, other than Sunday and Christmas Day.

In *State v. Ford*, 37 La. Ann. 466, however, in which the verdict though received and announced before midnight, was recorded a few minutes after that hour, on Sunday morning, this court quoted with approval the rule stated by Mr. Bishop, as follows: "Though Sunday is *dies non juridicus*, wherein no judicial act is valid, but

ministerial acts are, a verdict received on Sunday is good, yet not a judgment on the verdict. And on Sunday the court may find that the jury cannot agree, and discharge them."

The ruling so made was approved in *State v. Cauty*, 41 La. Ann. 589, 6 So. 338, and in *State v. Atkinson*, 104 La. 570, 29 So. 279, though in the case last mentioned the verdict was returned on Thanksgiving Day. In *State v. Varnado*, 126 La. 742-743, 52 So. 1006, the verdict was received and recorded and the jury discharged on Sunday, and this court said: "It is settled beyond controversy that the receiving and recordation of a verdict on a Sunday or other *dies non juridicus* is permissible."

That it was not the purpose of act No. 6 of 1904 to change the rule upon the subject is evident from the language: "Whenever the impaneling of a jury or the taking of evidence, on the trial of any case, shall have been begun, but not concluded," etc.

In a case therefore such as this, where the impaneling of the jury and the taking of the evidence has been concluded, and the jury has found the verdict, before the advent of the *dies non juridicus*, the law finds no application. In *State v. Duncan*, 118 La. 702, 10 L.R.A.(N.S.) 791, 43 So. 283, 11 Ann. Cas. 557 (to which the learned counsel refers), the point presented for decision, and decided, was that act No. 3, of 1904, making "general election" days legal holidays, did not render void judicial proceedings held on a day upon which was held an election less than a general election. And, whilst it was said that a sanctity is attributed to Sunday, apart from any statutory enactments, there is nothing in the opinion from which the idea can be deduced that, therefore, the return of a verdict on that day would be unlawful.

A motion for new trial was filed on the ground that one of the veniremen, selected as a juror, had, before being called to serve, expressed an opinion as to the guilt of the defendant, and had said that, if he were chosen as a juror, he would find guilty as charged. But, on the hearing of the motion, defendant entirely failed to sustain the allegation to that effect.

Defendant was allowed to amend his motion on the hearing of it in order to charge that one of the jurors was asleep during the trial; and there was some testimony given to that effect, as, also, some to the contrary. The trial judge, in signing what are called "the consolidated bills of exception," says: "The court will reiterate what it said in its oral reasons for refusing the new trial relative to the charge that Dr. Winceslas Lions, one of the jurors,

slept during the trial of the case. The court said that this charge was a myth; that this juror sat on the front bench, at the very feet of the judge, where he could be seen at all times during the progress of the trial; and that such an attempted misconduct on his part, or on the part of any other juror, would have met with a most severe reprimand at the hands of the court."

The juror who sat next to Dr. Lions fully corroborates the statement of the judge. We are therefore, of opinion that the charges contained therein were not well founded, and that the motion for new trial was properly overruled. There are some other matters presented by bills of exception, but they have been practically abandoned, and are without merit.

The judgment appealed from is accordingly affirmed.

Petition for rehearing denied, April 8, 1912.

MAINE SUPREME JUDICIAL COURT.

HERBERT A. FOGG

v.

LINWOOD C. TYLER.

PETITION OF GEORGE W. MAXFIELD.

(— Me. —, 82 Atl. 1008.)

Bank — special deposit — recovery from receiver.

1. A package of bills marked with the owner's initials, and delivered to a bank

Note. — When is a bank deposit special.

For the earlier cases upon the question when a deposit in bank is special so that the title remains in the depositor, see note to Mutual Acci. Asso. v. Jacobs, 16 L.R.A. 516.

"A special deposit is where the whole contract is that the thing deposited shall be safely kept, and that identical thing returned to the depositor." 1 Morse, Banks & Bkg. 4th ed. § 183.

"It is only where the special money or thing deposited is received by the bank to be kept to itself and returned *in corpore* on demand, that the deposit can be claimed to be special." Re Mutual Bldg. Fund Soc., 2 Hughes, 374, Fed. Cas. No. 9,976.

"If the agreement between the parties is that the identical coin or currency shall be laid aside and returned, then it is a special deposit. But if the agreement is that the money shall be returned not in the specific coin or currency deposited, but in an equal sum, it is a general deposit. In either case the money is deposited for safe-keeping, and the only distinction between the two kinds of deposit is in the character of the return that is to be made thereof to the 39 L.R.A. (N.S.)

for safe-keeping, and for which a receipt stating that fact is executed by the cashier, is a special deposit, which the owner is entitled to have returned to him in case the assets of the bank pass into the hands of a receiver.

Trusts — following trust funds — identification.

2. That a package of bills delivered to a bank for safe-keeping as a special deposit cannot be identified when the assets pass into the hands of a receiver does not destroy the prior right of the owner to payment out of such assets, if the cash on hand never fell below the amount of the deposit after it was made.

(April 8, 1912.)

REPORT by the Supreme Judicial Court for Penobscot County for the opinion of the Law Court of a petition for an order directing the receiver of the bankrupt firm of Tyler, Fogg, & Company to deliver to petitioner a special deposit of money which he had made in the bank. Granted.

The facts are stated in the opinion.

Mr. E. C. Ryder, for petitioner:

The deposit by the petitioner of the package of money for safe-keeping was a special deposit, and the title to the property remained in the petitioner.

3 Am. & Eng. Enc. Law, 824; Mutual Acci. Asso. v. Jacobs, 141 Ill. 261, 16 L.R.A. 516, 33 Am. St. Rep. 302, 31 N. E. 414; Dawson v. Real Estate Bank, 5 Ark. 297; Alston v. State, 92 Ala. 124, 13 L.R.A. 659, 9 So. 732; McLain v. Wallace, 103 Ind. 562, 5 N. E. 911; Pattison v. Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582;

depositor, whether it shall be returned in the identical thing deposited, or in kind." Warren v. Nix, 97 Ark. 374, 135 S. W. 896.

So, it has been held that the deposit of a sum of money in a bank to secure the purchase of certain city bonds, in the event they are awarded to the bank, the money to be returned to the depositor in the event the bonds are not awarded to the bank, or upon the depositor's taking up the last bond of the issue, in the event the bonds are so awarded, is a special deposit which may be recovered from a receiver of the bank, subsequently appointed, after the depositor has bought and taken up from the bank all of such bonds as are offered for delivery. Miami v. Shutts, 59 Fla. 462, 51 So. 929.

And a sum of money in gold coin, delivered to the acting president of a bank in his room, as a pledge to protect the bank from liability or loss under a contract to furnish a bail bond, for which coin a certificate of deposit or receipt is executed by the vice president and teller of the bank, stating that it is payable only on release of bond and not subject to check, and which coin afterwards, but without the knowledge or consent of the depositor, goes into

State v. Carson City Sav. Bank, 17 Nev. 146, 30 Pac. 703.

Tyler, Fogg & Co. became a trustee of the fund and answerable as such to the petitioner.

Lynam v. Belfast Nat. Bank, 98 Me. 448, 57 Atl. 799; Boettcher v. Colorado Nat. Bank 15 Colo. 16, 24 Pac. 582.

So far as appears, all other moneys received on deposit by the firm prior the time its vaults were closed, became the property of the firm.

National Mahaiwe Bank v. Peck, 127 Mass. 298, 34 Am. Rep. 368; Wasson v. Lamb, 120 Ind. 514, 6 L.R.A. 191, 16 Am. St. Rep. 342, 22 N. E. 729; Camp v. First Nat. Bank, 44 Fla. 497, 103 Am. St. Rep. 173, 33 So. 241; Reynes v. Dumont, 130 U. S. 354, 32 L. ed. 934, 9 Sup. Ct. Rep.

486; Clark v. Northampton Nat. Bank, 160 Mass. 26, 35 N. E. 108; Straus v. Tradesmen's Nat. Bank, 122 N. Y. 379, 25 N. E. 372; School Dist. v. First Nat. Bank, 102 Mass. 174; Grissom v. Commercial Nat. Bank, 87 Tenn. 350, 3 L.R.A. 273, 10 Am. St. Rep. 669, 10 S. W. 774.

If the money deposited by Mr. Maxfield can be traced into the general fund of the bankrupt firm, and at no time was that fund less than the amount of the special deposit, the petitioner need go no further.

Houghton v. Davenport, 74 Me. 590; Cushman v. Goodwin, 95 Me. 353, 50 Atl. 50; First Nat. Bank v. Eastern Trust & Bkg. Co. 108 Me. 79, 79 Atl. 4.

A special deposit cannot be used or appropriated by a bank without a breach of trust.

the bank vaults through the regular channels, is a special deposit, to the return of which the depositor is entitled, upon the release of the bond, after the bank has become insolvent. Anderson v. Pacific Bank, 112 Cal. 598, 32 L.R.A. 479 53 Am. St. Rep. 228, 44 Pac. 1063.

And money deposited in a bank by a prospective purchaser of a machine, to be paid over to the vender provided the machine fulfils the guaranty, after trial, and for which the bank cashier executes a certificate of deposit payable to the vender, provisionally, which certificate is retained by the bank, the depositor receiving no deposit slip, certificate of deposit, or other writing for the money deposited, is a special deposit which may be recovered as a preferential claim, in case of the appointment of a receiver for the bank. Shopert v. Indiana Nat. Bank, 41 Ind. App. 474, 83 N. E. 515.

Likewise, money or checks for a part payment on the purchase price of real estate, placed by the depositor in a bank for safe-keeping until the approval of the abstract of title, or the happening of some other contingency, and not to be checked out by him; or placed in the bank under an agreement that it shall act as bailee or agent, and deliver the money to the seller under certain conditions, or apply it to some special purpose,—is a special deposit, which the bank, as agent or bailee, has no right to use or mingle with its own funds. Covey v. Cannon, — Ark. —, 149 S. W. 514.

And money left with a bank to be paid to a certain person on presentation by him of a warranty deed conveying certain land to the depositor, with an abstract showing good title in the grantor, for which money the bank gives a receipt, reciting that it is received for such purpose, constitutes a special deposit which the owner is entitled to recover in case the assets of the bank pass into the hands of a receiver, although the money, without the knowledge or consent of the owner, is treated by the bank the same as any general deposit and is mixed with the general funds of the bank. Kimmel v. Dick-
su L.R.A. (N.S.)

son, 5 S. D. 221, 25 L.R.A. 309, 49 Am. St. Rep. 869, 58 N. W. 561.

Where a debtor, desiring to pay a creditor in another city, deposited the amount of his debt in a bank, to be by it transmitted and paid to the creditor, and the bank ordered another bank in the creditor's city to pay the amount to the creditor and charge the same to it, the refusal of the creditor, upon demanding payment of the amount from the second bank, to accept from the latter in payment either credit upon his own account with it or exchange on the first bank, fixes the character of the order of the first bank to the second as a special deposit for the creditor, for which, as such, he is entitled to maintain an action against a receiver of the second bank. Moreland v. Brown, 30 C. C. A. 23, 56 U. S. App. 722, 86 Fed. 257.

And a draft sent to a bank, which is the correspondent of a certain other bank, for the credit of the account of the latter bank, for the use of the depositor's agent, is a special deposit, which may be recovered by the depositor from the first bank, in case of the insolvency of the second before the deposit has been actually transmitted to it, or drawn out by it, for the use of the agent of the depositor. American Exch. Nat. Bank v. Loretta Gold & S. Min. Co. 165 Ill. 103, 56 Am. St. Rep. 233, 46 N. E. 202.

And a remittance to a bank for the account of another bank, of which the first bank is correspondent, with instructions to the second bank to pay the amount thereof to a third bank, is a special deposit, made for a particular purpose, and in the nature of a bailment, the amount of which the remitter, never having parted with his title thereto, is entitled to recover from the bank which received credit therefor, in case the latter, being insolvent, but having more than the amount of this special deposit in its vaults at all times after the receipt thereof, has suspended payment and closed its doors without having paid the amount as instructed. Montagu v. Pacific Bank, 81 Fed. 602.

A deposit is also special, so that it can

Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168; Englar v. Offutt, 70 Md. 78, 14 Am. St. Rep. 332, 16 Atl. 497.

Trust money mingled with trustee's money may be followed.

2 Lewin, Tr. 894; 2 Perry, Tr. 837, 838; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693; First Nat. Bank v. Hummel, 14 Colo. 259, 8 L.R.A. 788, 20 Am. St. Rep. 257, 23 Pac. 986; Independent Dist. v. King, 80 Iowa, 497, 45 N. W. 908; Carley v. Graves, 85 Mich. 483, 24 Am. St. Rep. 99, 48 N. W. 710; Frith v. Cartland, 2 Hem. & M. 420, 34 L. J. Ch. N. S. 301, 11 Jur. N. S. 238, 12 L. T. N. S. 175, 13 Week. Rep. 493; Pennell v. Deffell, 4 De G. M. & G. 382, 1 Eq. Rep. 579, 23 L. J. Ch. N. S. 115, 18 Jur. 273, 1 Week. Rep. 499.

In equity money may be followed which has no earmarks.

Knatchbull v. Hallett, L. R. 13 Ch. Div. 696, 49 L. J. Ch. N. S. 415, 42 L. T. N. S. 421, 28 Week. Rep. 732; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693; Farmers' & M. Nat. Bank v. King, 57 Pa. 202, 98 Am. Dec. 215; Harrison v. Smith, 83 Mo. 210, 53 Am. Rep. 571; Taylor v. Plumer, 3 Maule & S. 562, 2 Rose, 415, 16 Revised Rep. 361; Lynam v. Belfast Nat. Bank, 98 Me. 448, 57 Atl. 799.

Mr. Charles H. Bartlett, receiver in *propria persona*:

The transaction disclosed by the evidence was simply a gratuitous bailment.

4 Words & Phrases, 3160; Black's Law Dict. 2d ed. 114.

be recovered from a receiver of the bank in preference to claims of general creditors, where a certified check, which a bank refuses to receive on general deposit to the credit of an undesirable customer, is left, indorsed payable to the bank, for the specific purpose of taking up a check of like amount which the customer has drawn against the bank, with the paying teller, who gives a receipt therefor, and for more than four months carries the check in his cash, with a memorandum expressing the purpose thereof, after which he sends the check forward through the clearing house for collection, and in its place causes a certificate of deposit to be made out, reciting that the bank has deposited the amount of the check, and showing by indorsement on the back that it represents the said check, and which is retained until it comes into the hands of the receiver. *Star Cutter Co. v. Smith*, 37 Ill. App. 212.

And a fund placed in a trust company to the credit of a bank for the sole purpose of paying drafts drawn by a construction company on the bank in payment of items of construction in connection with a certain railway, the bank having agreed that the fund shall be used for no other purpose, constitutes a special deposit, to which the holders of such drafts for construction work are entitled, to the extent of the amount of their respective drafts, upon the failure of the bank. *McBride v. American R. & Light-ing Co.* — Tex. Civ. App. —, 127 S. W. 229.

But a bank deposit is not necessarily special and may be shown to be general, although the pass book given by the bank to the depositor describes the deposit as a special deposit, and the bank also furnishes the depositor with a form of a filled out check to be used in drawing on the deposit, upon which is written the words "special deposit." *Carr v. State*, 104 Ala. 43, 16 So. 155.

And a deposit of money paid into a savings bank over the counter, no pains being taken to keep it separate from other money or to preserve its identity, is not a special deposit, though made pursuant to an adver-

tisement of a bank, which had suspended payments over its counter, that it would resume business "by receiving special, separate deposits in trust to new account, pledging the bank to use the deposits only in payment of checks against that new account." *Re Mutual Bldg. Fund Soc.* 2 Hughes, 374, Fed. Cas. No. 9,976.

So, money deposited in a bank by the clerk of a court, who is also register in chancery, pursuant to a statute authorizing him to deposit in bank all moneys brought into court and paid to him by or for any suitor, which money is not treated by the bank as a special deposit, but is mingled with the general funds of the bank, does not constitute a special deposit. *Retan v. Union Trust Co.* 134 Mich. 1, 95 N. W. 1006.

And money deposited in a bank by an executor to the credit of the estate of the deceased, subject to checks drawn by the executor in his official capacity, and without any promise on the part of the bank to keep the identical money and to return it to him, is not a special deposit, although made with the knowledge of the bank that the money is a trust fund held by the executor. *Officer v. Officer*, 120 Iowa, 389, 90 Am. St. Rep. 365, 94 N. W. 947.

Where, pending litigation over the question of title and ownership of certain land in the possession of a tenant, it was agreed between the parties that the tenant should deposit in a certain bank the money representing the landlord's share of the rentals arising from the land during the pendency of the litigation, to abide the final decision of the controversy over the title, and then to go to the successful party, and there was no express agreement or understanding between the claimants and the bank that the deposit should be special, it is merely a general deposit. *Minard v. Watts*, 186 Fed. 245.

And money left with a bank for future investment in a real estate mortgage, which is entered and posted in the books of the bank the same as any regular deposit, and mingled with the funds of the bank, and for which

A special deposit must be traced like other trust property.

Butler v. Sprague, 66 N. Y. 392; Italian Fruit & Importing Co. v. Penniman, 100 Md. 698, 1 L.R.A.(N.S.) 252, 61 Atl. 694.

If the petitioner be entitled to receive his property, it must be on the ground of identification, and not on the ground of preference as a creditor.

Bromley v. Cleveland, C. C. & St. L. R. Co. 103 Wis. 562, 79 N. W. 741; Re First State Bank, 149 Iowa, 662, 129 N. W. 70; Crawford County v. Strawn, 15 L.R.A.(N.S.) 1100, 84 C. C. A. 553, 157 Fed. 49; Wetherell v. O'Brien, 140 Ill. 146, 33 Am. St. Rep. 221, 29 N. E. 904.

The burden is on the petitioner to identify his property or at least to trace it into some specific fund on which equity can impress a trust.

Goodell v. Buck, 67 Me. 514; Portland & H. S. B. Co. v. Locke, 73 Me. 370; Houghton v. Davenport, 74 Me. 590; Cushman v. Goodwin, 95 Me. 353, 50 Atl. 50; First Nat. Bank v. Eastern Trust & Bkg. Co. 108 Me. 79, 79 Atl. 4; Little v. Chadwick, 151 Mass. 109, 7 L.R.A. 570, 23 N. E. 1005; Lowe v. Jones, 192 Mass. 94, 6 L.R.A.(N.S.) 487, 116 Am. St. Rep. 225, 78 N. E. 402, 7 Ann. Cas. 551; Hewitt v. Hayes, 205 Mass. 356, 137 Am. St. Rep. 448, 91 N. E. 332; Slater v. Oriental Mills,

18 R. I. 352, 27 Atl. 443; Moore v. Taylor, 251 Ill. 468, 96 N. E. 229; Bishop v. Mahoney, 70 Minn. 238, 73 N. W. 6; Jones v. Chesebrough, 105 Iowa, 303, 75 N. W. 97; Twohy Mercantile Co. v. Melbye, 78 Minn. 357, 81 N. W. 20; Bradley v. Chesebrough, 111 Iowa, 126, 82 N. W. 472; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693; Re Hallett, L. R. 13 Ch. Div. 696, 49 L. J. Ch. N. S. 415, 42 L. T. N. S. 421, 28 Week. Rep. 732; Re Mulligan, 116 Fed. 715; 28 Am. & Eng. Enc. Law, 2d ed. 1120; 1 Perry, Tr. 6th ed. § 128; 2 Perry, Tr. 6th ed. § 828, note p. 1361; 3 Pom. Eq. Jur. 3d ed. § 1048, note F.

When the funds of several *cestuis que trust* are commingled, in the absence of evidence, withdrawals from the fund are presumed to be made in the same order in which they were deposited.

28 Am. & Eng. Enc. Law, 2d ed. 1116, note 4; Hewitt v. Hayes, 205 Mass. 365, 137 Am. St. Rep. 448, 91 N. E. 332; Clayton's Case, 1 Meriv. 572.

Mr. Edgar M. Simpson for committee of unsecured creditors.

Whitehouse, Ch. J., delivered the opinion of the court:

This is a petition filed by George W. Maxfield in the matter of the receivership

of the depositor receives an ordinary pass book, in which the money is credited to him and charged to the bank, does not constitute a special deposit, which the depositor is entitled to recover from an assignee of the bank after its insolvency, in preference to other creditors. Wetherell v. O'Brien, 140 Ill. 146, 33 Am. St. Rep. 221, 29 N. E. 904, reversing 41 Ill. App. 142.

Likewise, a deposit of money in a bank to secure a surety on a bond, for which the depositor receives a duplicate deposit slip bearing a written memorandum to that effect, and against which he subsequently draws a check payable to "certificates of deposit," for which he receives two certificates of deposit, one to be held by the surety and the other to secure another set of bondsmen,—is not a special deposit, although the depositor did not understand the force and effect of the duplicate deposit slip and of the check when he received the one and signed and delivered the other, but thought the papers were merely receipts for the money. Dearborn v. Washington Sav. Bank, 13 Wash. 345, 42 Pac. 1107.

And a roll of bills, neither wrapped nor tied nor inclosed within any kind of receptacle, left at a bank by the owner, without expecting a return of the identical roll of bills, but with the statement that he believes he will leave it for a few days and that he wants the bank to keep it for a few days, for which he is given an ordinary pass book in which the transaction is entered 39 L.R.A.(N.S.)

as an ordinary deposit, no request being made that the money be kept apart from the funds of the bank, no special agreement being made as to the character of the deposit, and ordinary deposit slips being prepared at the time, from which the books of the bank are afterward written up,—is not a special deposit, to the return of which the depositor is entitled upon the failure of the bank and the appointment of a receiver therefor, although he says at the time of the deposit, that he does not want a check book, because he intends drawing all the money in a few days, and that it is not necessary that he have a bank book; and further, that he does not want to become a regular depositor at the bank. State ex rel. Coleman v. Dickerson, 71 Kan. 769, 81 Pac. 497.

A deposit of a draft in a bank to the credit of a pledgee of goods which the depositor desires to purchase, made for the sole purpose, which is made known to the bank, of obtaining the release of the goods from the custody of the pledgee, but without special instructions to the bank in regard to it, is not a special deposit, in the nature of a bailment, which will entitle the owner to priority over other general creditors of the bank, in case the bank fails and is placed in the hands of a receiver before the proceeds of the draft, which is forwarded for collection and duly paid, are returned to the bank. Schofield Mfg. Co. v. Cochran, 119 Ga. 901, 47 S. E. 208.

of Tyler, Fogg, & Company, asking the court to issue an order directing the receiver of that firm to restore to him a package of money containing \$500 in bills, which the petitioner deposited with the cashier of the firm for safe-keeping April 22, 1911.

It is contended on the part of the petitioner that this was a special deposit, which was not to be mingled with the general funds of the bank and form a part of its disposable capital, but was to be kept by it, and be specifically returned. On the other hand, it is contended in behalf of the receiver that this was an ordinary general deposit of money with the bank, which transferred the title to the bank and created the relation of debtor and creditor between the bank and the petitioner.

It is not in controversy that on the 22d day of April, 1911, the petitioner, George W. Maxfield, hastily entered the banking rooms of Tyler, Fogg, & Company, and delivered to the cashier a package of bills containing \$500, taking from him a receipt of the following tenor:

April 22, 1911.

Received of George W. Maxfield \$500 for safe-keeping.

\$500. P. pro. Tyler, Fogg, & Co.,
Ralph P. Preble, Cashier.

And a sum of money deposited in a bank, with a contract for the drilling of a well, to secure the payment to the contractor of the agreed consideration for the performance of the contract, which sum is not intended to be kept separate from the other funds of the bank, but is treated the same as moneys received from other depositors, is not a special deposit, although entered by the bank on its books in what it calls a "trust fund account." *Butcher v. Butler*, 134 Mo. App. 61, 114 S. W. 564.

Where a bank, having an excess of currency, but being short of exchange, draws a draft upon another bank, where the conditions are the reverse, and sends it currency to meet the draft when it is returned in the course of business, the currency thus sent does not constitute a special deposit. *Bank of Blackwell v. Dean*, 9 Okla. 626, 60 Pac. 226.

And a general deposit, evidenced by an ordinary certificate of deposit, does not become special, so that it may be reclaimed out of the general funds of the bank in the hands of an assignee for the benefit of creditors, by reason of a mere unfulfilled promise of the bank to put away the amount thereof in a separate package and keep it until the depositor shall come again for it as he needs it. *Bayor v. American Trust & Sav. Bank*, 157 Ill. 62, 41 N. E. 622.

But a certain sum in currency, delivered to one of a partnership conducting a bank, 39 L.R.A. (N.S.)

According to the testimony of the petitioner, the deposit was made under the following circumstances: He received a telegram in the early afternoon of Saturday, April 22d, requesting his presence in New York the next morning, and, in order to comply with this request, it would be necessary for him to take the 1:50 train at Bangor in seventeen minutes from the time he received the telegram. He had lately received the package of \$500 in bills from the Augusta Trust Company, with the ordinary bank wrapper around it marked "\$500." On this wrapper, he marked his initials, "G. W. M.," with a pencil, and on his way to the railroad station stepped into the banking rooms of Tyler, Fogg, & Company, and delivered the package to the cashier, Mr. Preble, stating that he wanted to leave that money there; that he didn't want to buy anything, and didn't want to sell anything; that he simply wanted to leave that package there until he got back from New York. The cashier replied: "Mr Maxfield, you can have the money any moment you call for it." The petitioner testifies that the cashier started to open the package, and he said to him: "Don't meddle with that. Don't meddle with that. That is all right." "He says, 'All right, I just wanted to count it,' and he counted

in his private office at the bank, by one about to lease property, to be held as security for the faithful performance of the covenants of the lease, for which a receipt stating that fact is executed by the partner in the name of the partnership, and which is afterwards, though without the knowledge or acquiescence of the parties to the lease, turned over to one of the tellers and by him mingled with the funds of the bank, and accounted for on the books of the bank by a certificate of deposit, payable to the bankers, which is never delivered to anyone, but is pinned to the duplicate, in the possession of the bank, of the receipt given to the depositor, while not a special deposit in the sense that the transaction is a mere bailment for the safe-keeping of the money for the depositor, where the identical thing is to be returned to him, does constitute a trust fund, and does not belong to the bank as a part of its general fund, and may be recovered, in case of the failure of the bank, if the fund, though not the identical money, can be traced and identified. *Woodhouse v. Crandall*, 197 Ill. 104, 58 L.R.A. 385, 64 N. E. 292.

As to the measure of care required of a bank in keeping special deposits, see note to *Gray v. Merriam*, 32 L.R.A. 769.

As to the duty of a bank as to the payment of money held as bailee, see note to *People's Nat. Bank v. Wheeler*, 21 L.R.A. (N.S.) 816.

A. C. W.

it and wrote the receipt pretty fast; for I had only seven minutes."

There is no necessary conflict between the testimony of the petitioner and that of the cashier in relation to the material facts. The cashier does not recollect seeing the initials of Mr. Maxfield upon the bank wrapper, but would not say they were not there. He also admits that it would be his natural course to put a strap around the bills and put them away as a package, but would not say that he did not put the same strap around the package, if he took it off. The cashier also states that he does not recollect the petitioner's request that he should not meddle with the package.

The petitioner returned from New York on the next Saturday afternoon, April 29th, but not in season to call for his package of money that day. The great fire of April 30th occurred the next day (Sunday), and rendered it impossible to open the vault of the firm until May 25th. But, before the vault was opened, the petitioner made a demand upon the senior member of the firm for his money, and was informed that it would be delivered to him as soon as the vault was opened. But, before the opening of the vault, the firm was dissolved by a decree of court, and a receiver appointed, who took over all the assets of the firm. From the time the money was deposited with the firm, April 22d until the close of the banking hours on April 29th, cash was received and paid out by the firm in the usual course of its banking business. When the vault was opened by the receiver, there was on hand in the vault in cash \$1,620.21, and at no time after the petitioner's deposit to the time the assets were taken over by the receiver was there less than \$500.

At the time the vault was opened, there were two \$500 packages in it; but the cashier was unable to state whether either of them had the petitioner's initials upon it or not. The cash was kept in the vault, and the checks received were deposited daily with the Kenduskeag Trust Company; and at the time the receiver took possession there was on deposit in that company the sum of \$2,859.55 in addition to the amount of cash, above stated, in the vault of Tyler, Fogg, & Company. The cashier expressly states that, after he counted the petitioner's money, he deposited it in the cash drawer, where all the cash receipts were deposited that were received during the week following the deposit in question; but there is no evidence that any other package of money was deposited that week expressly "for safe-keeping," or under circumstances similar to §9 L.R.A. (N.S.)

those of the petitioner's deposit. So far as appears, all other moneys received by the firm prior to the closing of its vault were general deposits, which created the relation of debtor and creditor between the depositor and the firm.

In response to an inquiry by counsel for the defendant whether, in his opinion, judging from all he knew of the dealings in the bank, the petitioner's package was in the bank at the time the vault was closed, the cashier says: "Couldn't state; I have no opinion on that subject."

At the close of the testimony, by agreement of the parties, the questions involved were reported for the determination of the law court.

It is well-recognized and familiar law that "deposits made with bankers are either general or special. In the case of a special deposit, the bank merely assumes the charge or custody of property, without authority to use it; and the depositor is entitled to receive back the identical money or thing deposited. In such case, the right of property remains in the depositor, and, if the deposit is of money, the bank may not mingle it with its own funds. The relation created is that of bailor and bailee, and not that of creditor and debtor." *Alston v. State*, 92 Ala. 124, 13 L.R.A. 659, 9 So. 732; 3 Am. & Eng. Enc. Law, 824; *McLain v. Wallace*, 103 Ind. 562, 5 N. E. 911, 912; *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82-90, 36 Am. Rep. 582.

In *Mutual Acci. Asso. v. Jacobs*, 141 Ill. 261, 16 L.R.A. 516, 33 Am. St. Rep. 302, 36 N. E. 414, the court said: "As we understand the question, there is a wide difference between a special and a general deposit, as those terms are understood, not only by bankers, but by the public who are transacting business daily with banks. Where money of any description is deposited in a bank, and the identical gold, silver, or bank bills which were deposited are to be returned to the depositor, and not the equivalent, the deposit will be special. . . . Where . . . a package of bills or currency is received in the bank as a special deposit, the identical money to be returned, the bank has no authority to use the money in its business."

So, in *National Mohaiwe Bank v. Peck*, 127 Mass. 298, 34 Am. Rep. 368, the court said: "Money deposited in a bank does not remain the property of the depositor, upon which the bank has a lien only; but it becomes the absolute property of the bank. . . . The bank being the absolute owner of the money deposited, and, being a mere debtor to the depositor for his balance of account, holds no property in which the depositor has any title or right." See also

Grissom v. Commercial Nat. Bank, 87 Tenn. 350, 3 L.R.A. 273, 10 Am. St. Rep. 669, 10 S. W. 774; School Dist. v. First Nat. Bank, 102 Mass. 174; Clark v. Northampton Nat. Bank, 160 Mass. 26, 35 N. E. 108. In Boettcher v. Colorado Nat. Bank, 15 Colo. 16, 24 Pac. 582, the court thus speaks of a special deposit: A deposit is not general, but a trust fund, when there is an expressed agreement to that effect, or there are circumstances which give to the transaction the nature of a special deposit.

When these well-settled rules of law, which are well understood by men of affairs and constantly observed in the practical management of banking business, are applied to the facts and circumstances, above stated, in the case at bar, it is the opinion of the court that the plaintiff's contention must be sustained, and that his delivery of the package of \$500 in bills to the cashier of Tyler, Fogg, & Company, must be deemed a special deposit, which created the relation of bailor and bailee between the parties, and not a general deposit, which created the relation of debtor and creditor between them. It became a special trust fund, to be held by the bank for the petitioner, and restored to him on demand a few days later. It did not become a part of the general funds of the bank, to be used in the conduct of its business.

The law prescribes no particular formula for the contract involved in making a special deposit. Like all true contracts, it grows out of the mutual intention and understanding of the parties; and the sources of evidence and means of proof are no more difficult or complex than in most other inquiries constantly arising in the courts. The purpose and terms of the deposit may be explicitly stated, or the intention of the parties may be inferred from their declarations, considered in connection with their conduct and all of the circumstances. In this case, the declarations of the petitioner at the time of the delivery of the money to the cashier unmistakably show that he understood the deposit to be a special one; and that the identical money was to be returned to him on demand. The receipt written by the cashier himself, stating expressly that the money was received "for safe-keeping," is of the highest significance in its tendency to prove that the cashier had the same understanding of it. The term "safe-keeping" aptly expressed the duty imposed upon the cashier as bailee of a special deposit, but was wholly inappropriate and superfluous as applied to a

general deposit, which was to be mingled with other funds and become a part of the property of the bank. The evidence cannot be consistently reconciled with the proposition that the money was left as a general deposit, but fully warrants the conclusion that the package was received "for safe-keeping," to be held in trust as the property of the petitioner.

But it has been seen that neither of the \$500 packages found in the vault after it was opened, nor any other money found there has been identified by any distinguishing marks as the money deposited by the petitioner; and it is contended in behalf of the defendant that, in any event, the petitioner is not entitled to recover the sum of \$500 in this proceeding, for the reason that his money, having been mingled with the moneys of other depositors and paid out indiscriminately, can no longer be identified in the hands of the receiver. But it has been seen that all of the moneys received from depositors after the receipt of the petitioner's package were general deposits, which became the property of the bank; and that the cash in the vault was not less than \$500 at any time during that week. The petitioner's package was the only special deposit and the only trust fund held by the firm at that time. The petitioner's difficulty arising from a failure to identify his money by distinguishing marks is therefore readily solved by an application of the established principle of equity that, "when one makes a draft from a fund composed partly of his own money and partly of money of another, . . . the presumption is the draft was intended to be made and was made from the drawer's own funds." Hall v. Otis, 77 Me. 125. In Knatchbull v. Hallett, L. R. 13 Ch. Div. 696, it was decided that, if money held by a trustee has been mingled with his private funds in his bank account, the *cestui que trust* can follow it, and has a charge on the balance in the banker's hands. It was further held that the rule attributing the first drawings out to the first payments in does not apply, except as between the moneys of different *cestuis que trust*, whose moneys are commingled by the common trustee; and that, as between the individual funds and trust funds, the drawer must be taken to have drawn his own money in preference to the trust money. The principle is thus stated in 2 Perry on Trusts, 2d ed. §§ 837, 838: "If trust money is mixed in the same parcel with the trustee's own money, it may be said that the trust money has run into the general mass, and has become absorbed, and that the *cestui*

que trust has no lien; but such cannot be the case. . . . Although every identical piece of coin cannot be ascertained in a given mass, yet, there being so much trust money in the parcel, the *cestui que trust* is entitled to so much of it. . . . If a trustee deposits trust moneys in bank to his own credit . . . the court will disentangle the accounts and give the *cestui que trust* what belongs to him." This principle has received the emphatic approval of the Supreme Court of the United States in *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693, and of our own court in *Houghton v. Davenport*, 74 Me. 596; see also *Lynam v. Belfast Nat. Bank*, 98 Me. 448, 57 Atl. 799; *First Nat. Bank v. Eastern Trust & Bkg. Co.* 108 Me. 79, 79 Atl. 4; *Farmers' & M. Nat. Bank v. King*, 57 Pa. 202, 98 Am. Dec. 215; *Harrison v. Smith*, 83 Mo. 210, 53 Am. Rep. 571.

It thus appears from this beneficent doctrine of equity that, when trust money is mingled in the same parcel with the trustee's own funds, the question is not necessarily whether the trust money can be identified by distinguishing earmarks, but whether it can be traced into the hands of the trustee, "either in its original or its altered state." The petitioner's money was received by the firm of Tyler, Fogg, & Company in a fiduciary capacity, and mingled with its private funds. Moneys paid out during the week following April 22d are presumed to have been paid from the private funds of the firm, and not from the petitioner's trust money. The entire amount of cash on hand at the time the vault was opened was charged with a trust in favor of the plaintiff. The presumption is that \$500 of the \$1,620.21 in money found in the vault and turned over to the receiver belonged to the petitioner. As trustee of the petitioner for his \$500, the firm would have been bound to restore that sum to him on demand, if a receiver had not been appointed. A demand was made by the petitioner upon the receiver for the return of his money soon after the latter took possession of the assets of the firm on the 9th day of June, 1911. The receiver is now bound to restore to the petitioner the sum of \$500, deposited with the firm by him April 22, 1911; and it is ordered that the sum of \$500 be paid to the petitioner by the receiver, with interest thereon from the 5th day of September, 1911, the date of the petition. The certificate must accordingly be:

Petition sustained.

Claim for \$500 and interest allowed.
39 L.R.A.(N.S.)

OKLAHOMA SUPREME COURT. (Division No. 1.)

DAVE SCHONWALD et al., Pliffs. in Err.,
v.

JAMES G. RAGAINS.

(— Okla. —, 122 Pac. 203.)

Contract — inducing breach — liability.

1. Legitimate competition, by fair means, is always lawful, and no cause of action accrues to one who is unable to compete with his stronger competitor, notwithstanding his business be injured by the competitive strife. But unfair competition is, and always has been, frowned upon by the law, and the trend of the decisions sustains the proposition that it is a violation of a legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference.

Unfair trade — competition — legality.

2. It is impossible to formulate any general rule or definition whereby one may determine with accuracy what is fair competition, and what is not. Each case must depend, for its correct solution, upon its own peculiar facts and circumstances.

Contract — inducing breach — malice.

3. It is an actionable tort for one to maliciously interfere with a contract between two parties, and induce one of them to break that contract, to the injury of the other.

Same — persuasion — legality.

4. It is not unlawful for one, by fair means and lawful argument or persuasion, to interfere with the contractual relations of another, and without doubt one person has the legal right to persuade another to leave his employer's service, or to quit trading with another, provided always such persuasion and argument is fair, and not unlawful, and is made with the honest intent and purpose of fairly bettering one's own business, trade, or employment, and not for the primary object of wrongfully destroying honest competition, or wrongfully injuring one's competitor.

Definition — malice.

5. "Malice," in the sense used herein, means a wrongful act done intentionally, without just cause or excuse.

(March 12, 1912.)

Headnotes by ROBERTSON, C.

Note. — As to right of action for damages for inducing a breach of contract, see notes to *Knickerbocker Ice Co. v. Gardiner Dairy Co.* 16 L.R.A.(N.S.) 746, and *Swain v. Johnson*, 28 L.R.A.(N.S.) 615, and related notes there referred to. See also, in this connection, the case of *Sleeper v. Baker*, post, 864. Generally, as to the effect of bad motive to make actionable what otherwise would not be, see note to *Passaic Print Works v. Ely & W. Dry-Goods Co.* 62 L.R.A. 673.

ERROR to the District Court for Kay County to review a judgment in plaintiff's favor in an action brought to recover damages for alleged malicious interference with plaintiff's business. Affirmed.

Statement by Robertson, C.:

In the winter of 1904-05, Ragains, the plaintiff below, took from the Chickaskia river and stored in the city of Blackwell a large quantity of merchantable ice, with intent to sell the same at retail to the merchants and other customers in said city. In pursuance of such intent, he solicited and procured contracts with a large number of such customers, and made all necessary arrangements for the complete establishment of a retail ice business in said city, and, in fact, began to distribute ice among his customers. Schonwald, one of the defendants below, who was also the general manager and agent of the Blackwell Ice Company, the other defendant, according to the averments of the petition, with a malicious, wrongful, and unlawful intention of injuring plaintiff in and about his said business, and of wholly destroying his said business and depriving said plaintiff of his customers for the sale of his ice, and for the purpose of procuring the purchasers of plaintiff's ice, with whom plaintiff had contracts, to disregard their said contracts and to refuse to accept plaintiff's ice thereunder, did, during the months of February, March, April, and May, 1905, acting jointly and in conjunction, one with the other, and with various other ice companies (naming them), represent to the persons with whom plaintiff had contracts for the sale of ice and with the customers of his retail ice business that plaintiff was not a member of the combination or association of ice dealers, and could not, therefore, purchase from the manufacturers of ice in that and the adjacent territory any amount with which to supply his customers, and that if they, the said customers and consumers, and the persons with whom plaintiff had contracts, purchased ice from plaintiff, that they, the said defendants, and each of them, and all other persons engaged in the sale of ice in the city of Blackwell, would refuse to sell or deliver ice to any such person so purchasing from plaintiff, and further represented to plaintiff's customers and the persons with whom he had contracts for the sale of ice that plaintiff would be unable to purchase ice from any manufacturer on account of combinations and understandings had with such manufacturer by defendants, and that at such time as his customers had exhausted the supply of natural ice stored by plain-

tiff, such customers and persons with whom plaintiff had contracts would be unable to procure or purchase from defendants or any other person any ice for their use, and that, in furtherance of the design on the part of the defendants in carrying out the threats and representations so made, the said defendants, and each of them, did refuse to sell to persons who bought ice from plaintiff, and said defendants and each of them did refuse to sell ice to any person with whom plaintiff had contracts for the sale of ice, unless and until said persons and said customers had agreed and promised to disregard their contract of purchase which they had made with the plaintiff, and would further agree not to accept any further delivery of ice from said plaintiff; that said false and malicious representations, threats, and intimidating statements, as above related, so made by Schonwald and the Blackwell Ice Company, by and through its officers, agents, and employees, did intimidate, coerce, and influence the persons with whom plaintiff had contracts for the sale of ice, and the customers of plaintiff's retail ice business in the city of Blackwell, to break the said contracts had with plaintiff, and did cause all of them to refuse to purchase or accept the delivery of ice from plaintiff, and that thereby said defendants by their said wrongful, illegal, and malicious representations, intimidating statements, and conduct, did wholly and completely ruin and destroy plaintiff's retail ice business in the city of Blackwell; and that said defendants did wrongfully, unlawfully, and maliciously, and with a malicious intent to destroy plaintiff's business and to injure him, influence all persons manufacturing ice for sale to the inhabitants of the city of Blackwell and vicinity to refuse to sell or deliver any ice to plaintiff for sale to the residents of said city, all to his great damage, etc.

The court, in its instructions to the jury, held that there was not sufficient evidence to support the allegations of conspiracy by defendants and other ice companies, and therefore withdrew that issue from their consideration; and no finding was made by the jury upon that question, and the same will therefore receive no further consideration.

The answers of defendants were in effect general denials. Trial was had to a jury, and a general verdict was returned in favor of the plaintiff and against the defendants, which verdict was by the trial court approved and judgment in accordance therewith was duly entered, from which said judgment defendants bring error.

Mr. C. G. Hornor, for plaintiffs in error:

No action will lie for interference with trades, callings, and contracts, in the way of ordinary competition.

Cooley, Torts, 497; Mogul S. S. Co. v. McGregor [1892] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101, affirming L. R. 23 Q. B. Div. 598, L. R. 21 Q. B. Div. 544; Allen v. Flood [1898] A. C. 163, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, 17 Eng. Rul. Cas. 285; Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.) 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; J. F. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 21 L.R.A.(N.S.) 550, 98 Pac. 1027, 16 Ann. Cas. 1165; Boyson v. Thorn, 98 Cal. 578, 21 L.R.A. 233, 33 Pac. 492; Chambers v. Baldwin, 91 Ky. 121, 11 L.R.A. 545, 34 Am. St. Rep. 165, 15 S. W. 57; Bourlier Bros. v. Macauley, 91 Ky. 135, 11 L.R.A. 550, 34 Am. St. Rep. 171, 15 S. W. 60; Glencoe Land & Gravel Co. v. Hudson Bros. Commission Co. 138 Mo. 439, 36 L.R.A. 804, 60 Am. St. Rep. 560, 40 S. W. 93; Lewis v. Huie-Hodge Lumber Co. 121 La. 658, 46 So. 685; Passaic Print Works v. Ely & W. Dry Goods Co. 62 L.R.A. 673 and note, 44 C. C. A. 426, 105 Fed. 163; Macauley Bros. v. Tierney, 19 I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; Robison v. Texas Pine Land Asso. — Tex. Civ. App. —, 40 S. W. 843; Baker v. Metropolitan L. Ins. Co. 23 Ky. L. Rep. 1174, 55 L.R.A. 275, 64 S. W. 913; Payne v. Western & A. R. Co. 13 Lea, 507, 49 Am. Rep. 686; Vegelahn v. Guntner, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; Chambers v. Baldwin, 11 L.R.A. 545, and note, 91 Ky. 121, 34 Am. St. Rep. 165, 15 S. W. 57.

Messrs. John S. Burger and Moss, Turner, & McInnis for defendant in error.

Robertson, C., filed the following opinion:

There is but one question in this case that demands the consideration of the court. Was it an actionable tort for Schonwald and the Blackwell Ice Company to procure, induce, and cause, as charged in the petition, the persons who had contracts with Ragains for the purchase of his ice at retail to ignore and violate their contracts under the facts and circumstances of this case? The general verdict of the jury was a finding on all the facts as alleged in the petition necessary to sustain the judgment, so that the real inquiry may be narrowed down to the issue raised by counsel for plaintiffs in error, *viz.*, that the petition

did not state facts sufficient to constitute a cause of action.

The question involved is of more than passing interest to the people of this state, the correct solution of which requires not only careful consideration of the immediate questions primarily involved, but also the careful consideration of the so-called "business interests" of the state, as contradistinguished from the interests of all the people of the state, for all will, in a greater or lesser degree, be primarily affected. In order to better understand the real issue as submitted to the jury by the court, we will insert the two instructions which deal directly with the question under consideration. They are as follows:

"You are instructed that if you believe from a preponderance of the evidence that the plaintiff in this case, James G. Ragains, in the winter of 1905 made certain contracts and agreements with parties in the city of Blackwell, as alleged in his petition, to agree to purchase ice of and from said plaintiff, and that the defendant, the Blackwell Ice Company, through its agent and representative, Dave Schonwald, or by Dave Schonwald alone, with the malicious, wrongful, and unlawful intention of injuring this plaintiff, and destroying his business, and depriving plaintiff of customers for the sale of the said ice, and for the purpose of procuring purchasers of plaintiff's ice with whom the plaintiff had contracts to disregard the same, and to refuse to carry out the contracts theretofore made with the said plaintiff, and that the said patrons did refuse, by reason of the wrongful acts of the defendants, their agents or employees, to purchase ice of and from the plaintiff, then your verdict should be for the plaintiff and against the defendants, and each of them, for such sums as you believe will fairly and reasonably compensate him for damages sustained, not to exceed the amount prayed for in plaintiff's petition.

"You are instructed that the material and controlling questions for you to determine in this case are: First. Was there a contract by and between the plaintiff and certain customers, as alleged in plaintiff's petition, or any of them, whereby it was agreed by and between the plaintiff and his said customers that the said customers were to purchase of and from the plaintiff ice that he was to deliver upon his delivery of the same? Second. Were the customers of the plaintiff knowingly induced by the defendants, or either of them, or by their agents and employees, under their direction, to break said contracts with the plaintiff, intending thereby to injure said plaintiff and derive a bene-

fit therefrom? Third. Did injuries result to the plaintiff?"

If these instructions fairly and correctly state the law applicable to the case at bar, then the judgment of the trial court is right, and must be affirmed; for, while there are other errors assigned, such as the admission and rejection of testimony, yet it is tacitly agreed by counsel that the question first above alluded to is the real and controlling question in the case.

In *Nashville, C. & St. L. R. Co. v. McConnell* (C. C.) 82 Fed. 65, Judge Clark said: "It needs no extended statement to make it manifest that the right to carry on a business without interference, without fraud, and without obstruction, is one of the most valuable of all rights. Indeed, in the commercial world, the right of greatest value is the right to freely carry on a lawful business without unlawful interruption. It is a substantial right, which may be protected by any remedy known to the court as fully as a constitutional or statutory right, and as fully as a right in the ordinary forms of property." Nims, on *Unfair Business Competition*, p. 347, in discussing this question, says: "It has long been a recognized principle of common law that the prevention and curbing of competition is an unlawful act. The restriction of the freedom of trade is considered to be against public policy, and injurious to general welfare. During the past few years there has been a growing demand made on courts and legislatures that they take measures to limit the freedom of competition of the so-called trusts, and also that they take other measures to give the small dealer larger protection and freedom in competition. All these demands are made for the benefit of those who are not able to cope with the great powers of the commercial world that have come into existence under the law as it now exists. These demands are socialistic in their nature. Freedom of competition, under modern conditions, seems to lead to a monopoly,—the very evil which the common law sought to avoid. This condition has been reached, in part, by the application of the very rules laid down by the common law to prevent monopoly. The discussion of these questions by the courts is to be found largely in cases dealing (a) with the right which it is claimed every man has to carry on his trade or calling without molestation or interruption,—cases dealing principally with rights of labor organizations as to boycott, strikes, lockouts, etc.; (b) with the right of persons under contract with each other as against one who intentionally causes a breach of that contract. Cases of this sort are not usually classed

as unfair competition cases, but the principles involved in them go straight to the question of fairness and honesty in business competition. If the limits to the right of one merchant to interfere with, to block, harass, and to injure, the trade of a competitor, are not defined clearly, it means that the freedom of use of capital in commercial enterprises will be hampered and restricted unnecessarily. If the business world is not certain of its rights as against those who intentionally and wrongfully procure the breaking of contracts for their own gain, public confidence in the binding force of contracts, which is now none too strong, will be weakened."

Legitimate competition, by fair means, is always lawful, and no cause of action accrues to one who is unable to compete with his stronger competitor, notwithstanding his entire business be swept away by the competitive strife. But unfair competition is, and always has been, frowned upon by the law, and the trend of the decisions from *Lumley v. Gye*, 2 El. & Bl. 216, 22 L. J. Q. B. N. S. 463, 17 Jur. N. S. 827, 1 Week. Rep. 432, 1 Eng. Rul. Cas. 706, to the present time seems to sustain the proposition that it is a violation of a legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference. Prof. Bruce Wyman, in his *Control of the Market*, tersely states the situation as it now exists, as follows: "Generally speaking, a state of free competition has been for several centuries considered to be for the best interest of society; and therefore, in modern times, almost every business has been opened to almost every man; but at all times in economic history both restriction and freedom are to be found in the law; the proportion, however, changing greatly. In one epoch there is much legal limitation with little freedom left; in another age it is almost universal competition with some little regulation to be found.

. . . But the modern conclusion, after some bitter experience, is that freedom can be allowed only where conditions of virtual competition prevail, for, where there is monopoly without stern restriction, there is always great mischief. . . . Undoubtedly, therefore, the spirit of our present age demands that the great business enterprises shall be conducted in accordance with the requirements of society. The present program of organized society is to see to it that those who have gained a substantial control of the market shall not be left free to exploit those who look to them to supply their needs. Men now see clearly that freedom of action may, even in the industrial world, work injuriously for the pub-

lie, and it must then be restrained in the public interest. We have seen the results of unrestrained power, and we must not wish those who have control of our destinies be left to do with us as they please. . . . The attempt in every modern case of this sort is therefore to show something more than mere competition,—to show in the particular case there are some special circumstances which bring the case outside the ordinary course of competition.” And, as illustrative of this idea, he cites us a striking instance, the case of *Passaic Print Works v. Ely & W. Dry-Goods Co.* 62 L.R.A. 673, 44 C. C. A. 426, 105 Fed. 163, wherein the defendant company was sought to be enjoined from selling certain brands of calico at a price less than that fixed by the manufacturer. The court, speaking through Mr. Justice Thayer, decided against the manufacturer, and among other things said: “The owner of property, real or personal, has an undoubted right to sell it and to offer it for sale at whatever price he deems proper, although the effect of such offer may be to depreciate the market value of the commodity which he thus offers, and incidentally to occasion loss to third parties who have the same kind or species of property for sale.” The point is made in that case that competition is an absolute justification, regardless of the circumstances. But this means fair competition. On the other hand, the case of *Tuttle v. Buck*, 107 Minn. 145, 22 L.R.A. (N.S.) 599, 131 Am. St. Rep. 446, 119 N. W. 946, 16 Ann. Cas. 807, held the other way, that being the case where a banker, a man of great wealth and influence in the community, maliciously established a barber shop and engaged a barber to carry on the business, and used his personal influence to attract customers from the plaintiff’s shop, not for any legitimate purpose of his own, but to injure the plaintiff. Mr. Justice Elliott, speaking of the principle involved, said: “It must be remembered that the common law is the result of growth, and that its development has been determined by the social needs of the community which it governs. It is the resultant of conflicting social forces, and those forces which are for the time dominant leave their impress upon the law. . . . For generations there has been a practical agreement upon the proposition that competition in trade and business is desirable; and this idea has found expression in the decisions of the courts, as well as in statutes. But it has led to grievous and manifold wrongs to individuals, and many courts have manifested an earnest desire to protect the individual from the evils which result from unrestrained business 30 L.R.A. (N.S.)

competition. The problem has been to so adjust matters as to preserve the principle of competition, and yet guard against its abuse to the unnecessary injury to the individual. . . . To divert to one’s self the customers of a business rival by the offer of goods at lower prices is in general a legitimate mode of serving one’s own interest, and justifiable as fair competition. But when a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort.” This case, while undoubtedly stating the law applicable to the peculiar facts there existing, goes farther than most of the courts in the enunciation of the principle which guarantees the rights of an individual to protection from an unfair competition. However, under our present economic and industrial conditions, there can be no doubt of the soundness of the doctrine therein announced.

In the case of *London Guarantee & Acci. Co. v. Horn*, 206 Ill. 493, 99 Am. St. Rep. 185, 69 N. E. 526, Horn was a servant of Arnold & Company, and in the course of his employment by an accident he sustained a severe injury to his hand. His employers protected themselves from such accidents by a policy in the London Guarantee & Accident Company. Horn brought suit against Arnold & Company, and recovered \$3,500 damages. Pending appeal, the agent of the insurance company attempted to settle with Horn, and, failing, told him that he would procure his discharge from Arnold & Company, unless he settled. Horn still refused to settle. Whereupon the agent of the insurance company did secure Horn’s discharge by Arnold & Company by the threat to cancel the entire policy in case they refused to discharge him. In an action by Horn against the insurance company for wrongfully interfering with his contract of employment with Arnold & Company, it was held that he could recover, and Mr. Justice Scott, in delivering the opinion of the court, said: “It follows, therefore, that the act of the defendant, complained of, was wrongful and in the legal sense of the term, malicious,” because without justification. In *Moran v. Dunphy*, 177 Mass. 485, 52 L.R.A. 115, 83 Am. St. Rep. 289, 59 N. E. 125, it was said: “We apprehend that there no longer is any difficulty in recognizing that a right to be protected from malicious interference may be incident to a right arising out of a contract, although a contract, so far as per-

formance is concerned, imposes a duty only on the promisor. Again, in the case of a contract of employment, even when the employment is at will, the fact that the employer is free from liability for discharging the plaintiff does not carry with it immunity to the defendant, who has controlled the employer's action to the plaintiff's harm." In *Quinn v. Leathem* [1901] A. C. p. 495 (which effectually answers and disposes of *Allen v. Flood*, 87 L. J. Q. B. N. S. 119, [1898] A. C. 163, 77 L. T. N. S. 717, 46 Week. Rep. 258, 17 Eng. Rul. Cas. 285, the strongest case supporting the contrary doctrine), it is said: "It is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference." The earliest reported case dealing with this question, so far as we have been able to discover, is *Lumley v. Gye*, *supra*. In that case a Miss Wagoner had contracted with Lumley to sing at his theater. Gye induced her to break her contract and sing for him. The decision is to the effect that the inducement of Gye was a legal wrong. Mr. Justice Erle in his opinion said: "He who maliciously procures a damage to another by violation of his right ought to be made to indemnify, and that whether he procures an actionable wrong or a breach of contract. He who procures the nondelivery of goods according to contract may inflict an injury the same as he who procures the abstraction of goods after delivery; and both ought, on the same ground, to be made responsible." This case, notwithstanding the dissenting opinion of Lord Coleridge (upon which all cases holding that such interference is not actionable appear to be based), seems to state the law as followed by the courts of England even unto the present time, and is cited with approval and followed in all the reported cases that sustain the doctrine herein contended for. The case of *Glamorgan Coal Co. v. South Wales Miners' Federation* [1903] 2 K. B. 545, decided in 1903, is one of the later English cases upholding this same view, and, in the course of the opinion in that case as written by Lord Justice Stirling, it is said: "The justification set up seems to me to amount to no more than this,—that the course which they took, although it might be to the detriment of the masters, was for the pecuniary interest of the men; and I think it wholly insufficient. The defendants took active steps to carry this policy into effect, and, as I have said, interfered to bring about the violation of legal rights." A careful investigation of the cases shows that the rule announced in *Lumley v. Gye*, *supra*, which may be said to have established the Eng-

lish doctrine, has also been adopted and followed by a majority of the courts of the American states, and without doubt is the law of the land on the subject.

It is exceedingly difficult, however, to determine with accuracy what is fair competition and what is not, and what acts are malicious and unjustifiable. It seems to be impossible to formulate any general rule or definition that will answer for all cases, but each must depend, for its correct solution, upon its own peculiar facts and circumstances. Thus, in *Keeble v. Hickeringill*, 11 East, 574, note: Plaintiff owned a decoy pond, and put upon it decoy ducks, nets, etc., for taking fowl. "Defendant, knowing which, and intending to damnify the plaintiff in his vivary, and to fright and drive away the wild fowl, used to resort thither, and, to deprive him of his profit, did . . . resort to the head of the said pond and vivary, and did discharge six guns laden with gunpowder, and with the noise and stink of the gunpowder did drive away the wild fowl then being in the pond. . . . The defendant with design to damnify the plaintiff . . . did place himself with a gun near the vivary and there did discharge the said gun several times, . . . whereby the wild fowl were frightened away and did forsake the said pond." Sir John Holt, in the opinion in that case, said: Making a decoy is lawful; using the ground for that purpose is profitable. If man hath a property, he may employ it for his pleasure and profit, as for alluring and procuring ducks to come to his pond. "To learn the trade of seducing other ducks to come there in order to be taken is not prohibited either by the law of the land or the moral law. . . . When a man useth his art or his skill to take them, to sell and dispose of for his profit, this is his trade, and he that hinders another in his trade or livelihood is liable to an action for so hindering him. Why otherwise are scandalous words spoken of a man in his profession actionable when, without his profession, they are not so? Though they do not effect any damage, yet they are mischievous in themselves, and therefore in their own nature productive of damage, and therefore an action lies against him. Such are all words that are spoken of a man to disparage him in his trade that may bring damage to him. . . . How much more when the defendant doth an actual and real damage to another when he is in the very act of receiving profit by his employment. . . . Where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies in all cases." This case is frequently cited

as authority that a right of action existed at common law on account of injury to a man in his trade or calling. To our minds no possible doubt exists but that the common law has been, and is now, sufficiently comprehensive to furnish a full and complete remedy for the wrong complained of in the petition in the case at bar. So, also, is it our belief that the common law in these later days, with the ever-increasing demands made upon it for protection to the individual by reason of our material developments along industrial and economic lines, is sufficiently broad and comprehensive to relieve against such unfair and oppressive acts as those charged in the petition, and its applicability cannot be doubted. Wyman on Control of Market, p. 8, says: "No one can carefully study the authorities on the subject without feeling that we are just entering upon an important development of the common law. What branches of industry will eventually be of such public importance as to be included in the category of public concerns, and to what extent the control of the courts will be carried in the effort to solve by law the modern economic problems, it would be rash to predict. Enormous business combinations, virtual monopolization of the necessities of life, the strife of labor and capital, now the concern of the economist and the statesman, may prove susceptible of legal control through the doctrine of this special law. General doctrines have been established; and upon their successful working out depends to a large extent the future economic organization of the country. Only if the courts can adequately control the established monopolies in all contingencies may the business of these concerns be left in private hands." We need not, therefore, concern ourselves further as to whether or not the relief afforded by the common law is adequate, for without doubt it is amply sufficient; but let us continue our investigation to the ascertainment of whether or not the facts of the instant case warrant the relief, which the law, at all times, has stood and now stands ready to give.

In *Quinn v. Leathem*, supra, Lord Macnaghten said: "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent." That, in my opinion, is the sum and substance of *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, 17 Eng. Rul. Cas. 285;" and Lord Lindley in the same case said that *Allen v. Flood*, supra, established the fact that *Allen* "infringed no right of the plaintiffs, even although he acted maliciously." The question was later considered 39 L.R.A. (N.S.)

by the House of Lords in 1901, when it was held that a combination of two or more persons, without excuse and without justification, to injure a man in his trade by persuading or inducing his customers not to trade with him, or his servants or customers to break his employ, is actionable, provided he suffers damage. Freedom for fair competition is guaranteed to all, and, even though this competition results in the ruin of the competitor's business and the loss of all his property, there can be no right of action unless the successful competitor has done some malicious, intentional wrong, which is unjustifiable, and which is the cause of damage to the injured or complaining party. The American cases present a seemingly hopeless conflict of opinion on the subject, yet, with the above rule as a guide, it may safely be said that the doctrine as announced in *Lumley v. Gye*, supra, is recognized and followed by the majority of the American courts, and is amply sustained, in our opinion, by the weight of authority, as it certainly is by the better reason, as viewed in the light of our present industrial and economic conditions. The leading American case involving and sustaining this principle is *Angle v. Chicago, St. P. & O. R. Co.* 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240. The opinion is by Mr. Justice Brewer, and among other things he says: "It has been repeatedly held that, if one maliciously interferes in a contract between two parties, and induces one of them to break that contract, to the injury of the other, the party injured can maintain an action against the wrongdoer. *Green v. Button*, 2 Crompt. M. & R. 707, 1 Gale, 349, 1 Tyrw. & G. 118, 5 L. J. Exch. N. S. 81, in which the defendant by falsely pretending to one party to a contract that he had a lien upon certain property prevented such party from delivering it to the plaintiff, the other party to the contract, and was held responsible for the loss occasioned thereby. *Lumley v. Gye*, 2 El. & Bl. 216, 22 L. J. Q. B. N. S. 463, 17 Jur. N. S. 827, 1 Week. Rep. 432, 1 Eng. Rul. Cas. 706, in which a singer had entered into a contract to sing only at the theater of the plaintiff, and the defendant maliciously induced her to break that contract, and was held liable to the damages sustained by the plaintiff in consequence thereof. *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, 337, 17 Eng. Rul. Cas. 285, in which it was held that an action lies against a third person who maliciously induces another to break his contract of exclusive personal service with an employer, which thereby would naturally cause, and did in fact cause, an injury to such employer. In the opinion of Brett, L. J., it was said:

"That wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce an injury, an action on the case will lie. This is the proposition to be deduced from the case of *Ashby v. White*, 2 Ld. Raym. 938, 1 Eng. Rul. Cas. 521. If these conditions are satisfied, the action does not the less lie because the natural and probable consequences of the act complained of is an act done by a third person, or because such act so done by the third person is a breach of duty or contract by him, or an act illegal in his part, or an act otherwise imposing an actionable liability on him." *Walker v. Cronin*, 107 Mass. 555, in which a manufacturer was held entitled to maintain an action against a third party who, with the unlawful purpose of preventing him from carrying on his business, wilfully induced many of his employees to leave his employment, whereby the manufacturer lost their services and the profits and advantages which he would have derived therefrom. *Benton v. Pratt*, 2 Wend. 385, 20 Am. Dec. 623. *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30, in which a party had contracted to sell and deliver to plaintiffs a quantity of cheese, but, having been made to believe through the fraud of the defendant that the plaintiffs did not want the cheese, sold and delivered it to him, and it was held that an action could be maintained against the defendant for the damages which the plaintiffs sustained from failing to get the cheese. *Jones v. Stanly*, 76 N. C. 355, 356, in which the court said: "It was decided in *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780, that, if a person maliciously entices laborers or croppers to break their contracts with their employer and desert his service, the employer may recover damages against such person. The same reasons cover every case where one person maliciously persuades another to break any contract with a third person. It is not confined to contracts for service." Under these authorities, if the Omaha Company had by its wrongful conduct simply induced the Portage Company to break its contract with Angle, it would have been liable to him for the damages sustained thereby." The essence of this decision is found in the syllabus, which reads: "If one maliciously interferes in a contract between two parties and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer. Where one railroad company by its wrongful conduct induced another railroad company to break its contract with a contract-

or for its construction, it is liable to him for the damages sustained thereby; *a fortiori*, when it not only induces a breach of the contract by the latter company, but also disables it from performance." In the case of *Walker v. Cronin*, supra, used approvingly by the Supreme Court of the United States in *Angle v. Chicago*, St. P. M. & O. R. Co. supra, it was held that "it is a familiar and well-established doctrine of the law upon the relation of master and servant that one who entices away a servant or induces him to leave his master may be held liable in damages therefor, provided there exists a valid contract for continued service, known to the defendant. It has sometimes been supposed that this doctrine sprang from the English statute of laborers, and was confined to menial service. But we are satisfied that it is founded upon the legal right derived from the contract, and not merely upon the relation of master and servant, and that it applies to all contracts of employment, if not to contracts of every description." In *Rice v. Manley*, 66 N. Y. 82, the supreme court said in the syllabus: "S. agreed to sell and deliver to plaintiff a quantity of cheese. Defendant, by fraudulent and false representations, induced S. to sell and deliver the cheese to him. The agreement between S. and plaintiff was not in writing, and was void under the statute of frauds, but it would have been performed by S. but for defendant's fraud. Held, that plaintiff could maintain an action against defendant for the damages sustained." 23 Am. Rep. 30. In *Gore v. Condon*, 87 Md. 368, 40 L.R.A. 382, 67 Am. St. Rep. 352, 39 Atl. 1042, is found the following: "The right to maintain the action can also be sustained upon the doctrine that a man who induces one of two parties to a contract to break it, intending thereby to injure the other or to obtain a benefit for himself, does the other an actionable wrong." In *Lucke v. Clothing Cutters' & T. Assembly No. 7507*, K. L. 77 Md. 396, 19 L.R.A. 408, 39 Am. St. Rep. 421, 26 Atl. 505, it is said in the syllabus: "If a contract would have been performed but for the false and fraudulent representations of a third person, an action will lie against him although the contract could not have been enforced by action. Interference with the free exercise of another's trade or occupation or means of livelihood by fraud or force, such as preventing people, by threats or intimidation, from trading with or continuing him in their employment, is an actionable wrong." In *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367, 1 So. 934, Mr. Justice Raney says: "An employee may maintain an action for damages against a third party mali-

ciously procuring an employer to discharge him from employment under a legal contract for a certain period, pending such period, provided damages result to the employee from his discharge; and under the same circumstances the action may be maintained, though the employment is not for a fixed period. Though no contract exists between the master and servant, and no legal right as between them is violated, still the servant may maintain an action for damages against a third person who has maliciously procured his discharge." While in *Doremus v. Hennessy*, 176 Ill. 608, 43 L.R.A. 797, 802, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524, the supreme court of Illinois says: "The common law seeks to protect every person against the wrongful acts of others, whether committed alone or by combination; and an action may be had for injuries done which cause another loss in the enjoyment of any right or privilege or property. . . . Losses wilfully caused by another from motives of malice to one who seeks to exercise and enjoy the fruits and advantages of his own enterprise, industry, skill, and credit will sustain an action. It is clear that it is unlawful and actionable for one man, from unlawful motives, to interfere with another's trade by fraud or misrepresentation, or by molesting his customers or those who would be customers, or by preventing others from working for him, or causing them to leave his employ by fraud or misrepresentation or physical or moral intimidation or persuasion, with an intent to inflict an injury which causes loss." It must be observed that the case last cited holds that it is unlawful and actionable for a man, for unlawful motives, to interfere with another's trade, etc., by fraud or misrepresentation or physical or moral intimidation or persuasion, with intent to inflict an injury which causes loss.

That case does not hold it to be unlawful for one, by fair and lawful argument and persuasion, to interfere with the contractual relations of another, and without doubt a person has the legal right to persuade one to leave his employer's service, or to quit trading with another, provided, always, such persuasion and argument is fair and not unlawful, and is made and done with the honest intent and purpose of fairly bettering one's own business, trade, or employment, and not for the primary object of wrongfully destroying honest competition. In the instant case, had the conduct of Schonwald and the ice company been directed and governed solely by the desire to legitimately eliminate Ragains's retail ice business by fair competition, no action could have been maintained against them; 39 L.R.A. (N.S.)

but it is plainly evident that they were not so limited, directed, or actuated. The threats, coercions, and intimidating statements made by them to the customers of Ragains had for their sole and primary object, not the building up of their own legitimate business, but the destruction of Ragains's business; and that, too, by the most unreasonable, unfair, coercive, and unjustifiable methods. The only legitimate result of their conduct, as is plainly shown by the testimony, from the commencement of the troubles between them, was to injure unfairly, and without sufficient excuse or justification, the business of Ragains. They did not sell their ice cheaper. They did not claim to have a better grade or quality of ice. They did not offer better delivery facilities. They did not offer any inducement by way of credits, or time, in payment of accounts. They did not show by any legitimate or reasonable or justifiable method that the customers by patronizing them would obtain better results, or better service, than Ragains could furnish, and their sole and only excuse was that they enjoyed a monopoly of the ice business in Blackwell and vicinity, and thereby controlled the ice market, and that, unless the customers who had contracts with Ragains would forthwith break and violate these contracts, they could not have or purchase any ice from said defendants in case Ragains's ice supply, for any reason, should become exhausted; and they further informed said customers that Ragains could not, in the event of his supply becoming exhausted, purchase ice from any other person who supplied said city with ice, on account of combinations and understandings had by said defendants with other ice companies, the benefits of which said combination were denied Ragains, and that therefore the said customers would be unable to procure any ice at all. There was no possible excuse or justification for such conduct. The actions of defendants without doubt were malicious and unwarranted.

By the term "malicious" we do not mean that defendants were actuated by motives of ill will against Ragains personally, but by it is meant an unreasonable and wrongful act, done intentionally, without just cause or excuse. In 16 Am. & Eng. Enc. Law 2d ed. 1112, the reason for stating these acts to be malicious is given as follows: "Breach of contract gives a cause of action against the contracting party guilty of the breach, and is therefore a wrongful or unlawful act. The procurement of a breach of contract is wrongful; and, if the procurement is intentional and without excuse, it follows that it is malicious." The reasons for this definition have been object-

ed to as containing a step which assumes too much, in that the procurement of an act which gives a cause of action against the actor is universally wrongful. Subject to the limitations and restrictions hereinbefore alluded to, we are not willing to assent to this criticism. However, there is another definition of the term "malicious," in the adjudicated cases, which is not open to this objection, and it is sufficiently comprehensive to meet the requirements of the present case. Brett, L. J., in *Bowen v. Hall*, L. R. 6 Q. B. Div. 338, 1 Eng. Rul. Cas. 717, defines a malicious act "as one done for the indirect purpose of injuring the plaintiff or benefiting the defendant at the expense of the plaintiff." In *Keeble v. Hickeringill*, 11 East, 574, note, it was held that malice, or the intent to injure, will, under certain circumstances, cause an act, otherwise legal, to become illegal. Lord Watson, in *Allen v. Flood* [1898] A. C. 92, said: "The existence of a bad motive in the case of an act which is not in itself illegal will not convert that act into a civil wrong for which reparation is due. A wrongful act done knowingly and with a view of its injurious consequences may, in the sense of law, be malicious; but such malice derives its essential character from the circumstance that the act done constitutes a violation of the law." And in the same case, in discussing what would excuse a man from the charge of malice, he said: "He shall act honestly . . . and shall not be prompted by a desire to injure the person who is affected by his act." Bowen, L. J., in *Allen v. Flood*, supra, said: In order to justify the intentional doing of "that which is calculated, in the ordinary course of events, to damage, and which does in fact damage another, in that other person's property or trade . . . [you must have some] just cause or excuse." Which was afterwards characterized by Lord Chancellor Halsbury as "exactly accurate." Justice Oliver Wendell Holmes said that "when a responsible defendant seeks to escape liability from an act which he had notice was likely to cause temporal damage to another, he must show justification." In 19 Am. & Eng. Enc. Law, 2d ed. p. 623, it is said: "Malice" in its legal sense "means a wrongful act done intentionally, without just cause or excuse." Lord Campbell, in *Ferguson v. Kinnoull*, 9 Clark & F. 321, said: "'Malice' in the legal acceptance of the word is not confined to personal spite against individuals, but consists in a conscious violation of the law, to the prejudice of another." In *Page v. Cushing*, 38 Me. 523, "malice" is defined as: "Acts wilfully and designedly done which are unlawful are malicious in respect to those to whom they 39 L.R.A. (N.S.) :

are injurious." Bowen, L. J., in *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 612, said: "Maliciously means and implies an intention to do an act which is wrongful, to the detriment of another."

Viewed in the light of the above definitions, we are willing to, and do, say that the acts of the defendants under the facts and circumstances of the case at bar were malicious and were without proper or sufficient justification or excuse. The learned trial judge happily stated the correct rule of law applicable to this case in his instructions to the jury. The jury resolved the question in favor of the plaintiff on conflicting testimony, which, however, was sufficient to sustain the verdict. The verdict being general, it is presumed that a finding was made on every question necessary to sustain the same. Should the conclusion as reached in this case be otherwise, under our present industrial and economic conditions, gross wrongs could, and doubtless would, be committed in the name of commercial freedom or legal competition. Great interests—financial, industrial, or other—could, by the strength of an unfair and wrongful combination, disguised as competition, arbitrarily and unjustly control the markets of the state as to all commodities. The result would be the elimination of fair and honest competition, without which there can be no freedom in the commercial world, or in other lines of human endeavor. It therefore becomes the duty of the courts to protect the weak from the intentional and unjustifiable wrongs of the powerful, and for that purpose the beneficent provisions of the ever-growing and developing common law are amply able to correct the evils complained of. It is peculiarly the duty of the state to control by proper regulation all businesses which are of common and public interest. As was well said by Prof. Wyman in his *Control of the Market*: "All businesses, both great and small, are subject, to be sure, to that general police power of the state, whereby in any civilized society an effort is made to so order things that one may not use his own so as to injure another. But the comparison of the large amount of regulation which is considered proper for the state to impose upon a monopolized business which the small amount of regulation which is considered proper for the state to enforce in regard to competitive business is in itself significant enough. The difference which is shown is more than one of degree. It becomes one in kind. In the ordinary business where regulation by competition is still sufficient the law cannot question the decision of the proprietor to refuse to sell to a particular applicant, or to discriminate

in his prices. But where the business is in the hands of a monopolistic combination, refusal to sell may become a conspiracy, and discrimination may be held illegal." It therefore becomes the duty of the courts to guard with jealous care all the various interests of our commercial and industrial world, to the end that every man may, so far as possible, be guaranteed entire freedom of competition in every field of human activity, so far as the same may be consistent with the larger common interests of the whole.

Having reached this conclusion, it is unnecessary to consider the other assignment of error. The judgment of the District Court of Kay County should be affirmed.

Per Curiam:

Adopted in whole.

NORTH DAKOTA SUPREME COURT.

S. H. SLEEPER, Appt.,

v.

G. W. BAKER et al., Respts.

(— N. D. —, 134 N. W. 716.)

Trial — motion to exclude evidence — sufficiency.

1. An objection to the introduction of any evidence upon the ground that the complaint does not state facts sufficient to constitute a cause of action must specially point out wherein the complaint is defective.

Same — defects reached.

2. An objection to the evidence, which is based upon and calls attention to substantial defects in a count of a complaint merely, will not reach a misjoinder of actions or formal defects in pleading.

Pleading — sufficiency to admit proof.

3. As against such a motion to exclude all of the evidence, one count, although misjoined, if otherwise stating a cause of action, will be allowed to stand.

Conspiracy — to induce breach of contract — liability.

4. The civil action of conspiracy is a tort action, and cannot, in general, be maintained for inducing a third person to break his contract with the plaintiff; the consequence at law being only a broken contract for which the party to the contract may have his remedy by suing upon it. In order to sustain such an action, it is generally necessary that there shall be an averment

and proof of the commission of an act which, if done by one alone, would, at the common law, constitute a ground for an action on the case. The action will not generally lie for merely inducing another to break his contract, except where direct fraud or force or coercion has been used.

(December 19, 1911.)

A PPEAL by plaintiff from a judgment of the District Court for Ward County in defendants' favor in an action brought to recover damages for the breach of two contracts for the sale of certain lands, and for alleged conspiracy to break said contracts. Reversed.

Statement by Bruce, J.:

Facts: This action was brought by S. H. Sleeper, appellant, to recover damages for the breach of two contracts, one with the defendants G. W. Baker and C. E. Brace, copartners, known as "Baker & Brace," and the other with Frank D. Banta and Lincoln Banta, copartners, known as "Banta Brothers," and joining these defendants and each of them as individuals in a tort action by reason of an alleged conspiracy to break said contracts. The trial court sustained a motion to exclude all of the testimony under the complaint, on the grounds that no cause or causes of action were therein set forth. This motion specifically stated wherein the several counts failed to state causes of action, but made no point as to misjoinder of actions or as to any other defects in the pleadings. After the granting of this motion and the exclusion of the testimony, another motion was made to dismiss the action "on the ground and for the reason that the complaint failed to allege facts sufficient to constitute a cause of action." This request was also granted, and the action was dismissed, but without prejudice to the plaintiff. The error complained of, and for which a reversal is asked on this appeal, is the action of the court in granting such motions.

The first count of the complaint is in contract against the defendants Baker & Brace. It first sets up a contract between the plaintiff, S. H. Sleeper, and the defendants Banta Brothers, made on the 1st day of May, 1906, wherein and whereby it was agreed that the plaintiff, Sleeper, "should furnish lands for sale to purchasers to be furnished by said defendants (Banta Brothers), and that, for each acre sold to purchasers furnished by said Banta Brothers, the plaintiff should allow them the sum of \$3 per acre, and a refund of \$29 railroad fare for each purchaser who actually purchased land shown by the said Sleeper, plaintiff herein, to said defendants

Headnotes by BRUCE, J.

Note. — As to the right of action for damages for inducing a breach of contract, see *Schonwald v. Ragains*, ante, 854, and the annotations referred to in the footnote thereto.

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or their customers. That in the months of August and September, 1906, the plaintiff, having listed and inquired about and arranged for the sale of a large amount of lands to customers of said Banta Brothers, did show to defendants Banta Brothers, large quantities of said lands so to be had for their said customers, and which this plaintiff had the right, as agent, to sell, and for which he had the right to procure customers under contract hereinafter more particularly set forth, together with other lands also shown to customers of said defendants, Banta Brothers, in the months of August and September of the year 1906. That said lands were so exhibited to defendants, wherein and whereby it was agreed number, in said months of August and September, and large quantities of land hereinafter more specifically set forth were, by reason of said showing and exhibition, sold to the customers of the defendants Banta Brothers, all of the land in this complaint mentioned being so sold; and the said lands were exhibited to said customers at an expense to this plaintiff of not less than \$630.50. That in the month of July, A. D. 1906, and for the purpose of carrying out the contract between the defendants Banta Brothers, and the plaintiff, Sleeper, the said Sleeper made and entered into a certain contract, partly oral and partly written, with Baker & Brace, the other defendants, wherein and whereby it was agreed that the said Baker & Brace would, and did, by the terms of said contract, give authority to said plaintiff, Sleeper, to sell any of the lands which they had in their hands as agents for sale, to any person whomsoever, and that, as compensation to said Sleeper if said sale was made, he, the said Sleeper, should receive the difference between the price given him upon the said lands and a net price by said last-named defendants, Baker & Brace, or that, in case of a sale by Baker & Brace to any customers furnished by said S. H. Sleeper or procured or introduced to said Baker & Brace by said Sleeper, they (Baker & Brace) were to pay to said Sleeper \$1.50 an acre. That under the terms of said contract with Baker & Brace, the plaintiff, Sleeper, exhibited 5,080 acres of land (in said complaint particularly described) to said Banta Brothers, and a number of other persons, 'all of said persons as aforesaid being furnished by said S. H. Sleeper to Baker & Brace under the terms and provisions of the contract before set forth, and that Baker & Brace sold to said persons the said land, amounting in all to 5,080 acres of land,' and that the plaintiff, Sleeper, was entitled to receive from said Baker & Brace \$1.50 per acre for such land,

amounting in all to the sum of \$7,620, with interest thereon from the 1st day of March, 1907, and amounting in all to the sum of \$8,642.35, no part of which has been paid."

The second count is in contract against Banta Brothers, and is substantially as follows: "That in the sale of said lands this plaintiff is informed and verily believes the fact to be that Banta Brothers & Company, a copartnership hereinbefore named as defendants, and Frank D. Banta and Lincoln Banta, received as commission on the sale of said lands and retained lands by way of commission, in the sum of not less than \$35,000. That of said commissions so received by the said Frank D. Banta, Lincoln Banta, and Banta Brothers & Company, the sum of \$19,760 is justly due and owing from said Lincoln Banta, Frank D. Banta, and Banta Brothers & Company under the terms and provisions of the contract between plaintiff and said defendants in this paragraph mentioned, no part of which has been paid, though payment thereof has been demanded, and no accounting for which has been rendered the plaintiff, though a demand for an accounting has been made upon the defendants in this paragraph mentioned and each of them. That the said amount of \$19,760 and interest from the 1st day of March, 1907, is justly due and owing, as this affiant is informed and verily believes, by said defendants in this paragraph mentioned, to the plaintiff, said interest amounting, at the date hereof, to the sum of \$2,651.14, making a total now justly due and owing of \$22,411.14, no part of which has been paid, though payment thereof has been demanded.

The third count purports to be an action in conspiracy, and is as follows: "That, in reliance upon the said contracts with the several defendants named in this action, and depending in good faith upon the same, and fulfilling the same on the part of this plaintiff in good faith, the plaintiff expended large sums of money and time for the purpose and in showing prospective purchasers the lands alleged hereinbefore to have been sold, and in furnishing buyers to said Baker & Brace and furnishing lands to said Frank D. Banta, Lincoln Banta, and Banta Brothers & Company, and did, in all things, comply with the terms of the two said contracts in this complaint mentioned, and performed in all things the said contracts, and did earn, as this plaintiff is informed and verily believes, the sums of money hereinbefore alleged to be due and owing, and the said services and sums of money so expended were of reasonable value to the defendants in this action of the sums claimed to be

due and owing this plaintiff under the terms of said contracts. That heretofore, and in pursuance and performance of said contracts, this plaintiff did procure and introduce to Baker & Brace, as purchasers for lands, all persons hereinbefore named, and others, about the month of August or September, in the year 1906; and by reason of said procuring of said lands for said Banta Brothers & Company, Frank D. Banta, and Lincoln Banta, so sold and purchased as aforesaid, this plaintiff did in all matters and things comply with the terms of said contracts with all of the defendants hereinbefore named. That the said Frank D. Banta, Lincoln Banta, and Banta Brothers & Company, and G. W. Baker and C. E. Brace, disregarding the terms of said contracts hereinbefore set forth and alleged, which were then known to all the defendants, and with the intent to cheat and defraud this plaintiff, did, in the months of August and September, A. D. 1906, and afterwards, and prior to the date hereof, falsely, fraudulently, and with the intent to cheat and defraud the plaintiff, conspire together to prevent this plaintiff from collecting any of the moneys due to this plaintiff, as hereinbefore alleged, by ignoring this plaintiff as the agent of all of said parties under the terms of said contracts, and by dealing directly with each other without the intervention or the agency of this plaintiff, and by pretended sales of various and sundry of the said lands hereinbefore described, prior to the actual and bona fide sales which were thereafter made, after said pretended sales, and by various and sundry unlawful and deceitful schemes to deceive, each and all of said defendants have conspired together for the purposes of defeating and cheating this plaintiff out of moneys alleged to be due and owing by fraud and deceit as aforesaid. That this plaintiff did not know for about the period of one year or more after the consummation of said conspiracy aforesaid, that the same existed; does not know exactly how much land was sold, but believed that large amounts were sold on which this plaintiff is entitled to commissions in addition to those hereinafter set forth and alleged. That the plaintiff was deceived by said defendants and each of them to his damage in the sums hereinbefore alleged to be due and owing, having relied on the honesty and integrity of the said defendants and each of them, by false and fraudulent transactions and statements hereinbefore made in pursuance of and carrying out the said conspiracy in this paragraph alleged; and that said defendants and each of them did profit, and have kept and retained, for the use and benefit of said de-

fendants and each of them, commissions and lands received by them as commissions by reason of the agency and performance of the contract hereinbefore set forth, by plaintiff, the said sums of money hereinbefore alleged to be due and owing by defendants to plaintiff in the respective sums alleged against them and each of them, together with the other and large commissions, aggregating much more than the amounts alleged to be due, and that said defendants were entitled to keep and retain."

The prayer for relief is as follows: "Wherefore plaintiff prays judgment in his favor, and against Frank D. Banta, Lincoln Banta, and Banta Brothers & Company, for the sum of \$22,411.14, and against G. W. Baker, C. E. Brace, and G. W. Baker and C. E. Brace, copartners, as Baker & Brace, for the sum of \$8,622.45, and against all of the defendants herein for the sum of \$31,000, with interest from this date until paid at the rate of 7 per cent per annum, and that the defendants Baker & Brace be enjoined, pending this litigation, from collecting the judgment in favor of Baker & Brace and against this plaintiff; that the defendants and each of them be compelled to render a full and complete account of all of said transactions set forth in this complaint by order of this court; and that the plaintiff have such further relief as to the court seems just and meet in the premises."

Messrs. LeSueur & Bradford and Ryerson & Nash for appellant.

Messrs. Winslow Evans and Bowen & Adams for respondents.

Bruce, J., delivered the opinion of the court:

Three causes of action are intended to be set forth in the complaint. Two are separate and distinct actions upon the contract, against separate and distinct defendants, and one is an action of tort against all of the defendants.

It is for this court to determine whether such complaint is vulnerable to a motion to exclude all of the testimony for the failure of the several counts to state sufficient causes of action, and which motion, though specifically pointing out wherein such failure consists, raises no objection to the misjoinder of the parties or of the actions, nor to the form of the pleadings.

We are of the opinion that the first count of the complaint states a cause of action in contract against the defendants Baker & Brace, and that the trial court erred in excluding all of the evidence thereunder, and in directing a dismissal of the action in so far as this count was concerned. There is, it is true, a question as to

whether the joinder or attempted joinder of two causes of action upon the contract with separate and distinct defendants, and with another separate and distinct action in tort against all of the defendants, does not render the complaint defective; but, since this point was not raised by motion or demurrer preliminary to the trial in the court below, nor even by a specific objection pointing out the defect in the motion to exclude the evidence, or in the motion to dismiss on that trial, we hold that these objections, if any, were waived, and that the lower court erred in excluding all of the evidence under the complaint. "If there is but one righteous man in Sodom, the city may stand,"—and there appears to be at least one righteous count in this complaint. *James River Nat. Bank v. Purchase*, 9 N. D. 280, 83 N. W. 7.

We now come to the second count in the complaint, which also is on the contract. This count is against the defendants Banta Brothers. The causes of action against Baker & Brace and against Banta Brothers are separate and distinct, and should be separately stated (see § 6877, Rev. Codes, 1905), even if they can be properly joined, and there is some doubt as to whether the former portions of the complaint can be prefixed to the paragraphs just quoted and be made a part thereof, so as to constitute a cause of action. Even if they could, however, no cause of action in contract is stated against Banta Brothers. The complaint, indeed, as we view it, does not allege that Banta Brothers owe Sleeper anything on the contract, but rather that Sleeper owes Banta Brothers commissions at the rate of \$3 per acre. The fact, if fact it be, that Banta Brothers received thereunder \$35,000 commission from other parties, is, under this count, no concern of the plaintiff. No cause of action on the contract is stated in the complaint against Banta Brothers.

The next count, if count it be, is a count in tort or for conspiracy, and, although on the oral argument counsel for appellant hardly mentioned the subject, it was the sufficiency of this count that furnished the main matter in controversy both on the trial below and in the printed briefs of counsel on this appeal.

We must remember at the outset that, although the complaint seeks to establish a conspiracy, mere opprobrious epithets do not change, in any way, the nature of the action. The action is a civil and not a criminal one. Indeed, as was said by Lord Holt in the case of *Savile v. Roberts*, 1 Ld. Raym. 374: "Though in the old books such actions are called conspiracies, yet they are nothing in fact but actions upon the case." It is generally only when men con-

spire to violate the primary, and not the mere contractual, rights of another that the civil action of conspiracy will lie. As one authority puts it: "An act which, if done by one alone, constitutes no ground of an action on the case, cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several." "The quality of the act, and the nature of the injury inflicted by it," the courts say, "must determine the question whether the action will lie." *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340; *Savile v. Roberts*, *supra*.

Although there are a number of cases to the contrary, the weight of American authority seems to hold to this rule. See 1 *Jaggard, Torts*, p. 636; 1 *Addison, Torts*, p. 7. Even the cases which are often cited in contradiction to it often fail to bear out the contention of their proponents. In the case of *Van Horn v. Van Horn*, 52 N. J. L. 284, 10 L.R.A. 184, 20 Atl. 485, for instance, the act was done by an outsider, and was a malicious libel to character and to business; and the same is true of *Lally v. Cantwell*, 30 Mo. App. 524. In the case of *Jones v. Stanly*, 76 N. C. 355, a malicious desire to injure the plaintiff, and not the mere desire to profit one's self, is the gravamen of the action. The same is also true of the case of *Delz v. Vinfree*, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111, and even of the leading English case of *Lumley v. Gye*, 2 El. & Bl. 216, 22 L. J. Q. B. N. S. 463, 17 Jur. 827, 1 Week. Rep. 432, 1 Eng. Rul. Cas. 706, on which the minority American rule seems to be grounded. In the leading American minority case of *Angle v. Chicago*, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240, upon which the plaintiffs rely, there are to be found both a malicious motive, positive tortious acts, and positive injury, which an action on a contract against the contracting party could hardly have reached. The cases, indeed, are generally cases where the solicitation was by an entire outsider, and were accompanied by fraud or intimidation. It is also true that there is a line of cases where laborers were induced to break their contracts of employment, and which also hold to a contrary rule. See *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *Walker v. Cronin*, 107 Mass. 555; *Mapstrick v. Ramge*, 9 Neb. 390, 31 Am. Rep. 415, 2 N. W. 739. These cases, however, belong to a class of their own, and they are historically grounded in the deep-rooted policy of the old English, and even early colonial American law, which almost gave to the employer a property right in his employee, which was evidenced by the stat-

utes of laborers, of Elizabeth, and of Edward VI., and which tied the laborer to the land and dictated and controlled his contracts of employment. They are chiefly to be found in the Southern states, and in those of the East, where, at an early time, the institution of slavery not only gave to the master a property right in his employee, but bonded servants were common. See 1 Addison, Torts, p. 7; *Chambers v. Baldwin*, 91 Ky. 121, 11 L.R.A. 545, 34 Am. St. Rep. 165, 15 S. W. 57, 58; 1 Jaggard, Torts, p. 636.

The rule, indeed, has, except where direct fraud or coercion has been used, or where no adequate action upon the contract would lie against the guilty parties, rarely been extended to the breach of contracts generally. The whole question is so thoroughly and adequately discussed in the case of *Chambers v. Baldwin*, supra, and under a very similar state of facts, that we will refrain from lengthening this opinion; and, without necessarily affirming all that is in that opinion contained, we will refer to it for a discussion of the law. The rule, as we see it, is substantially this: "That an action cannot in general be maintained for inducing a third person to break his contract with the plaintiff; the consequence after all being only a broken contract for which the party to the contract may have his remedy by suing upon it." *Ashley v. Dixon*, 48 N. Y. 430, 8 Am. Rep. 559; *Brentman v. Note* (City Ct. N. Y.) 3 N. Y. Supp. 420; *Boyson v. Thorn*, 98 Cal. 578, 21 L.R.A. 233, 33 Pac. 492; *Kimball v. Harman*, supra.

It is true that the Wisconsin case of *Martens v. Reilly*, 109 Wis. 464, 84 N. W. 840, seems to support the position of the appellant; but this case is not only contrary to the weight of American authority (see Jaggard, Torts, p. 696), but, as we will hereafter see, was decided under a peculiar local statute. The same is true of the cases of *White v. White*, 132 Wis. 121, 111 N. W. 1117, and *Randall v. Lonstorf*, 126 Wis. 147, 3 L.R.A. (N.S.) 470, 105 N. W. 663. In the latter case, also, something greater than a breach of contract was involved, namely, a breach and annulment of the marriage relationship, in which the state as well as the individual is concerned. Anyway, all of the Wisconsin cases are decided under a statute in regard to conspiracy which is radically different from our own. To use the language of the admirable note to the case of *Randall v. Lonstorf*, supra, which is to be found in 5 Ann. Cas. 375: "The reported case cannot be said to be in conflict with the rule which is generally recognized. The case turned on the construction of the Wisconsin L.R.A. (N.S.)

statute defining conspiracy, and it was merely held that the allegations of the complaint brought the case within that portion of the statute which makes it unlawful for any two or more persons to combine or agree together 'for the purpose of maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act.'" The court held, in the Wisconsin case, that the conspiracies or agreements were for the purpose of "preventing a lawful act," i. e., the fulfillment of the contracts. Our statute (§ 8768, Rev. Codes, 1905) only makes the prevention of the doing of a lawful act unlawful when that prevention is brought about "by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use or employment thereof."

We hold, therefore, that the trial court did not err in excluding all the evidence as to the alleged conspiracy, and if this were the only count we would affirm the judgment. We are, however, as we have before said, equally satisfied that an action in contract is sufficiently pleaded in the complaint as against the defendants *Baker & Brace*, in so far, at least, as to render it invulnerable to a motion on the trial to exclude all of the testimony, and to a motion to dismiss the action after such testimony was excluded, which merely specifies basic faults in substance, and do not call attention to misjoinder or lack of form.

The judgment of the trial court is reversed, and the case is remanded for a new trial. The costs will be taxed against the respondents.

Goss, J., being disqualified, did not participate. Honorable Charles A. Pollock, Judge of the Third Judicial District, sat in his place.

WYOMING SUPREME COURT.

GEORGE BOLLN COMPANY

v.

NORTH PLATTE VALLEY IRRIGATION COMPANY.

(— Wyo. —, 121 Pac. 22.)

Statute — passage — mandatory constitutional requirements.

1. A constitutional provision requiring

Note. — Constitutionality of statute making owner personally liable to laborers or materialmen because of noncompliance with provisions for their protection.

Gibbs v. Tally, 133 Cal. 373, 60 L.R.A.

the presiding officer of each house, in the presence of the house over which he presides, to sign all bills passed immediately after their titles have been publicly read, and the fact of the signing to be at once entered upon the journal, is mandatory.

Same — record of passage — mistake — rejection.

2. An erroneous number of original bill, employed by mistake of the clerk in attempting to give a double description to a bill signed by the presiding officer of a legislative body, while giving its correct number as enrolled bill, will be rejected as surplusage if the records show that the specified number of original bill was not passed, but that the enrolled bill mentioned was passed, duly signed, and filed in the proper archives.

Constitutional law — contractors' supplies — personal liability of owner.

3. The attempt to make an owner who fails to take from one contracting to construct for him a ditch or reservoir a bond conditioned to pay all claims for materials, farm produce, provisions, or goods of any kind furnished the contractor or subcontractor, personally liable for such claims, is invalid, as taking property without due process of law, and denying him the equal protection of the laws, so far as it attempts to include claims for materials which do not go to enhance the value of his property.

Bond — to protect materialmen — fixing penalty.

4. A statute requiring a property owner to take a good and sufficient bond from one contracting to do work for him, to pay claims of laborers and materialmen, is insufficient which does not fix any method for ascertaining the penalty of the bond.

Constitutional law — bond to secure materialmen — limitation of surety.

5. Limiting the surety which a property owner may take from one contracting to do work for him to secure payment of laborers and materialmen to incorporated companies deprives him of his liberty to contract, and denies him the equal protection of the laws.

(February 13, 1912.)

RESERVATION by the District Court for Converse County for the decision of the Supreme Court of questions arising in an action brought to hold defendant liable for the value of supplies furnished to a contractor, because of its failure to take the statutory bond from him. Answer favorable to defendant.

The facts are stated in the opinion

Mr. F. H. Harvey for plaintiff.

Messrs. Clark & Clark, for defendant:

A failure of the journal affirmatively to show a proper signing defeats the bill.

State ex rel. Hynds v. Cahill, 12 Wyo. 225, 75 Pac. 433; State ex rel. Cheyenne v. Swan, 7 Wyo. 166, 40 L.R.A. 195, 75 Am. St. Rep. 889, 51 Pac. 209.

An affirmative showing has not been made.

Cohn v. Kingsley, 5 Idaho, 416, 38 L.R.A. 74, 49 Pac. 985; Hunt v. State, 22 Tex. App. 401, 3 S. W. 233; Chicago, B. & Q. R. Co. v. Smyth, 103 Fed. 376; State v. Burlington & M. River R. Co. 60 Neb. 741, 84 N. W. 254; Fillmore v. Van Horn, 129 Mich. 52, 88 N. W. 69.

Such a statute is an unwarranted interference with the right to contract, and con-

815, 65 Pac. 970, cited in *GEORGE BOLLN CO. v. NORTH PLATTE VALLEY IRRIG. CO.*, holds that an owner of property who has made and filed a valid contract for the placing of a building thereon, under which, by the terms of the statute, the entire contract price may be applied to the claims of laborers and materialmen, cannot constitutionally be required to furnish a bond which will make him liable to them in an additional amount in case their claims are not satisfied by the contractor.

But it has been held within the power of the legislature to provide that the owner of a building shall be liable to materialmen and laborers for the full value of their material and labor, if he fails to execute his contract in a certain form and file it in the recorder's office, although he has paid the contractor the contract price. *Kellogg v. Howes*, 81 Cal. 170, 6 L.R.A. 588, 22 Pac. 509.

And it is held that a statute making an owner who fails to comply with its requirement as to the form and filing of the contract, liable for the claims of materialmen and laborers, though they may exceed the contract price, does not uncon-

stitutionally interfere with his right to contract, or make him liable to a penalty, nor does it otherwise unconstitutionally interfere with his rights. *Chicago Lumber Co. v. Newcomb*, 19 Colo. App. 265, 74 Pac. 786.

As to the constitutionality of a statute giving a mechanics' lien contrary to the agreement of the contractor, see the note to *Kelly v. Johnson*, 36 L.R.A. (N.S.) 573.

As to whether a building contractor's bond indemnifies the owner against mechanics' liens when none are especially mentioned, see the note in 24 L.R.A. (N.S.) 1075.

As to the right of a subcontractor, materialman, or laborer to maintain an action on a contractor's bond to the owner, see the note in 27 L.R.A. (N.S.) 573.

As to the liability of sureties on the contractor's bond to laborers or materialmen who are not entitled to a lien, when the bond is conditioned against liens or claims, see the note in 9 L.R.A. (N.S.) 889.

As to the effect of surrender or discharge by the owner of property, of a bond given by the contractor, conditioned for the payment of materialmen and laborers, upon the right of the latter to recover thereon, see the note in 18 L.R.A. (N.S.) 455.

L. A. W.

travenes the constitutional provisions which prohibit the taking of property without due process of law. It is class legislation.

Gibbs v. Tally, 133 Cal. 373, 60 L.R.A. 815, 65 Pac. 970.

This statute denies the equal protection of the laws.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Shaughnessy v. American Surety Co.* 138 Cal. 543, 69 Pac. 250, 71 Pac. 701.

Beard, Ch. J., delivered the opinion of the court:

This case comes to this court on questions reserved by the district court of Converse county and certified here for decision as to the constitutionality of chapter 78 of the Session Laws of 1909, entitled, "An Act to Protect Laborers, Mechanics, Ranchmen, Farmers, Merchants, and Other Persons Furnishing Work or Labor, Material, Ranch or Farm Products, Goods or Provisions, to Contractors or Subcontractors in the Construction of Ditches, Canals, and Reservoirs," and now being §§ 3823, 3824, and 3825, Comp. Stat. 1910; the reserved questions being as follows:

"(1) In the passage of chapter 78 of the Session Laws of Wyoming 1909, did the legislature violate the provisions of § 28 of article 3 of the Constitution of the state of Wyoming?

"(2) Does the journal of the senate of the tenth state legislature of the state of Wyoming sufficiently show the signing by the president of the senate, in the presence of the senate, of chapter 78 of the Session Laws of Wyoming 1909?

"(3) Does the first sentence of § 1 of chapter 78 of the Session Laws of Wyoming 1909 violate the provisions of § 6 of article 1 of the Constitution of the state of Wyoming?

"(4) Does the first sentence of § 1 of chapter 78 of the Session Laws of Wyoming 1909 violate the provisions of § 1 of the 14th Amendment to the Constitution of the United States?"

Section 28, art. 3, of the Constitution, referred to in the first question, is as follows: "The presiding officer of each house shall, in the presence of the house over which he presides, sign all bills and joint resolutions passed by the legislature immediately after their titles have been publicly read, and the fact of signing shall be at once entered upon the journal." On this branch of the case two questions are presented: First. Is this provision of the Constitution mandatory? Second. If so, does the senate journal show a compliance with such provision? The first question is very ably and elaborately discussed in 39 L.R.A. (N.S.)

State ex rel. Hynds v. Cahill, 12 Wyo. 225, 75 Pac. 433; and, while the question was there left undecided, because not necessary to a determination of the case, we think one reading that discussion can arrive at no other conclusion than that the court as then constituted would have held the provision mandatory had it been necessary to decide the point. The court as now constituted deems it sufficient, without encumbering the reports by repeating what was there said, to concur in and adopt as the basis of its decision the reasoning in that case, and to now hold the provisions of said § 28, art. 3, of the Constitution, to be mandatory.

Second. Does the senate journal show a compliance with that provision of the Constitution? It is contended by counsel for defendant that it does not; but, to the contrary, shows affirmatively that at the time the bill was signed by the president of the senate it bore a different title than that of chapter 78, Session Laws 1909, and related to an entirely different subject. The only entry found in the senate journal with reference to the signing by the president of the senate of the act in question is found on page 521, senate journal 1909, under the heading, "Signing of Enrolled Acts," and is as follows: "Mr. President thereupon gave notice that he was about to sign, and he did, thereupon, in the presence of the senate, affix his official signature to the following enrolled acts, to wit: . . . house enrolled act No. 73, original being: house bill No. 96—A bill for an act relating to the issuance of certificates of appropriation under permit, and to the use of the waters of the state of Wyoming for power purposes." The journal entries under the heading and recital above set out describe more than twenty bills as being then signed, two preceding and the others following the one set out above, and in each instance describes the bill in the same manner by giving the number of the enrolled act, the number of the original house bill, and the title of the act. An examination of said chapter 78, Session Laws 1909, on file in the office of the secretary of state, discloses that it bears at the top of the first page the following: "Original house bill No. 69." "Enrolled act No. 73"—followed by the title and body of the act as published in the Session Laws 1909 as chapter 78. The house journal shows that house bill No. 96, bearing the title as recited in the senate journal, passed the house (H. J. p. 313), went to the senate, and was there referred to a committee (S. J. p. 272), was reported back to the senate by the committee without recommendation (S. J. p. 317), and was indefinitely postponed by the adop-

tion of the report of the committee of the whole of the senate so recommending (S. J. pp. 330, 331). House bill No. 96, therefore, never passed the senate or became an enrolled act. The history of house bill No. 69, as briefly stated, is as follows: As introduced and as it passed the house it bore the title of chapter 78, S. L., was amended in the senate, the house concurred in the senate amendment, and passed the bill as amended, was reported by the house enrolling committee as properly enrolled as "enrolled act No. 73," and as such signed by the speaker of the house. H. J. pp. 154, 554, 557, 579; and S. J. pp. 314, 439, 443, 478. House bill No. 69, therefore, as shown by the journals, was regularly passed by both houses, was properly enrolled as "enrolled act No. 73," and duly signed by the speaker of the house; and the enrolled act on file in the office of the secretary of state bears the signature of the speaker of the house, the president of the senate, and of the governor, approving the same. If there was simply a conflict between the enrolled act and the senate journal as to the signing of the bill, the latter, being the best evidence, should control. But here we find not only such a conflict, but a conflict in the journal recital itself. Either the recital that the bill then signed was "house enrolled act No. 73," or that it was house bill No. 96—a bill for an act," etc., is erroneous. We must therefore look beyond the single journal entry for evidence as to which of the two is correct. Tracing the history of the two bills,—house bill No. 69 and house bill No. 96,—as shown by the journals, we have little difficulty in arriving at the conclusion that it was "enrolled act No. 73" which was in fact house bill No. 69. The senate journal recites that the president of the senate gave notice that he was about to sign and did then sign certain enrolled acts. Then follows the description of the bills then signed, and in each instance the number of the enrolled act is given as well as the other description; and, had the journal in this instance contained the number of the enrolled act only, it would no doubt have been sufficient. Again, house bill No. 96, never having passed the senate or become an enrolled act, could not properly have been among the bills then signed; while house bill No. 69 had been regularly passed by both houses, had been properly enrolled, bore the signature of the speaker of the house, and was in proper condition to be then signed by the president of the senate. How the error in the senate journal occurred we have no means of knowing; but it seems quite probable that on that last busy session of the senate the clerk inadvertently transposed the figures "6" and "9," and in 39 L.R.A. (N.S.)

writing up the journal in full from his minutes took the title from house bill No. 96, instead of from enrolled act 73. But, however the error may have occurred, we think the recital in the journal, which is supported by the enrolled act and by all other recitals in the journal with reference to the bill, must be taken as speaking the truth, and that the other description of the bill must be rejected as the erroneous one. Such being our opinion, the first reserved question is answered in the negative, and the second in the affirmative.

The third and fourth questions call for a determination of the validity of the first sentence of § 1 of the statute in question on other grounds. Counsel for defendant contend that it violates § 6, art. 1, of the Constitution of this state, which provides: "No person shall be deprived of life, liberty, or property without due process of law;" and also the provisions of the 14th Amendment to the Constitution of the United States, that no state shall make or enforce any law denying to any person within its jurisdiction the equal protection of the laws. The part of the statute thus questioned is as follows: "Whenever any ditch or canal company, or other owner or owners, shall contract with any person, persons, or corporation, for the construction of its, his, or their ditch, canal, or reservoir, or any part thereof, such company, owner, or owners, shall take from the person, persons, or corporation with whom such contract is made, a good and sufficient bond in some guaranty or surety company authorized to do business in this state, conditioned that such contractor or contractors shall pay or cause to be paid all laborers, mechanics, materialmen, ranchmen, farmers, merchants, and other persons who supply such contractor or contractors, or any of his or their subcontractors, with labor, work, materials, ranch or farm products, provisions or goods of any kind, all just debts incurred therefor in carrying on such work, which bond shall be filed by such company or other owner in the office of the county clerk and *ex officio* register of deeds in the county where the principal work of such contractor shall be carried on; and if any such ditch or canal company or other owner or owners shall fail to take such bond, such ditch or canal company or other owner or owners shall be liable to the persons herein mentioned to the full extent of all such debts so contracted by such contractor, or contractors, or any of his or their subcontractors." [§ 3823.] The other provisions of the act relating to actions on the bond, etc., are not involved in this case. The effect of the statute, if it can be upheld, is to extend the application of the principles

upon which mechanics' lien laws are founded, and to render the owner personally liable, not only for the labor and materials which actually go into the improvement and thereby enhance the value of the property, but also for all just debts incurred by the contractor or any of his subcontractors for labor, work, material, ranch or farm products, provisions or goods of any kind in carrying on such work, unless he takes from the contractor the bond provided for by the statute. That the legislature cannot make the owner personally liable for other things or to a greater amount than it can create a lien upon his property we have no doubt; and, if the statute under consideration does so, to that extent it is invalid. In many states the liens given for labor performed for or for materials furnished to the contractor or subcontractor are limited by the statutes to the contract price between the owner and the original contractor, or to a lesser amount, or to the amount due or to become due to the contractor at the time of giving notice, etc. In other states a lien is given for labor and materials without regard to the contract price or the state of the account between the owner and the contractor. The latter class of statutes has been many times attacked as unconstitutional on the grounds that are here urged against the statute above quoted. In a majority of the state courts, and in the Federal courts, the constitutionality of such statutes has been upheld to the extent of the value of the labor or materials which have actually gone into the building or other structure or improvement, upon the principle that equitably those who have furnished labor or materials which have gone into and thereby increased the value of the property should be compensated therefor by the owner who has been benefited thereby. Many cases are cited and reviewed by Judge Lurton in the case of *Jones v. Great Southern Fireproof Hotel Co.* 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 370, which decision was affirmed by the Supreme Court of the United States, 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. Rep. 576. But our statute goes much further, and imposes upon the owner an obligation to require the contractor to give security for debts that he or any of his subcontractors may contract with third persons for supplies and goods of any kind in carrying on the work, and which do not enter into or become a part of the work, or enhance its value, and for which, but for the statute, the owner is in no wise liable. 39 L.R.A. (N.S.)

To illustrate: The first eight items of the account in suit are:

March 3. 2 kerchiefs 20, Oshoes	
1.75, W. Sox 1.00	Rowe 2.95
Mits 1.25 2 shirts 1.00 Underwear	
2.75	" 5.00
Jumper .85 Blanket 1.25	" 2.10

The account contained many items of like kind, and also dry goods, pipes, and tobacco, etc. Upon what principle of natural justice can one who lets a contract for the construction of a ditch, canal, or reservoir be required to take security or to become personally liable for debts which may be contracted by the contractor or any of his subcontractors for goods or supplies which do not enter into the work or add to its value, and from which one derives no benefit? What justice is there in requiring a homesteader, desert entryman, or other landowner who lets a contract for the construction of a ditch to conduct water onto his land to take security from such contractor that he (the contractor) will pay all debts contracted by him or any of his subcontractors for groceries, clothing, bedding, etc., in carrying on the work? We confess we can see none. The statute goes beyond the principles upon which lien laws have been sustained, viz., that the property is enhanced in value to the extent of the value of the labor and materials actually going therein. In the *Jones Case*, supra, 30 C. C. A. on page 126, it is said: "If, then, this statute does not unduly restrain the owner's liberty of contract, considered as an incident to the right of owning, possessing, and enjoying property, the law must be constitutionally unobjectionable. If, however, this legislation is the mere arbitrary exercise of the powers of government, unauthorized by the established principles of private right, and not having the sanction of natural justice, it is not the law of the land. But we have already seen that the underlying purpose of the act is not to arbitrarily and unnecessarily oppress the owner in any incident of his right as owner, but to secure those who, by their labor or materials, have contributed to the improvement of the owner's property. That the liens under consideration are given to secure debts which are primarily the debts of another would be fatal to the legislation, as taking the property of one to pay the debts of another, but for the equity arising from the use of the labor and materials by the owner." In the present case there is no allegation that a single item of the account sued on was for labor or materials that went into the work; but for goods, wares, and merchandise to be

used as supplies in the construction of a tunnel on the line of an irrigating canal, as set forth in an itemized account attached to the petition; the account consisting principally of provisions, clothing, bedding, hay, and grain. The equities upon which the law giving a lien for labor and materials was upheld in the Jones Case are entirely wanting in this case; and the statute, in so far as it requires the owner to take security or become personally liable for other debts of the contractor or subcontractors than for those things—labor or materials—entering into the construction of the work, and contributing to the improvement of the property, and enhancing its value, in effect takes the property of the owner to pay the debts of another and is "fatal to the legislation."

A statute of Kansas provided: "That whenever any railroad company shall contract with any person for the construction of its road or any part thereof, such railroad company shall take from the person with whom such contract is made, a good and sufficient bond, conditioned that such person shall pay all laborers, mechanics, and materialmen, and persons who supply such contractor with provisions or goods of any kind, all just debts due to such persons, or to any person to whom any part of such work is given, in carrying on such work," etc. This seems to have been taken as the model from which our statute was drawn, as it appears to be in almost identical language with a few additions, and extending the liability to debts contracted by any subcontractors; and as we learn by reference to the house journal, pp. 251, 252, the words, "in some guaranty or surety company authorized to do business in this state," were not in the original bill, but were inserted by amendment. We are aware that the Kansas statute has been enforced by the courts of that state, but fail to find where its constitutionality has been raised or passed upon by the courts of that state on the questions involved in this case. In California a statute required a bond to be filed with the contract in at least 25 per cent of the contract price, to secure laborers and materialmen; and providing that a failure so to do made the owner personally liable. The statute had been enforced by the courts for some time without its constitutionality being questioned on the grounds that it deprived the party of his liberty of contract, or of his property without due process of law, or of equal protection of the laws. But the statute was so attacked in the case of Gibbs v. Tally, 133 Cal. 373, 60 L.R.A. 815, 65 Pac. 970, and held unconstitutional as violative of § 1, art. 1, of the Constitution of that 39 L.R.A. (N.S.)

state, and the 14th Amendment to the Constitution of the United States. Statutes making a railroad company liable for labor and materials, instead of giving a lien on the road therefor, have been upheld upon the same principle and to the same extent as mechanics' lien laws, but no further, so far as we have been advised.

Another objection to this statute, urged by counsel for defendant, while not a constitutional question, may be properly mentioned here. That is, the amount or penalty of the bond. The statute requires a good and sufficient bond, conditioned for the payment of all just debts contracted by the contractor or any of his subcontractors for specified items in carrying on the work, but fails to provide any method by which the amount of the liability can be determined at the time the bond is executed. It seems unreasonable to require a bond in an unlimited amount; and equally unreasonable to suppose that any surety or guaranty company would be willing to become surety on a bond so conditioned without the extent of its liability being therein fixed at a specific sum. Suppose the owner takes a bond in an amount reasonably believed to be sufficient at the time, but it should turn out to be entirely insufficient in amount. By the terms of the statute he would be personally liable at least for the excess. When a bond is required by a statute, it should provide some method by which the obligor and his sureties—and in this instance the owner as well—can ascertain and fix a definite amount beyond which they could not be held. Whether a bond, if given, containing no penalty, would be valid and enforceable, is quite a different question from requiring a bond containing certain conditions without prescribing the penalty for a breach of those conditions. Perhaps this defect might be cured by a provision for an official approval of the bond, in which case such approval might be held to attest the sufficiency of the penalty as well as of the sureties.

The only remaining question to be considered is that the bond required by the statute must be "in some guaranty or surety company authorized to do business in this state." Prior to the adoption of this statute, and a similar one applying to railroad companies, passed at the same session of the legislature, all bonds required by law, so far as we have been able to discover, were permitted to be given with either personal or surety company security; and if personal security is sufficient for public officers, executors, administrators, etc., and in court proceedings, why not in this class of bonds? As said by the supreme court of Ohio in the case of *State ex rel. McKell v. Rob-*

bins, 71 Ohio St. 273-291, 69 L.R.A. 427, 73 N. E. 470, 2 Ann. Cas. 485. "It is very plain that the security companies may be greatly benefited by this legislation, but an adequate corresponding benefit or protection to the general public, such as would justify such a radical and drastic limitation upon individual rights, is not apparent." The Ohio statute considered in that case, requiring official bonds (with certain exceptions) and administrators' bonds above \$2,000, to be surety company bonds, unless an affidavit was filed that application had been made to such company and refused, was held to be unconstitutional. The statute we are considering places it within the power of the half dozen surety companies authorized to do business in this state to prevent any ditch or canal company, or other owner, from letting a contract for the construction of any ditch, canal, or reservoir, except under the penalty of becoming personally liable for the unlimited debts of others for things which have not gone into the work, and due to persons with whom the owner has no contractual relations. Or, if they become surety on such bond, they may charge what they please therefor. Such a requirement, in our opinion is not only an unwarranted restriction upon the liberty to contract, but a denial of the equal protection of the laws; and in so far as the statute requires a surety or guaranty company bond, and creates a personal liability for other things than labor and materials which actually go into the work and thereby enhance the value of the property, it must be held to be unconstitutional and void.

To that extent the third and fourth questions are answered in the affirmative.

Scott and Potter, JJ., concur.

RHODE ISLAND SUPREME COURT.

CHARLES E. BLAKE, Trustee, etc., of N. Curtis Fletcher & Company,
v.

ATLANTIC NATIONAL BANK.

(33 R. I. 464, 82 Atl. 225.)

Contract — promise of stranger — assent — bankruptcy.

1. A bank cannot assent to the ratification

Note. — *Right of creditor after promisor's bankruptcy to adopt and enforce his assumption of another's debt.*

This note, as the title indicates, is confined strictly to the question whether one for whose benefit the promise was made must assent to the agreement before the 39 L.R.A. (N.S.)

by a partnership of the individual debt of a partner to it after the partnership has become insolvent, so as to be entitled to apply collateral held to secure firm obligations in satisfaction of such indebtedness.

Partnership — contracts — ratification.

2. That a contract signed by one partner was in fact a partnership matter is established by testimony of the one who signed it that it was intended as such, and a letter signed by the other partner agreeing that such partner's signature shall be assumed as that of the firm.

(March 4, 1912.)

EXCEPTIONS by defendant to rulings of the Superior Court for Providence and Bristol Counties made during the trial of an action brought to recover collaterals of the insolvent partnership, which defendant claimed to retain in satisfaction of a note made by N. Curtis Fletcher which had been adopted by the firm. Judgment for defendant.

The facts are stated in the opinion.

Messrs. John S. Murdock and Percy W. Gardner, for defendant:

A third person may enforce a promise made for his benefit.

Lawrence v. Fox, 20 N. Y. 268; Urquhart v. Brayton, 12 R. I. 169; Wood v. Moriarty, 15 R. I. 518, 9 Atl. 427; Wilbur v. Wilbur, 17 R. I. 295, 21 Atl. 497; Smith v. Union Ins. Co. 25 R. I. 260, 105 Am. St. Rep. 882, 55 Atl. 715; Gould v. United Traction Employees Mut. Aid Asso. 26 R. I. 142, 58 Atl. 624.

The fact that the promise made for the benefit of the bank is in the nature of an assumption by a firm of an individual liability does not alter the general rule.

Merriman v. Social Mfg. Co. 12 R. I. 175; Dean v. Collins, 15 N. D. 535, 9 L.R.A. (N.S.) 96, 125 Am. St. Rep. 610. 108 N. W. 242, 11 Ann. Cas. 1027; Arnold v. Nichols, 64 N. Y. 117; J. & H. Claagens Co. v. Silber, 93 Wis. 579, 67 N. W. 1122; Warren v. Farmer, 100 Ind. 593.

The fact of bankruptcy does not alter the rights of the defendant.

Re Downing, 1 Dill. 33, Fed. Cas. No. 4,044; Burdick, Partn. 1906 p. 295; Re Long, 7 Ben. 141, Fed. Cas. No. 8,476.

Mr. Charles R. Haslam, with Messrs. Gardner, Pirce, & Thornley, for plaintiff.

bankruptcy of the promisor in order to enforce such promise against the bankrupt's estate. The American authorities show a decided conflict of opinion on this question; on the other hand, the English cases are unanimous in holding that the assent must be made effective before the bankruptcy of the promisor.

Sweetland, J., delivered the opinion of the court:

This is an action in assumpsit, brought by Charles E. Blake, trustee in bankruptcy of N. Curtis Fletcher & Company a copartnership composed of N. Curtis Fletcher and William R. Potter against the Atlantic National Bank. The case was tried before a justice of the superior court sitting without a jury. The case is now before this court upon the defendant's exception to the decision in favor of the plaintiff.

In September, 1907, the said N. Curtis Fletcher signed his own name to an underwriting agreement as to certain bonds of the United Illuminating Company. Other persons also signed this agreement. By the terms of the agreement each person signing became obligated to the Atlantic National Bank for the amount set opposite his name in consideration of a loan made by the bank to the nominee of the underwriters. The amount set opposite the name of N. Curtis Fletcher was \$1,700. By the testimony of Mr. Fletcher he signed the underwriting agreement in behalf of the copartnership. In the early part of November, 1907, Mr. Potter was considering a dissolution of the firm; and Mr. Fletcher demanded from him that he should sign an acknowledgment that the obligation on the underwriting agreement, arising from the signature of Mr. Fletcher, was a firm obligation. Mr. Potter testi-

fied that up to that time he had understood that the underwriting agreement was an individual transaction of Mr. Fletcher. After considerable controversy between the partners, Mr. Potter signed the acknowledgment, which was dated as of the date of the underwriting agreement. In this written acknowledgment Mr. Potter agreed that the signature of Mr. Fletcher upon the underwriting agreement "shall be and is hereby assumed by N. Curtis Fletcher & Company." The said partnership was not dissolved at that time.

On January 28, 1908, N. Curtis Fletcher & Company obtained a loan from the Atlantic National Bank, the defendant, and gave to said bank the firm's promissory note for \$5,800, payable on demand. The firm deposited and pledged with the bank as collateral security for the payment of said note certain shares and a bond of the United States Steel Corporation. In said note the copartnership gave to the bank authority to sell the collateral security at public or private sale on non-payment of the note, to apply the net proceeds of such sale to the payment of the note, and also to apply the surplus of such net proceeds after payment of said note to the payment of any other note or claim against said firm held by the bank. On February 7, 1908, said copartnership was adjudged bankrupt, and the plaintiff was appointed the trustee in bankruptcy of said copartnership. After the bankruptcy

Thus, an agreement by a partnership to assume separate debts of each partner will not entitle separate creditors to prove their claims as joint creditors of the firm against the partnership estate, where they did not assent to the arrangement before bankruptcy. *Re Isaacs*, 3 Sawy. 35, Fed. Cas. No. 7,093, 6 Nat. Bankr. Reg. 92.

And in *Scull v. Alter*, 16 N. J. L. 147, it was held that a creditor must assent to the transfer of liability where one firm assumes the debt of another.

In *Robb v. Mudge*, 14 Gray, 534, it was held that an agreement by a partner who purchased partnership property to assume firm indebtedness must be assented to by the firm creditors before commencement of insolvency proceedings, to enable such creditors to prove their debts against the separate estate before separate creditors are paid.

But in *Re Downing*, 1 Dill. 33, Fed. Cas. No. 4,044, where a firm creditor was permitted to prove his claim against the estate of the partner, who had purchased the assets of the firm and agreed to pay all the debts, the court, in the course of its opinion, said that a promise by one to another for the benefit of a third person may, according to the prevailing American doctrine, be enforced at law in the name of the latter, especially where, as was true in the case at bar, the promisor receives a fund or prop-

erty with which to make such payment. And such promise is not defeated by subsequent bankruptcy of the promisor, and may be assented to, and the benefits thereof claimed, at any time either before or after the bankruptcy of the debtor. And *Re Dowling* was cited with approval and followed in *Re Long*, 7 Ben. 141, Fed. Cas. No. 8,476, the latter case criticizing the case which held that creditors must assent to such agreement before the bankruptcy of the promisor.

And in *Re Rice*, 9 Nat. Bankr. Reg. 373, Fed. Cas. No. 11,750, it seems to have been assumed that a purchasing partner's assumption of the firm debts was sufficient to entitle the firm creditors to share with his individual creditors in his bankrupt estate, without any question as to assent by the former.

A promise by one partner to pay all firm debts is enforceable against the separate estate of such partner by firm creditors, and they may share *pari passu*, though they did not know of the promise when made and the consideration did not move from them; and the benefit of this promise can be claimed either before or after the bankruptcy of the debtor. *Re Collier*, 12 Nat. Bankr. Reg. 266, Fed. Cas. No. 3,002.

And in *Colt v. Wilder*, 1 Edw. Ch. 484, in holding that a private debt assumed on the formation of a partnership may be proved

the defendant was informed by Mr. Fletcher that the underwriting obligation arising from his signature upon the underwriting agreement was a firm obligation, and the defendant also received from Mr. Fletcher a copy of the above-mentioned written acknowledgment of Mr. Potter.

After the bankruptcy of the copartnership, the defendant sold said collateral security, and from the net proceeds of the sale satisfied the indebtedness upon said note for \$5,800, and also satisfied the obligation of \$1,700 upon the underwriting agreement. The plaintiff protested against the action of the bank in treating said claim for \$1,700 as firm indebtedness, and has brought this action to recover the balance of the net proceeds of the sale of said collateral security remaining after the payment of the note of \$5,800, and interest thereon. The plaintiff claims that the indebtedness of \$1,700 in question was originally the individual obligation of Mr. Fletcher, and that the paper signed by Mr. Potter in November, 1907, is, at most, merely evidence of an assumption by the firm of that individual indebtedness of a partner. This was the finding of the justice of the superior court. The defendant urges that, even if this is the conclusion properly to be drawn from the testimony, and although the defendant was not aware of the assumption by the firm of the partner's individual obligation until after the bankruptcy of the firm, and hence its assent

must have been given after the bankruptcy, still the assent, when it was given, would make the bank a creditor of the firm from the time of the assumption, and the bank would be entitled to apply the balance of the proceeds of the sale of said collateral security in satisfaction of this claim of \$1,700 as an obligation of the firm, under the authorization contained in the note given by the firm to the bank.

The defendant bases its contention upon the authority of the Rhode Island cases, which uphold the right of a third person to enforce a promise made by one person to another for the benefit of said third person, although the consideration does not move from such third person, and although he was not cognizant of the promise when it was made. This court has frequently recognized such a doctrine. *Urquhart v. Brayton*, 12 R. I. 169; *Merriman v. Social Mfg. Co.* 12 R. I. 175; *Wood v. Moriarty*, 15 R. I. 518, 9 Atl. 427; *Wood v. Moriarty*, 16 R. I. 201, 14 Atl. 855; *Munroe v. Providence Permanent Firemen's Relief Asso.* 19 R. I. 363, 34 Atl. 149; *Smith v. Union Ins. Co.* 25 R. I. 260, 105 Am. St. Rep. 882, 55 Atl. 715; *Gould v. United Traction Employees Mut. Aid Asso.* 26 R. I. 142, 58 Atl. 624. However, the third person acquires no rights under the promise made for his benefit until he accedes to it. It must clearly appear, by suit brought upon the agreement or in some other manner, that the third person knows of the

against the partnership assets, and that without creditor's express assent, the court said it is not incumbent upon the complainant to show that by any act on his part he assented to the agreement between the partners at the time of forming the partnership, to assume his debt and become his joint debtors. It is sufficient that they did so agree between themselves, and that an assignment has been made creating a trust for the benefit of the creditors of the firm.

English cases.

Assent before bankruptcy to agreement by a partnership to assume separate debts of one partner is necessary to enable separate creditors to prove against the bankrupt's estate. *Ex parte Williams*, Buck, Bankr. 13.

And to the same effect is *Ex parte Appleby*, 2 Beacon, Bankr. 482, where, upon the dissolution of a partnership, the continuing partner agreed to assume the partnership debts.

And also *Ex parte Parker*, 2 Mont. D. & DeG. 511, where a partnership assumed the liability of one of the partners.

In *Ex parte Freeman*, Buck, Bankr. 471, it was held that the joint creditors not having, previous to bankruptcy, accepted as a sole debtor the continuing partner, who, on 39 L.R.A. (N.S.)

dissolution of the partnership, had covenanted to pay the firm debts, they could not prove against his separate estate. It was said: "The engagement of one partner with the other to pay the debts of the firm can, as to the creditors of the firm, be considered only as a proposal that he is willing to become their sole debtor. If they accede to this proposal before the bankruptcy, then a contract to that effect is concluded, and under the bankruptcy they are his separate creditors. But their acceptance of him as their separate debtor after the bankruptcy comes too late, for he is then incapable of contract.

And, also, in *Ex parte Fry*, 1 Glyn & J. 96, where one of three partners assigned his interest in the partnership property to two continuing partners, who agreed to pay the debts of the three, and afterwards became bankrupt, it was held that the joint creditors of the three were not entitled to prove against the estate of the two, there having been no acceptance prior to the bankruptcy, of the continuing partners as debtors.

And in *Ex parte Bonbonus*, 8 Ves. Jr. 540, there is a *dictum* to the effect that when a general partnership agrees to take upon itself the demand to the individual, the creditor must show consent to be the creditor of the general partnership only. J. H. B.

promise in his favor, or the assumption by a stranger of the debt due to him, accepts the new agreement, and assents to its terms. Until such circumstances appear showing accession on his part, the third person is not in position to avail himself of any benefit under the agreement. Before such accession on his part, his right to insist upon the performance of the promise in his favor may be lost by revocation or release between the parties to the agreement, or by the intervention of the rights of others. *Wood v. Moriarty*, 16 R. I. 201, 14 Atl. 855.

Such assent, to be effective, must be given before the bankruptcy of the promisor. This view is in accord with the general doctrine of the Rhode Island cases as to the position of the beneficiary under such promise before his assent to it. It also agrees with the great weight of authority that the indebtedness of a bankrupt may not be increased in this manner after bankruptcy. *Re Isaacs*, 3 Sawy. 35, Fed. Cas. No. 7,093. We are of the opinion that, if the indebtedness of \$1,700 to the defendant bank is to be regarded as the individual obligation of the partner Fletcher, assumed by the firm, the assent on the part of the bank to such an arrangement, made after the firm's bankruptcy, will not constitute the defendant a creditor of the firm, and that the defendant cannot be permitted to use the firm's property, in the defendant's hands at the time of the bankruptcy, to satisfy such indebtedness.

We think, however, that it is established by the testimony that the obligation arising from the underwriting agreement was an indebtedness of the copartnership originally, and not an indebtedness assumed by the firm. The partner Fletcher, who signed the agreement, testified that in doing so he acted for the firm, and that the obligation was always that of the copartnership. The partner Potter does not deny that it was in fact a firm obligation. The limit of his testimony in that regard is that up to the time of signing the letter of acknowledgment, in November, 1907, he "understood it as individual underwriting." There was a long interview between the partners in November, 1907, when Mr. Potter had the intention of withdrawing from the firm, and as a result of that conference, in which the matter must have been thoroughly considered, Mr. Potter signed the letter, addressed, not to the Atlantic National Bank, but to his partner, Mr. Fletcher. In this letter Mr. Potter agrees that "your signature on the agree-

ment with the Atlantic National Bank . . . shall be and is hereby assumed by N. Curtis Fletcher & Company." Although the language of the letter is that the "signature" of Mr. Fletcher is assumed, the circumstances show that the letter was not intended by the partners as the assumption by the firm of a new obligation, but as an acknowledgment or ratification of the act of Mr. Fletcher in a transaction which he had always regarded as part of the firm's business. According to the testimony of the partner Potter, the business of the firm, which was that of a banker and broker, was divided into two departments. One of these, which the witness calls the "New York end," was under his charge.

He testified that he "had very little to do with the corporate end, with the corporation. My end was the New York end."

C. Q. 38. You were the inside man?

A. I had the New York end.

C. Q. 39. Mr. Fletcher was interested in these various companies, a director, was he not?

A. That was his department; yes.

This testimony is corroborative of the testimony of Mr. Fletcher, and explains that, though the underwriting agreement was signed in furtherance of the copartnership business, the details were not known to Mr. Potter, as they belonged to Mr. Fletcher's department, with which he "had very little to do." Mr. Potter also testified that the firm did not receive any consideration for his signature upon the letter in question. It is therefore quite unlikely, when the partner Potter believed that he was about to retire from the firm, that without consideration he would have agreed to increase the indebtedness of the firm by assuming the individual debts of his partner, and thus reduce the value of his own share in the copartnership. It is more in accord with probability that at this conference in November, 1907, he learned the true nature of the underwriting obligation, and signed the said letter as a ratification of the act of his partner performed for the firm.

In the transcript we find no contradiction of the testimony of Mr. Fletcher, while the circumstances of the case strongly corroborate him. Decision should have been for the defendant upon the facts of the case.

Opportunity will be given to the plaintiff on March 11, 1912, to show cause why the case should not be transmitted to the Superior Court, with direction to enter judgment for the defendant for costs.

MASSACHUSETTS SUPREME JUDICIAL COURT.

CATHERINE CRAFT

v.

BOSTON ELEVATED RAILWAY COMPANY.

(211 Mass. 374, 97 N. E. 610.)

Carrier — closing door on passenger — evidence of negligence.

The closing of the door of a street car upon a passenger as he is attempting to enter the car, to his injury, shows prima facie negligence on the part of the street car company, although a passenger may have intentionally started the mechanism which caused the door to close.

(March 1, 1912.)

Note. — Carrier's liability for injury to passenger from door of vehicle.

As to liability of a carrier for accidents resulting from leaving vestibule doors open, see 2 L.R.A.(N.S.) 645. And the duty of a carrier to provide and keep gates on street cars and interurban cars closed is discussed in a note appended to 32 L.R.A.(N.S.) 346.

As to the liability of a carrier for injury to a passenger by a draft or rain from open windows or doors, see 11 L.R.A.(N.S.) 926.

The variety of circumstances under which injuries to passengers by vehicle doors have occurred makes it impossible to lay down any general rules concerning liability for such injuries.

In *Western Maryland R. Co. v. Stanley*, 61 Md. 266, 48 Am. Rep. 96, where plaintiff was groping in the dark for the purpose of shutting the door to keep out the cinders and smoke as the train was passing through a tunnel, and the door suddenly swung, and plaintiff's arm was driven through the glass, injuring it, the question of negligence was held to be for the jury.

In *Trumbull v. Donahue*, 18 Colo. App. 460, 72 Pac. 684, it was held that the carrier was liable where plaintiff was standing on the platform, because of the crowded condition of the train, supporting himself by the door frame, when the brakeman opened and closed the door, catching plaintiff's hand, there being testimony tending to show that the brakeman had observed the dangerous position of plaintiff's hand.

In *Kentucky & I. Bridge Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. 338, a verdict for plaintiff was sustained where plaintiff, upon finding that the train had not stopped at the proper place for her to alight, was told by an employee to remain on the platform, when the train was suddenly started, shutting the door on her finger, the court saying that while they doubted if failure to secure the door so it would not shut tended to show negligence, there was sufficient evidence of negligence, independent of that, to prevent dismissal of the suit.

In *Madden v. Missouri P. R. Co.* 50 Mo. 39 L.R.A.(N.S.)

REPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, after an instruction that the evidence was insufficient to warrant a verdict for plaintiff. Judgment for plaintiff.

The facts are stated in the opinion.

Mr. Alonzo E. Yont, for plaintiff:

The evidence showing the nature of the accident and the surrounding circumstances would justify the jury in finding the defendant negligent, first, in not properly safeguarding its passengers; second, in employing improper or unsafe appliances.

Nellis, Street R. Acci. Law, 570; Pev-

App. 666, evidence that a train was started without giving plaintiff opportunity to alight, and, as she steadied herself by taking hold of the door frame, the brakeman, seeing her, pulled the cord and stopped the train suddenly, so that the door swung against her hand, was held to make out a prima facie case for plaintiff.

In *McGlynn v. Brooklyn Crosstown R. Co.* 6 N. Y. S. R. 51, evidence that the sliding door was closed on plaintiff's finger was held to be sufficient to charge defendant with negligence, as plaintiff should have been given sufficient opportunity to leave the car.

In *Poole v. Georgia R. & Bkg. Co.* 89 Ga. 320, 15 S. E. 321, the carrier was held liable to a passenger who was not given time to board the train properly, and was injured by the door, which was not securely fastened, swinging to and catching his hand, the court saying that the controlling fact was that plaintiff was not given sufficient time to board the car.

In *Colwell v. Manhattan R. Co.* 57 Hun, 452, 10 N. Y. Supp. 636, where plaintiff arose to alight as a trainman opened the door, when a sudden stoppage of the car and the releasing of the door by the trainman caused it to close on plaintiff, it was held that the carrier was negligent, the court saying: "Either a door should have been provided which, under ordinary circumstances, would remain stationary after having been opened by the trainman to permit the egress of passengers, or the trainman should have exercised due care to prevent any injury to passengers by a door which he had opened to offer them an exit, and which was under his immediate control at the time."

In *Carroll v. Boston & N. Street R. Co.* 186 Mass. 97, 71 N. E. 89, evidence that a passenger on an electric car intended to alight, but, on finding that his stop had not been reached, steadied himself by taking hold of the door casing, when the conductor, facing him, shut the door on his hand, was held sufficient to warrant a finding of negligence on the part of defendant and absence of contributory negligence on the part of plaintiff.

erly v. Boston, 136 Mass. 366, 49 Am. Rep. 37; Graham v. Badger, 164 Mass. 42, 41 N. E. 61; Savage v. Marlborough Street R. Co. 186 Mass. 203, 71 N. E. 531; Heblethwaite v. Old Colony Street R. Co. 192 Mass. 295, 78 N. E. 477; Minihan v. Boston Elev. R. Co. 197 Mass. 367, 83 N. E. 871; James v. Boston Elev. R. Co. 201 Mass. 263, 87 N. E. 474; Glennen v. Boston Elev. R. Co. 207 Mass. 497, 32 L.R.A. (N.S.) 470, 93 N. E. 700; Brisbin v. Boston Elev. R. Co. 207 Mass. 553, 93 N. E. 572; Kuhlen v. Boston & N. Street R. Co. 193 Mass. 341, 7 L.R.A. (N.S.) 729, 118 Am. St. Rep. 516, 79 N. E. 815; Pomeroy v. Boston & N. Street R. Co. 193 Mass. 507, 79 N. E. 764; Egan v. Old Colony Street R. Co. 195 Mass. 159, 80 N. E.

696; Marshall v. Boston & W. Street R. Co. 195 Mass. 284, 81 N. E. 195; Gilmore v. Brooklyn Heights R. Co. 6 App. Div. 117, 39 N. Y. Supp. 417.

Defendant was bound to furnish safe methods of transportation, and the nature of the accident was such that proof of it alone raises a presumption of negligence.

Eaton v. Boston & L. R. Co. 11 Allen, 500, 87 Am. Dec. 730; Simmons v. New Bedford, V. & N. S. B. Co. 97 Mass. 361, 93 Am. Dec. 99; Ware v. Gay, 11 Pick. 106; McElroy v. Nashua & L. R. Corp. 4 Cush. 400, 50 Am. Dec. 794; Littlejohn v. Fitchburg R. Co. 148 Mass. 478, 2 L.R.A. 502, 20 N. E. 103; Isbell v. Pittsfield Electric Street R. Co. 196 Mass. 296, 82 N. E. 3.

The levers operating the door could be

In Larson v. Boston Elev. R. Co. — Mass. —, 98 N. E. 1648, it was held that a passenger who arose and started toward the door as the car approached her station was not negligent in placing her hand against the door to steady herself, and while the lurching of the car did not show negligence on the part of defendant, it might have operated as a warning to the servant in charge of the door that persons approaching it might be thrown against it and placed in a position making it dangerous to open the door at that time.

In Jones v. Great Western R. Co. 1 Times L. R. 333, which was an action for injury to plaintiff's elbow by the door being slammed against it by the porter, the court said that while slamming the doors was not necessarily negligence, it certainly was not evidence of care; and it might, under certain circumstances, be very strong evidence of negligence.

In Wood v. New York C. & H. R. R. Co. 109 App. Div. 770, 96 N. Y. Supp. 419, where plaintiff, while sitting in the baggage compartment, which was the only part of the car warm enough for comfort, where he was recognized as a passenger by the conductor, inadvertently projected his elbow between slats at the back of his seat, and was injured by a door which slid between the slats and the wall, it was held that the court could not say, as matter of law, that a proper place had been provided for the passenger, or that he was guilty of contributory negligence in sitting with his elbow through the slats.

In Sturdivant v. Ft. Worth & D. C. R. Co. — Tex. Civ. App. —, 27 S. W. 170, whether the construction of the door by which plaintiff's hand was injured was such as to show negligence on the part of defendant, and whether plaintiff was guilty of contributory negligence in bracing himself against the door, which had the appearance of a blank wall, while he was drying his hands after washing at the basin, were held to be questions for the jury.

In Romine v. Evansville & T. H. R. Co. 24 Ind. App. 230, 56 N. E. 245, where plaintiff was looking out of the rear door, steady-

ing himself by placing his hand against the closet, when the conductor approached, without plaintiff's knowledge, opening and closing the closet door quickly, and crushing plaintiff's finger, which slipped into the crack, it was held that the question of negligence was for the jury.

However, in Murphy v. Atlanta & W. P. R. Co. 89 Ga. 832, 15 S. E. 774, in which the circumstances were identical with those of Romine v. Evansville & T. H. R. Co., except that plaintiff was standing because no seats were available, it was held that the circumstances failed to show any negligence on the part of the defendant.

In Weinschenk v. New York, N. H. & H. R. Co. 190 Mass. 250, 76 N. E. 662, evidence that plaintiff went to the platform to be ready to alight as soon as the train reached the station, when a sudden jolt swung the door to, catching her hand, was held to show no negligence on the part of the defendant.

In Guthman v. Manhattan R. Co. 53 N. Y. Supp. 139, where plaintiff herself opened the door, which shut upon her hand when the car stopped with a jerk, it was held that she was guilty of contributory negligence which would bar recovery.

In Maillefert v. Interborough Rapid Transit Co. 50 Misc. 160, 98 N. Y. Supp. 207, where plaintiff, while entering a car door which had been only partly opened, on being jostled by the crowd, placed his hand on the door at the instant it was opened wider, so that his finger was caught between the door and the frame into which it slid, it was held that no negligence on the part of defendant was shown.

In Rubin v. Interborough Rapid Transit Co. — Misc. —, 136 N. Y. Supp. 60, it was held that if the agents of defendant used due care in closing the door, it could not be held liable for the acts of those within the car in pushing plaintiff into the position in which he was injured by the door.

In Brineger v. Louisville & N. R. Co. 24 Ky. L. Rep. 1973, 72 S. W. 783, where plaintiff, on the train approaching a station, stood in the open door with his hand on the casing, when it was injured as a passenger pushed the door shut when the brakeman,

protected or disabled by single mechanical devices.

Beattie v. Boston Elev. R. Co. 201 Mass. 3, 86 N. E. 920; *Cassady v. Old Colony Street R. Co.* 184 Mass. 156, 63 L.R.A. 285, 68 N. E. 10; *Carroll v. Boston Elev. R. Co.* 200 Mass. 527, 86 N. E. 793; *James v. Boston Elev. R. Co.* 204 Mass. 158, 90 N. E. 513.

Mr. H. S. MacPherson for defendant.

Hammond, J., delivered the opinion of the court:

The only question is whether there was evidence of the negligence of the defendant. At the time of the accident the plaintiff was entering the car by the right-hand door, which was at the forward end of the car. The door is 46 inches in width and the aperture is divided in the middle by a perpendicular rod. The door in closing passes outside this rod, leaving a space of about 3 inches. "The rod is apparently designed as a handhold to steady passengers when entering or alighting from the

car, and to separate outgoing and incoming passengers." The plaintiff's evidence, which is not contradicted, was that the car was pretty well filled, she being the last passenger to enter at this door, all the seats being occupied, "and there were a few people standing in the aisle." She was passing to the left of the rod previously mentioned when suddenly, without warning, the door started to close and struck her, pinning her body against this rod. The door starts to close slowly and increases its speed as it acquires momentum. Her head, one shoulder, part of her body, and one leg were on the inside, the other shoulder, leg, and part of her body being held outside the door. She struggled to free herself and was assisted by passengers to a seat, and did not then or at any other time see the conductor, and had no communication with any employee of the defendant. She saw the motorman inclosed within his cab, his back being turned toward her.

There was testimony to the effect that

who did not see plaintiff's position, called out to shut the door, recovery was denied, on the ground of contributory negligence.

In *Texas & P. R. Co. v. Overall*, 82 Tex. 247, 18 S. W. 142, it was held that for plaintiff to place his hand in a position where the door would strike it if closed was negligence; and the mere fact that the door was closed by the brakeman would not make defendant liable unless it appeared that the brakeman saw plaintiff's position.

In *Ham v. Georgia R. & Bkg. Co.* 97 Ga. 411, 24 S. E. 152, it was held that the carrier was not liable to plaintiff, who, while passing from one car to another, behind a train employee, was injured by his hand being caught when the employee shut the door, there being no act, negligent or otherwise, which fairly could be treated as the proximate cause of the injury.

In *Christensen v. Oregon Short Line R. Co.* 35 Utah, 137, 20 L.R.A. (N.S.) 255, 99 Pac. 676, 18 Ann. Cas. 1159, the court says that while it is not necessarily negligence *per se* for a passenger to rest his hand on the door jamb while attempting to leave the car, negligence on the part of the carrier will not be inferred from the mere fact that the door slammed shut, injuring the hand.

The carrier is not bound to have the upper part of the car door constructed of glass, so that persons approaching it from opposite directions may see each other, and avoid injury as the door is swung open. *Graeff v. Philadelphia & R. R. Co.* 161 Pa. 230, 23 L.R.A. 606, 41 Am. St. Rep. 885, 28 Atl. 1107.

In *Cormier v. Dominion Atlantic R. Co.* 36 N. B. 10, where a passenger on a steamboat was injured by a door swinging to and catching his fingers, it was held that the company was not obliged to provide fasten-

ers to keep the doors open, or to keep such fasteners in repair.

In *Hannon v. Boston Elev. R. Co.* 182 Mass. 425, 85 N. E. 809, it was held that opening the door of an elevated car before it came to a full stop was not negligence which would entitle plaintiff to recover for injury to his finger, which was caught by the door as he was standing near it, preparatory to alighting.

In *Hardwick v. Georgia R. & Bkg. Co.* 85 Ga. 507, 11 S. E. 832, where plaintiff went to the car door, which had been left open by the conductor, and placed his hand against the frame to steady himself as the door was swung shut by a sudden stopping of the train, it was held the injury was a purely accidental one for which the company was not liable.

And in *Skinner v. Wilmington & W. R. Co.* 128 N. C. 435, 39 S. E. 65; *Muller v. Manhattan R. Co.* 48 Misc. 524, 97 N. Y. Supp. 270; and *Graf v. West Jersey & S. R. Co.* — N. J. L. —, 62 Atl. 333, it is held that when the motion of a train which causes the door to shut on plaintiff's hand is not more than the usual motion of the car, no negligence on the part of defendant is shown.

In *Maddox v. London, C. & D. R. Co.* 38 L. T. N. S. 458, where plaintiff was completely inside the car when a servant of the company closed the door, catching his thumb in the hinge, it was held that there was no evidence of negligence to go to the jury.

And it was also so held in *Benson v. Furness R. Co.* 88 L. T. N. S. 268, and *Drury v. North Eastern R. Co.* [1901] 2 K. B. 322, 70 L. K. B. N. S. 830, 84 L. T. N. S. 658, the court saying that the carrier was not bound to give notice to passengers seated inside the car that the door was about to be closed.

R. L. S.

it is possible for a passenger to operate the door by the levers in the rear.

The car was standing for the reception of passengers, and in attempting to enter the car at the place and at that time the plaintiff had so far entered the car that the defendant owed to her the duty of a common carrier to a passenger. The car, the door, and all the levers for moving them, were under the exclusive care and control of the defendant. The closing of the door under the circumstances was evidence of negligence; and since the door was under the care of the defendant, and since there was absolutely no explanation of the cause for the movement of the door, the negligence was *prima facie* that of the defendant. And that is so even if some passenger might have intentionally started the machinery by which it was closed. It was the defendant's duty not only to use care to see that its servants and agents properly managed the machinery, but also to see that no stranger started the mechanism. The doctrine of *res ipso loquitur* applies. *White v. Boston & A. R. Co.* 144 Mass. 404, 11 N. E. 552; *Savage v. Marlborough Street R. Co.* 186 Mass. 203, 71 N. E. 531; *Hebblethwaite v. Old Colony Street R. Co.* 192 Mass. 295, 78 N. E. 477, and cases cited. See also *James v. Boston Elev. R. Co.* 201 Mass. 263, 87 N. E. 474, and cases cited; *Beattie v. Boston Elev. R. Co.* 201 Mass. 3, 86 N. E. 920, and cases cited; *Rockwell v. McGovern*, 202 Mass. 6, 23 L.R.A.(N.S.) 1022, 88 N. E. 436.

In accordance with the terms of the report the entry must be:

Judgment for the plaintiff for \$850.

WISCONSIN SUPREME COURT.

C. J. HABHEGGER et al., Respts.,
v.

WILLIAM KING, Appt.

(— Wis. —, 135 N. W. 166.)

Appeal — facts omitted from verdict — presumption as to finding.

1. A statutory provision that facts necessary to support a judgment founded on a

Note. — Authority of child to bind parent by contracts other than those for necessities.

The decision in *HABHEGGER v. KING*, to the effect that a son operating his father's automobile for his own pleasure has no implied authority to engage a physician at his father's expense, to attend a person whom he accidentally injured while driving the machine, is particularly valuable, as it appears 39 L.R.A.(N.S.)

special verdict shall be deemed to have been determined in conformity with the judgment, although omitted from the verdict, does not apply where there was a special request to submit the question to the jury.

Parent and child — agency — engaging physician.

2. A boy operating his father's automobile for his own pleasure or convenience has no implied authority to engage a physician at his father's expense, to attend a person whom he accidentally injured by the vehicle.

(March 12, 1912.)

APPEAL by defendant from a judgment of the Circuit Court for Jefferson County in plaintiffs' favor in an action brought to recover compensation for medical services rendered at the request of defendant's son, for whose contract defendant was alleged to be responsible. Reversed.

The facts are stated in the opinion.

Messrs. Kading & Kading for appellant.

Messrs. Arthur Mulberger & R. W. Lueck for respondents.

Timlin, J., delivered the opinion of the court:

The plaintiffs, suing for medical services performed upon one Richard Karge, had a verdict, finding that Charles King, the minor son of defendant, at the time of the accident in which Karge was injured, had general permission from his father to run and operate his father's automobile, and that the services in question were performed at the request of Charles. It is conceded that this verdict alone would not support the judgment; but it is said that the judgment in favor of the plaintiffs must be taken to find, under chapter 346, Laws of 1907 (§ 2858m, Rev. Stat.), either that the defendant authorized Charles to employ the plaintiffs, or ratified such employment. But this statute does not apply, so far as authorization is concerned, because the defendant requested that that question be submitted to the jury.

We do not find any evidence tending to show that Charles King was authorized by the defendant, his father, to employ the doctors for Karge. The latter had been run over and injured in the public street by

to be the only case which has ever considered the precise point.

It is well established by the decisions that the mere fact of relationship of parent and child is insufficient to charge the parent on contracts entered into by the child for articles other than necessities. In order to bind the parent in such cases, it is held necessary to show either an express or implied authority from the parent. 29 Cyc. 1664.

Charles King, while the latter was using his father's automobile for his own pleasure or convenience. It was stipulated on the trial in this case that this was purely accidental, and without fault on the part of Charles King. The injured boy was taken to a nearby hospital by the hospital superintendent, who telephoned for one of the plaintiffs; and Charles King took this doctor in his automobile to the hospital, informing him of the occurrence, and while at the hospital requested the doctor to give the injured boy every attention to save his life. He did not attempt to contract on behalf of the defendant; nor did the doctors communicate with the defendant at any time before the completion of the services, for the value of which this suit

is brought. When the injured boy was about to be discharged from the hospital, the hospital superintendent, in an interview with defendant, told him that the boy's mother was poor and would probably never be able to pay for the hospital charges, and requested defendant to do something toward paying the bill, whereupon the defendant paid the hospital bill, informing the superintendent that he was not responsible. The second day after this he received a bill from the plaintiffs for their services. He had heard that doctors were attending the injured boy at the hospital, but did not know they were making a claim against him until he received this latter bill, which he refused to pay. The circuit judge, after submitting the special

It requires a greater degree of proof of the father's consent and authority to his child to make purchases upon the father's credit where the articles are not necessary than where they are such. *Fowlkes v. Baker*, 29 Tex. 135, 94 Am. Dec. 270. The court said: "The result of all the authorities seems to be properly laid down by Parsons in his treatise on Contracts, vol. 1, p. 253: 'That, where the goods are not necessities, the father's authority must be proved to render him liable; where they are necessities, the father's authority is presumed, unless he supplies them himself or was ready to supply them. Where the infant lives with the father, or under his control, his judgment as to what are necessities will be so far respected that he will be held liable only for things furnished to the infant to relieve him from absolute want. Where the infant does not live with the father, but has voluntarily left him, the authority of the father must be strictly proved, unless, perhaps, in cases of absolute necessity; and where he has been deserted by the father, or driven away from him, either by command or cruel treatment, there the infant carries with him credit and authority of the father for necessities.'"

In *Freeman v. Robinson*, 38 N. J. L. 383, 20 Am. Rep. 399, where goods were sold to a son without the order, knowledge, or consent of the father, it was held that the latter could not be charged on the ground of the son's agency in making the contract in his father's name.

And where there is no evidence that a son had authority to bind his parent, the latter is not liable for a broker's commission on a loan secured by the direction of the son. *McMahon v. Smith*, 136 App. Div. 839, 121 N. Y. Supp. 736.

And authority sufficient to bind a father for purchases made by his daughter is not shown where it appears that the person from whom the purchases were made had knowledge that there was a matrimonial difficulty in the father's family, and that a notice had been published warning people against trusting the wife, and it appears further that, upon telephoning the father's office, his

son stated that matrimonial difficulties existed and that the seller would have to take his chances. *Cousins v. Boyer*, 114 App. Div. 787, 100 N. Y. Supp. 290.

So, a father is not liable for services rendered in tutoring his minor son, who lives with and is supported by him, during vacation, where the father is not consulted about and does not consent to the employment. *Peacock v. Linton*, 22 R. I. 328, 53 L.R.A. 192, 47 Atl. 887.

Express authority given.

A parent is liable for goods, wares, and merchandise furnished to his child of full age, where they are furnished at the instance and request of the parent. *Ellenbarger v. Swiggett*, 1 Ind. App. 598, 28 N. E. 110.

And where a father authorized a merchant to let his minor daughter have whatever she wanted out of the store, he is liable for articles usually sold by the merchant which the daughter bought, although they were not necessary or such as a prudent parent would furnish. *Harper v. Lemon*, 38 Ga. 227.

And where a father leaves the entire management of the making of a contract for tuition in a school to his son, and a contract for an entire school year is made, the father is liable for the full year's tuition, although the son withdraws from the school on his own account when the school year is about half up. *Center v. Rush*, 35 Misc. 294, 71 N. Y. Supp. 767.

So, where a son's account is contracted with the authority of the father, it is a contract binding upon the latter, and the promise of the father to pay the account in certain events is admissible. *Brown v. Deloach*, 28 Ga. 486.

Authority implied from child's employment by father.

Where a son is employed in his father's grocery, sells goods, gives orders to runners for goods, and orders stock in his father's name, the father suffers him to act as a general agent both in buying and selling, and the public are justified in assuming that

verdict to the jury, stated that Charles King had no actual, oral or written, direct authority from his father to employ the plaintiffs for the purpose stated, but that he had implied authority as matter of law. Upon this showing, can there be any recovery against the defendant? There is no evidence of ratification, and judgment did not go upon that ground.

The law relating to the agency of servants to bind the employer to pay for physicians or nurses in attendance upon persons injured by the negligence of such servants will be found in *Adams v. Southern R. Co.* 16 Am. & Eng. R. Cas. N. S. pp. 369 to 379, where the cases are collected. Also in *Hanscom v. Minneapolis Street R. Co.* 53 Minn. 119, 20 L.R.A. 695, 54 N.

he possesses all the powers requisite to a general agent in buying and selling. *Thurber v. Anderson*, 88 Ill. 167.

And in such a case the father is liable for a bill of cigars and imported ale ordered and used by the son without the knowledge of the father. *Ibid.*

And where a son acts for his father in procuring a mortgage, taking upon himself the whole negotiation, deciding upon the security, satisfying himself respecting the title, attending to the execution of the paper, receiving the money from his father, and paying it over to the mortgagor, and doing everything which an agent could do in a similar transaction, he is his father's agent, although he testifies that he was acting as the agent of the mortgagor; and this is especially true where he admits that he was his father's agent just prior to and after the execution of the mortgage. *Matteson v. Blackmer*, 46 Mich. 393, 9 N. W. 445.

And the jury may properly find that a son was acting as agent for his father in contracting in his own name for a large amount of stone-work on his father's burial lot, where the evidence tends to show that the son had little property, that he told his father of the contract, and conferred with him from time to time; that he was his father's general agent for the transaction of business, and that the father, before he was taken sick, had in mind the idea of putting the improvement upon the lot, and that neither during the progress of the work nor after it was completed was anything said between the father and the son to show that it was intended by the latter as a gift to his father, who, it appeared, was a man of advanced age, and had been confined to the house for a number of years, and who, it was shown, had signed an application for a permit to do the work, addressed to the superintendent of the cemetery, before the commencement of the work. *Ford v. Linehan*, 146 Mass. 283, 15 N. E. 591.

But a father is not liable to a carriage builder for repairs made upon wagons sent by his son to be sold, where there is no proof 39 L.R.A. (N.S.)

W. 944. The employment must have been of such nature that this act of the servant is reasonably within its scope, as in the case of a general superintendent of a railway company, general manager or agent, and by some authorities a railroad conductor. *Terre Haute & I. R. Co. v. Stockwell*, 118 Ind. 98, 20 N. E. 650; *Louisville, E. & St. L. R. Co. v. McVay*, 98 Ind. 391, 49 Am. Rep. 770. These cases go largely upon the corporate character of the employer, the usual practice pursued, and the great exigency which arises in railroad disasters and the dangerous character of the business. A mere chauffeur or automobile driver in a town where the employer is known and can be readily reached by telephone, or by other speedy and certain means

that the son was authorized by the father to order repairs, and the defendant testified that he could not say whether the father ever authorized the son to direct the repairs, and that he took it for granted that a man's son had authority to order them or he would not have come with the wagons. *Walsh v. Curley*, 42 N. Y. S. R. 470, 16 N. Y. Supp. 871.

And where it appears that the son of a mortgagee was authorized merely to receive and collect the payments on the mortgage as they fell due, the father is not bound by the agreement of the son to receive a part of the principal in advance and extend the time of payment for the residue, although the father consented to receive the payment in advance without having knowledge of the agreement for extension. *Ritch v. Smith*, 82 N. Y. 627.

Where daughter has limited authority to act for mother.

A mother is not bound by letters written by her adult daughter, who was living at home, by which she undertook to authorize the sale of land owned by her mother, where it clearly appears that the mother was not present when the letters were written or signed in her name, did not dictate them, and did not know the contents of them, although there had been a general understanding in regard to the selling of the property, and the daughter was verbally authorized to transact a part of the mother's business, including the business pertaining to this property. *Hickox v. Bacon*, 17 S. D. 563, 97 N. W. 847.

And in *Re Acken*, 144 Iowa, 519, 123 N. W. 187, Ann. Cas. 1912 A, 1166, where a daughter who was her mother's attorney in fact made a conveyance of property to herself during her mother's lifetime, it was held that such an attorney had no implied authority to deal with and make conveyances to herself, and that no presumption of gift, and no inference as to a consideration of natural love and affection, could arise under such circumstances.

of communication, would not ordinarily possess such authority. Neither would an infant son using his father's automobile under like circumstances. This follows from the logic of the decisions in *Baker v. Witten*, 1 Okla. 160, 30 Pac. 491; *Malone v. Robinson*, — Miss. —, 12 So. 709; *Holmes v. McAllister*, 123 Mich. 493, 48 L.R.A. 396, 82 N. W. 220; *Hiroux v. Baum*, 137 Wis. 197, 19 L.R.A.(N.S.) 332, 118 N. W. 533; *Kumba v. Gilham*, 103 Wis. 312, 79 N. W. 325. Besides, the stipulation entered into upon the trial, to the effect that the injuries here were the result of mere accident, for which the boy in charge of the automobile was not to blame, cut away the groundwork of such implied agency, even if otherwise within the reasonable scope

of employment, by reason of an implied authority to save the employer from damages caused by the negligence of the employee. *Godshaw v. J. M. Struck & Bro.* 100 Ky. 285, 51 L.R.A. 668, 58 S. W. 781; *Lithgow Mfg. Co. v. Samuel*, 24 Ky. L. Rep. 1590, 71 S. W. 906; *Evans v. Marion* Min. Co. 100 Mo. App. 670, 75 S. W. 178; *Cox v. Midland Counties R. Co.* 3 Exch. 268, 18 L. J. Exch. N. S. 65, 13 Jur. 65. The conclusion of the trial court that the boy had in law implied authority to employ physicians at the expense of his father was incorrect, and the judgment must be reversed.

Judgment reversed and the cause remanded, with directions to render judgment for defendant.

Implication of authority from parent's payment of debts contracted by child.

It is generally held that an implied authority in a child to bind a parent is shown where it appears that the latter has paid accounts charged to him by his child, without giving notice not to make further charges. This result was reached in the following cases: *McKenzie v. Stevens*, 19 Ala. 691 (although the former account was contracted fifteen months before); *Bryan v. Jackson*, 4 Conn. 288 (although the father instructed his son not to make further charges); *Bailey v. King*, 41 Conn. 365 (where payments for charges were made subsequently to a notice not to trust the son); *Wilkes v. McClung*, 32 Ga. 507; *Fowlkes v. Baker*, 29 Tex. 135, 94 Am. Dec. 270 (where the son was residing on the father's plantation).

And the fact that previous purchases made by the son, which were regularly paid for by the father, were made from other merchants than the plaintiff, will not prevent the latter from recovering for goods sold to the son in reliance upon the authority implied from the father's general course of dealing with other merchants. *Fowlkes v. Baker*, supra.

In *Emery-Bird-Thayer Dry Goods Co. v. Coomer*, 87 Mo. App. 404, where it was sought to hold a daughter personally liable for dry goods purchased at a store where she was accustomed to make such purchases, which were charged to her mother, it was held that the daughter was not liable, the court saying that the fact that she had become of age when the particular purchases were made did not affect the case, but she still continued to be the agent of the mother in such transactions.

But sufficient proof of agency is not shown to bind a father for goods furnished his daughter, who is of full age and living with her father, although it is proved that she had previously bought goods at the same store and charged them to her father, and that he had paid the bills without objection, where the father testifies that he never had had any dealing with the plain-

tiff, and that he did not know that any bills were being run, and had never authorized the payment of any bills for his daughter. *White v. Mann*, 110 Ind. 74, 10 N. E. 629.

And no authority in the daughter is shown from the fact that goods had previously been delivered to her and had been paid for, where it was shown by the father that such purchases were paid for by a check signed by the mother. *Cousins v. Boyer*, 114 App. Div. 787, 100 N. Y. Supp. 290.

And in *Alschuler v. Anderson*, 142 Ill. App. 323, it was held that the fact that a parent pays one account without protest does not render him liable for goods subsequently purchased by his child, which were not shown to be necessities.

Implication of authority from use of father's name on notes, etc.

In *Weaver v. Ogletree*, 39 Ga. 586, the evidence showed that a son had been using the name of his father for years on his own notes, and that this fact was known to the father. And where the latter was silent when a holder of a note presented it to the father to be divided into two smaller notes, and said nothing to the holder that the note presented was not genuine, but referred him to the son, who promptly agreed to divide the note, and soon after brought two notes with the name of himself and his father upon them, it was held that the father was liable, since the jury were authorized by the evidence to find that the son had authority to sign his father's name, or, if not, that the latter, by his conduct, ratified the act of the son.

And where a father had been accustomed to assume the liability of indorser on promises on which his name had been written by his son, and he did not deny the validity of the indorsement in question until his son had absconded, sufficient authority of the son to indorse his father's name appears, and he is liable therefor. *Abeel v. Seymour*, 6 Hun, 656.

In *Muller v. Barker*, 90 N. Y. Supp. 388, it was held that a father was not legally

chargeable for a check forged in his name by his son.

And in *Greenfield Bank v. Crafts*, 2 Allen, 269, where a father set up the defense to an action on notes that his signature thereto was forged, it was held that he could not be made liable by proof that there had been a large number of other similar drafts indorsed with his name in circulation, where it was not shown that the father had any knowledge of such drafts, since authority by the son so to use the father's name could be implied only from a course of dealing which was known to the father, or from a knowledge of and acquiescence in the use of the father's name by his son in the manner in which it had been used upon the paper in question.

Goods purchased for place in which father is interested.

A father cannot be charged for hay delivered on a farm which he had formerly owned and bought hay for, because of the statement of his son that his father was connected with the place and would pay for the hay. *Nuckolls v. St. Clair*, 1 Colo. App. 427, 29 Pac. 284.

And want of knowledge that the father had sold the farm upon which delivery of hay was made, and reliance upon a former course of dealing with the son for the father, will charge the latter, if at all, only up to the time the plaintiff has knowledge of the change of ownership, without proof of the son's agency and authority to bind his father. *Ibid.*

Agency where child contracts for himself.

A father is not liable for goods, wares, or merchandise necessary for the maintenance of a minor son, or in the management of a farm which the father bought and placed his wife and son upon, where the son is carrying on the farm on his own account, and his mother is keeping house for him, and he procures the goods on his own credit. *Bushnell v. Bishop Hill Colony*, 28 Ill. 204.

And no question for the jury is raised where the seller of a piano admitted that a son did not tell him that he was buying the piano for, or as the agent of, his father, but testified that he inferred that the son was so doing because he said that he would have to consult his folks before buying, it appearing that he issued a receipt to the son for a part payment made by him and took his individual note for the balance, and at one time commenced a suit on the note against the son. *Fisher v. Lutz*, 146 Wis. 664, 132 N. W. 592.

And no lien attaches to a father's land for lumber sold to a son who was farming his father's land and using such of the proceeds as he saw fit, although part of it was used for improvements on the land, where the contract was made with the son in his own name, and his individual notes were given, since the son had no interest in the land and had no authority, either ex-

press or implied, to bind his father for the purchase price of the lumber. *Hoag v. Hay*, 103 Iowa, 291, 72 N. W. 525.

Cases involving stepchildren and son-in-law.

No recovery can be had against a stepfather for money lent to his stepson in the absence and without the request or promise of the stepfather; nor upon proof merely of a contract of the stepson in the making of which the father did not have anything to do, for the use of a stock pasture; nor upon proof merely that the defendant's stock went into and used the plaintiff's stock pasture, without proof of any express contract or promise on the part of the defendant to pay therefor, or of any facts from which the law would imply such a promise. *Pike v. Bright*, 29 Ala. 332.

The fact that a son-in-law had, with his father-in-law's knowledge and consent, sold or exchanged other land of which the father-in-law had subsequently executed the deed in accordance with the agreement made, tends at most to show a special and not a general agency, and the father-in-law, not having held his son-in-law out as his general agent, is not bound by his fraudulent representations. *Hovey v. Brown*, 59 N. H. 114.

Evidence that in other instances in which a son-in-law had sold land of which his father-in-law subsequently executed the deed, the father-in-law had no interest in the premises conveyed, except as security for money loaned to his son-in-law, negatives the idea of any relation of principal and agent between them as to such land. *Ibid.*

And evidence that a father-in-law signed a deed written by his son-in-law, conveying certain land, is not evidence of the son-in-law's agency for the former to make representations concerning the quantity of land sold, where it appears that the land in question belonged to the son-in-law. *Ibid.*

Ratification.

Where a father, after goods had been purchased by his adult son, stated that they had been rightfully charged to the father, and that he would pay for them, he thus recognizes the agency of his son, and he is liable. *Booker v. Tally*, 2 Humph. 308.

And where a son had previously purchased goods of the plaintiff with his father's consent, the jury are warranted in inferring the father's consent where the son bought goods in his father's name on six months' credit, and the plaintiff immediately notified the father by letter of the transaction, expressing a confidence that it was correct, and that the son had been duly authorized, but the father failed to reply to the letter. *Thayer v. White*, 12 Met. 343.

And the court is warranted in saying that such consent is proof either of an original authority or of a subsequent affirmative, by which the father is bound. *Ibid.*

And where a minor son, without his father's express approval and apparently against his wishes, exchanged his father's

horse for another, the father cannot maintain replevin for the horse exchanged by his son, where he did not repudiate the bargain for about two months, made no objection when the horse was brought home by the son, but retained and used the horse, and made no remonstrance against the retention of his horse by the person exchanging with his son. *Hall v. Harper*, 17 Ill. 82.

But a father is not liable for the price of a horse sold to his son, who lived with the father and cultivated a part of his farm, where there was no evidence as to the son's being under full age or to connect the father with the transaction, notwithstanding the fact that there was evidence that on one occasion the father was seen riding with the son in a buggy drawn by the horse in question. *Gregory v. Herring*, 73 N. C. 518.

And a father cannot be held liable for purchases made by his daughter on the ground of estoppel, where he had no knowledge of the purchases made by his daughter for which it was sought to hold him liable. *White v. Mann*, 110 Ind. 74, 10 N. E. 629.

And where a son did not act or assume to act as the agent of his father in purchasing a piano, and had no authority to make such purchase, there can be no ratification of the contract by the father. *Fisher v. Lutz*, 146 Wis. 664, 132 N. W. 592.

See also *Holt v. Baldwin*, under section on "Questions for the jury."

Questions for the jury.

The question of whether a parent made his daughter his agent in purchasing goods is one of fact, and where the finding of the trial court is sustained by the evidence, it will not be disturbed. *White v. Mann*, 110 Ind. 74, 10 N. E. 629.

Where facts are proved from which the law will presume a son's authority to bind his father for goods furnished, and there is no proof offered to rebut this presumption, it is proper to charge the jury that if they believe the evidence, they must find for the plaintiff. *McKenzie v. Stevens*, 19 Ala. 691. The court said: "A father is not bound by the contract of the son, even for articles suitable and necessary, unless an actual authority be proven, or the circumstances be sufficient to imply one. But here it is contended that the proof fully justified the legal presumption of the existence of such authority, and that the court in the charge only declared what that presumption was. On the contrary, it is insisted that the question whether the son was authorized to bind the father, in the contracting the account sued on, is a question of fact exclusively for the jury, and that in the charge given the court invaded the province of the jury. The question is, undoubtedly, a mixed question of law and fact, where, the facts being ascertained, the court will direct the jury as to the legal inference they would be bound to make. The facts were proven to the jury, from which, according to the authorities above cited, the law presumed an au-

thority from the father to the son to buy the goods, and there was no proof to rebut the presumption. This, we think, authorized the court to charge the jury that, if they believed the facts, they were bound to infer the authority; in other words, they were bound to find for the plaintiff, etc."

In *Holt v. Baldwin*, 46 Mo. 265, 2 Am. Rep. 515, where it was sought to hold a parent liable for the price of a horse bought by his minor son, an instruction to the effect that if the father, after the sale of the horse, ratified the act and promised to pay for it, he would be liable, was held erroneous. The court said: "It assumes as a matter of law what should have been left to the jury to determine as a question of fact. The instruction assumes and declares the liability of the defendant upon the sole ground of his supposed subsequent ratification and promise, leaving out of view entirely the question of the son's agency in the transaction. If the defendant was liable at all, it was because he had authorized the purchase, either expressly or by implication. Whether there was any such express or implied authority was a matter for the jury to inquire into, and not for the court to assume as a matter of law. The fact of a subsequent ratification and promise was legitimate and persuasive evidence to go to the jury, from which they might have found that the purchase was made by the son as the defendant's agent, acting under authority either expressed or implied. 'The moral obligation of a father to support his child does not make him legally liable to pay his child's debts; and to charge a father on his son's contracts, the same circumstances must be shown as to charge an uncle, a brother, or any third person. The son need not, however, have an express authority to bind his parent; for an authority may be implied under certain circumstances, and it is always a question for the jury whether the circumstances are sufficient for that purpose.' (Tyler, *Infancy & Coverture*, 106, § 64.) The general doctrine on this subject is that the 'only ground upon which an infant can bind others by his contract is that of an express or implied agency.'" J. T. W.

NEBRASKA SUPREME COURT.

FIRST NATIONAL BANK OF SUPERIOR v.

J. F. BRADSHAW, Admr., etc., of H. N. Bradshaw, Deceased, et al., Appts.

(— Neb. —, 135 N. W. 830.)

Pledge — surrender — loss.

In the absence of fraud or a special bail-

Headnote by REESE, Ch. J.

Note. — Effect of surrender of pledged property upon rights of pledgee.

This note does not include cases where the pledgor obtains possession of the property

ment, a pledge will be deemed to be waived or lost by the surrender of the pledged property by the pledgee.

(April 20, 1912.)

APPEAL by defendants from a judgment of the District Court for Nuckolls County in plaintiff's favor in an action brought to foreclose the lien of an alleged pledge of certain corporate stock to secure the payment of notes made to plaintiff by H. N. Bradshaw, since deceased. Reversed.

The facts are stated in the opinion.

Mr. J. H. Grosvenor for appellants.

Messrs. Stubbs & Stubbs for appellee.

Reese, Ch. J., delivered the opinion of the court:

This is an action to foreclose the lien of an alleged pledge of certain shares of the capital stock of plaintiff, which it is alleged were pledged to plaintiff to secure the payment of certain promissory notes made to plaintiff by H. N. Bradshaw in his lifetime, but who is now deceased. A trial was had to the district court, which resulted in findings in favor of plaintiff and decree for the sale of the stock. Defendants appeal.

It is not deemed necessary to set out nor to even refer to the pleadings, as they

surreptitiously or fraudulently, or without the consent or ratification of the pledgee; nor cases where the property is taken from the possession of the pledgee on judgment or execution; nor cases of actual substitution of other property for that first pledged. Neither does it include cases dealing with the necessity under the statute of frauds for actual or continuous change of possession of personal property sold; but it is limited to cases of voluntary surrender to the pledgee or his agent.

Lien has been defined as "the right of one man to retain property in his possession belonging to another until certain demands of the party in possession are satisfied." Grose, J., in *Hammonds v. Barclay*, 2 East, 235.

The ancient rule.

"In the old Roman law, the pledgee, after receiving possession of the pledge, could legally return it to the pledgee, to be used by him, either for a consideration or as a gratuity; and that did not impair the validity of the pledge. But such is not, clearly, the modern law of either England or the United States, or the countries of the Civil law." Denis, *Contracts of Pledge*, § 135.

"The old civil law of the Digest, it is true, was more indulgent, and permitted the pledge to be delivered to the pledgee without prejudice to the security, in a manner that would not be allowed at the present day. Thus, in book xiii. of the Digest, title vii., law 35, Modestinus says: 'A pledge transfers only the possession to the creditor, the property remaining in the debtor; yet the debtor may have the use of it, either as a gratuity, or for hire.' And Paulus, in the same title, law 37, says: 'If I lend a pledge to the owner thereof, I retain possession by means of the loan; for before the debtor borrowed it, the possession was not in him; and when he borrowed it, it was my intention still to retain the possession, and it was not his to acquire it.' Pothier's *Pandects*, vol. vii. p. 360." *Casey v. Cavaroc*, 96 U. S. 467, 24 L. ed. 779.

"As to this law of the Digest, Mr. Bell, in his *Commentaries on the Scotch Law*, remarks as follows: 'Voet very justly ob-

serves, in criticizing this law, that to permit such practices were to endanger the safety of other creditors, and to sanction a fraud upon the rule which requires possession to complete a real right to movables; and that no true analogy can hold between the law of Rome, where hypothecs without possession were admitted, and the laws of modern commercial nations, in which the rule is established that possession preserves property. It is true,' Bell continues, 'that, in the course of many contracts, there is a necessity for separating property and possession; and that the mere circumstance of goods being in the hands of another on a temporary contract will not deprive the real proprietor of his right, in favor of the creditors of the temporary possessor. And there seems to be no doubt that the right of a pledgee will also be sufficiently strong to support this temporary dereliction of possession, in the course of necessary operations on it; the manufacturer or other holder being custodian for the pledgee, without injury to the real security. But the doctrine delivered by Voet is sound, where the possession is given up without necessity to the owner of the goods.' 2 Bell, *Com.* 7th ed. p. 22." *Ibid.*

General modern rule.

"From these authorities, it seems to be evident that, in the French law, at least, the text of which, in this regard, is the same as that of Louisiana, a delivery by the owner of securities by way of pledge, followed by a return thereof to him, for the purpose of enabling him to collect them and apply the money to his own use, on substituting others in their stead, and with general liberty of substitution, and to appear as the owner and possessor thereof in his dealings with others (the title of the securities not being transferred to the creditor), is not such a delivery of possession as is necessary to establish the privilege due to a pledge as to third persons. It would be contrary to the very letter of the law to allow such a transaction to have that effect. It would not be mere evidence of fraud, which might be rebutted by counter evidence; but it would be contrary to the rule of law adopted to prevent fraud. In

are in the usual form, since, as we view the case, it must be disposed of upon the facts either admitted or conclusively shown by the evidence. A brief history of the case will render it more easily understood.

On the 25th day of October, 1893, a certificate for 74.42 shares of the capital stock of plaintiff was issued to H. N. Bradshaw, and on the 26th day of July, 1894, another certificate was issued to him for 3.33 shares of stock, making in the aggregate 77.75 shares held by him. Without so deciding, we will assume that those certificates were pledged to secure certain indebtedness due plaintiff upon his promissory notes held by it. The capital stock of the bank was \$100,000, represented by shares of the par or face value of \$100

each. Later on it was found that the capitalization of the bank was greater than its business and condition required, and, by the consent of the Comptroller of the Currency, it was scaled down to \$50,000, and stock issued for one half the number of shares of the first issue. On the 10th of January, 1901, the original certificate having been canceled, a certificate for 38.875 shares was issued to H. N. Bradshaw. On the 21st day of the following February (1901) H. N. Bradshaw died, the last-named certificate being in the bank, as were a number of other papers belonging to the decedent. Some time shortly after his decease the bank delivered to his widow, Mrs. E. J. Bradshaw, a number of papers belonging to the decedent, and among

other words, as to third persons, it would not be a pledge at all within the meaning and requirements of the law." *Ibid.*

Every reason of policy that has ever induced courts to watch with suspicion sales and mortgages unaccompanied by possession, and to presume them fraudulent when secret and known only to the parties, applies with yet greater force to a secret continuance of lien after the owner receives voluntary possession. It opens a wide door to fraud and abuse. *McFarland v. Wheeler*, 26 Wend. 467.

Due and reasonable care should be observed by the pledgee to negative the existence of ostensible ownership in the pledgeor, and to this end such means should be resorted to as fairly to inform or put third persons on inquiry. The law does not require more than this. *Philadelphia Warehouse Co. v. Winchester*, 156 Fed. 600.

FIRST NAT. BANK V. BRADSHAW follows the general modern rule that, in the absence of fraud or a special bailment, a pledge will be deemed to be waived or lost by the voluntary and unconditional surrender of the pledged property by the pledgee to the pledgeor. *Eastman v. Avery*, 23 Me. 248; *Day v. Swift*, 48 Me. 368; *Collins v. Buck*, 63 Me. 459; *Kimball v. Hildreth*, 8 Allen, 167; *Wilkie v. Day*, 141 Mass. 68, 6 N. E. 542; *Barrett v. Cole*, 49 N. C. (4 Jones, L.) 40; *Smith v. Sasser*, 49 N. C. (4 Jones, L.) 43; *Russell v. Fillmore*, 15 Vt. 130.

In order to preserve his lien, the pledgee must retain actual and continuous possession of the pledged article. *Gamson v. Pritchard*, 210 Mass. 296, 96 N. E. 715.

A pledgee who, upon naked request, returns the property to the pledgeor for no special, limited, or temporary purpose of his own, and not for his own benefit, loses his lien. *Hickok v. Cowperthwait*, 137 App. Div. 94, 122 N. Y. Supp. 78.

The pledgee loses his lien by letting the property go back into the possession of the pledgeor, to be used at the pleasure of the latter. *Colby v. Cressy*, 5 N. H. 237.

If the pledgee takes possession of the property and immediately delivers it to the

pledgeor, or permits it to go back into his possession, the special property created by the bailment or pledge is determined and gone. *Fletcher v. Howard*, 2 Aik. (Vt.) 115, 16 Am. Dec. 686.

If a pledgee, after taking formal possession of property, leaves it in the possession of the pledgeor, he loses his lien, although the property is marked with his initials. *Goodrich v. Dore*, 194 Mass. 493, 80 N. E. 480.

The pledgee of carriages loses his lien when, after taking formal possession, he leaves them in the possession of the pledgeor, with the agreement that the latter may use and let them in his business. *Thompson v. Dolliver*, 132 Mass. 103.

If the pledgee, after taking formal possession of a carry-all and chaise, leaves it in the absolute custody of the pledgeor, for him to use, even though only by the most careful drivers, the pledgee thereby releases his lien. *Walker v. Staples*, 5 Allen, 34.

The pledgee loses his lien when he permits the pledgeor to remove the goods from his possession, notwithstanding an express stipulation that the lien should remain as before; this would be recognizing a right to retain after the property had ceased to be retained. *McFarland v. Wheeler*, 26 Wend. 467.

When a pledgee allows the property to be removed from a warehouse to the premises of the pledgeor, simply taking his receipt of the goods "on storage," and the pledgeor sells the property to bona fide purchasers, the pledgee's lien is gone as against those purchasers. *Geddes v. Bennett*, 6 La. Ann. 516.

Where pledgees placed a stock of pledged goods in a store operated by the pledgeor, and allowed him to mingle his goods with the pledged goods and sell indiscriminately as his own, their lien was gone as against attaching creditors of the pledgeor. *Jackson v. Kincaid*, 4 Okla. 554, 46 Pac. 587.

The indorsement and delivery of stock certificates to another as security, the pledgee holding them in his hand for an instant and then returning them to the pledgeor, who keeps them among his own

which was the certificate of stock of the date of January 10, 1901, on the back of which was written: "Left as security to note of H. N. B. Bo (to?) Bank. C. E. A." (C. E. A. are the initial letters of C. E. Adams, the cashier of the bank. There was no indorsement or transfer by H. N. Bradshaw.) The certificate was retained by Mrs. Bradshaw in her possession until the 2d day of January, 1906, near five years, and during which time the surplus of dividends, after the payment of interest upon the notes of H. N. Bradshaw, was paid to her, and by her distributed to the heirs of his estate. On the said 2d day of January, at the suggestion of the bank officers, she surrendered the certificate in her possession to the bank, and it was indorsed, "Can-

celed by re-issue to E. J. Bradshaw, No. 209. 1-2-06," and a certificate was issued to her, in her name, for an equal number of shares. On the 5th day of January, 1906, that certificate was assigned by her to "the estate of H. N. Bradshaw;" the assignment being witnessed by C. E. Adams, the then president of the bank, and soon thereafter she delivered the certificate to J. F. Bradshaw, the administrator of the estate of H. N. Bradshaw, deceased, and he has retained its possession ever since, it being shown that it was in his possession at the time of the trial of this cause. From the time of the delivery of the certificate to Mrs. Bradshaw, early in 1901, to the date of the trial, the certificate had never been in the possession of the

papers, constitutes no valid pledge as against creditors of the pledgeor. *McFall v. Buckeye Grangers Warehouse Asso.* 122 Cal. 468, 68 Am. St. Rep. 47, 55 Pac. 253.

If a bank delivers back to the pledgeor a note held as security, to be used by him at his pleasure in the prosecution of his business, the bank no longer looking to the note as its security, but trusting to the honor of the pledgeor, such surrender puts an end to the lien of the bank upon the note. *Citizens' Nat. Bank v. Hooper*, 47 Md. 88.

If the pledgee intrusts a pledged note to the pledgeor in such a way that the latter may go into the market and probably mislead people into the belief that he is the owner, and a person in good faith pays him money on the note, the pledgee loses his lien as against such person. *Kellogg v. Tompson*, 142 Mass. 76, 6 N. E. 860.

Where a mill company purchased grain with drafts to be cashed by a bank, and deposited the grain in warehouses, taking receipts in the name of the bank, and delivering them to it as security, the bank had a lien on the grain, the validity of which depended upon its possession of the property; and while the grain remained in the warehouses and the bank held the receipts the possession was sufficient; but when the receipts were indorsed and delivered back, together with the grain, to the mill company, the latter had both title and possession, and the lien of the bank was extinguished as against the creditors of the mill company. *Salinas City Bank v. Graves*, 79 Cal. 192, 21 Pac. 732.

Where a dealer in iron pledged his stock of goods about once a month to secure loans, the pledgee taking formal or symbolic possession each time, and appointing pledgeor's bookkeeper his agent to hold possession later releasing quantities as needed for deliveries to purchasers, but where there was no separation of the pledged goods, but a continuous intermixture of pledged with unpledged property, it was held that possession was not retained in the pledgee sufficient to hold his lien; the arrangement was made with the obvious purpose, or at least with the effect, of enabling the pledgeor to carry on

his business in the usual manner and without exciting suspicion, and thus was directly opposed to the object of the rule that pledgees must retain possession in order to prevent pledgeors from misleading others into the belief that they are the real owners. *Moors v. Reading*, 167 Mass. 322, 57 Am. St. Rep. 460, 45 N. E. 760.

A leading case upon the necessity of possession in the pledgee is *Casey v. Cavaroc*, 96 U. S. 467, 24 L. ed. 779. In that case, a bank agreed to deposit certain bills and notes with its president and his private firm as a pledge to secure a loan from a third party. The notes were selected by the bank clerk, placed in an envelop by themselves, and handed to the president for the purpose stated. He delivered them to the cashier of the bank for safe-keeping and for collection and renewal. They were kept thus separate, but, so far as the public could perceive, the bank continued to have possession and control of them in its own right, and they appeared to be equally liable with the other assets to the claims of all the creditors; and it was held that this was not sufficient possession in the pledgee or in a third person agreed upon by the parties to protect the lien as against third persons.

Exceptions; delivery for sale.

But the general rule prohibiting the pledgee from surrendering the property to the pledgeor upon pain of losing his lien thereby is subject to several important exceptions. Thus, he may deliver the property over to the pledgeor for the express purpose of selling it for the benefit of the pledgee. *Eplan v. Wheat*, 134 Ga. 511, 68 S. E. 78 (diamond ring); *Durfee v. Harper*, 22 Mont. 354, 56 Pac. 582; *Rose v. Coble*, 61 N. C. (Phill. L.) 517 (horse); *Winslow v. Herriman Iron Co.* — Tenn. —, 42 S. W. 698.

"Possession in the plaintiff, or the right thereto, was necessary for the preservation of this lien. But such possession could have been constructive as well as actual, and what will amount to a possession sufficient

bank, either actual or constructive, nor had any information been given Mrs. Bradshaw or the administrator that the bank claimed a lien upon the stock as pledgee, no demand ever having been made for its surrender, nor did either one have any knowledge that such lien or pledge was claimed, nor did the bank ever take, or cause to be taken, any steps to obtain the possession of the certificate.

It is contended by defendant that, assuming that the stock, as originally issued, had been pledged, the lien of the bank had been waived and lost by the surrender and the subsequent issues of the stock, as above outlined, with the total absence of any claim of a lien upon it. There is no intimation of fraud or deception on the

part of E. J. Bradshaw, the widow of deceased. Did plaintiff waive its lien? In *Mahoney v. Hale*, 66 Minn. 463, 69 N. W. 334, the supreme court of Minnesota, in discussing the law of pledge, says: "To constitute a pledge, the pledgee must take possession, and to retain it he must retain possession. An actual delivery of property capable of personal possession and a continued change of possession is essential. In case of a pledge the requirement of possession in the pledgee is an inexorable rule of law adopted to prevent fraud and deception; for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods. . . . There must not only be an

for the continuance of a lien will depend upon the nature of the articles, and the intention of the parties. Standing trees or mill logs cannot be in such obvious personal possession as chattels of a less bulky and more portable description. One may have a valid lien upon property while it is in the hands of the person who pledged it; as if an innholder should have a horse for the purpose of being fed only, which he had before pledged to his creditor to secure a debt; or if a watchmaker deliver a watch as a pledge and afterwards receive it for the sole purpose of showing it to a friend, or to repair; in neither case is the lien extinguished; for the right of immediate possession is in the pledgee, and the possession of the pledgeor is that of the pledgee; it being parted with for a specific purpose, not inconsistent with the existence of the pledge. And it is immaterial whether such qualified possession in the pledgeor is in obedience to the agreement made when the pledge was given, or by a subsequent understanding between the parties, provided there be no relinquishment of that possession, which perfected the lien." *Bradeen v. Brooks*, 22 Me. 463.

So, a pledgee with power to sell the property does not lose his lien by employing the pledgeor as his agent to make the sale, nor by allowing him to contract in his own name, nor by delivering the goods on his order. *Thayer v. Dwight*, 104 Mass. 254.

The right of the pledgee to the proceeds from the sale of the pledged property is not lost as between the parties, or as against the purchaser with notice of the pledge, simply because he delivers the warehouse receipt to the pledgeor as his agent, to carry out the contract of sale. *Rice & B. Maltling Co. v. International Bank*, 185 Ill. 422, 56 N. E. 1062.

Under a contract whereby one party is to advance money to another for the manufacture of bricks, the former to retain them as security as fast as they shall be made, such pledgee does not lose his lien by permitting the pledgeor to have charge of the property according to the contract, nor by giving him limited authority to act as his 39 L.R.A. (N.S.)

special agent in the sale of small quantities of brick at retail. *Macomber v. Parker*, 14 Pick. 497.

In *Oakes v. Moore*, 24 Me. 214, 41 Am. Dec. 379, a case of a lien more like a mortgage than a pledge, it was held that the lienor would not lose his lien by suffering the property to go into the general possession of the lienors, with the expectation raised by them that he would be paid out of the proceeds of its sale, subject to his right to resume the lien in case of nonpayment.

A pledgee's surrender of property for the purpose of receiving from the transaction payment of his debt is not a waiver of his lien. *Fairbanks v. Sargent*, 117 N. Y. 320, 6 L.R.A. 475, 22 N. E. 1039.

But it has been held that if, after taking possession, the pledgee permits the property to be returned to the pledgeor for the purpose of sale, the pledgeor to notify him whenever any purchaser should be found, and only the pledgee to give title and take the pay, he loses his lien as against an attaching creditor of the pledgeor or subsequent purchasers in good faith. *Shaw v. Wilshire*, 65 Me. 485.

Delivery for collection.

In the same way, as an exception to the general rule, pledged commercial paper may be delivered to the pledgeor for collection, to the account of the pledgee. *Dickey v. Pocomoke City Nat. Bank*, 89 Md. 280, 43 Atl. 33; *Leahy v. Simpson*, 60 Mo. App. 83; *White v. Platt*, 5 Denio, 269.

Thus, the pledgee may deliver pledged notes to the pledgeor for convenience in collection, and to be collected for the account of the pledgee, or to be replaced by others, without affecting the lien. *Clark v. Iselin*, 21 Wall. 360, 22 L. ed. 568.

A pledgee of notes may, without losing his lien, deliver them back to the pledgeor for convenience in collecting, and in order that they may be collected when due and be delivered to the makers when paid, then to be replaced by other notes as security, the pledgeor undertaking to keep the security

actual delivery, as distinguished from a mere pretense, but the change of possession must be continuing; not formal, but substantial." In *Jones, Pledges and Collateral Securities*, 2d ed. § 40, it is said: "It is a well-settled principle that a delivery back of the possession of the thing pledged terminates the pledgee's title, unless such redelivery be for a temporary purpose only, or be to the pledgor in a new character, such as special bailee, or agent,"—and a large number of cases are cited in the note as sustaining the doctrine. The rule is stated in 22 *Am. & Eng. Enc. Law*, 2d ed. 860, to be: "In general.—The pledgee must not only obtain possession of the property pledged, but must also retain possession; and a delivery back

of the property with the consent of the pledgee terminates the bailment and the pledgee's lien." The rule is well supported by the citation of authorities in the footnote. See also *Casey v. Cavaroc*, 96 U. S. 467, 24 L. ed. 779; *Walker v. Staples*, 5 Allen, 34; *Walcott v. Keith*, 22 N. H. 196; *Black v. Bogert*, 65 N. Y. 601; *Collins v. Buck*, 63 Me. 459; *Kimball v. Hildreth*, 8 Allen, 167; *Thompson v. Doliver*, 132 Mass. 103; *McFarland v. Wheeler*, 26 Wend. 467; *Smith v. Sasser*, 49 N. C. (4 Jones, L.) 43; *Hickok v. Cowperthwait*, 137 App. Div. 94, 122 N. Y. Supp. 78. In *Harding v. Eldridge*, 186 Mass. 39, 71 N. E. 115, it is said: "It is uniformly held that by a contract of pledge only a

good at all times. *Samson v. Rouse*, 72 Vt. 422, 48 Atl. 666.

Collateral notes held as a pledge may be returned to the pledgor (a banker) for the purpose of safe-keeping and collection, without depriving the pledgee of his lien.. *Re Reeve*, 111 Iowa, 260, 82 N. W. 912.

Under the provision of a code that the voluntary restoration of property to its owner by the holder of a lien thereon, dependent on possession, extinguishes the lien, a note and mortgage, being "things in action," are subjects of lien without change of possession, and not being dependent upon possession, their redelivery to the pledgor for collection does not extinguish the lien. *Merced Bank v. Price*, 9 Cal. App. 177, 98 Pac. 383.

Delivery for exchange

Also, the pledgee may deliver property to the pledgor for exchange, the substituted property to become security in its stead. So, the delivery by the pledgee to the pledgor of a life insurance policy held as security for the payment of a note, for the purpose of procuring a paid-up policy to be issued in lieu thereof, does not divest the lien under which it was held. *Castle v. Hickman*, — Cal. —, 41 Pac. 1036.

A pledgee of bonds may, without losing his lien, deliver them to the pledgor for the special purpose of getting them exchanged for other bonds, the others to be returned to the pledgee as a substituted security. *Hays v. Riddle*, 1 Sandf. 248.

A pledgee does not lose his lien by delivering certificates of stock over to the pledgor as his agent to get them exchanged for other stock, under an agreement that the new stock shall be issued in the pledgee's name, and if the pledgor takes the new stock in his own name, he holds it as agent and trustee for the pledgee. *McClung v. Colwell*, 107 Tenn. 592, 89 Am. St. Rep. 961, 64 S. W. 890.

The pledgee of a note does not lose his lien by delivering it back to the pledgor under an agreement that the latter is to

return either the same or another note. *Way v. Davidson*, 12 Gray, 465, 74 Am. Dec. 604.

Delivery for special, temporary use.

Neither does the pledgee lose his lien by delivering the property to the pledgor for a particular, temporary use, under a special arrangement. Thus, where a ship captain pledged a chronometer to his employers, the shipowners, and they allowed him to use it on a particular voyage, it was held that they did not legally part with their possession, but his possession was theirs; he had no interest in the chronometer, but only a license or permission to use it for a limited time while he continued their servant, and employed it for the purpose of navigating their ship. *Reeves v. Capper*, 5 Bing. N. C. 136, 2 Jur. 1067, 6 Scott, 877, 1 Arnold, 427.

A pledgee does not lose his lien simply by consenting that the pledgor may take the property (a team of horses) for a special purpose, so that if the pledgor takes them at another time for a different purpose, he may be guilty of larceny. *Bruley v. Rose*, 57 Iowa, 651, 11 N. W. 629.

The fact that the pledgee allows the pledgor to wear a suit of clothes and ride a bicycle which were held as security for board does not show such a surrender as to divest the lien. *Henry v. State*, 110 Ga. 750, 78 Am. St. Rep. 137, 36 S. E. 55.

A pledgee of oxen may loan them to the pledgor temporarily for a particular use without losing his lien, and may maintain trover against a third person for wrongfully retaining them. *Hutton v. Arnett* 51 Ill. 198.

Where a pledgee of an omnibus loaned it temporarily to the pledgor, and it was subsequently returned to him, his lien still subsisted, and a mortgagee thereafter would take his lien subject to the pledge. *Cooper v. Ray*, 47 Ill. 53.

A pledgee's lien upon a team and harness is not lost by his permitting the pledgor to have the temporary use of the same for a specific purpose, with the distinct under-

special title passes to the pledgee, which depends on actual possession, while the general right of property remains in the pledgeor; and, in order to hold and preserve his lien, there must be not only a physical delivery, where the chattel can thus be transferred, but continued possession also retained,"—citing cases.

As we have seen, the certificate for the 38,875 shares was issued to H. N. Bradshaw on the 10th day of January, 1901, and remained in the bank until after his death, which occurred February 21, 1901.

Soon after his death, the certificate was delivered to Mrs. Bradshaw, and she retained the exclusive possession of it until about the 2d day of January, 1906, a period of nearly five years, during which time the surplus of dividends, after paying interest on the notes, was paid to her, and during which time no intimation was ever conveyed to her that a lien of pledge was claimed. On the last-named date she surrendered the certificate, and one was issued to her in her name and delivered to her, which she retained for a short time,

standing that it is to be delivered back to the pledgee immediately thereafter, and a chattel mortgage executed upon it by the pledgeor while thus in possession of the property is subject to the pledge. *Clare v. Agerter*, 47 Kan. 604, 28 Pac. 694.

The fact that the pledgee and pledge holder permit the pledgeor to use pledged machinery at times in his business does not derogate from the validity of the pledge. *Jacquet v. His Creditors*, 38 La. Ann. 863.

The fact that the pledgeor, after the delivery of a pledged threshing machine to the pledge holder, even with the knowledge and consent of the pledgee, for a time assists the pledge holder in moving and setting up the machine, and advises him as to managing the same, does not necessarily render the holding of the pledge void as against creditors of the pledgeor. The change of possession is sufficiently continuous to preserve the lien. *Hilliker v. Kuhn*, 71 Cal. 214, 16 Pac. 707.

But, as against an innocent purchaser, it has been held that a pledgee loses his lien by redelivery of the property, even if only a loan to the pledgeor, who works for him, and for a special, temporary purpose. *Bodenhauer v. Newsom*, 50 N. C. (5 Jones, L.) 107, 69 Am. Dec. 775.

And where a silver cornet was pledged by a tenant to the landlord as security for rent, and later the tenant was permitted to borrow it for use, and did not return it, it was held that the lien was gone. *Re Harlow*, Fed. Cas. No. 6,070.

Delivery to third person agreed upon.

Under a statute in Louisiana the lien of a pledgee is not destroyed when the property is placed by the pledgee in the hands of a third person agreed upon by the parties. *Peters v. Pacific Guano Co.* 42 La. Ann. 690, 7 So. 790.

And the fact that the pledge holder selected by the parties is an employee of the pledgeor does not affect the validity of the pledge. *Weems v. Delta Moss Co.* 33 La. Ann. 973.

The validity of a pledge of mining stock is not affected by the fact that the pledgee, with the consent of the pledgeor, places the property in a pool in the hands of a trustee of the pledgeor; although he thereby loses actual possession, he still retains construc-

tive possession. *Van Cise v. Merchant's Nat. Bank*, 4 Dak. 485, 33 N. W. 897.

A pledgee does not lose his lien simply because he puts the property in the possession of the servant of the pledgeor as his special agent, nor because the goods are not removed from the premises of the pledgeor, provided that they are in the legal control and custody of such agent. *Sumner v. Hamlet*, 12 Pick. 76.

Delivery to pledgeor as agent of pledgee.

The pledgeor himself may be considered as trustee *ad hoc* of the property, and be given possession, provided his tenure be precarious and clearly for the account of the pledgee. *Conger v. New Orleans*, 32 La. Ann. 1250.

A bank holding bills of lading on hides as security does not lose its lien by indorsing the bills to the pledgeors upon their agreement to receive the hides from the carriers as agents of the bank, and to deliver to the bank the leather tanned from the identical hides. *Moors v. Wyman*, 146 Mass. 60, 15 N. E. 104.

A pledgee may deliver goods to the pledgeor as his agent, to hold for the account and benefit of the former until remittance shall be made. *Carter v. Arguimbau*, 31 Abb. N. C. 3.

The lien of the pledgee is not affected by the fact that the pledgeor was employed by him to handle the goods. *Griffith v. Brightwell*, 10 Ky. L. Rep. 814.

Where the pledgee directed the pledgeor as his agent to lease a pledged piano to a third person in the pledgee's name, and the pledgeor took it away, but leased it in his own name and collected the rent, and the pledgee, immediately upon learning of the wrong, explained the facts to the lessor and made other arrangements with him, it was held not to be such a voluntary delivery of possession of the pledged article as to destroy the lien. *Palmtag v. Doutrick*, 59 Cal. 154, 43 Am. Rep. 245.

Miscellaneous.

The pledgee may also deliver the property into the possession of the pledgeor under various other special arrangements. Thus, a prospective purchaser of land, who has the right to temporary possession of the abstract of title, does not lose that right by deliv-

when she transferred and delivered it to the administrator of the estate of H. N. Bradshaw, who retained its possession from that time on. No demand was ever made for its possession, nor was any claim of pledge made. Under all authority this must be held to have been a waiver of any lien which might have existed during the life of Dr. Bradshaw. It is unfortunate to plaintiff that we must so hold, for, if Dr. Bradshaw owed the bank at the time of his decease, every principle of honor would require that the debt be paid; but

payment cannot be enforced by this action without running counter to the great weight of authority. Payment will have to be enforced by a resort to the assets of his estate, if at all.

It follows that the decree of the District Court will have to be reversed, and the cause remanded for further proceedings, which is done.

Letton and Sedgwick, JJ., not sitting.

ering the abstract back to the owner of the land for the special purpose of examination and answering objections, the abstract then to be restored to the purchaser. *Roberts v. Wyatt*, 2 Taunt. 268, 11 Revised Rep. 566.

A pledgeor's offer to permit pledged brick to remain on his premises and keep it in his possession and care until sold is not a stipulation for exclusive possession, but only a concession on his part, and the pledgee's acceptance of the offer, and his agreement that the pledgeor should have the first right to purchase the brick, and the exclusive right to control the sale or other disposition thereof without reference to possession, cannot be considered such a surrender as to defeat his lien. *Thompson v. Colvin*, 53 Or. 488, 101 Pac. 201.

Where a wagon maker and blacksmith agree to make wagons jointly, the former to do the woodwork and painting and the latter to furnish the shop and do the iron work, and to advance money and materials for the former, and in return to have and hold the wagons until the proceeds should repay him for the advancements, and where the wagons had thus been in the exclusive possession of the blacksmith for at least a month, and were kept upon his premises and were marked with his name, his allowing the wagon maker to paint them was not a surrender sufficient to defeat his lien upon the share of the other. *Waldie v. Doll*, 29 Cal. 555.

A vendor of trees for lumber purposes, who, under the contract of sale, retains "possession" until the lumber is paid for, does not lose his lien by reason of the fact that he allows the vendee to cut and remove the timber according to the terms of the contract and according to the intention of the parties, and the usual course of proceeding in relation to such property. *Bradeen v. Brooks*, 22 Me. 465.

A creditor holding a note as collateral security may deliver it to the maker, to be pledged to a second person, and to be returned immediately thereafter, without losing his lien. *Cahn v. Ford*, 42 La. Ann. 965, 8 So. 477.

Where it is the custom of brokers upon the day when a loan is repayable to return the securities to the borrower in the morning, and for the borrower to pay the debt later in the day, or return the securities, or others of equal value, a broker does not lose 39 L.R.A. (N.S.)

his lien upon such securities by thus returning them; he does not thereby intend to surrender his securities. *Burra v. Ricard*, 1 Cab. & El. 478.

The fact that the pledgee delivers the property to one ignorant of the pledge, in whose name it is shipped, and that the property is consigned to the pledgeor in order to save freight charges, under an arrangement made by the latter before the property was pledged, does not terminate the lien, where the pledgee employs an agent to take charge of the property during transportation, and the pledgeor never actually regains possession. *Cooley v. Minnesota Transfer R. Co.* 53 Minn. 327, 39 Am. St. Rep. 609, 55 N. W. 141.

Where the pledgeor, a building contractor, becomes insolvent, the mere presentation to his assignee in insolvency by the pledgee, who was also the assignee of moneys to become due under a building contract from the owner to the contractor, of the note pledged, as an unsecured claim, and its rejection by the assignee in insolvency, without any further effort on the part of the pledgee to enforce the claim against the contractor, does not work a forfeiture of his right to enforce the security against the owner of the building. *Perry v. Parrott*, 135 Cal. 238, 67 Pac. 144.

The fact that after the death of the pledgeor, pledged paper was found among his effects, pinned to the original note which was thereby secured, but which had been renewed and another substituted, is not sufficient to show a surrender of the pledge by the pledgee, when it appears that the pledgeor had been administrator of the estate of the pledgee, and as such had taken possession of all papers of the latter, and when their correspondence does not in any degree bear out the theory of surrender. *Davis v. Bean*, 78 Fed. 41.

Although the lien of the pledgee of personal property to secure the payment of purchase money is lost by the voluntary and unconditional delivery of the property to the pledgeor, this does not prevent the parties from contracting for a lien in the nature of a mortgage which, as between themselves, will be good even after such delivery; in such case the lien does not depend upon possession, but upon contract. *Gregory v. Morris*, 96 U. S. 619, 24 L. ed. 740, H. C. Sh.

WASHINGTON SUPREME COURT.
(Department No. 1.)

DUDLEY H. ROCKWELL, Appt.,
v.
EILER'S MUSIC HOUSE, Respt.

(67 Wash. 478, 122 Pac. 12.)

Landlord and tenant — lease for prohibited use — concealment — right of lessee.

One leasing a portion of a building for a moving picture show cannot, upon surrendering the lease, recover from the lessor rent paid in advance, and for time when he had no use of the premises, and the cost of necessary alterations, upon the refusal of the police department to permit him to operate the establishment for the intended purpose because it lacked the fire escapes prescribed by the municipal ordinances, on the theory that the lessor knew that the building could not be used for the purpose intended, and neglected to inform him of the fact.

(March 16, 1912.)

APPEAL by plaintiff from a judgment of the Superior Court for Pierce County in defendant's favor in an action brought to recover rent paid in advance, and for the recovery of the amount paid by plaintiff for repairs and improvements on the leased building. Affirmed.

The facts are stated in the opinion.

Messrs. Stallcup & Keyes for appellant.
Mr. Walter M. Harvey for respondent.

Gose, J., delivered the opinion of the court:

This is an appeal from a judgment entered in favor of the defendant, after a demurrer had been sustained to the complaint, and the plaintiff had declined to plead further. The appellant predicates his cause of action upon a lease which

bears date July 7, 1910. The lease provides: "That said party of the first part [the respondent] does by these presents lease and demise unto the said party of the second part [the appellant] that part of the second and third floors commonly known as the Temple of Music, situate and being in that building described as 843-845 C street, Tacoma, Washington, and room number one (1) on the second floor, with the appurtenances, for the term of five (5) years, from the 1st day of August, one thousand nine hundred and ten, for the sum of twelve thousand dollars (\$12,000), payable in gold coin of the United States of America, as follows, to wit: The sum of one hundred and sixty-five dollars (\$165) per month for the first year; one hundred and ninety dollars (\$190) per month for the second year, and two hundred and fifteen dollars (\$215) per month for the third, fourth, and fifth years, as follows, to wit: The sum of three hundred and eighty dollars (\$380) at the time of the signing of this lease, being payment for the first and last month's rent, the receipt whereof is hereby acknowledged, and the rent thereafter shall be paid on the 1st of each and every month thereafter in advance during the said term of this lease. . . ." The lease further provides that the respondent may re-enter the premises and remove all persons therefrom in case of a default in the payment of rent, or if default shall be made in any of the covenants of the lease; and obligates the appellant to pay the rent in the manner stipulated. It further provides that the respondent shall pay for light used by the appellant, and for the power to run the organ in the building; that all improvements and changes made by the appellant shall be at his expense; that they shall conform to the insurance

Note. — Liability for rent as affected by fact that property cannot be devoted to use intended without alteration to conform to police regulations.

In Leuthold v. Stickney, ante, 231, it was held that the owner of a building who, during the term of a lease thereof, unlawfully fails to equip such building with fire escapes, cannot maintain an action upon such lease for rent.

As to effect upon lease of property for saloon, of passage of prohibitory laws during term, see notes to Heart v. East Tennessee Brewing Co. 19 L.R.A.(N.S.) 964; O'Byrne v. Henley, 23 L.R.A.(N.S.) 497; Hecht v. Acme Coal Co. 34 L.R.A.(N.S.) 773.

As to the enforcement by public officers of restrictions or conditions as to the use of leased premises, as constructive eviction of 39 L.R.A.(N.S.)

tenant, see note to Taylor v. Finnigan, 2 L.R.A.(N.S.) 973.

As to the landlord's breach of covenant to repair or make improvements as defense to action for rent, see note to Young v. Berman, 34 L.R.A.(N.S.) 977.

And as to the landlord's breach of covenant to repair or make improvements as justification of abandonment of premises, see note to Partridge v. Dykins, 34 L.R.A.(N.S.) 984.

As to the validity of contracts in business which it is a misdemeanor to transact, see note to Levison v. Boas, 12 L.R.A.(N.S.) 575.

As to effect of passage, before expiration of the time of performance of contract, of statute rendering performance impossible, see note to American Mercantile Exch. v. Blunt, 10 L.R.A.(N.S.) 415, E. M. S.

laws and ordinances of the city; that they shall become a part of the building and remain therein after the expiration of the lease; and that, if they increase the cost of the insurance on the building, the excess shall be borne by the appellant. The complaint is of too great length to be set forth in *extenso*. It alleges, in substance, that the appellant, with the knowledge of the respondent, leased the premises for the purpose of carrying on a moving picture show; that the premises prior to and at the time of the letting were used for public shows and entertainments, and were equipped with chairs and seats for that purpose; that the appellant did not know that the premises could not be used for the contemplated purpose; that the respondent "did not disclose" to the appellant that the premises could not "be any longer used for such purposes," or for the use of audiences for any purpose, "until an exit for escape in case of fire" should be constructed extending over a part of the building not included in the lease; that it was agreed that the appellant should make certain alterations and permanent improvements, "the same being considered taken and accepted as part payment in the rental charge of said premises, so that the cash rate of the monthly rental was proportionately reduced as stated in the lease in consideration of the same;" that the appellant entered into the possession of the premises and completed the improvements on the 30th day of September; that the chief of the fire department of the city then notified the appellant that the premises could not be used for moving picture shows until an exit was constructed in conformity with the city ordinance; that the respondent refused to construct the exit; that the appellant, on October 15th, opened the show, and was arrested by the city authorities; that on the 25th day of October, the respondent refusing to construct an exit, the appellant "then and there surrendered such leasehold estate and the keys thereof" to the respondent; and that it has since had the possession and control of the premises. It is further alleged: "That thereafter, and on or about the 4th day of November, 1910, the said defendant commenced an action against this plaintiff upon said lease contract for the sum of one hundred and sixty-five dollars (\$165) for the rent for the month of October, 1910; that thereafter, while said action was still pending, the said defendant agreed to and did terminate the said lease, and accepted the said surrender theretofore made of the same."

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The appellant seeks to recover upon three causes of action. The first cause of action is for the recovery of \$215 paid as rental at the time of the execution of the lease, for the rent of the last month of the term. The second cause of action is for the recovery of the rent paid for the months of July, August, and September, 1910. The third cause of action is for the recovery of the amount paid by the appellant for repairs and improvements on the building, upon the allegation that the improvements are of a "lasting and beneficial" character. The three causes of action are so intimately associated that we will consider them together.

There being no restrictions in the lease as to the purposes for which the premises may be used, the appellant was at liberty to use them for all lawful purposes. *Hayton v. Seattle Brewing & Malting Co.* 66 Wash. 248, 37 L.R.A. (N.S.) 432, 119 Pac. 739.

The lease is complete in itself, and its terms cannot be changed by a contemporaneous parol agreement. *Hockersmith v. Ferguson*, 63 Wash. 581, 116 Pac. 11.

The appellant cannot recover under the terms of the lease by the matter pleaded. The allegation is that he had no knowledge of the ordinance requiring the construction of an exit as a prerequisite to the use of the building for a moving picture show, and that the respondent "did not disclose" that fact to him. This is true for two reasons: (1) The lease does not limit the use of the building; and (2) the city ordinances operate with all the force of a statute within the limits of the municipality, and all persons "within the corporate territory are bound to take notice of their provisions" when duly enacted and promulgated, and to obey them. 28 Cyc. 291, 292. All persons who contract within the limits of a municipality in reference to matters which are governed by police regulations are charged with knowledge of their provisions. *North Birmingham Street R. Co. v. Calderwood*, 89 Ala. 247, 18 Am. St. Rep. 105, 7 So. 360; *Central R. & Bkg. Co. v. Brunswick & W. R. Co.* 87 Ga. 386, 13 S. E. 520; *Hope v. Alton*, 214 Ill. 102, 73 N. E. 406; *Palmyra v. Morton*, 25 Mo. 593; *Buffalo v. Webster*, 10 Wend. 100.

It is not important whether the matter set forth in the complaint be treated as a re-entry and termination of the lease for the nonpayment of rent or a surrender. In either case, there was a termination of the relation of landlord and tenant, and the right of the landlord to accrued rent was fixed and determined by the terms of the lease. "A surrender has no effect upon the liability of the tenant for rents ac-

crued at the time of the surrender. And this is true though the rent was payable in advance for a period beyond the time of the surrender, and *a fortiori*, rent paid in advance cannot be recovered on surrender." 18 Am. & Eng. Enc. Law, 2d ed. 295. The same rule is well stated in American Bonding Co. v. Pueblo Invest. Co. 9 L.R.A. (N.S.) 557, 80 C. C. A. 97, 150 Fed. 17, 10 Ann. Cas. 357, as follows: "The termination of a lease during its term by surrender, by re-entry, or by eviction without more, discharges the lessee from liability for rents that have not accrued, but leaves him liable for all the rents which have accrued and become due, and for the performance of all covenants whose fulfillment is due." See also Cameron v. Little, 62 Me. 550; Learned v. Ryder, 61 Barb. 552; Sperry v. Miller, 16 N. Y. 407. Taylor v. Finnigan, 189 Mass. 568, 2 L.R.A. (N.S.) 973, 76 N. E. 203, is an instructive case upon all the questions under consideration, and is directly in point. In that case it was held that a lessor of a building used by the lessee as a theater, who has not covenanted to make repairs, does not breach the lease by failing to furnish additional means of egress ordered by the inspector of public buildings, for want of which the lessee's license to carry on theatrical performances was suspended. In that case, as in the case at bar, it was alleged that the order requiring additional means of egress could not be complied with within the portion of the building demised to the defendant. In addressing itself to that question, the court observed that there was no averment that upon request the landlord refused to assent to such repairs being made by the lessee, so far as they were necessary to comply with the order. Nor is there such an allegation in the complaint in the case at bar. The averment here is that the respondent refused to provide the means of egress. It is not necessary to consider what the appellant's rights would be if, upon request, the respondent had refused him permission to construct an exit upon the walls of the unleased portion of the premises. Nor is it necessary to consider whether such right was implied from the terms of the lease and the facts pleaded. Rosenbaum v. United States Credit System Co. 64 N. J. L. 34, 44 Atl. 966, cited by the appellant, is not in point. The decision in that case is based upon the principle that a mistake in regard to the law of another state is a mistake of fact, and it was held that, where an employer, with knowledge of the laws of a sister state, engages an employee who has no knowledge of the laws of that state, to enter into a contract for service to be rendered therein 39 L.R.A. (N.S.)

forbidden by the laws of that state, the employer is liable for damages upon the ground of fraud. It is scarcely necessary to say that the case is not in point. Nor are the authorities upon the question of a failure of consideration pertinent to the facts pleaded.

In conclusion it suffices to say that the use of the premises was not limited by the terms of the lease; that the lease is complete in itself; that the respondent did not engage to make any repairs or improvements upon the premises; that the appellant did engage to make certain improvements; that both parties were bound to take notice of the police regulations of the city where the subject-matter of the contract was situated; that there is no averment that the respondent misled the appellant, or that it refused to permit him to construct the exit upon the wall of the building without the terms of the lease; that, upon the cancellation or surrender of the lease, the appellant was obligated to pay all rent that had accrued by the terms of the lease, and that the complaint, when read with the lease, shows no breach of any of its terms or of any legal duty upon the part of the respondent.

The judgment is therefore affirmed.

Chadwick, Parker, and Crow, JJ., concur.

CALIFORNIA SUPREME COURT. (Department No. 2.)

EURETTA REYNOLDS, Resp't.,
v.
LOS ANGELES GAS & ELECTRIC COMPANY, App't.

(— Cal. —, 122 Pac. 962.)

Negligence — forgetfulness of excavation — injury.

Forgetfulness by an aged tenant whose faculties were unimpaired, of a trench which had been made upon the property by a licensee during the day, when returning to the house after doing an errand in the evening, which results in her falling into the excavation, is negligence as matter of law, which will prevent her holding the licensee liable for the resulting injury.

(March 16, 1912.)

Note. — Forgetfulness of obstacle or defect as contributory negligence.

It is not the purpose of this note to consider the general question of forgetfulness of a dangerous position, as of a railroad crossing, but to limit its discussion to cases where there was some particular tangible obstacle or defect which had been momen-

APPEAL by defendant from a judgment of the Superior Court for Los Angeles County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. William A. Cheney and Le Roy M. Edwards, for appellant:

The injuries received by the plaintiff were directly and proximately caused by contributory negligence upon her part.

Davis v. California Street Cable R. 105 Cal. 131, 38 Pac. 647; McGraw v. Friend & T. Lumber Co. 120 Cal. 574, 52 Pac. 1004; Dufour v. Central P. R. Co. 67 Cal. 322, 7 Pac. 770; Brett v. Frank, 153 Cal. 267, 94 Pac. 1051; Bruker v. Covington, 69 Ind. 33,

35 Am. Rep. 202; Casey v. Fitchburg, 162 Mass. 321, 38 N. E. 499; Indianapolis v. Cook, 99 Ind. 10; Hesser v. Grafton, 33 W. Va. 548, 11 S. E. 211; Bedford v. Neal, 143 Ind. 425, 41 N. E. 1029, 42 N. E. 815.

The fact that plaintiff was an old person does not free her from being guilty of contributory negligence in this case.

Worthington v. Mencer, 96 Ala. 310, 17 L.R.A. 407, 11 So. 72; Winn v. Lowell, 1 Allen, 177; Hilborn v. Boston & N. Street R. Co. 191 Mass. 14, 77 N. E. 646; Hawes v. Boston Elev. R. Co. 192 Mass. 324, 78 N. E. 480; Karl v. Juniata County, 206 Pa. 633, 56 Atl. 78; Smith v. Cairo, 48 Ill. App. 166; Mt. Vernon v. Brooks, 39 Ill. App. 426.

tarly forgotten by the plaintiff, such as a hole at the crossing. Thus, there are excluded cases such as *Mau v. Morse*, 3 Colo. App. 359, 33 Pac. 283, where a man while looking down an elevator shaft was killed by the elevator descending upon him.

Cases between master and servant are excluded.

Cases relating to defects in streets and to the liability of municipal corporations in connection therewith are excluded, as that part of the subject is treated in the note to *Lerner v. Philadelphia*, 21 L.R.A. (N.S.) 651.

As to the question as relating to the contributory negligence of a tenant in matters between landlord and tenant, see the note to *Walsh v. Schmidt*, 34 L.R.A. (N.S.) 808, and that matter is also here excluded.

For cases on intoxication as affecting negligence, see the note to *Kingston v. Ft. Wayne & E. R. Co.* 40 L.R.A. 131.

For cases on care required of one in sudden emergency, see the note to *Lemay v. Springfield Street R. Co.* 37 L.R.A. (N.S.) 43.

It is not intended to include cases which turn upon the fact that the plaintiff had reasonable cause to suppose that an obstruction had been removed, or that in the natural course of things it would have been removed, though that element is present in some of the cited cases.

The reader will observe that in *REYNOLDS v. LOS ANGELES GAS & ELECTRIC CO.* it was held that momentary forgetfulness of a danger not induced by some sudden and adequate disturbing cause is "itself, as matter of law, contributory negligence barring a recovery."

As stated in the opinion the court follows the cases of *Davis v. California Street Cable R. Co.* 105 Cal. 131, 38 Pac. 647, and *McGraw v. Friend & T. Lumber Co.* 120 Cal. 574, 52 Pac. 1004, which are therein reviewed at length.

In accidents of this kind so much depends upon the particular circumstances of each case that little is to be gained by any attempt at general rules.

39 L.R.A. (N.S.)

Holes and excavations.

In *Anderson v. Northern P. R. Co.* 19 Wash. 340, 53 Pac. 345, where the plaintiff's intestate while going home at night from work crossed a lot of the defendant's which people were in the habit of crossing, and fell into an excavation and was killed, the court said: "It having been shown that the deceased had knowledge of the excavation as aforesaid, and it also appearing that he had been in the habit or had frequently crossed the tract in question up to the time of the injury, and the pit being open and exposed and nothing to prevent its being seen, at least when near it, it must be presumed that he had knowledge of its existence, and was chargeable with negligence in attempting to cross when it was so dark that he could not see the pit or follow the paths which had been used by people in crossing the tract."

So, in *Eisenberg v. Missouri P. R. Co.* 33 Mo. App. 85, where the plaintiff's horses were killed and his wagon injured by his driver driving into an excavation upon or near the defendant's road, upon which he was an invitee, the court, while holding the plaintiff a mere licensee, yet said: "In the case at bar the danger was neither a hidden nor a recent danger. The excavation existed before the road was built. The plaintiff knew the exact situation for years; his drivers knew it. This very driver had traveled over the road repeatedly on the day of the accident. He discussed such dangers when they were in his full view, in broad daylight, with his fellow servant, and knowing what risk he undertook, voluntarily assumed it, although he might have used another and safer road."

And in *Bond v. Smith*, 113 N. Y. 378, 21 N. E. 128, where the plaintiff's intestate, a watchman, was killed by falling into an area on an alley, and had been accustomed to pass through the alley nightly and knew all about the danger, the court, while thinking that the defendants were not guilty of any negligence, also held that there had been no evidence produced by the plaintiff

Messrs. Morton, Riddle, & Hollzer for respondent.

Henshaw, J., delivered the opinion of the court:

This is an action for personal injuries. From the judgment following the verdict of the jury in favor of the plaintiff, and from the order denying its motion for a new trial, defendant appeals.

Plaintiff was living as tenant in a small house situated about 10 feet from the sidewalk in the middle of a 60-foot lot. Across this lot and under the plaintiff's house running parallel to the street was a zanja owned by the city of Los Angeles. This zanja was leased to the defendant under a contract compelling defendant to keep it in repair. The old zanja pipe required renewal, and defendant undertook to replace it with a new concrete pipe. Defendant entered upon the premises with the express license of the owner thereof, and proceeded to dig a trench to uncover the old pipe from the southerly line of the lot to the house. This trench was so dug in the daytime, plaintiff having knowledge of the digging, and watching the men at work. The trench

was about 3 feet wide and from 1 to 3 feet deep. The dirt removed in digging was thrown up along the street side. There was access to the rear of the house upon both sides of it, but the path habitually used extended along the south side where the trench had been dug. Such were the physical conditions.

Plaintiff was an elderly woman about seventy-five years of age, but physically vigorous. She raised and tended a flock of fifty or sixty chickens, took care of a cow, sold and herself distributed the milk; she cooked her own meals, did her own housework, and was a rapid and sure-footed walker. She had never been sick a day in her life, or, if so, it was so long ago that she had forgotten it. Such is her own testimony.

About 8 o'clock of the evening of the accident, it being then very dark, plaintiff left her residence by the back door to deliver milk to her neighbors. She first started to go around by the path on the south side of the house, but remembered the open ditch, and, not knowing in what condition it was left, turned about and walked with perfect safety around the north side of the house to the street. Upon returning

as to the lack of contributory negligence on the part of her intestate.

On the other hand, in *Kelly v. New York C. & H. R. R. Co.* 29 N. Y. S. R. 646, 9 N. Y. Supp. 90, the court set aside a nonsuit in a case where the plaintiff was injured by stumbling on uneven planking patching a hole in the defendant's bridge, on a night when it was quite dark and the thermometer was ten below zero, and he was walking rapidly along with his hands in his pockets. He testified that he had seen several patches on the bridge, but whether he had seen this particular one or not he did not remember.

Where the plaintiff was in the employ of a railroad which had the right for certain purposes to use the track of the defendant railroad at a place where the latter crossed the highway, and, owing to the negligence of the defendant, there was a hole in the planking between the tracks, known to the plaintiff, who, while endeavoring to uncouple cars on his own road, and not thinking about the hole, moved with the cars and caught his foot in the hole and was injured, it was held that it was error to direct a verdict for the defendant. *Snow v. Housatonic R. Co.* 8 Allen, 441, 85 Am. Dec. 720.

Snow and ice.

In *Waterbury v. Chicago, M. & St. P. R. Co.* 104 Iowa, 32, 73 N. W. 341, where the plaintiff had been injured by slipping on the ice of a railway platform, the court, in reversing a judgment for the plaintiff, said: "Having full knowledge as to the 39 L.R.A.(N.S.)

dangerous condition of this incline, and the point near it,—having passed over it a few minutes before with his mother, when he says he was especially careful,—he proceeds to step backwards upon it without exercising any care whatsoever. From the undisputed facts,—from his own evidence,—but one conclusion can be drawn, and that is that he was guilty of negligence which resulted in his injury. It does not appear that there was any necessity for stepping backwards onto this incline, which he knew was especially dangerous, save to escape the wind, and that would not justify his so doing without exercising any care for his safety."

But a different view was taken of the situation in *Dewire v. Bailey*, 131 Mass. 169, 41 Am. Rep. 219, where the plaintiff testified that as he went into a building to attend a paid entertainment, he noticed that there was ice and snow on the plank sidewalk, but he did not slip going in; that, at the close of the entertainment, he was among the last to leave; and that, after the accident happened, he noticed that the sidewalk in front of the door where he fell was in the same condition as when he went in; and that he stepped carefully in going out,—the court, in setting aside a verdict for the defendant, said: "The nature of the obstruction in this case, as shown by the exceptions, was such that it ought to have been submitted to the jury to determine whether the plaintiff, even if he knew the condition of the sidewalk at the time he attempted to pass over it, was, under the circumstances, in the exercise of reasonable

home a few minutes later, plaintiff testified that she was in a hurry, and had forgotten entirely about the ditch. "It never entered my mind." "I never thought of it, until I fell into it." "I was in a hurry, and I walked right into it. That is the whole upshot of it. If I had thought of it, I would never have walked into it."

Under this condition of the evidence, appellant contends that respondent as matter of law brought about her injury by her own contributory negligence, and is thus barred of a recovery. Respondent's position is that whether or not her temporary forgetfulness which led to and resulted in her injury constituted contributory negligence was a question of fact for the jury. Undoubtedly the general rule is as laid down

prudence and due care in attempting to pass over it in the manner he did."

Defects in buildings.

In *Chicago, P. & St. L. R. Co. v. Doyle*, 119 Ill. App. 303, it was held that it was error to refuse a nonsuit where the plaintiff was injured, as he claimed, owing to the negligent arrangement of doors and steps in a stairway with which he was entirely familiar.

But in *Gordon v. Cummings*, 152 Mass. 513, 9 L.R.A. 640, 23 Am. St. Rep. 846, 25 N. E. 978, it was held that it was error to direct a verdict for the defendants, the owners of a building which the plaintiff, a letter carrier, was entering, there being two similar entrances close together, one of them being the elevator shaft, through which he fell, he being aware of the similarity. The court said upon the question as to whether the plaintiff offered any sufficient evidence of due care, that his previous knowledge of the dangerous proximity of the two entrances was not conclusive that he was not exercising due care in attempting to enter.

In *Scrivner v. Lowe*, 32 Ont. Rep. 290, the defendants were engaged in putting electrical fittings into a house in which the plaintiff was a lodger; and, leaving their work to go to dinner at midday, left in an unprotected state two holes in the floor of the bath room, one of which they had made for the purposes of the work, and the other of which was a stovepipe hole, which they had uncovered. While they were absent the plaintiff went into the bath room to wash her hands, observed the holes, and avoided them in going to the washstand, but, on leaving it, she forgot one of the holes, stepped into it, and was bruised and strained in consequence. Robertson, J., said: "It was a case of 'momentary forgetfulness,' and that, in my judgment, does not constitute negligence. Plaintiff had not seen the holes in the floor before the occasion in question. She stepped over the one at the door, when she saw the other in front of the washstand, which she went

in 29 Cyc. 641, as follows: "Whether an injured person was guilty of contributory negligence in failing to observe the danger is usually for the jury to determine under the particular facts of the case." And in support of this text decisions of this court are cited. It is true, also, that some courts have declared that under circumstances similar to those here presented the question should be referred to the jury. In other words, they have held that temporary forgetfulness of a known danger, even without some sudden or great disturbing cause, does not constitute negligence as matter of law. Of such cases are *Kelly v. Blackstone*, 147 Mass. 448, 9 Am. St. Rep. 730, 18 N. E. 217; *Meridian v. McBeath*, 80 Miss. 485, 32 So. 53, and *Collins v. Janesville*, 111

to the bath room to use. Instead of standing in front of the washstand, to avoid the larger hole, she stood at the end of it, and her skirts apparently covered the other. After performing her ablutions, she turned round to leave the stand, and, in turning, one of her feet went into the other hole, and the injury was occasioned thereby. To my mind, there could be very little doubt as to the inference to be drawn from these circumstances, but it was not for the judge to say; it was a question of fact as to what was the proper inference to be deduced from the facts in proof, and in that case it was for the jury to decide."

In *Bassett v. Fish*, 75 N. Y. 303, the court, while reversing a judgment for the plaintiff, a school teacher, for injury in falling through a hole in the floor of a room in the schoolhouse, nevertheless considered that she was not guilty of contributory negligence in that she had seen the hole once three weeks before the accident, she having been since that time occupied in her duties in another room, but on the day of the accident was teaching a class in the room where the hole was and was walking to and fro instructing them when she fell through it. The court said she had a right to suppose that as great a hole as the one in question would have been repaired in the interval that had elapsed.

Miscellaneous.

In *West Kentucky Teleph. Co. v. Pharis*, 25 Ky. L. Rep. 1838, 78 S. W. 917, it was held that it was not contributory negligence as a matter of law for a woman fifty-eight years of age to stumble over a telephone wire partly embedded in the snow in the street, which she had seen in an accidental and cursory way some four days before, it being half-past six on the morning of a cloudy day as she was hurrying to her work through the falling snow with her mind upon the serious condition of her sick sister, whom she had attended during the greater part of the previous night. The court said: "Under such circumstances it is not strange to have forgotten the

Wis. 348, 87 N. W. 241. This last case, however, recognizes the conflict of authority which exists upon this proposition, saying: "Some courts have held that, if a person knows of a dangerous defect in a sidewalk, he is bound at his peril to remember it. *Gilman v. Deerfield*, 15 Gray, 577; *Bruker v. Covington*, 69 Ind. 35, 35 Am. Rep. 202." This is the view which has uniformly prevailed in this state. As it is contributory negligence as matter of law to approach a railroad crossing without stopping, or looking or listening, so it has been held that momentary forgetfulness of a danger, which forgetfulness is not induced by some sudden and adequate disturbing cause, is itself as matter of law contributory negligence barring a recovery. The question was first pre-

sented under circumstances very similar to those in the case at bar in *Davis v. California Street Cable R. Co.* 105 Cal. 131, 38 Pac. 647. In the *Davis Case* defendant had placed an iron rail to be used in the construction of its street railway track in front of the house in which plaintiff lived. It had remained there about four weeks. An alarm of fire having been sounded in the nighttime, plaintiff came out of her house and started across the sidewalk to discover the whereabouts of the fire. She forgot the presence of the rail, tripped, fell, and was injured. This court said: "We quite agree with counsel for appellant that previous knowledge or familiarity with the dangerous place or obstruction in a highway is not *per se* conclusive evidence of

presence of the fallen wires or the danger of catching her foot in one of their loops."

In *Fox v. Sackett*, 10 Allen, 536, 87 Am. Dec. 682, the plaintiff, while driving in the highway in the afternoon, saw a wagon left there by the defendant. In the evening the plaintiff, having dropped a blanket from his wagon, drove at a gentle trot looking out on one side of the road for the blanket, while his companion looked out for it on the other side, and, going along in this way, struck the wagon without seeing it, the night being dark, and was injured, and it was held that it was error to direct a verdict for the defendant.

In *Wood v. Richmond & D. R. Co.* 100 Ala. 660, 13 So. 552, it was held that the jury was properly instructed to find for the defendant in an action by a passenger against a railroad for injuries due to falling over lumber on the platform in the middle of the night, although the defendant was guilty of negligence in failing to have the passageway cleared of obstructions, or having sufficient light to enable the passengers to see them. The plaintiff had testified that he had seen the lumber and obstruction on the platform and knew its location, but at the time he stumbled upon it "he did not recollect the fact that he had seen the timber the evening before." The court summarized the evidence as being to the effect "that the route from the station house to the train was over a platform prepared by the defendant for the use of passengers; that there were pieces of lumber and cross-ties on the platform obstructing in part the passageway; that there was room sufficient for passengers on the platform between the pile of lumber and the edge of the platform; that it was dark, and defendant had no lights, and that in attempting to reach the train at the place where passengers were accustomed to board the train, he stumbled over the obstruction and was injured."

Where the plaintiff's intestate was killed by an electric wire, it was held that the court properly charged the jury that "if the deceased, knowing the proximity of this wire and the danger thereof, became preoc-

cupied in any way and forgot about the danger, and his so doing was a failure to remain as alert and watchful as a reasonably careful man should under the circumstances, then there can be no recovery in this action;" and a judgment for the defendant was affirmed. *Buckley v. Westchester Lighting Co.* 93 App. Div. 436, 87 N. Y. Supp. 763 (affirmed in 183 N. Y. 506, 76 N. E. 1090).

In *Bliss v. Boeckh*, 8 Ont. Rep. 451, it was shown that the plaintiff was thoroughly familiar with a certain lane in which there were gates and a crossbeam about 9½ feet high which it was held the defendant had no right to have in the lane. One day when the roadway was somewhat elevated with snow and ice, the plaintiff, on the top of a large load, gave up his attention to driving his horses through the narrow gateway, and did not think of the beam overhead, and was struck by it and injured, and the court declined to disturb a verdict in his favor.

Where the plaintiff, knowing that there were projecting perpendicular supply pipes close by a private way, and, being at the time in a covered wagon where he could not see very well, backed his horse over one of the pipes and broke its leg, it was held that as he knew of the existence of the pipes, he was guilty of contributory negligence. *Bomberger v. American Iron & Steel Mfg. Co.* 33 Pa. Super. Ct. 299.

Reference may be made in this connection to *Giles v. London County Council*, 68 J. P. 10, 2 L. G. R. 326, where many cricket fields were laid out upon a certain green, each marked by a number, the marking flag in question having been put some distance back of the wicket by one of the plaintiff's fellow players, and he, in running to catch a ball, ran into it and was injured, it was held that he could not recover; but the decision of the court was particularly on the point that there was no negligence on the part of the defendant. It does not appear whether the plaintiff was aware of the location of the flag, although the court stated that he must be deemed to have assumed the risk.

B. B. B.

contributory negligence in failing to avoid it. In this case if the plaintiff's house had been falling, rendering great haste in escaping from imminent danger necessary, the haste, excitement, and fear might reasonably be held sufficient to obliterate all memory or thought of the presence of the obstruction upon the sidewalk. But that is not this case. . . .

No danger could have been apprehended by Mrs. Davis from the fire after she reached the sidewalk, but mere curiosity induced her to start to go down the street to see where the fire was. That she forgot the presence of the rail is not disputed in the evidence, but that the circumstances justified her forgetfulness and consequent want of care cannot be conceded." Under this state of facts it was held that as matter of law plaintiff had been guilty of contributory negligence. In *McGraw v. Friend & T. Lumber Co.* 120 Cal. 574, 52 Pac. 1004, a pedestrian walking on a dark night along a sidewalk in process of repair, and knowing it to be in a dangerous condition, sought to excuse himself from culpability for the injuries which he received by showing that at the moment of the injury his attention was distracted by an expiring street light. It was held that the question of contributory negligence under those circumstances was one of law for the court, and that as matter of law he was guilty of such negligence. These and other authorities are reviewed in *Brett v. Frank*, 153 Cal. 274, 94 Pac. 1051, and the reasoning and doctrine upheld and applied to the case of an employee who momentarily forgot the existence of a shaft hole into which he fell and was injured. In the opinion in that case full recognition is given to the circumstances where preoccupation or forgetfulness do not bar a recovery, and it is said: But "there was no sudden emergency, no stress of peril, no haste in the performance of the work. The case does not belong to the exceptional class which we have been considering."

The effort to distinguish the case at bar from these cases is hopeless. True, plaintiff was aged, but, if the effect of age was to impair her faculties in any respect, common prudence and the requirements of law demanded from her the exercise of care sufficient to make good these defects. *Mt. Vernon v. Brooks*, 39 Ill. App. 426; 16 Am. & Eng. Enc. Law, 400. She was subjected to no peril, stress, or strain; no haste was imposed upon her; no excuse for her forgetfulness was shown.

The judgment and order are therefore reversed, and the cause remanded.

We concur: *Lorigan, J.; Melvin, J.*
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MICHIGAN SUPREME COURT.

JULIA WINES

v.

CROSBY & COMPANY et al., Plffs. in Err.

(— Mich. —, 135 N. W. 96.)

Corporation — sale of dangerous article — personal liability of officer.

A managing officer of a corporation which is engaged in the manufacture for general consumption of an article dangerous to use is personally liable for injury to a consumer by its use, if he knows of its dangerous character and actively promotes its manufacture and sale.

(March 12, 1912.)

ERROR to the Circuit Court for Wayne County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Edwin Henderson and Alexander J. Groesbeck for plaintiffs in error.

Mr. James H. Pound, for defendant in error:

Defendant Charles F. Crosby is liable for plaintiff's injury.

Clement v. Crosby & Co. 157 Mich. 643, 122 N. W. 263.

Note. — Personal liability of officer or director of corporation for personal injuries from torts in connection with its business.

A few of the cases on this question accept the distinction between misfeasance and nonfeasance, which has sometimes been applied to the question of the liability of a servant to third persons for his own negligence. (On that question, see notes to *Mayer v. Thompson-Hutchison, Bldg. Co.* 28 L.R.A. 433, and *Ward v. Pullman Co.* 25 L.R.A.(N.S.) 343, and especially the criticism therein of such distinction.) It is held that the officer may be held personally liable where the injuries result from negligence in respect of matters under his personal supervision or control, or from orders promulgated by him.

Thus, the president of a corporation who, as its controlling officer, had charge of work in constructing a building, is personally liable for negligent failure to erect a scaffold which was needed to protect persons near the walls. *Mayer v. Thompson-Hutchison Bldg. Co.* 104 Ala. 611, 28 L.R.A. 433, 53 Am. St. Rep. 88, 16 So. 620.

So, an officer who is a general managing agent of a lumber company may be held personally liable for setting an inexperienced and ignorant employee at work on a machine which the former knew to be dangerous. *Greenberg v. Whitcomb Lumber Co.*

Stone, J., delivered the opinion of the court:

The plaintiff, a married woman twenty-eight years old at the time of the injury herein complained of, brought this action against Charles F. Crosby, Crosby & Company, and the 6-5-4 Manufacturing Company, the last two named defendants being corporations, to recover damages for a personal injury received by her on June 15, 1907, through a severe burning occasioned by the alleged inflammable nature of a compound, or stove polish, known as "6-5-4. Self Shining Lusta," that she was using to polish a Peninsular coal range. It was the claim of the plaintiff that the article in question was manufactured and sold by the two corporations named as defendants, and that the business was managed and controlled by the defendant Charles F. Crosby, as an officer of said companies.

No question is raised in the case as to the sufficiency of the declaration, and it

may be said that the alleged duties of the defendants are substantially as stated in the case of *Clement v. Crosby & Co.* 148 Mich. 293, 10 L.R.A. (N.S.) 588, 111 N. W. 745, 12 Ann. Cas. 265, and 157 Mich. 643, 122 N. W. 263. Upon the trial the testimony on behalf of the plaintiff tended to show that the composition known as "6-5-4" consisted of 75 per cent or a little more of naphtha, and that it was a highly inflammable substance, and dangerous to be used by persons ignorant of its ingredients. The plaintiff testified that she purchased from a grocer the can of "6-5-4" a few days before the injury, that this was the first can she had ever used, and that she read the directions carefully. Among the directions were these words: "6-5-4 will burn when brought into contact with flame." Plaintiff further testified that when she started to polish the stove, about 11 o'clock A. M., she noticed that it was a trifle warm over the fire box; that she had been burn-

90 Wis. 225, 28 L.R.A. 439, 48 Am. St. Rep. 911, 63 N. W. 93. The principal ground of this decision is that the efficient cause of the injury, so far as the officer was concerned, was misfeasance, and not nonfeasance, within the rule that where injury is caused to a third person through the negligence of the servant, the principal or master alone is liable, if the agent is guilty of nonfeasance merely; but that the agent or servant may be held personally liable, when he is guilty of misfeasance.

And the president of an incorporated omnibus line is liable to a passenger who receives personal injuries as the result of being forcibly ejected from the conveyance by a servant, under the express order of the president to eject all colored persons. *Peck v. Cooper*, 112 Ill. 192, 54 Am. Rep. 231. But where an order directing servants to eject certain persons from railroad premises is deemed to be that of the company merely transmitted by the president to the servants, the president cannot be held liable for a personal injury resulting from the excessive and improper violence on the part of the servant in carrying out the order, although it is said that if the order promulgated was that of the president personally, he would be liable for the injuries. *Hewett v. Swift*, 3 Allen, 420.

By way of illustration, attention is also directed to *Favorite v. Cottrill*, 62 Mo. App. 119, which, largely upon the authority of *Peck v. Cooper*, supra, holds that the president of a corporation who directs its servants to destroy the property of a competitor is personally liable for the damage inflicted.

The fact that the corporation itself is liable does not affect the liability of the officer. *Peck v. Cooper*, supra.

It is said that it is only where the officer has been guilty of active personal negligence, that is, of some act of misfeasance, 39 L.R.A. (N.S.)

that he can be made to answer to third parties. *O'Neil v. Young & Sons' Seed & Plant Co.* 58 Mo. App. 628.

So, if the president of a corporation did not know of the defectiveness of an appliance furnished by the corporation, which he directed a servant to use, he is not liable to the latter for the injuries which he sustained while using it. *Ibid.* The court further declared in this case that if the officer had inspected the appliance and negligently failed to find a defect, even then he was guilty of but a nonfeasance, for which the corporation alone could be held.

Attention is also directed to *Lundy v. Delmas*, 104 Cal. 655, 26 L.R.A. 651, 38 Pac. 445, holding that regents of the University of California, who constituted a corporation, and were expressly declared by statute not to be deemed public officers, could not be held individually liable for personal injuries caused by negligence respecting poles and wires of a telegraph and telephone line maintained by the corporation.

It was held in *Thérien v. Brodie*, Rap. Jud. Quebec 4 C. S. 23, that the directors of a corporation were not personally liable for injuries caused by the explosion of a defective boiler; and the decision was placed upon the ground that while the evidence showed a want of watchful attention, which the use of such hazardous articles demanded, there was no such individual fault on the part of the directors as rendered them personally liable for the injury, it appearing that they had no reason to believe that the servants placed in charge of the boiler were untrustworthy or incompetent.

It is similarly declared in *Van Antwerp v. Linton*, 89 Hun, 417, 35 N. Y. Supp. 318, affirmed without additional opinion in 157 N. Y. 716, 53 N. E. 1133, that where athletic grounds belonging to a domestic corporation were put in a condition for an exhibition by a committee of directors appointed for

ing soft coal or coke, she did not remember which; that the back griddles and middle griddles were cold; that she put her hand on the griddle over the fire box, and that it did not burn her hand, but was warm; and that she applied the preparation with a cotton rag, which absorbed the liquid more or less. The directions were: "Use 5 cent flat bristle brush." The plaintiff further testified that she covered the entire top of the stove, including the griddles over the fire box, and nothing happened; that the fire box was getting cooler; that she noticed a place near the stovepipe which did not suit her, and which she had skipped; that the stovepipe was in the middle of the stove, back of the two central griddles, and was not over the fire pot; that she had the can in her left hand and the rag in her right, and dipped the rag into the can to apply some of the preparation; that, as she was leaning over, some of the preparation dropped on the stove,

on the griddle over the fire box, and immediately ignited, and she was very severely burned, resulting in the loss of the fingers upon one hand, and the use of the other hand. That the plaintiff has sustained severe and permanent injuries is not questioned.

We shall not quote the testimony *in extenso*, but it is sufficient to say that there was evidence tending to show that the defendant Crosby & Company was the manufacturer of said "6-5-4" from 1905 down to the time of the injury complained of, and that during all of that time the defendant Charles F. Crosby had been the president of the company, and that the manufacture and sale of the article in question were under his immediate supervision, and that he knew the constituent parts of said compound and had personally made sales of the same while he was an officer of said corporation.

The defendants offered no testimony, but

that purpose, personal liability upon the part of the members of the committee for injuries from a defective grand stand could not be predicated of their being directors, officers, or stockholders in the corporation. And it was further held that they could not be held liable as agents or servants of the corporation since the duties for the breach of which they were sought to be held liable were corporate rather than individual, within the meaning of the rule that if the duty omitted by the agent or servant devolved upon him purely from his agency or employment, his omission is only a duty he owes his principal or master, and the master alone is liable; while if the duty rests upon him in his individual character, and is one that the law imposed upon him independently of his agency or employment, then he is liable.

The mere fact that the directors of an exhibition company employed a person to display fireworks does not render them liable for personal injuries resulting from negligence in the manufacture or manner of handling of the explosives, it not appearing that they gave any specific directions, or that they were present when, or knew anything about the manner in which, the display was conducted. *Bianki v. Greater American Exposition*, 3 Neb. (Unof.) 656, 92 N. W. 615.

But the president of an incorporated political club, who purchased fireworks and procured them to be exploded in a public street, is liable for resulting injuries to a third person, upon the theory that the explosion of fireworks in a public street is a public nuisance, and that all participants in the creation of a public nuisance are liable to answer for its ill effects. *Jenne v. Sutton*, 43 N. J. L. 257, 39 Am. Rep. 578.

The liability of the officers of a corporation for negligence in storing giant powder in violation of law depends upon their ex-

ercise of reasonable diligence and the control and supervision of the business; and they are liable if, and only if, they had knowledge of the nuisance, or could by exercising ordinary diligence have known it; and their liability is not affected by the fact that the amount of explosives stored did not exceed the quantity permitted by municipal ordinance, where it did exceed that authorized by statute. *Cameron v. Kenyon-Connell Commercial Co.* 22 Mont. 312, 44 L.R.A. 508, 74 Am. St. Rep. 602, 56 Pac. 358. In this case, the court also declared that the nonexecution of the duty of directors which results in the positive act of a creation and maintenance of a continuing nuisance by the corporation, on account of which a third person is killed, amounts, unless explained, to a misfeasance on their part, or if they have actual knowledge of, and authorized the nuisance, to malfeasance; and is not merely a nonfeasance, for which their liability can be limited to the corporation only.

As to the liability of a dealer for personal injuries from an article not obviously dangerous, see the note in 13 L.R.A. (N.S.) 382.

As to the liability of the manufacturer of dangerously defective machines, see the note in 5 L.R.A. (N.S.) 1103.

As to the applicability of the rule of *res ipsa loquitur* in an action for personal injuries from defects in articles manufactured or sold by the defendant, see the note in 28 L.R.A. (N.S.) 949.

For a recent case on the liability of a manufacturer or dealer for injuries caused by defects in an automobile, see the case of *Olds Motor Works v. Shaffer*, 37 L.R.A. (N.S.) 560.

As to the liability of a druggist for injuries to a stranger from a drug or poison sold by him, see the note in 13 L.R.A. (N.S.) 646.

L. A. W.

at the close of the plaintiff's case the defendant Charles F. Crosby requested the court to direct a verdict in his favor for the following reasons:

"(1) Because there is no proof in the case of any negligence on his part.

"(2) Because the compound in question was sold by Crosby & Company a Michigan corporation, or by the 6-5-4 Manufacturing Company, and that said corporations are legal entities and responsible in law for their actions.

"(3) Because the stockholders of a corporation are not in any way responsible for the torts of the corporation.

"(4) Because the allegations of negligence contained in the declaration as to the defendant Charles F. Crosby are not supported by any evidence in the case.

"(5) Because there is no evidence in the case that would warrant a jury in finding that Charles F. Crosby, having actual knowledge of the defects in the product of the Crosby & Company wilfully and fraudulently placed the same on the market.

"(6) Because there is no evidence supporting the theory of the plaintiff to the effect that there was any spontaneous combustion or explosion which resulted in the damage to the plaintiff as claimed by the declaration.

"(7) Because there are no contractual relations between the defendant Charles F. Crosby and the plaintiff, or between Charles F. Crosby and any of the parties through whom said compound was sold."

The defendants Crosby & Company and the 6-5-4 Manufacturing Company requested the direction of a verdict in their favor for the following reasons:

"(1) Because the allegations of negligence contained in the declaration are not supported by any evidence in the case.

"(2) Because there is no evidence in the case that the compound in question, through the use of which the plaintiff claims she was injured, was at any time sold or manufactured by the defendants.

"(3) Because there is no evidence in the case that would warrant the jury in finding that Crosby & Company, having actual knowledge of the defects in their products, wilfully or fraudulently placed the same on the market.

"(4) Because there is no evidence in the case that the composition known as '6-5-4' is *per se* dangerous to human life.

"(5) Because there was no evidence supporting the theory of the plaintiff to the effect that there was any spontaneous combustion or explosion which resulted in the damage to the plaintiff as claimed by the declaration.

"(6) Because all the proof in the case

shows that the compound in question could not ignite except when brought in contact with a flame or that which amounted to a white heat, and that plaintiff testified that there was no such flame or heat present."

These requests or motions were refused, and the case was submitted to the jury under the charge of the court, and the jury returned a verdict for the plaintiff against all of the defendants in the sum of \$12,000. A motion for a new trial was made by the defendants, which was granted as to the defendant the 6-5-4 Manufacturing Company, and denied as to the defendants Crosby & Company and Charles F. Crosby. The last-named defendants duly excepted to the reasons denying said motion, and they have brought the case here on writ of error.

There are twenty-two assignments of error, but counsel for appellants have only argued and called attention to the eleventh, twelfth, and twenty-second.

1. The eleventh assignment of error is to the effect that the court erred in refusing to direct a verdict for defendant Charles F. Crosby for the reasons set forth in his motion to direct a verdict. Appellants' counsel state the rule to be that "an officer or director of a corporation is not liable for its torts, unless he has participated therein." They cite in support of this doctrine 21 Am. & Eng. Enc. Law, 2d ed. 880, and cases there cited. We think that the rule of law stated is correct, but it is also true that the converse of the proposition is the law where there has been such participation.

Upon this branch of the case the trial court charged the jury as follows: "You can only find against Mr. Crosby if it appears, and you find it is a fact, that he had knowledge of the dangerous character of this compound, and that he was actively promoting the manufacture and sale of this compound, as an officer with authority in the corporation. If you find that he was not actively promoting the manufacture and sale of this compound, knowing it to be dangerous, as an officer of the corporation, you cannot find against him." We think that the learned circuit judge stated the rule correctly, and that he did not err in refusing to direct a verdict for said defendant. We are of opinion that there was sufficient evidence upon this point, as to this defendant, to carry the case to the jury. The following cases are in point here: *Favorite v. Cottrill*, 62 Mo. App. 119. In this suit plaintiff sued the defendants for the destruction of his business as bill poster in the city of St. Louis. The defendant corporation was engaged in the same business, and its codefendant was its president and general manager. As to joint

liability, the court said: "The English rule, as declared by Lord Holt in the case of *Lane v. Cotton*, 12 Mod. 488, is that, for the neglect of the servant, third persons can have no remedy against him, but that the master alone is chargeable; but for a misfeasance or actual tort, an action will lie against the servant because he is a wrongdoer. The general principle is that those who participate in the commission of a trespass by counseling, aiding, or abetting it, are equally liable with the person who actually committed it." The doctrine of this case seems to be that, when a trespass or tort has been committed by a corporation, both the corporation and the agent under whose direction it acted are jointly liable therefor. *Peck v. Cooper*, 112 Ill. 192, 54 Am. Rep. 231. This action was brought to recover for damages claimed to have been sustained by plaintiff by being forcibly ejected from an omnibus controlled and operated by the defendant. The court said: "The fact that appellant was the president of the corporation is no protection to him in the commission of an illegal act, and where an officer of an incorporation performs an illegal act resulting in an injury to another, he is liable. Nor does it exonerate him from such liability because the corporation may also be liable." *Cameron v. Kenyon-Connell Commercial Co.* 22 Mont. 312, 44 L.R.A. 508, 74 Am. St. Rep. 602, 56 Pac. 358. This case goes to the extent of holding that the directors of a corporation are personally liable for the death of one killed by an explosion of powder unlawfully kept in the corporation's warehouse, though they had no knowledge thereof, for, by exercising ordinary diligence as directors, they could have known that the warehouse contained an unlawful amount. This action was brought jointly against the company and the directors. *Nunnally v. Southern Iron Co.* 94 Tenn. 397, 28 L.R.A. 421, 29 S. W. 361; *Davenport v. Newton*, 71 Vt. 11, 42 Atl. 1087. In this case the doctrine is stated that, to make a director of a corporation personally liable for its torts, he must have done something through his acts also. The mere fact that he is one of the board of directors is not sufficient. Referring to *Nunnally v. Southern Iron Co.* supra, the court said: "The only question of which there can be any serious doubt in this class of cases is whether the officer or agent has participated in the wrong so that it may justly be regarded as his act; that, if he has, his liability is indisputable." *Hewett v. Swift*, 3 Allen, 420. In *Fanning v. D. M. Osborne & Co.* 102 N. Y. 441, 7 N. E. 307, action was brought against D. M. Osborne & Company, a corporation, and 39 L.R.A. (N.S.)

David M. Osborne, its president. The court said: "It appears that . . . [Mr. Osborne] was president of the corporation . . . but it is not shown that he advised or approved, either in his individual capacity or as trustee, of the acts of the corporation. The point that he was not shown to have personally intermeddled in the matter was specifically taken, and upon the case as presented we think the judgment against him individually is erroneous." *Westervelt v. Demarest*, 46 N. J. L. 37, 50 Am. Rep. 400. This case holds that the publication by savings bank directors that "directors and stockholders are personally responsible for its debts," if the statement is false, lays foundation for an action for deceit against the persons making the representations. *Montfort v. Hughes*, 3 E. D. Smith, 591; *Phelps v. Wait*, 30 N. Y. 78; *Suydam v. Moore*, 8 Barb. 358; *Bell v. Josselyn*, 3 Gray, 309, 63 Am. Dec. 741; *Greenberg v. Whitcomb Lumber Co.* 90 Wis. 225, 28 L.R.A. 439, 48 Am. St. Rep. 911, 63 N. W. 93; 10 Cyc. 824, 920, 933.

2. The twelfth assignment of error is to the point that the court erred in refusing to direct a verdict for defendant Crosby & Company for the reasons set forth in its motion to direct a verdict. The argument in support of this assignment of error is to the effect that the testimony absolutely failed to show that the compound sold to plaintiff as claim was manufactured by the defendant Crosby & Company. We cannot agree with this contention, and we have already referred to the testimony tending to show such fact. We are of opinion that there was sufficient evidence upon this point to carry the case to the jury.

3. The twenty-second assignment of error is that the court erred in refusing to grant the defendants Crosby and Crosby & Company a new trial for the reasons set forth in their motion for a new trial. The argument in support of this assignment of error is that the verdict against Charles F. Crosby was clearly against the weight of evidence. Counsel find no fault with the charge of the court upon that subject, but quote from it with approval, claiming, however, that there was no testimony to support a verdict as to said defendant. We do not agree with counsel in this claim, as already pointed out. The general doctrine as to liability of manufacturers in cases of this nature is discussed in *Clement v. Crosby & Co.* supra, and we need not repeat it here.

We find no reversible error in the record, and the judgment of the Circuit Court is affirmed.

NEW YORK COURT OF APPEALS.

LAFAYETTE STREET CHURCH SOCIETY
OF BUFFALO, Resp.,

v.

HERBERT F. J. NORTON, Appt.

(202 N. Y. 379, 95 N. E. 819.)

Trust — establishment by parol.

1. The effect of an absolute deed of church property by its trustees to a stranger cannot be controlled by parol evidence that the transfer was made upon the understanding that the grantee should take the property in

trust in order to secure a revenue from it by leasing it for a purpose which the members of the church would not sanction.

Same — relation of partners — trust.

2. The fact that one taking a conveyance of property from a religious association is a brother and partner of one of the trustees does not prevent his becoming a purchaser of the property, or establish a relation of confidence between the parties which would uphold a parol promise to hold the property in trust for the association, against the terms of the absolute conveyance.

Deed — trust — confirmation in grantee.

3. Confirmation in the grantee of title to

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2. When fraudulent intent inferable.

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(2) Instances where motive of grantor was to avoid family troubles, 915.

(3) Instances where anticipated danger of litigation or prosecution influenced grantor, 916.

(4) Instances where conveyance was intended to protect grantor's family, 917.

(5) Instances where conveyance was in nature of family arrangement, 917.

(6) Instances in which conveyance was by way of advancement of child, 920.

(7) Instances where property conveyed to facilitate its management, 920.

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(8) Instances where conveyance was in nature of testamentary disposition, 921.

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1. In general, 923.

2. Where relation of parties is that of principal and agent, or partners, 924.

3. Where one party sustains relation of confidential adviser, 924.

4. Where parties are husband and wife, 925.

5. Where parties are parent and child, grandparent and grandchild, father-in-law, son-in-law, etc., 926.

6. Where parties are brother and sister, 928.

d. Accident or mistake, 928.

e. Part performance of oral agreement taking case out of statute, 928.

I. Scope.

Other aspects of the general question as to when a trust will grow out of an oral promise have been treated in notes to *Crossman v. Keister*, 8 L.R.A.(N.S.) 698, and *McDowell v. McDowell*, 31 L.R.A.(N.S.) 176, entitled, "Impressing share of heir, devisee, or legatee with constructive trust because of his fraud in frustrating decedent's intention to give the property to a third person," and the note to *Winder v. Scholey*, 33 L.R.A.(N.S.) 995, upon the question whether a constructive trust may be based upon an undertaking to hold for the benefit of another property received through devise or inheritance, where no actual testamentary intention has been frustrated; which notes contain some discussion of the evidentiary basis upon which

property conveyed by the trustees of a religious society, which conveyance was made in consideration of the execution of mortgages for the full value, and is claimed to have been in trust, is effected by the acceptance at the expiration of the mortgage of a partial payment thereon, and the extension of the time for paying the balance, with promise to make payments in installments.

Trusts — unconscionable conduct — accounting for profits.

4. A transaction by which a religious society, for the purpose of disposing of unused and unproductive property, which it

has been unable to do otherwise, conveys it to a stranger, taking mortgages for its full value, upon condition that he shall care for and rent the property, pay the rent to the society, and reconvey it in case he cannot effect a lease, is not so unconscionable as to require him to account as trustee for the profits in case, after caring for the property for a number of years, he sells it at a large advance in price.

(Gray, Vann, and Chase, JJ., dissent.)

(June 13, 1911.)

equity will proceed to raise a trust *ex maleficio*.

Reference may also be made in this connection to the note to Logan v. Brown, 20 L.R.A.(N.S.) 298, entitled, "Parol agreement to take title to real property, sell the same, and account for the proceeds, as affected by the statute of frauds;" and the note to Vickers v. Vickers, 24 L.R.A.(N.S.) 1043, entitled, "Will donor's expectation that the donee will allow him to share in the benefit of the property raise an implied trust to that effect?"

The aim of the present note is to collate the cases involving the question under what circumstances a constructive trust will arise where a grantee has orally agreed with his grantor, or with the person furnishing the consideration for the conveyance, to hold the property conveyed as a trustee. Its scope does not therefore require the inclusion of the numerous decisions on the question as to when a constructive trust will arise out of an agreement to buy land, or bid it in at a judicial sale, for another's benefit. (See, in this connection, a note in 5 L.R.A.(N.S.) 112, entitled, "Statute of frauds as affecting right to equitable relief against one who has purchased land in his own name, in violation of his agreement to purchase for and in the name of another.") Nor does it include cases in which a constructive trust is based solely upon the existence of a fiduciary relation between the grantor and grantee, independently of any agreement to hold the property in trust.

II. Enforceability as an express trust.

a. In general.

It is uniformly held, wherever the statute of frauds in force contains a provision requiring express trusts to be created, or evidenced, by writing, that an oral agreement between grantor and grantee that the property conveyed shall be held in trust for the grantor cannot be enforced as an express trust. Patton v. Beecher, 62 Ala. 579; Manning v. Pippin, 86 Ala. 357, 11 Am. St. Rep. 46, 5 So. 572; Kinley v. Thelen, 158 Cal. 175, 110 Pac. 513; Dean v. Dean, 6 Conn. 285; Brown v. Brown, 66 39 L.R.A.(N.S.)

Conn. 493, 34 Atl. 490; McCartney v. Fletcher, 11 App. D. C. 1; Stevenson v. Crapnell, 114 Ill. 19, 28 N. E. 379; Biggins v. Biggins, 133 Ill. 211, 24 N. E. 516; Champlin v. Champlin, 136 Ill. 309, 29 Am. St. Rep. 323, 26 N. E. 526; Moore v. Horsley, 156 Ill. 36, 40 N. E. 323; Ellis v. Hill, 162 Ill. 557, 44 N. E. 858; Davis v. Stambaugh, 163 Ill. 557, 43 N. E. 170; Mayfield v. Forsyth, 164 Ill. 32, 45 N. E. 403; Godschalk v. Fulmer, 176 Ill. 64, 51 N. E. 852, affirming on rehearing 45 N. E. 809; Williams v. Williams, 180 Ill. 361, 54 N. E. 229; Monson v. Hutchin, 194 Ill. 431, 62 N. E. 788; Potter v. Clapp, 203 Ill. 592, 96 Am. St. Rep. 322, 68 N. E. 81; Skahen v. Irving, 206 Ill. 597, 69 N. E. 510; Lancaster v. Springer, 239 Ill. 472, 88 N. E. 272; Stubbings v. Stubbings, 248 Ill. 406, 94 N. E. 54; Prouty v. Moss, 111 Ill. App. 536; Fouty v. Fouty, 34 Ind. 433; Pennington v. Flock, 93 Ind. 378; Mohn v. Mohn, 112 Ind. 285, 13 N. E. 859; Montgomery v. Craig, 128 Ind. 48, 27 N. E. 427; Shaw v. Jones, 156 Ind. 60, 59 N. E. 166; Hemstreet v. Wheeler, 100 Iowa, 290, 69 N. W. 521; Gregory v. Bowlsby, 115 Iowa, 327, 88 N. W. 822; Luckhart v. Luckhart, 120 Iowa, 248, 94 N. W. 461; Donaldson v. Empire Loan & Invest. Co. 130 Iowa, 467, 106 N. W. 192; Morrall v. Watson, 7 Kan. 199; Gee v. Thrailkill, 45 Kan. 173, 25 Pac. 588; Gerry v. Stimson, 60 Me. 186; Wentworth v. Shibles, 89 Me. 167, 36 Atl. 108; McElderry v. Shipley, 2 Md. 25, 56 Am. Dec. 703; Hertle v. McDonald, 2 Md. Ch. 128; Clagett v. Hall, 9 Gill. & J. 80; Titcomb v. Morrill, 10 Allen, 15; Walker v. Looke, 5 Cush. 90; Blodgett v. Hildreth, 103 Mass. 484; Fitzgerald v. Fitzgerald, 168 Mass. 488, 49 N. E. 431; Brown v. Bronson, 35 Mich. 415; Palmer v. Sterling, 41 Mich. 218, 2 N. W. 24; Pierson v. Conley, 95 Mich. 619, 55 N. W. 387; Waldron v. Merrill, 154 Mich. 203, 117 N. W. 631; Babbitt v. Bennett, 68 Minn. 260, 71 N. W. 22; Henderson v. Murray, 108 Minn. 76, 133 Am. St. Rep. 412, 121 N. W. 214; Moore v. Jordan, 65 Miss. 229, 7 Am. St. Rep. 641, 3 So. 737; Horne v. Higgins, 76 Miss. 813, 25 So. 489; Green v. Cates, 73 Mo. 116; Rogers v. Ramey, 137 Mo. 598, 39 S. W. 66; Hillman v. Allen, 145 Mo. 638, 47 S. W. 509; Bartlett v. Tinsley,

APPPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, fourth department, affirming a judgment of a Special Term for Erie County in plaintiff's favor in an action brought to require defendant to transfer, or account for the proceeds of, a half interest in a mortgage. Reversed.

Statement by Cullen, Ch. J.:

This action was brought to impress a trust in favor of the plaintiff upon a mortgage for \$52,000 held by the defendant, to compel the transfer thereof to the plaintiff, with an accounting for all moneys paid thereon, and to enjoin the defendant from assigning or encumbering said mortgage during the pendency of the action. The

answer, after admitting certain allegations of the complaint, denied the remainder, and pleaded the statute of limitations for the period of six years. After a trial at special term, judgment was rendered in favor of the plaintiff, substantially in accordance with its prayer for relief, as to an undivided half of the mortgage held by the defendant when the action was commenced; the other half having been previously assigned to a bona fide purchaser. The appellate division unanimously affirmed, and the defendant appealed to this court.

The facts found, some details being omitted, are substantially as follows: The plaintiff is a religious corporation, and the defendant is a practising lawyer, the brother and law partner of Nathaniel W. Norton,

175 Mo. 319, 75 S. W. 143; Heil v. Heil, 184 Mo. 665, 84 S. W. 45; Crawley v. Crafton, 193 Mo. 421, 91 S. W. 1027; Budnek v. Budnek, 128 Mo. App. 319, 107 S. W. 458; Chowen v. Phelps, 26 Mont. 524, 69 Pac. 54; Hansen v. Berthelsen, 19 Neb. 433, 27 N. W. 423; O'Brien v. Gaslin, 20 Neb. 347, 30 N. W. 274; Dailey v. Kinsler, 31 Neb. 340, 47 N. W. 1045; Thomas v. Churchill, 48 Neb. 266, 67 N. W. 182; Veeder v. McKinley-Lanning Loan & T. Co. 61 Neb. 892, 86 N. W. 982; Marvel v. Marvel, 70 Neb. 498, 113 Am. St. Rep. 972, 97 N. W. 640; Farrington v. Barr, 36 N. H. 86; Whyte v. Arthur, 17 N. J. Eq. 521; Slocum v. Wooley, 43 N. J. Eq. 451, 11 Atl. 264; Coffey v. Sullivan, 63 N. J. Eq. 296, 49 Atl. 520; Movin v. Hays, 1 Johns. Ch. 339; Sturtevant v. Sturtevant, 20 N. Y. 39, 75 Am. Dec. 371; Hutchinson v. Hutchinson, 84 Hun. 482, 32 N. Y. Supp. 390; Nevius v. Nevius, 117 App. Div. 236, 101 N. Y. Supp. 1091; Hubbard v. Sharp, 27 N. Y. Week. Dig. 455, 11 N. Y. S. R. 802; Dickinson v. Dickinson, 6 N. C. (2 Murph.) 279; Grove v. Kase, 2 Dauphin Co. Rep. 125; Kinsey v. Bennett, 37 S. C. 319, 15 S. E. 965; Salisbury v. Clarke, 61 Vt. 453, 17 Atl. 135; Spaulding v. Collins, 51 Wash. 488, 99 Pac. 306; Kalinowski v. McNeny, — Wash. —, 123 Pac. 1074; Fairchild v. Rasdall, 9 Wis. 379; Bird v. Morrison, 12 Wis. 139; Pavey v. American Ins. Co. 56 Wis. 221, 13 N. W. 925; Fillingham v. Nichols, 108 Wis. 49, 84 N. W. 15; Illinois Steel Co. v. Konkel, 146 Wis. 556, 131 N. W. 842; Jones v. Van Doren, 18 Fed. 619.

Under the provisions of the statute of frauds, that a contract to convey land shall be void unless in writing, and that no trust in real property shall be valid unless created by writing or by operation of law, a promise by a grantee to reconvey to a grantor is invalid, and cannot be enforced as such. Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689.

An oral promise by a grantee to receive and hold the land, in express trust to compensate the grantor, is not enforceable, by virtue of the statute of frauds. Manning

v. Pippen, 86 Ala. 357, 11 Am. St. Rep. 46, 5 So. 572.

The case is the same where the agreement is between the grantee and the person furnishing the consideration for the conveyance. Robinson v. Robinson, 45 Ark. 481; Wilson v. Warner, 84 Conn. 560, 80 Atl. 718; Johnston v. Johnston, 138 Ill. 385, 27 N. E. 930; Murray v. Murray, 153 Ind. 14, 53 N. E. 946; Andrew v. Andrew, 114 Iowa, 524, 87 N. W. 494; Hoon v. Hoon, 126 Iowa, 391, 102 N. W. 105; Groesbeck v. Seeley, 13 Mich. 345; Newton v. Sly, 15 Mich. 391; Johnson v. Johnson, 16 Minn. 512, Gil. 462; Luse v. Reed, 63 Minn. 5, 65 N. W. 91; Watson v. Pinckney, 29 Jones & S. 188, 18 N. Y. Supp. 790.

Nor can an oral agreement between the grantee and grantor to hold in trust for the benefit of a third person be enforced as an express trust. Tillman v. Kifer, 166 Ala. 403, 52 So. 309; Spradling v. Spradling, — Ark. —, 142 S. W. 848; Smith v. Mason, 122 Cal. 428, 55 Pac. 143; Verzier v. Convard, 75 Conn. 1, 52 Atl. 255; Smith v. Hollenback, 51 Ill. 223; Adams v. Adams, 79 Ill. 517; Scott v. Harris, 113 Ill. 447; Larmion v. Knight, 140 Ill. 232, 33 Am. St. Rep. 229, 29 N. E. 1116, 30 N. E. 318; Marie M. E. Church v. Trinity M. E. Church, 205 Ill. 601, 69 N. E. 73; Ryder v. Ryder, 244 Ill. 297, 91 N. E. 451; Cox v. Arnsamann, 76 Ind. 210; Wright v. Moody, 116 Ind. 175, 18 N. E. 608; McClain v. McClain, 57 Iowa, 167, 10 N. W. 333; McGinness v. Barton, 71 Iowa, 644, 33 N. W. 152; Willis v. Robertson, 121 Iowa, 380, 96 N. W. 900; Heddeleston v. Stoner, 128 Iowa, 525, 105 N. W. 56; Re Hall, 132 Iowa, 664, 110 N. W. 148; Schurz v. Schurz, — Iowa —, 128 N. W. 944; Ingham v. Burnell, 31 Kan. 333, 2 Pac. 804; Rogers v. Richards, 67 Kan. 706, 74 Pac. 255; Wormald v. Heinze, 28 Ky. L. Rep. 1022, 90 S. W. 1064; Philbrook v. Delano, 29 Me. 410; Wolf v. Corby, 30 Md. 356; Campbell v. Brown, 129 Mass. 23; Moran v. Somes, 154 Mass. 200, 28 N. E. 152; Shaffer v. Huntington, 53 Mich. 310, 19 N. W. 11; Thompson v. Marley, 102 Mich. 476, 60 N.

who was one of the trustees of the church, and had been for a long time prior to the transaction in question. In January, 1901, the plaintiff owned two church structures, one known as the "Old Church Property," which was no longer used for religious worship, and the other with a new and valuable edifice thereon, which was in constant use for church purposes. The society was heavily in debt, and the expense of holding the "Old Church Property" was so great that "it was imperatively necessary" to lease or sell it "in order to secure present revenue." It was subject to a mortgage for \$60,000, and, while the carrying charges for interest and taxes amounted to a large sum annually, the income was but nominal. For a long time efforts had been made to sell

it, without success, and it was impossible to lease it at a satisfactory rental, except for use as a theater, and some of the members of the congregation were unwilling that it should be leased for that purpose. At the annual meeting held on the 8th of January, 1901, a resolution was passed, authorizing the trustees to sell, lease, or otherwise dispose of it, and to execute the necessary instruments to carry the resolution into effect. Thereafter at a meeting of the board of trustees the defendant's brother, one of their number, stated that after various negotiations, "in view of the difficulty of making a lease direct, because of the opposition of the people in the church to its leasing, an arrangement was proposed by which the property should be transferred

W. 976; Sheldon v. Carr, 139 Mich. 654, 103 N. W. 181; Randall v. Constans, 33 Minn. 329, 23 N. W. 530; Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; Elder v. Webber, 3 Neb. (Unof.) 534, 92 N. W. 126; Hall v. Congdon, 55 N. H. 104; Eaton v. Eaton, 35 N. J. L. 290; Arnwine v. Carroll, 8 N. J. Eq. 620; Baker v. Baker, 75 N. J. Eq. 305, 72 Atl. 1000; Cardiff v. Marquis, 17 N. D. 110, 114 N. W. 1088; Salter v. Bird, 103 Pa. 436; Braden v. Workman, 1 Sadler (Pa.) 224, 1 Atl. 655; Robinson v. Robinson, 29 W. N. C. 159; Lloyd v. Inglis, 1 Dessaus. Eq. 333; Rogers v. Rogers, 52 S. C. 388, 29 S. E. 812.

The same doctrine sometimes finds expression in the statement that oral proof cannot be heard to engraft an express trust upon a deed absolute in terms. See McDonald v. Hooker, 57 Ark. 632, 22 S. W. 655, 23 S. W. 678; Salyers v. Smith, 67 Ark. 526, 55 S. W. 936; Louisville & N. R. Co. v. Ramsay, 134 Ga. 107, 67 S. E. 652; Lawson v. Lawson, 117 Ill. 98, 7 N. E. 84; Pillsbury-Washburn Flour Mills Co. v. Kistlor, 53 Minn. 123, 54 N. W. 1063, and cases following.

In the absence of a confidential relation, or of facts raising a trust by operation of law, a trust cannot be imposed upon the grantee under an absolute deed unless it be declared by a writing. Gray v. Walker, 157 Cal. 381, 108 Pac. 278.

No parol trust can be engrafted on a legal title which the instrument of conveyance makes absolute on its face, unless its execution is procured by fraud. Smith v. Smith, 153 Ala. 504, 45 So. 168.

If land is conferred by an absolute deed, no express trust in favor of the grantor can be raised by proof of a parol agreement by the grantee to hold the property in trust or reconvey it. Barr v. O'Donnell, 76 Cal. 469, 9 Am. St. Rep. 242, 18 Pac. 429.

And an absolute conveyance of land cannot, after its execution, be turned into a trust by any oral declarations of the parties thereto. Sherman v. Sandell, 106 Cal. 373, 39 Pac. 797.
39 L.R.A.(N.S.)

b. Where local statute of frauds does not require writing.

Even where some equivalent to the 7th section of the English statute of frauds has not been enacted, so that an express trust in lands may be created in favor of a third person by a parol declaration made prior to or contemporaneously with the transfer of the legal title (Pittman v. Pittman, 107 N. C. 159, 11 L.R.A. 456, 12 S. E. 61; Dover v. Rhea, 108 N. C. 88, 13 S. E. 144; Hughes v. Pritchard, 122 N. C. 59, 29 S. E. 93; Owens v. Williams, 130 N. C. 165, 41 S. E. 93; Sykes v. Boone, 132 N. C. 199, 95 Am. St. Rep. 619, 43 S. E. 645; Murphy v. Hubert, 7 Pa. 420; Freeman v. Freeman, 2 Pars. Sel. Eq. Cas. 81; Haywood v. Ensley, 8 Hump. 460; Thompson v. Thompson, — Tenn. —, 54 S. W. 145; Renshaw v. First Nat. Bank, — Tenn. —, 63 S. W. 194; Mee v. Mee, 113 Tenn. 453, 106 Am. St. Rep. 865, 82 S. W. 830; Insurance Co. v. Waller, 116 Tenn. 1, 115 Am. St. Rep. 763, 95 S. W. 811, 7 Ann. Cas. 1078); it is nevertheless held that except in cases of fraud, mistake, or undue influence, a parol trust to arise by reason of the contract or agreement of the parties thereto will not be set up or engrafted in favor of the grantor upon a written deed conveying to the grantee the absolute title, and giving clear indication on the face of the instrument that such a title was intended to pass. In such case, and to that extent, the doctrine of parol trusts is subordinated to another well-recognized principle of law, that when parties have formally and exclusively expressed their entire contract in writing, the same shall not be contradicted or changed by contemporaneous stipulations or agreements resting in parol. Gaylord v. Gaylord, 150 N. C. 222, 63 S. E. 1028; Ricks v. Wilson, 154 N. C. 282, 70 S. E. 476; Porter v. Mayfield, 21 Pa. 263; Troll v. Carter, 15 W. Va. 567; Pusey v. Gardner, 21 W. Va. 469; Poling v. Williams, 55 W. Va. 69, 46 S. E. 704; Richardson v. McConaughy, 55 W. Va. 546, 47

at a price stated to some person who should take the property, subject to the present Erie County Bank mortgage, and himself give back a mortgage upon the property for the balance of the purchase price, as agreed upon. If such price could be agreed upon with such person, then that person to whom the property was transferred would be at liberty to enter into a lease with the party." Thereupon a resolution was adopted directing application to be made to the court for authority to sell the property for a sum not less than \$120,000, of which \$60,000 was to be represented by the old mortgage and the balance by a new mortgage upon such terms and conditions as should be agreed upon. The application was accordingly made, and leave was

granted by the court, authorizing the sale on the terms specified. Thereafter a deed of the property was made to the defendant for the sum of \$120,000, which the trial court found was the full value of the property, and a mortgage executed by him to the plaintiff for the sum of \$60,000, but without any bond or personal obligation for the payment of said sum, and a lease was made by the defendant to the theater people for the term of five years. Just before the expiration of the demised term, in April, 1906, the defendant wrote to the plaintiff, offering to pay \$20,000 on his mortgage, then past due, and asking for an extension of time for the payment of the balance. The request was granted, and the defendant paid to the plaintiff the sum of \$20,000

S. E. 287; Crawford v. Workman, 64 W. Va. 19, 61 S. E. 322.

And although the local statute of frauds may not preclude the engrafting of an express trust by parol evidence upon an absolute conveyance, yet the rule of evidence as to varying or contradicting the terms of a written instrument will render parol evidence inadmissible to show that the grantee in an absolute conveyance took as trustee, where the deed by its terms confers on the grantee a discretion to dispose of the land as he pleases. Mee v. Mee, 113 Tenn. 453, 106 Am. St. Rep. 865, 82 S. W. 830.

But in Texas, where, on account of the absence of any equivalent to the 7th section of the English statute of frauds, express trusts resting in parol are held to be enforceable (see, *inter alia*, Miller v. Thatcher, 9 Tex. 482, 60 Am. Dec. 172; Bailey v. Harris, 19 Tex. 108; Leakey v. Gunter, 25 Tex. 400; Holland v. Farthing, 2 Tex. Civ. App. 155, 21 S. W. 67; Whitfield v. Diffie, — Tex. Civ. App. —, 105 S. W. 324; Smalley v. Paine, — Tex. Civ. App. —, 130 S. W. 739; Landrum v. Landrum, — Tex. Civ. App. —, 130 S. W. 907). The rule followed seems to permit the enforcement of such a trust for the benefit of the grantor (see Mead v. Randolph, 8 Tex. 191; Reeves v. Bass, 39 Tex. 618; Craig v. Harless, 33 Tex. Civ. App. 257, 76 S. W. 594; Rogers v. Tompkins, — Tex. Civ. App. —, 87 S. W. 379).

In the absence of a statutory provision making it necessary that an express trust shall be created or evidenced by a written instrument, equity will enforce an oral agreement between a vendee of land under a bond for title and a third person, by which the latter advanced the purchase money and took a deed in his own name as security for the loan, agreeing to convey to the vendee upon repayment. Jones v. McDougal, 32 Miss. 179; Cloninger v. Summit, 55 N. C. (2 Jones, Eq.) 513; Turner v. Eford, 58 N. C. (5 Jones Eq.) 106; Cohn v. Chapman, 62 N. C. (Phill. Eq.) 92, 39 L.R.A. (N.S.)

93 Am. Dec. 600; Avery v. Stewart, 136 N. C. 426, 68 L.R.A. 776, 48 S. E. 775.

As to whether a constructive trust will arise out of such a transaction, see Moseley v. Moseley, 86 Ala. 289, 5 So. 732, and Hoover v. Strohm, 44 Pa. Super. Ct. 177; hereinafter set forth.

III. Grounds upon which equity will enforce promise.

a. In general.

It is well settled, however, that notwithstanding the provisions of the statute of frauds, the presence of fraud, accident, or mistake in the transaction will warrant the interposition of equity, which will compel the performance of the oral promise by fastening a constructive trust upon the conscience of the grantee.

But, as in other classes of cases in which constructive trusts are sought to be established, the courts require evidence which is clear, satisfactory, and convincing.

Thus, in Brock v. Brock, 90 Ala. 86, 9 L.R.A. 287, 8 So. 11, it is said: "No parol trust will be engrafted on a legal title which the instrument of conveyance makes absolute on its face, unless with the greatest caution, and where the fraud necessary to create the trust is established by clear and convincing proof."

The evidence which will authorize the court to find that a conveyance of land which is absolute in terms was in reality made upon a trust must be clear, satisfactory, and convincing. Sherman v. Sandell, 106 Cal. 373, 39 Pac. 797; Bohm v. Bohm, 9 Colo. 100, 10 Pac. 790.

A trust *ex maleficio* can be established only by evidence which is clear, definite, and unequivocal in its character. Ryder v. Ryder, 244 Ill. 297, 91 N. E. 451.

Before a deed absolute upon its face can be impressed with a parol trust *ex maleficio* the evidence must be clear, precise, and indubitable. Grove v. Case, 2 Dauphin Co. Rep. 125.

on account of the mortgage. Thereupon the defendant sold and conveyed the premises for the sum of \$172,000. Subsequently the plaintiff brought this action, claiming that the defendant held the property conveyed to it as its trustee and for its benefit, and asking judgment that he account for what he had received on the sale.

Messrs. Moses Shire and Vernon Cole, for appellant:

The court committed reversible error in excluding the proof of what the trustees, at the conclusion of the meeting, stated to Herbert J. Norton.

Tilson v. Terwilliger, 56 N. Y. 273; Waldele v. New York C. & H. R. R. Co. 95 N. Y. 283, 47 Am. Rep. 41; Holcomb v. Campbell,

118 N. Y. 52, 22 N. E. 1107; 1 Greenl. Ev. 13th ed. § 108, 129-131.

One trustee of a corporation may deal with the corporation. The rest of the board of trustees may treat with him as with a stranger; if the deal is open and above-board, and no undue advantage is taken, the transaction is entirely valid.

Gamble v. Queens County Water Co. 123 N. Y. 91, 9 L.R.A. 527, 25 N. E. 201; Barr v. New York, L. E. & W. R. Co. 125 N. Y. 265, 26 N. E. 145; Strobel v. Brownell, 16 Misc. 660, 40 N. Y. Supp. 702; Barr v. Pittsburgh Plate-Glass Co. 6 C. C. A. 260, 17 U. S. App. 124, 57 Fed. 86; Angell & A. Priv. Corp. § 233; Ely v. Sprague, Clarke, Ch. 351; Allen v. Gillette, 127 U. S. 589, 32 L. ed. 271, 8 Sup. Ct. Rep. 1331;

b. Actual fraud.

1. In general.

There must be something more than mere receipt of title to real estate, with a parol promise to hold it subject to a trust; there must be some interference with the owner of the property, by means of which he is induced to forego the execution by himself of his designs, and leave the execution to the party deluding him by a false promise, and through such false promise obtaining a title to the property. Lantry v. Lantry, 51 Ill. 459, 2 Am. Rep. 310.

In order to take the case out of the statute and establish a trust *ex maleficio*, the transaction by means of which the ownership of the property is obtained must be in fact a scheme of actual deceit, in other words, there must be an element of positive fraud accompanying the promise and by means of which the acquisition of the legal title is wrongfully consummated. Davis v. Stambaugh, 163 Ill. 557, 43 N. E. 170.

The frauds which will raise a constructive trust against the grantee are those which induce the conveyance, or which consist in a refusal to execute defeasances or other instruments to witness the trust, or which secure the execution of an instrument different from the one agreed upon, and the like. McClain v. McClain, 57 Iowa, 167, 10 N. W. 333.

When it is made to appear that an innocent party has been led by fraudulent practice or deception, into parting with his property, a constructive trust arises; and notwithstanding the general rule, a court of equity will grant relief to the extent of enforcing a parol contract entered into at the time, and may otherwise by its decree protect and enforce the rights of the innocent party. Newis v. Topfer, 121 Iowa, 433, 96 N. W. 905.

In Moseley v. Moseley, 86 Ala. 289, 5 So. 732, it is said that the rule as recognized and adopted in Alabama is that the title must be obtained by a false and fraudulent 39 L.R.A. (N.S.)

promise to hold and use the same for the expressed and agreed uses and purposes, and subsequently converted to other purposes, or claimed by the grantee as his own; that mere subsequent fraud is not sufficient, but there must be fraud in the original transaction, which must be of such a character as to constitute a fraudulent contrivance for the purpose of acquiring the legal title. Where there is no fraud or imposition in acquiring the title by means of the verbal promise or agreement, equity will not enforce it in contravention of the expressed declaration of the statute.

2. When fraudulent intent inferable.

(a) Preliminary statement.

While there is complete accord in the statement of the rule, there is naturally considerable difference of opinion as to whether a fraudulent intent on the part of the grantee may be inferred from any given set of circumstances. To avoid the injustice arising from the repudiation of a parol trust, courts of equity have frequently seized upon the slightest circumstances connected with the procurement of the conveyance to avoid the operation of the statute of frauds.

(b) Failure or refusal to perform.

(1) In general.

It is well settled that neither the failure of the grantee to perform his oral promise to hold property upon trust (Smith v. Smith, 153 Ala. 504, 45 So. 168; Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; Willis v. Robertson, 121 Iowa, 380, 96 N. W. 900; Randall v. Constans, 33 Minn. 329, 23 N. W. 530; Ryan v. Williams, 92 Minn. 506, 100 N. W. 380; Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; Lovett v. Taylor, 54 N. J. Eq. 311, 34 Atl. 896; Avery v. Stewart, 136 N. C. 428, 68 L.R.A. 776, 48 S. E. 775; Perkins v. Cheairs, 2 Baxt. 194; Krouskop

Twin Lick Oil Co. v. Marbury, 91 U. S. 593, 23 L. ed. 331, 3 Mor. Min. Rep. 688; Leavenworth County v. Chicago, R. I. & P. R. Co. 134 U. S. 709, 33 L. ed. 1064, 10 Sup. Ct. Rep. 708.

The fact that Nathaniel W. Norton was one of the plaintiff's board of nine trustees does not impress upon the property a trust, so that the defendant was forbidden to purchase it, as he did under all the facts, with open and clear disclosures, as shown by the proofs and findings herein.

Robertson v. Bullions, 11 N. Y. 265; Gram v. Prussia Emigrated E. L. German Soc. 36 N. Y. 163; Petty v. Tooker, 21 N. Y. 267; Madison Ave. Baptist Church v. Baptist Church, 46 N. Y. 131; Landers v. Frank

Street M. E. Church, 97 N. Y. 119; Wheaton v. Gates, 18 N. Y. 395.

Mr. George Clinton, for respondent:

The facts found by the court create an equitable trust in favor of the plaintiff.

Religious Corporations Law, § 5; Moore v. St. Thomas's Church, 4 Abb. N. C. 56; People ex rel. Freeman v. Hulbert, 46 N. Y. 110; 1 Parsons, Contr. 52; Gram v. Prussia Emigrated E. L. German Soc. 36 N. Y. 161; Robertson v. Bullions, 11 N. Y. 243.

The court correctly excluded the testimony offered to show what certain trustees said to defendant after the meeting of January 26, 1901.

Tilson v. Terwilliger, 56 N. Y. 273; Jex v. Board of Education, 1 Hun, 157; New York L. Ins. & T. Co. v. Beebe, 7 N. Y.

v. Krouskop, 95 Wis. 296, 70 N. W. 475), nor the breach or violation thereof (Ammonette v. Black, 73 Ark. 310, 83 S. W. 910; Spradling v. Spradling, — Ark. —, 142 S. W. 848; Crossman v. Keister, 223 Ill. 69, 8 L.R.A. (N.S.) 698, 114 Am. St. Rep. 305, 79 N. E. 58; Andrew v. Andrew, 114 Iowa, 524, 87 N. W. 494; Newis v. Topfer, 121 Iowa, 433, 96 N. W. 905; Hedleston v. Stoner, 128 Iowa, 525, 105 N. W. 56; Harper v. Harper, 5 Bush, 176; Bullenkamp v. Bullenkamp, 34 App. Div. 193, 54 N. Y. Supp. 482, s. c. 43 App. Div. 510, 60 N. Y. Supp. 84; Parrish v. Parrish, 33 Or. 486, 54 Pac. 352; Robinson v. Robinson, 29 W. N. C. 159; Grove v. Kase, 2 Dauphin Co. Rep. 125), nor the grantee's repudiation (Patton v. Beecher, 62 Ala. 579; Willis v. Robertson, 121 Iowa, 380, 96 N. W. 900; Gaylord v. Gaylord, 150 N. C. 222, 63 S. E. 1028), or refusal to perform (Barr v. O'Donnell, 76 Cal. 469, 9 Am. St. Rep. 242, 18 Pac. 429; Verzier v. Convard, 75 Conn. 1, 52 Atl. 255; Newis v. Topfer, 121 Iowa, 433, 96 N. W. 905; Tatge v. Tatge, 34 Minn. 272, 25 N. W. 596, 26 N. W. 121; Henderson v. Murray, 108 Minn. 76, 133 Am. St. Rep. 412, 121 N. W. 214; Weiss v. Heitkamp, 127 Mo. 23, 29 S. W. 709; Hutchinson v. Hutchinson, 84 Hun, 482, 32 N. Y. Supp. 390; Watson v. Pinckney, 29 Jones & S. 188, 18 N. Y. Supp. 790; Barry v. Hill, 166 Pa. 344, 31 Atl. 126; Braun v. First German E. L. Church, 198 Pa. 152, 47 Atl. 963; Simon's Estate, 20 Pa. Super. Ct. 450; Richardson v. McConaughy, 55 W. Va. 546, 47 S. E. 287; Fairchild v. Rasdall, 9 Wis. 379), is fraud; although it has been held in some instances (see Brock v. Brock, and Gregory v. Bowlsby, *infra*) that such failure or refusal may be taken into consideration in determining whether the promise was made with fraudulent intent.

Thus, in Brock v. Brock, 90 Ala. 86, 9 L.R.A. 287, 8 So. 11, it is said: "The mere breach of an oral agreement, standing alone, though often a moral wrong, is not sufficient to establish that fraud in procur-

ing the title which is requisite to render the grantee or devisee a trustee *ex maleficio*; although the fact of such breach may, of course, be looked to, in connection with the other circumstances of the case, as sometimes constituting one of several links in a chain of facts going to prove fraud. If this were not so the statute of frauds would practically be repealed, because no case can arise in the courts under it except where such a breach is charged, other than cases of fraud, either positive or constructive."

The mere failure or refusal to perform a parol agreement, which was made in good faith, to reconvey to the grantor upon request, is not fraud. Feeney v. Howard, 79 Cal. 525, 4 L.R.A. 826, 12 Am. St. Rep. 162, 21 Pac. 984; Williams v. Williams, 180 Ill. 361, 54 N. E. 229.

The mere refusal of a supposed trustee to execute a parol trust, or the denial of its existence, is not such a fraud as will take the case out of the statute of frauds, and authorize a court of equity to enforce the trust. McCartney v. Fletcher, 11 App. D. C. 1; Scott v. Harris, 113 Ill. 447; Davis v. Stambaugh, 163 Ill. 557, 45 N. E. 170; McClain v. McClain, 57 Iowa, 167, 10 N. W. 333.

While breach of a contract on the part of a grantee to hold the lands conveyed in trust may be considered, it is not alone sufficient to establish fraud, but there must be also some clear and explicit evidence of fraud or imposition at the time of the making of the conveyance to constitute the grantee a trustee *ex maleficio*. Gregory v. Bowlsby, 115 Iowa, 327, 88 N. W. 822.

A representation on the part of the grantee that if the grantor would convey to him a fee simple, he would hold in trust for the grantor, and would reconvey the same to him at any time on request, or, in case of his death, to a third person, is not such a fraudulent representation as will avoid the deed. Representations upon which fraud can be predicated must be of an existing fact, or of a fact alleged to

369; Hay v. Platt, 66 Hun, 488, 21 N. Y. Supp. 362.

Cullen, Ch. J., delivered the opinion of the court:

I am of opinion that the facts found by the trial court do not support the judgment. The foundation of the plaintiff's right to relief are the two findings: "That it was not the understanding of the trustees that the transfer to a third person should deprive the plaintiff of its real ownership of the property. That it was the understanding and intent of the trustees that the property should be conveyed to a third person to hold for the church and lease to the theater people, in order to cover up and conceal from the church members the fact

that it was in reality leasing to them." There is no finding that the defendant ever agreed to hold the lands conveyed to him in trust for the plaintiff, and, on the contrary, there is an express finding, to which I shall hereafter allude, which negatives any such promise or agreement. And even had such a promise been made, it not being in writing, the promise with the two findings I have quoted would be insufficient alone to establish the trust and entitle the plaintiff to relief. Wood v. Rabe, 96 N. Y. 414, 48 Am. Rep. 640.

It is the settled law of this state that parol evidence is inadmissible to limit the effect the law attributes to the delivery of a deed to a grantee. Hamlin v. Hamlin, 192 N. Y. 164, 168, 84 N. E. 805, 806, was an

exist, and not a mere promise to something afterwards. Fouty v. Fouty, 34 Ind. 433.

(2) *As giving rise to inference of actual fraudulent intent.*

One court has gone so far as to hold that proof of an intention not to perform at the time of making a promise is not enough to establish an actual fraudulent intent. In Tatge v. Tatge, 34 Minn. 272, 25 N. W. 596, 26 N. W. 121, an intention on the part of a grantee at the time of taking a conveyance not to perform a promise to hold the property in trust is held to be no ground for declaring a trust *ex maleficio*, the court saying: "The authorities are uniform that a mere refusal to perform a verbal promise, void under the statute, is no ground for relief on the ground of fraud. This is so for the manifest reason that if a party chooses to go outside of the law, and trust to the honor of another, he must take the consequence of his misplaced confidence; and, in such a case, we fail to see how it can make any difference whether the promisor did or did not at the time intend to fulfill the promise. The case is obviously different where there has been some concealment, or misrepresentation of facts or of the real nature of the transaction, or some oppression, intimidation, undue influence, or the like, by means of which a party has been deceived or entrapped into making the conveyance. But, notwithstanding certain loose remarks in some of the cases, we find no well-considered case which holds that the mere intention not to perform will, in and of itself alone, furnish a ground for relief on the ground of fraud."

But there is authority to the contrary, and, indeed, a majority of the cases appear to proceed on the contrary assumption.

Thus, in Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9, it is held that ordinarily a false representation upon which fraud may be predicated must be of an existing fact, or a fact alleged at the 39 L.R.A. (N.S.)

time to exist, and cannot consist of a mere promise to be performed in the future, but that if the intention not to perform the promise be shown to have existed at the time the promise was made, the promise is fraudulent.

And in Parrish v. Parrish, 33 Or. 486, 54 Pac. 352, the court said: "The essence of the fraud consists in the existence of a wrongful intent at the time to eventually appropriate the property while lending countenance to the belief in the owner that it was designed to be used for, and would finally inure to, his benefit. It differs from a promise with a purpose of complying therewith at the appointed time, and a breach thereof, for it is settled and conceded that a mere failure to fulfill the promise is not fraud, and the statute applies in such a case; but if the evil intent primarily existed, as above suggested, the transaction is fraudulent, and without the statute."

Actual fraud may be found in the fact, admitted by demurrer, that a promise by a grantee to reconvey upon request was made without any intention of performing it. Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689.

In Grote v. Grote, 121 App. Div. 841, 106 N. Y. Supp. 986, where it was admitted, for the purposes of demurrer, that the grantee never intended to carry out an agreement with the grantor to give him board and lodging as long as he should require it, but made that agreement solely to induce him to convey the property to her, and that he did so convey it, believing and relying upon this promise, it was said that if these allegations should be established on the trial, a strong case could be made out, charging the grantee as a trustee *ex maleficio*.

And in Haigh v. Kaye, L. R. 7 Ch. 469, 41 L. J. Ch. N. S. 567, 28 L. T. N. S. 675, 20 Week. Rep. 597, where the grantor conveyed property without actual consideration, upon an oral agreement, admitted by the grantee, to hold for the grantor's bene-

action by the wife to set aside a deed made by her to her husband, on the claim that she delivered the deeds "simply to help him temporarily, in case he needed the money for his business." This court said, through Gray, J.: "If we should give full effect to the plaintiff's claim, it would be to hold the delivery by her of the deeds to have been conditional, and not absolute; but that would be violative of the settled rule in this state that a delivery cannot be made to the grantee conditionally. Any oral condition accompanying the delivery in such case would be repugnant to the terms of the deed, and parol evidence to prove that there was such a condition attached to the delivery is inadmissible" (p. 188),—citing *Sou- verby v. Arden*, 1 Johns. Ch. 240; *Worrall*

v. Munn, 5 N. Y. 229, 55 Am. Dec. 330; *Wallace v. Berdell*, 97 N. Y. 13; *Blewitt v. Boorum*, 142 N. Y. 357, 40 Am. St. Rep. 600, 37 N. E. 119. There can be no distinction as to this element between the case at bar and that cited. There it was attempted to show the title was to pass to the husband by the deed merely temporarily; here, that it was not to pass at all. As to such a claim it is said in *Wallace v. Berdell*, supra: "The general term in their opinion say that they are of the opinion that the evidence leads to but one conclusion; namely, that the trust deed was made for a temporary purpose only. . . . If this be the correct view of the facts, the conclusion that the deed was invalid is clearly erroneous. . . . The delivery having been

fit, and to reconvey upon request, it was held that the statute of frauds would not preclude the court from decreeing a reconveyance.

If by a false and fraudulent oral promise, which he intended at the time of making it afterward to violate, the grantee induces the making of the conveyance, equity, by reason of his fraud, will fasten upon him a constructive trust in behalf of the grantor. *Brown v. Doane*, 86 Ga. 32, 11 L.R.A. 381, 12 S. E. 179.

A promise made without any intention of performing it is fraudulent. *Hays v. Gloster*, 88 Cal. 560, 26 Pac. 367.

(c) From activity in procuring conveyance.

(1) Generally.

Perhaps the most satisfactory inference of a fraudulent intent on the part of a grantee is to be derived from his activity in procuring the conveyance; and in the instances hereinafter detailed in which equity has compelled the performance of the promise, it will be found that the grantee made some representation, or otherwise took an active part in inducing the grantor to convey.

Thus, in the absence of fraud or imposition on the part of the grantee in obtaining a conveyance, equity will not enforce an oral promise to hold for the grantor's benefit. *Skahen v. Irving*, 206 Ill. 597, 69 N. E. 510.

In the absence of fraud, misrepresentation, imposition, circumvention, artifice, or concealment, or abuse of confidential relations in obtaining a deed, the grantee cannot be held a trustee *ex maleficio* because of his failure to perform an alleged parol agreement to hold the property upon trust. *Verzier v. Convard*, 75 Conn. 1, 52 Atl. 255.

A complaint simply alleging a parol agreement between the parties to deeds of partition, whereby one received more than his share, to hold the land in trust, and trans-

fer to the other when required such portion thereof as would make the parts owned by each in severality of equal value, and the violation of such agreement, but containing no allegation that the conveyance was obtained by fraud or deceit, does not establish a case for the intervention of equity. *Barr v. O'Donnell*, 76 Cal. 469, 9 Am. St. Rep. 242, 18 Pac. 429.

Where it appears that the deed in question was made by a husband to his wife without any suggestion or procurement whatever on her part, and during a period of separation between them occasioned by his drunken habits, that she at first refused to accept the deed, and persisted in declining to do so, until she finally yielded to the persuasion of her father and the further solicitations of the husband, there is not satisfactory proof that at the time the deed was accepted the wife entertained any fraudulent purpose not to perform the alleged oral promise to reconvey should the grantor reform his intemperate habits, and return to live with her. *Brock v. Brock*, 90 Ala. 86, 9 L.R.A. 287, 8 So. 11.

And equity will not raise a trust *ex maleficio*:

—where a conveyance was made by the grantor of his own motion and without any solicitation, undue influence, or fraud upon the part of the grantee, though at the time the grantor expressed confidence that the grantee would do what was right. *Doran v. Doran*, 99 Cal. 311, 33 Pac. 929.

—where there was no evidence to show that the grantee ever uttered a word to induce the conveyance to himself, or to prevent a conveyance from the grantor to the person claiming to be the beneficiary of a parol promise. *Lantry v. Lantry*, 51 Ill. 459, 2 Am. Rep. 310.

—where the evidence showed only that the grantee took without consideration, and it was not shown that he ever asserted title in himself, or did any act in contravention of the alleged agreement to hold for another. *Barry v. Hill*, 166 Pa. 344, 31 Atl. 126.

to the grantee himself, neither party would have been permitted to show, for the purpose of defeating the rights of the *cestui que trustent*, that the delivery was with intent that the deed should not take effect, or that it should not take effect unless again delivered, or unless the grantor should afterward determine that it should take effect, or upon any other contingency whatever, contrary to the terms of the instrument." 97 N. Y. 24. Therefore, to uphold the judgment below some other element must be established than those I have referred to. Doubtless, a relation of confidence between the parties would be sufficient had the defendant made a promise to hold the lands in trust (Wood v. Rabe, supra), and it is claimed that such relation

was established by the fact that the defendant was the law partner of his brother, Nathaniel W. Norton, who was one of the trustees. Now, while the defendant could not retain any advantage he might gain over the plaintiff by virtue of this relation, still the relation did not necessarily preclude him from becoming a purchaser of the property, and so the trial court found. At the time the trustees of the plaintiff voted to sell and convey the property to the defendant, they also authorized the execution of an agreement with the defendant as to his responsibilities. The agreement recited the conveyance for the sum of \$120,000, represented by a mortgage of \$60,000 then on the property, and a further mortgage of \$60,000 to be given to the plaintiff; that

But equity will raise a trust *ex maleficio*:

—where the execution of a conveyance was induced by a promise that it should not go into effect or be filed for record until approved by the grantor's attorneys, and should be destroyed if not so approved, which promise was made by the grantee with a fraudulent intention of not complying therewith. *Smith v. Smith*, 153 Ala. 504, 45 So. 168;

—where a husband intending to convey property to his wife, was induced by a friend to convey the property to him in order to avoid any suspicion that the transfer was made to defraud creditors, the friend representing that he would hold the property in trust for the wife, or would convey it to her. *Fischbeck v. Gross*, 112 Ill. 208;

—where the party to whom an absolute deed is made obtains the execution and delivery thereof to himself by fraud and imposition upon the grantors, on a parol promise to hold the land in trust for them. *Williams v. Williams*, 180 Ill. 361, 54 N. E. 229;

—where an uncle conveyed to a niece who had acquired great influence over him, at her suggestion, and in reliance upon her promise to hold for his benefit, and to reconvey on request. *Hansen v. Barthelsen*, 19 Neb. 433, 27 N. W. 423;

—where a mortgagor executed a power of sale to the mortgagee upon the understanding that he would settle a portion of the property for the use of the mortgagor's wife. *Blount v. Carroway*, 67 N. C. 396.

And in *Booth v. Turler*, L. R. 16 Eq. 183, 21 Week. Rep. 721, where one desirous of disposing of his interest in property held under an agreement for a lease assigned the agreement to a purchaser, with the oral understanding that certain stables on the premises should be held in trust for him, and made a reduction in the purchase price upon that understanding and agreement, and the plaintiff remained in possession without the payment of rent or 39 L.R.A. (N.S.)

other consideration, it was held that the statute of frauds had no application.

Where a widow, in order to relieve certain real estate descending to her from her first husband from the operation of a statute limiting her right to convey the same during a second contemplated marriage, and being induced by virtue of the intimate and confidential relations existing between her and her intended husband's family to rely on the integrity and good faith of the grantee, conveyed such realty to the wife of the brother of her intended husband, relying upon the verbal agreement of the latter to reconvey it to her after the marriage had taken place, equity will enforce the promise. *Catalini v. Catalini*, 124 Ind. 54, 19 Am. St. Rep. 73, 24 N. E. 375. This case has been referred to in subsequent decisions by the same court as an extreme case, and as resting largely upon the consideration that the person seeking to enforce the trust was not in the position of a mere volunteer.

Although the motive for the conveyance has not the slightest bearing on the questions upon which the decisions turn, the desirability of bringing into juxtaposition cases the circumstances of which are similar has suggested the following arrangement, based on the character of the transaction involved:

(2) Instances where motive of grantor was to avoid family troubles.

In several instances the motive actuating the grantor arose out of family troubles.

Equity will not raise a constructive trust:

—where a conveyance was made at the instance of the grantor, to aid him in freeing his land from any dower claim or right of his wife, with whom he was then having trouble, and to save the property for his grandchildren by a former wife, and it did not appear that the grantee induced the making of the conveyance by

there was a proposition from one Kernan and others to take a lease of the property for the period of five years, and to pay as rent, \$4,000 a year quarterly, in advance, as well as all taxes and assessments, and to keep the buildings insured for a sum not less than \$25,000, loss payable to mortgagee; that the lessees proposed to make certain improvements upon the property. It then contained an agreement by the defendant that he would, so far as he was able, safeguard "himself and mortgagees" by seeing to it that the contracts for such improvements were carried out, and that the improvements were paid for by the lessees; that the work done in improvements should not interfere with the building laws of the city, and that the property should

not be wasted or made of less value by reason of any improvements being begun and then abandoned, which should be provided for either by giving a bond or deposit by James L. Kernan and others to the extent of the costs of the proposed improvements, or in some other manner. It further provided that if the lease contemplated should not be made, the defendant should reconvey the property to the plaintiff, and take a discharge of his mortgage. Lastly, the defendant agreed to collect the rents under the lease as the same should become due, and immediately pay over the same to the plaintiff, "to the extent of \$4,000 yearly," which rent should be in lieu of interest upon the mortgage debt upon said property; and the defendant was not to be

fraud or promise to execute some instrument showing the trust character of the conveyance. *Willis v. Robertson*, 121 Iowa, 380, 96 N. W. 900;

—where the grantor, having some trouble with his wife, in order to place his property so that she could establish no claim upon it in case of litigation, had a deed prepared and made it over to his brother, with the understanding and agreement that it should be reconveyed on demand. *Gaylord v. Gaylord*, 150 N. C. 222, 63 S. E. 1028;

—where the grantor conveyed property to a sister to hold for him so as to protect it from any claim of his wife, who was separated from him, there being neither fraud nor mistake in the transaction. *Holtheide v. Smith*, 24 Ky. L. Rep. 2535, 74 S. W. 689.

(3) Instances where anticipated danger of litigation or prosecution influenced grantor.

Sometimes an anticipated danger of litigation or criminal prosecution has influenced the conveyance.

It has been held that there is no constructive trust:

—where the grantor, at the suggestion of his family that he should put his property out of his hands until an anticipated danger of litigation should have passed, but fully understanding at the time he executed the conveyance that, in case of a refusal of the grantee to reconvey, he would be without remedy, conveyed to his mother, with the understanding that, when it should become safe to do so, she should reconvey to him. *Tatge v. Tatge*, 34 Minn. 272, 25 N. W. 596, 26 N. W. 121;

—where the grantor, being apprehensive of arrest and prosecution, and desirous so to arrange his affairs that he might escape from the country, conveyed certain realty upon his own motion and without any solicitation or instigation on the part of the grantee, to his brother, without consideration, upon his agreement to hold the prop-

erty in trust for the use and benefit of the grantor and his heirs. *Fairchild v. Rasdall*, 9 Wis. 379.

But a constructive trust has been held to exist:

—where the grantee procured land to be conveyed to her without consideration, by representing that it was liable to seizure for the debts of a corporation in which the grantor was a stockholder, and that if the grantor would so convey said premises, she would, upon demand, reconvey to him. *Chamberlain v. Chamberlain*, 7 Cal. App. 634, 95 Pac. 659;

—where the grantee obtained the conveyance without consideration by representing to the grantor and his wife that there was danger of the property being levied upon by a creditor, and that if they would deed it to him he would keep it until their son was of age, and convey it to him. *Miller v. Pearce*, 6 Watts & S. 97;

—where the grantor, under an unfounded apprehension of criminal prosecution, conveyed to another upon a parole agreement to retransfer when the difficulty should have passed, especially where the grantor had been allowed to remain in possession of the property, and had paid off the mortgage thereon in the meantime. *Davies v. Otty*, 35 Beav. 208, 5 New Reports, 391, 34 L. J. Ch. N. S. 252, 12 L. T. N. S. 789, 13 Week. Rep. 484;

—where, at the instance of the grantee, and under the apprehension that the property would be seized and sold in satisfaction of the fine for an offense for which the grantor was under indictment, a conveyance was made to a relative, without consideration, upon an oral agreement to reconvey on demand. *Cordova v. Lee*, — Tex. —, 14 S. W. 208.

A complaint alleging that the grantor, induced by the grantee's promises, representations, and pretenses that he would manage the grantor's affairs so as to relieve him of his then-present embarrassment, and would retransfer the property to him, executed and delivered a deed of

personally obligated to pay more moneys than he had received. As to this agreement, the special term expressly found "that at the meeting of the trustees held on the 26th of January, 1901, Nathaniel W. Norton informed the trustees that his brother would take the property on the terms mentioned in said contract, and upon no other terms; that he had no money to invest in the property, and could not pay anything for carrying it during the leasehold period." This finding of the trial court necessarily excludes any promise, agreement, or assent on the part of the defendant to anything except that which is provided for in the written agreement. He distinctly defines his position and the terms on which he would accept the conveyance

to the trustees of the plaintiff, and with full knowledge of those terms and conditions the trustees directed the conveyance to him, and entered into the agreement the defendant proposed. It is to be noted that the agreement in one contingency, and only in one contingency, provides for a reconveyance of the property; that is, in case the proposed lease should not be executed; and the agreement also provides that the defendant shall safeguard not only the plaintiff, but himself, by seeing that the lessees pay for the improvements they may make in the property. In the face of this agreement and the findings of the court as to it, it seems to me idle to claim that the property was impressed in the hands of the defendant with any trust in

his property, but that the grantee knew his representations to be false and untrue, and that the same were made with intent to deceive and defraud, sets forth matters constituting a cause of action. *Hays v. Gloster*, 88 Cal. 560, 26 Pac. 367.

(4) Instances where conveyance was intended to protect grantor's family.

In other instances the conveyance has been made with the idea of protecting the grantor or his family from the consequences of his improvidence.

The courts have held no constructive trust to exist in the following instances:

—where a son of unsteady habits conveyed to his mother, to enable her to manage his property for him, there being no fraud or imposition in the transaction. *Horne v. Higgins*, 76 Miss. 813, 25 So. 489;

—where the grantor was induced to deed the property to his mother to preserve it from the consequences of his improvidence, there being no deceit, false representation, or mistake in the transaction. *Lovell v. Taylor*, 54 N. J. Eq. 311, 34 Atl. 896;

—where a brother transferred to a sister his interest in his father's estate, to preserve it for his family against his creditors, upon his own suggestion, and without any undue influence, persuasion, or misrepresentation on the part of the grantee. *Simon's Estate*, 20 Pa. Super. Ct. 450;

—where the grantor conveyed property to a sister residing in his family, for the purpose of protecting his family against the consequences of his improvidence, there being no fraud, mistake, or contrivance. *Salisbury v. Clarke*, 61 Vt. 453, 17 Atl. 135;

—where the grantor, at the suggestion and on the persuasion of her husband, who had become insolvent, and who was apprehensive that his creditors would attempt to subject the premises to the payment of his debts, conveyed them to an inmate of her household, who for several

years had been received into and treated as a member of her family, and was a trusted confidential friend, without consideration, upon his promise that he would hold for her use, and on request would reconvey to her, or surrender the conveyance to be canceled. *Patton v. Beecher*, 62 Ala. 579;

—where one who had inherited property from her father, at the suggestion of the administrator of her father's estate, who supposed that a conveyance of the estate to a third person would be effectual to coerce a favorable settlement of a claim against his decedent as surety on a bond, conveyed to a sister, who took no part in the scheme other than to receive the conveyance. *Moore v. Jordan*, 65 Miss. 229, 7 Am. St. Rep. 641, 3 So. 737.

Where there was no evidence that a conveyance from a brother to a sister was solicited or induced by her, equity will not enforce against her heirs an oral promise to hold in trust for the grantor. *Biggins v. Biggins*, 133 Ill. 211, 24 N. E. 516.

For another instance in which the conveyance was made by the grantor with the idea of protecting himself from threatened embarrassments, but in which a fiduciary relation between the grantor and grantee was an element, see *Rozell v. Vansyckle*, 11 Wash. 79, 39 Pac. 270, *infra*, under heading, "Constructive Fraud."

In the group of cases immediately following, the conveyance was in the nature of a family arrangement.

(5) Instances where conveyance was in nature of family arrangement.

In the absence of an averment of undue influence arising out of confidential relations, or other circumstances of fraud between the parties, to constitute the grantee a trustee *ex maleficio* a bill averring that property was conveyed to the grantee on the trust and confidence that the grantee would hold it for the grantor's children, and would at a later time execute

favor of the plaintiff, or that the defendant's obligations and relations to the property were anywise different from those expressed in the conveyance and agreement. If there is any inconsistency between the finding quoted and the other findings made by the trial court, the appellant is, under the settled rules of practice, entitled to the benefit of the one most favorable to him.

I think also that the plaintiff, by its subsequent conduct, ratified and confirmed the conveyance to the defendant. The trial court found that in April, 1906, five years after the transaction, and within a few days before the expiration of the lease to the theater company, the defendant wrote to the trustees of the plaintiff, offering to pay \$20,000 on the plaintiff's mortgage,

and asking, in consideration thereof, that the remainder be allowed to stand for four years, \$5,000 to be paid each year on the principal, together with interest; that the trustees adopted a resolution that the request of the defendant be complied with, and thereupon the defendant paid to the plaintiff the sum of \$20,000. It is very probably true that, no new consideration being advanced; the payment by the defendant of \$20,000, already due on the mortgage, was not a sufficient consideration for its extension, and the plaintiff might have insisted on the immediate payment of the balance, despite of its receipt of the \$20,000 on the condition stated. But the receipt of the money seems to me plainly an acknowledgment that the deed given by the

a deed to them, does not state a case for equitable relief. *Tillman v. Kifer*, 166 Ala. 403, 52 So. 309.

Where property was conveyed by the grantor to his intended wife, in consideration of marriage, an oral agreement on her part that she would take only a life estate therein, and that after her death it should go to his children, even if established by evidence, is not enforceable in equity. *Ryder v. Ryder*, 244 Ill. 297, 91 N. E. 451.

Where the grantor conveyed and to his intended wife upon a verbal agreement that she should hold it in trust for both of them, equity will not enforce the agreement. *Mescall v. Tully*, 91 Ind. 96.

In the absence of fraud, deceit, or misrepresentation of any kind in obtaining a deed, equity will not enforce an alleged parol promise by a wife to hold property conveyed to her by her husband in trust for him. *McCartney v. Fletcher*, 11 App. D. C. 1.

Where a husband procured title to property purchased by him to be made to his wife, with the understanding between them that when he desired she would convey to him, equity will not enforce the promise. *Johnston v. Johnston*, 138 Ill. 385, 27 N. E. 930.

Where no fraudulent representations were made, nor any undue means resorted to to influence the grantor to make a conveyance to his wife, but the matter was talked over among the parties, and the grantor acted of his own free will and accord, without any particular persuasion, equity will not enforce an oral promise to hold for the grantor's benefit. *Moore v. Horsley*, 156 Ill. 36, 40 N. E. 323.

Where by a voluntary conveyance, untainted with fraud, and unaffected by any written declaration of trust, a grantor conveyed property to his wife, she cannot be held trustee thereof, although the grantor made the conveyance to preserve and protect his home, and she accepted it to assist him, and joined in carrying his 39 L.R.A.(N.S.)

desire into execution. *Fitzgerald v. Fitzgerald*, 168 Mass. 488, 47 N. E. 431.

In the absence of evidence to show that a conveyance was obtained from a husband by his wife through undue influence or fraudulent misrepresentation, she will not be held a trustee *ex maleficio* for the benefit of their children. *Scott v. Harris*, 113 Ill. 447.

Where a husband agreed with his wife that the lands conveyed by him to her should be held in trust for the benefit of their children, the alleged trust cannot be enforced. *Moran v. Somes*, 154 Mass. 200, 28 N. E. 152.

But where a wife procures a conveyance of lands from her husband by promising to make a will in his favor, and does so with a fraudulent intent not to comply with her promise, the fraud will vitiate the transaction, and equity in such case will declare the grantee to be a trustee *ex maleficio*; and the conduct of the wife after the execution of the deed may be looked to as an aid in determining what her intention was when she obtained the deed. *Manning v. Pippen*, 86 Ala. 357, 11 Am. St. Rep. 46, 5 So. 572.

Where no fraud was practised on a mother to induce her to convey land to one of her sons, who agreed to hold it for her benefit during her life, and upon her death upon a secret trust for a brother, there is no constructive trust. *Brown v. Brown*, 66 Conn. 493, 34 Atl. 490.

But where a mother was induced to convey property to a son in trust for his brother, on account of the latter's dissipated habits, without other consideration than the parol understanding that he would reconvey to his brother when he should become temperate, without an intention on the part of the grantee to perform his promise, but with the intention of claiming and holding absolutely for himself, equity will declare him a trustee. *Nordholt v. Nordholt*, 87 Cal. 552, 22 Am. St. Rep. 268, 26 Pac. 599.

Where the grantor, then about to be

plaintiff was effective to pass the title to the defendant, and that the title was then in him. On no other possible theory could the plaintiff, under the facts then known to it, have been entitled to the money. If the defendant held title simply as the trustee or dummy of the plaintiff, it was not entitled to money from him unless, under its instructions, he had sold the property on its behalf, of which there is no finding, and, on the contrary, the plaintiff claims to have been ignorant at the time of any sale.

Nor am I disposed to look upon the transaction as so unconscionable on the part of the defendant, or prejudicial to the plaintiff, as is contended. The members of the church empowered the trustees to sell

the property, the use of which the church no longer required. No fraud was practised upon them. The trustees had made diligent effort in that behalf and failed. The property was producing no income, and carrying it was a severe burden upon the resources of the church. Proposals were made to lease it for the purpose of a theater, but the trustees, while they were not unwilling that it should be occupied for that purpose, were unwilling that the church should lease it for such a use, fearing dissatisfaction on the part of some of the church members. Thereupon the scheme was planned which was subsequently carried through, and which resulted in the property being used as a theater. In the adoption of this plan the trustees exhibited

married and to go to the state of Texas, thinking she might never return to live at the old home, conveyed her interest therein to her brother, with the understanding and agreement that if she never returned, he was to own and hold the land, but if she returned from Texas to live at the old home, he was to give up the land and deed to her, equity will not enforce the promise. *Stevenson v. Crapnell*, 114 Ill. 19, 28 N. E. 379.

Where one of the members of a family in whose name title had been taken to the premises upon which they all lived, working together to earn the purchase price, notified the family that he expected soon to be married, whereupon it was insisted that some arrangement should be made to safeguard the rights of the parties, and the land was conveyed to their mother, under an agreement that she should hold it until her death, when it should be equally divided among the children, equity will not enforce the promise. *Champlin v. Champlin*, 136 Ill. 309, 29 Am. St. Rep. 323, 26 N. E. 526.

Where the children of a decedent, relying on the verbal promise of one of them to convey back the lands when his father's estate was settled, or pay for the same, voluntarily conveyed their interests in the land to him, no trust arose. *Mayfield v. Forsyth*, 164 Ill. 32, 45 N. E. 403.

But a petition stating that at the request of their father, plaintiffs met him at the home of a son-in-law; that the father then and there requested them to deed to him their interest in the realty left by their deceased mother, in order that he might use and farm the land to better advantage; and that he then and there verbally agreed that he would hold the land, would not sell or dispose of the same, and that the net proceeds and accumulations should and would descend to them at his death; that, believing in such promises, they executed a deed to him without consideration; that the father did not intend to carry out the arrangement or agreement

on his part, but made the representations and agreement for the sole purpose of cheating and defrauding them out of their interest in the land of their deceased mother,—recites facts showing a constructive trust in favor of the grantors. *Gregory v. Bowlby*, 115 Iowa, 327, 88 N. W. 822.

Where one who had become pecuniarily embarrassed and intemperate, in pursuance of a verbal agreement between and among himself, his wife, his brother-in-law, and his father, the two last named being sureties on a bond given by him, that the brother-in-law should pay certain of his debts, in consideration for which he was to convey to the brother-in-law certain land, a portion of which was to be reconveyed to the grantor's wife, did so convey, equity will enforce the agreement. *Teague v. Fowler*, 56 Ind. 569.

Where a grantee, the mother of her immediate grantor, who acted merely as a conduit for title, expressed an intention that at some future time she would convey the land to the grantor as a provision for him, there is no constructive trust. *Henninger v. McGuire*, 146 Iowa, 270, 125 N. W. 180.

For other instances in which the conveyance was made as a family arrangement, but in which a fiduciary relation between the grantor and grantee was an element, see *Brison v. Brison*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; *Hayne v. Hermann*, 97 Cal. 259, 32 Pac. 171; *Lauricella v. Lauricella*, 161 Cal. 61, 118 Pac. 430; *Larmon v. Knight*, 140 Ill. 232, 33 Am. St. Rep. 229, 29 N. E. 1116, 30 N. E. 318; *Ruhe v. Ruhe*, 113 Md. 595, 77 Atl. 797; *Thompson v. White*, 1 Dall. 424, 1 L. ed. 206, 1 Am. Dec. 252; *Bowler v. Curler*, 21 Nev. 158, 37 Am. St. Rep. 501, 26 Pac. 226; *Goldsmith v. Goldsmith*, 145 N. Y. 313, 39 N. E. 1067; *Foote v. Foote*, 59 Barb. 258; *Hanson v. Svarverud*, 18 N. D. 550, 120 S. W. 550, fully set forth infra, under the heading, "Constructive fraud."

some moral cowardice, but committed no fraud. The plan was to convey the property to someone who would take it at its full value, the purchase money to be secured by a mortgage on the land, but without personal liability of the grantee. He was to make the lease to the theater. If the negotiations for the lease failed, the property was to be reconveyed to the church. If the lease was made, the grantee was to pay, on account of the interest on the mortgage, only the amount of rent he might receive. By this arrangement the plaintiff was no worse off than it was before, for if there was no lease, the property was reconveyed. If there was a lease, the

plaintiff would get just what it was willing to receive, had the trustees had the moral courage to rent the property for a theater. The defendant became personally liable for the rent he might receive, and, if he failed to pay it, the mortgage to the plaintiff, which ran only for a year, could be immediately foreclosed. What the plaintiff undoubtedly did lose was the chance of the appreciation in the value of the property. On the other hand, the plaintiff got the defendant's obligation to collect the rent, look after the property, to care and superintend the improvements, and so arrange that there should be no charge against the property for the cost of such improvements

(6) Instances in which conveyance was by way of advancement of child.

Sometimes the question under discussion has arisen in relation to a conveyance to a son-in-law by way of an advancement to the grantor's daughter.

Where a woman's father made a conveyance to her husband as an advance to her, there being no fraud in the transaction, there is no constructive trust. *Meredith v. Meredith*, 150 Ind. 299, 50 N. E. 29; *Acker v. Priest*, 92 Iowa, 610, 61 N. W. 235; *Braden v. Workman*, 1 Sadler (Pa.) 224, 1 Atl. 655.

Nor will equity raise a trust in a case where a father wished to make an advance to his daughter, but executed a deed to her husband, who, however, made no promise to hold it for his wife's benefit to induce the execution, but merely expressed an intention that it should be for her, and added "that if he did not get it in his own name, he did not want it at all." *Dilts v. Stewart*, 1 Sadler (Pa.) 230, 1 Atl. 587.

(7) Instances where property conveyed to facilitate its management.

In the following instances property was conveyed in order to facilitate the grantee's management of it.

It has been held that no trust *eo maleficio* will be declared:

—where a wife voluntarily conveyed property to her husband without consideration, to enable him to manage her business for her. *Stubbings v. Stubbings*, 248 Ill. 406, 94 N. E. 54;

—where at the instance of the grantor, her brother left his home in a foreign state upon an agreement that her farm should be conveyed to his wife, that he should move upon the farm, furnish the grantor with a home, and keep the farm, if it could be saved from the debts and encumbrances resulting from the grantor's improvidence. *McHenry v. McHenry*, 248 Ill. 506, 94 N. E. 84;

—where one going out of the state, and wishing to leave his business in the hands of a son-in-law, conveyed the property to

of an agent, solicited one to become his agent, and conveyed land to him to enable him to sell it and give a deed for it. *Morrall v. Waterson*, 7 Kan. 199;

—where the grantor conveyed his interest in certain property to his sister, who was his cotenant thereof, with a full understanding of the consequences of his act, to avoid the annoyance in the management of the property incident to having the title standing in the name of both, relying upon her oral agreement to hold it in trust for him, there being no fiduciary relation between the parties or undue advantage taken. *Hutchinson v. Hutchinson*, 84 Hun, 482, 32 N. Y. Supp. 390;

—where the grantor conveyed to his father-in-law, a man of considerable influence in the locality, in order that he might use his influence in opposition to the extension of a street across the property, and upon his verbal promise to reconvey, and the father-in-law died before so doing. *Slocum v. Wooley*, 43 N. J. Eq. 451, 11 Atl. 264;

—where no deception was employed by the grantee, who accepted an absolute conveyance of the property, made for the express purpose of enabling him to make sales, pay off an indebtedness, and if possible, save something out of the proceeds for the grantor. *Braun v. First German E. L. Church*, 198 Pa. 152, 47 Atl. 963;

—where the grantor, without accident, or mistake or fraud on the part of the grantee in procuring the conveyance, deeded property to her son for the purpose of enabling him to defend the title against a threatened suit, with the understanding that he would hold it for her benefit. *Jones v. Van Doren*, 18 Fed. 618.

But where an illiterate grantor executed a conveyance to her brother for the purpose of prosecuting certain trespassers, under a verbal promise to reconvey as soon as the purpose for which the deed was given should be accomplished, there is a constructive trust. *Lee v. Lee*, 11 Rich. Eq. 574.

And where the grantee fraudulently, by false representations that he would faith-

by the failure of the lessees themselves to pay therefor. For these services the defendant could not recover any compensation from the plaintiff. The only inducement for him to do this work and assume the obligations was the chance that he might make a profit on the sale of the property, and it was doubtless due to the efforts of himself and Luther, with whom the court found he agreed to divide the profits, that a profit was finally realized. Often an option is given on real estate for a nominal consideration, in the belief or hope that the party to whom it is given may be able to effect a sale where the owner had been unable to do so. I am by no means cer-

fully act as agent of the grantor, and with the fraudulent intent and design of retaining the land as his own, induced the grantor, who was about to enter the military service of the United States, and desired before doing so to make some provision for payment of his debts, to convey to him, with the parol understanding and agreement that he would sell a sufficient amount to pay the debts, and would reconvey the balance, equity will raise a constructive trust. *Newell v. Newell*, 14 Kan. 202.

So, also, where the grantee acted in bad faith and fraudulently in inducing the grantor, who was about to enter the military agreement that if he would do so he would furnish bail for the grantor, who was under arrest, and upon his appearance and compliance with the bail bond, would reconvey, to leave the deed in his hands during his imprisonment, and permit him, as agent or trustee, to have charge of all his business, representing that he would account to the grantor upon his release, and would reconvey to him the property, equity will raise a trust *ex maleficio*. *Jasper v. Hazen*, 1 N. D. 75, 44 N. W. 1018.

For other instances in which the conveyance was made with the idea of enabling the grantee to manage the property for the grantor's benefit, but in which a fiduciary relation between the grantor and grantee was an element, see *Butler v. Hyland*, 89 Cal. 575, 26 Pac. 1108; *Jones v. Jones*, 140 Cal. 587, 74 Pac. 143; *Brophy v. Lawler*, 107 Ill. 284; *Giffen v. Taylor*, 139 Ind. 573, 37 N. E. 392; *Bullenkamp v. Bullenkamp*, 43 App. Div. 510, 60 N. Y. Supp. 84; *Parrish v. Parrish*, 33 Or. 486, 54 Pac. 352, fully set forth *infra*, under the heading "Constructive fraud."

(8) Instances where conveyance was in nature of testamentary disposition.

It frequently happens that the motive actuating the conveyance gives it somewhat the character of a testamentary disposition.

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tain that, taking the transaction between the parties solely as it appears on the face of the instruments executed by them, the transaction was not a beneficial one to the plaintiff, and did not enable it to make a sale that by its own efforts it would have been unable to effect.

The judgment should be reversed, and new trial granted; costs to abide event.

Gray, J., dissenting:

I vote for the affirmance of the judgment. The case differs from that of *Hamlin v. Hamlin*, 192 N. Y. 164, 84 N. E. 805, where it was sought to prove that a deed had been conditionally delivered. Here, that the de-

Equity will not enforce the grantee's promise:

—where a conveyance was made without any solicitation on the part of the grantee, who verbally promised to hold the property in trust to sell, and from the proceeds to pay legacies named in the grantor's will. *Adams v. Adams*, 79 Ill. 517;

—where a husband, in anticipation of an early death, voluntarily conveyed lands to his wife, who promised to carry out his wishes with regard to them. *Davis v. Stambaugh*, 163 Ill. 557, 43 N. E. 170;

—where the grantor, being ill, and desiring to make a distribution of property among her children, and to save the expense of guardianship for one of them who was a minor, conveyed property to a daughter, who orally agreed to convey a one-half interest therein to her brother, on his request, after he should become of age, but who was not shown to have used any undue influence or fraud in procuring the conveyance. *Peterson v. Boswell*, 137 Ind. 211, 36 N. E. 845;

—where, in the absence of fraud on the part of the grantee, the grantor, being very sick and expecting to live but a short time, conveyed property to his daughter without any consideration, with the understanding between them that the conveyance was made in order that the daughter might have the property at the grantor's decease, and that if the grantor recovered and wanted the property back the daughter would reconvey. *Wentworth v. Shibbes*, 89 Me. 167, 36 Atl. 108.

On the other hand, a constructive trust has been held to exist:

—where a grantee, after ascertaining that his old and infirm mother intends to devise property to a grandson, advises her that the best way to accomplish such a purpose is to convey the land to him, he intending at the time to dispose of it in a different way. *Ammonette v. Black*, 73 Ark. 310, 83 S. W. 910;

—where the grantee, who was the confidential adviser of the grantor, persuaded the grantor, who desired to make a final disposition of her property so that it should

livery of the deed was absolute is not disputed. The claim of the plaintiff is that the conveyance was upon trust, and that the defendant must account for his acts as its trustee. It was found "that the defendant knew that the plaintiff's trustees, in conveying the property to him, did so simply for the purpose that he might hold the same for plaintiff's benefit and lease

it to the theater people." This finding has been unanimously affirmed, and is conclusive as to the nature of the defendant's title.

Haight, Werner, and Willard Bartlett, JJ., concur with **Cullen, Ch. J.**; **Vann and Chase, JJ.**, concur with **Gray, J.**

go at her death to certain nephews and nieces, not to make a will, but to execute an absolute deed to him, by leading her to believe that he would carry out her desire and intention concerning the property. *Aldrich v. Hassinger*, 13 Haw. 138;

—where a father, wishing to make some arrangement whereby certain realty would become the property of his two daughters after his death, at first requested his attorney to take title in his name and hold it for them, and, upon the attorney's declining to do so, thereafter conveyed it to a son, with the understanding that he should deed it to his sisters after the father's death. *Hilt v. Simpson*, 230 Ill. 170, 82 N. E. 588;

—where a mother, ill in bed, at the solicitation of her children, conveyed without consideration her property to one of them, who had the confidence of all, upon his agreeing to hold it for the benefit of all, to avoid the expense of distributing it through the courts. *Stahl v. Stahl*, 214 Ill. 131, 68 L.R.A. 617, 105 Am. St. Rep. 101, 73 N. E. 319, 2 Ann. Cas. 774;

—where a mother, during her last illness, believing that she would not recover, conveyed all of her real estate to her husband, at his request, and upon his oral promise to devise said real estate to their demented child, and care for him during the father's natural life. *Schneringer v. Schneringer*, 81 Neb. 661, 116 N. W. 491;

—where a wife prevailed upon her husband, who was fatally ill, to convey certain of his property to her by promising to make a certain disposition thereof among his heirs at law, and wilfully failed to make such disposition. *Pollard v. McKenney*, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9;

In *Becker v. Schwerdtle*, 141 Cal. 386, 74 Pac. 1029, it was held that the allegations of a complaint setting forth that the plaintiff and defendant were mother and son, that the most confidential relations always existed between them, that while very ill, and believing that she had but a few days to live, and placing every trust and confidence in the defendant, and desiring him to have all her property on her death, and without seeking or obtaining advice from any person, the mother delivered a deed of all her property to her son, stating to him at the time that in case of her recovery she would expect him to pay her \$20 per month for her support, that defendant did not say whether or not he would comply with said request, but, hav-

ing great trust and confidence, she believed he would comply with it, and that since her recovery he has refused to pay her the said \$20 per month, and that when the deed was delivered the defendant did not intend to comply with her request, but, by accepting the deed and by his silence, fraudulently induced her to believe that her request would be complied with,—were sufficient to warrant the interposition of a court of equity.

Where a wife to whom property was conveyed by her husband's mother represented to her that she was without a relative in the world, and that if she should die all her property would go to her husband, it was held that the trial court would have been justified in finding a trust *ex maleficio*. *Luse v. Reed*, 63 Minn. 5, 65. N. W. 91.

For other instances in which the conveyance was made as a mode of effectuating a desired disposition of property after the grantor's death, but in which a fiduciary relation between the grantor and grantee was an element, see *Kimball v. Tripp*, 136 Cal. 631, 69 Pac. 428; *Cooney v. Glynn*, 157 Cal. 583, 108 Pac. 506; *Fisk's Appeal*, 81 Conn. 433, 71 Atl. 559; *Crossman v. Keister*, 223 Ill. 69, 8 L.R.A. (N.S.) 698, 114 Am. St. Rep. 305, 79 N. E. 58; *Newis v. Topfer*, 121 Iowa, 433, 96 N. W. 905; *McClellan v. Grant*, 83 App. Div. 599, 82 N. Y. Supp. 208, affirmed without opinion in 181 N. Y. 581, 74 N. E. 1119; *Lang v. Lang*, 131 N. Y. Supp. 891; *Ahrens v. Jones*, 169 N. Y. 555, 88 Am. St. Rep. 620, 62 N. E. 666, fully set forth infra, under the heading, "Constructive fraud."

(9) *Instances in which conveyance was by way of security.*

In some cases the question under discussion has arisen in relation to conveyances made by way of security.

Where a mortgagee quitclaimed to the mortgagee, in reliance on an oral agreement that the property would be reconveyed upon payment of the indebtedness, there is no constructive trust. *Donaldson v. Empire Loan & Invest. Co.* 130 Iowa, 467, 106 N. W. 192.

But where a creditor induced his debtor to convey to him realty worth much more than the debt, at a time when a large part of the debt had already been discharged by money then in the creditor's hands, which was unknown to the debtor, upon an oral promise to reconvey upon

payment of the debt, equity will constitute him a trustee *ex maleficio*. Goodwin v. McMinn, 193 Pa. 646, 74 Am. St. Rep. 703, 44 Atl. 1094.

And where the grantee obtained a deed to be made to him under an agreement and promise on his part that he would sell the land, and use the proceeds of the sale in paying off the grantor's debts, equity will enforce the promise. Diffie v. Thompson, — Tex. Civ. App. —, 90 S. W. 193.

Where a mortgagee obtained an absolute deed of the mortgaged property by representing that if the owner and her husband would make him a deed of the land, absolute on its face, he would endeavor to sell the land, or a part of it, at private sale, at its highest market value, and, after satisfying his claim, would pay over the remainder of the money, or reconvey the remainder of the land unsold after satisfaction of the debt; and that he was a shrewd business man and a man of means, and could get a better price for the land than the owner or her husband; and the grantor, fearing that, as the undertaking was to be by parol, it would not be binding, objected to it, and at first declined to sign a deed, but was prevailed upon by the grantee to go with him to a lawyer's office, who, upon hearing of the proposed arrangement, pronounced it as binding as if reduced to writing and signed by the grantee, equity will enforce the promise. Clark v. Haney, 62 Tex. 511, 50 Am. Rep. 536.

Where a deed was procured without consideration by the grantee's agreement to raise money on the land of the grantor, the grantee is a trustee *ex maleficio*. Danzeisen's Appeal, 73 Pa. 65:

In Barton v. McMillan, 20 Can. S. C. 404, where one agreed to make a loan to the owner of property, taking an absolute deed thereof as security, and executed a contract for the purchase of the property, at the agreed price, telling the solicitor that he would advise him by telephone whether the deed would be taken in his own name or his daughter's, and the next day a telephone message came, instructing the solicitor to make the deed in the name of the daughter, and the evidence tended to show that the daughter was aware of the agreement, although she claimed to have purchased the property absolutely and upon her own account, it was held that the agreement would be enforced as against the daughter, notwithstanding the statute of frauds.

In the absence of fraud or imposition in acquiring title, no trust *ex maleficio* can be based on the refusal of one who, at the instance of the vendee in a land contract, has advanced the balance of the purchase price and received an absolute conveyance from the vendor, to perform his contemporaneous parol agreement to convey to the vendee on being repaid. Moseley v. Moseley, 86 Ala. 289, 5 So. 732.
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But where a vendee under a land contract procures another to advance purchase money and take title in his own name, under a verbal promise to convey to the vendee upon repayment of the advances, equity will raise a trust *ex maleficio*. Hoover v. Strohm, 44 Pa. Super. Ct. 177. See also, in this connection, Spies v. Price, 91 Ala. 166, 8 So. 405, and Jenkins v. Eldredge, 3 Story, 81, Fed. Cas. No. 7,266, under heading, "Part performance of oral agreement taking case out of statute," *infra*.

3. Where creation of written instrument contemplated.

The failure to carry out a promise to execute a written declaration of trust will not, in the absence of fraud, accident, or mistake, render parol evidence admissible to show that the grantee in an absolute conveyance was to hold in trust for the grantor. Dean v. Dean, 6 Conn. 285.

But where, as a part of the original contract through which one becomes an absolute grantee, but is in fact constituted merely a trustee, he agrees to execute a declaration of trust and preserve the same for the grantor's use, but fraudulently fails and refuses to do so, the terms of such trust may be proved by parol evidence, notwithstanding the statute of frauds, even though there may have been no premeditation of fraud. Hall v. Linn, 8 Colo. 264, 5 Pac. 641.

Where property was conveyed upon the faith that a declaration of trust had been or would be signed by the grantee, equity will enforce the trust. Hacker's Estate, 5 Pa. Co. Ct. 586.

And see also Barnard v. Flinn, 8 Ind. 204, under heading, "Accident or mistake," *infra*.

o. Constructive fraud.

Although, as stated in the introductory portion of this note, it does not include cases in which a constructive trust is based solely on the existence of a fiduciary relation between the grantor and grantee, independently of any agreement to hold the property in trust, there are a number of decisions in which the controlling element seems to have been the fiduciary relation between the promisor and the promisee, rather than any actual fraudulent intent at the time of making the promise. These will be found under this head.

1. In general.

A constructive trust may arise where the relation between one making a conveyance in reliance on the grantee's parol promise and such grantee is a confidential one. Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689.

Where a general fiduciary relation exists

and actual confidence is also reposed in the grantee, it is not necessary to allege or prove a fraudulent intent existing at the time of the conveyance, in order to establish a constructive trust. *Alaniz v. Casenave*, 91 Cal. 41, 27 Pac. 521.

Where a grantee and grantor of land stand in fiduciary relations to each other, and the deed is executed without consideration other than a promise, express or implied, of the grantee, to hold the land for the purpose of carrying out an express trust in favor of the grantor, which is not put in writing, and is therefore invalid as an express trust in the land, the confidence which induced the transaction having actually or presumably arisen from the fiduciary relations, the violation by the grantee of the terms of the parol agreement as an express trust constitutes a constructive fraud, makes him an involuntary trustee of the land for the use of the grantor, and gives the grantor the right to have the deed declared void, and to a decree that the land is property of the grantor, notwithstanding the execution of the deed. *Jones v. Jones*, 140 Cal. 587, 74 Pac. 143; *Cooney v. Glynn*, 157 Cal. 583, 108 Pac. 506.

Where a conveyance is made between parties standing in a fiduciary relation to each other, on a parol agreement of the grantee to hold the land in trust for or convey it to someone else, when in fact the grantee has no intention of performing the agreement, but intends to retain the benefit of the conveyance for his own use, the law raises a constructive trust, and takes the case out of the operation of the statute of frauds. *Crossman v. Keister*, 223 Ill. 69, 8 L.R.A. (N.S.) 698, 114 Am. St. Rep. 305, 79 N. E. 58.

Where there is fraud or artifice in procuring the title to property, or the same is wrongfully taken or retained in his own name by one occupying a fiduciary relation, a trust results in favor of the party equitably entitled. *Randall v. Constaas*, 33 Minn. 329, 23 N. W. 530.

If a party obtained the legal title to property by virtue of a confidential relation, and under such circumstances that he ought not, according to the rules of equity and good conscience, to hold the benefits of such circumstances or relations, a court of equity will raise a trust by construction, and fasten it upon the conscience of the offending party, and convert him into a trustee of the legal title. *Pollard v. McKenney*, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; *Koefoed v. Thompson*, 73 Neb. 128, 102 N. W. 268.

2. Where relation of parties is that of principal and agent, or partners.

Where the grantee is a mere conduit for the transfer of title from a husband to wife, equity will raise a constructive trust in him, pursuant to the agreement by which 39 L.R.A. (N.S.)

he obtained the deed to the property. *Cox v. Arnsmann*, 76 Ind. 210.

Even though there is no fraud in the procurement of the conveyance, a constructive trust will arise where the grantee takes as the agent of the grantor, for the purpose of carrying out an agreed distribution in the event of the grantor's death. *Kimball v. Tripp*, 136 Cal. 631, 69 Pac. 428.

In *Seichrist's Appeal*, 66 Pa. 237, where one who had purchased part of a tract of land from another, who held it under a contract therefor, obtained a deed for the whole tract upon his undertaking that he would hold title to the portion not purchased by him in trust for the vendee, and that he would convey to him upon his paying his share of the purchase money, it was held that his abuse of the confidence reposed in him rendered him a trustee *ex maleficio*.

Where one conveyed his half interest in land without consideration to his partner, for the sole purpose of enabling the latter to secure a new loan to redeem the land from a mortgage foreclosure, leaving him in possession thereof under a verbal agreement that he would so redeem for their joint benefit, and account for one half of the rents and profits, and in due time reconvey to the grantor, equity will raise a trust *ex maleficio*. *Koefoed v. Thompson*, 73 Neb. 128, 102 N. W. 268.

3. Where one party sustains relation of confidential adviser.

Where the leader of a religious society, by virtue of pretended revelations, induced the members to convey their lands to him for the benefit of the community, equity will enforce a trust. *Scott v. Thompson*, 21 Iowa, 599.

Where the parties active in procuring the execution of an absolute conveyance by a woman, then on her deathbed, to her stepfather, were the stepfather and the minister in charge of the church to which she belonged, who knew her desire was not to confer a benefit upon the grantee, but to provide for her children, there is a constructive fraud which will raise a trust *ex maleficio*. *Newis v. Topfer*, 121 Iowa, 433, 96 N. W. 905.

Evidence that, at the time of the making of a deed to one who was the priest in charge of the church of which the grantor was a member, and whom the grantor was accustomed to consult on business matters, the grantor was a widower over seventy years of age, ill, childish, and was having some trouble with his children; that the grantee repeatedly advised and urged him to deed the land to him and he would deed it back whenever he requested it, and would keep him out of trouble with his family; that thereafter, without the knowledge of the grantee, but relying upon such advice and promise, and believing that if

he acted upon them he would be relieved of his troubles, he made the deed in question, is sufficient to raise a trust *ex maleficio*. *Henderson v. Murray*, 108 Minn. 76, 133 Am. St. Rep. 412, 121 N. W. 214.

McClellan v. Grant, 83 App. Div. 599, 82 N. Y. Supp. 208, affirmed without opinion in 181 N. Y. 581, 74 N. E. 1119, where an old and illiterate woman, whose only son had left home and had not communicated with her for many years, conveyed certain realty to her pastor, who was her confidential adviser, upon the understanding that if the son should ever turn up, the pastor would convey the property to him, it was held that although there was no distinct finding or charge of fraud, yet, on account of the confidential relation existing between the parties, and the presumption following therefrom, the grantee became a trustee *ex maleficio*, and therefore that the pastor's heirs were accountable to the son for the property.

In *Rozell v. Vansyckle*, 11 Wash. 79, 39 Pac. 270, where it appeared that the grantor was an old man very ignorant, illiterate, mentally weak, easily alarmed, and easily imposed upon; that the grantee, in whom he had implicit confidence, was greatly his superior in mental sagacity; that at and immediately prior to executing the deed he feared that a third party was seeking to establish false claims against him, and for the purpose of protecting the land in question therefrom sought the advice of the grantee, who, by his conduct and conversation, added greatly to the fears and apprehensions under which the grantor was then laboring, and encouraged him to deed the property to him, assuring him that he would reconvey upon request, it was held that the transaction raised a trust *ex maleficio*.

4. Where parties are husband and wife.

In view of the provision of the California Code that either husband or wife may enter into transactions with each other subject to the general rules which control the actions of persons occupying confidential relations with each other, and of an averment in an action to establish a trust *ex maleficio*, that the plaintiff had at all times confidence in his said wife and her devotion and fidelity to him, and that he made the deed, having confidence in his said wife and in her representation and promises, and relying upon the same, the relation between a husband who conveyed land to his wife relying upon her parol promise that she would reconvey to him upon his request may be considered as confidential, both in law and in fact; and equity will enforce the promise as a constructive trust. *Brison v. Brison*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689.

Where a husband caused land held in trust for him to be conveyed to his wife 39 L.R.A. (N.S.)

upon her oral agreement that she would hold it in trust for him during his life, and after his death for his son and herself, in equal proportions, a constructive trust arises which equity will enforce. *Hayne v. Hermann*, 97 Cal. 259, 32 Pac. 171.

Where a wife conveyed property to her husband for the purpose of enabling him to maintain an action to oust a tenant, equity will enforce a constructive trust. *Jones v. Jones*, 140 Cal. 587, 74 Pac. 143.

A trust by operation of law is established by proof that a grantor conveyed lands by deed absolute on its face to his wife, in reliance upon an oral agreement between them that she would hold the same in trust for him during his lifetime, and that upon his death she would hold one half thereof as her own property, and would convey the other half to his father and mother in equal shares. *Lauricella v. Lauricella*, 161 Cal. 61, 118 Pac. 430.

Where a husband induced his wife, who was dangerously ill and did not expect to recover, to execute an absolute conveyance to him upon his promise that he would hold the property conveyed, as she desired, in trust for her two children, he is, notwithstanding the statute of frauds, chargeable in equity, on parol proof of such facts, with constructive fraud, from which the law raises a trust *ex maleficio*. *Fisk's Appeal*, 81 Conn. 433, 71 Atl. 559.

Where the evidence showed that a husband made repeated requests that his wife should transfer to him her rights in a land contracts held by her, which she peremptorily refused to do, until, being upon her deathbed, but being sensible that she would be unable to make the required payments, and realizing that her children would be without other means, and that one of them being a minor, it would be difficult, if not impossible, for them to raise the money after her death wherewith to comply with her contract, she finally yielded to her husband's request to transfer the property to him, in reliance on his promise to hold it for her children,—he will be held a trustee *ex maleficio*. *Larmon v. Knight*, 140 Ill. 232, 33 Am. St. Rep. 229, 29 N. E. 1116, 30 N. E. 318.

Averments of a bill in equity that the plaintiff and his wife, considering the advisability of preserving a home in their old age for each other and for their children, mutually agreed that the title to certain property owned by the husband should be placed in the name of the wife, and that she should hold the property for his benefit, and that in pursuance of this understanding the husband conveyed to a third person without any pecuniary consideration, who thereafter transferred the property to the wife, are sufficient to establish a constructive trust in favor of the husband. *Ruhe v. Ruhe*, 113 Md. 595, 77 Atl. 797.

In *Ahrens v. Jones*, 169 N. Y. 555, 88

Am. St. Rep. 620, 82 N. E. 666, where the grantor, being sick, and not expected to live, and being desirous of disposing of his property before he died, conveyed certain premises to his wife with the express understanding between them that the wife should pay a sum of money to certain grandchildren, which the wife, after her husband's death, refused to do, it was held that equity would declare the grantee a trustee *ex maleficio* for the protection of the grantor's intended beneficiaries.

In *Lang v. Lang*, 131 N. Y. Supp. 891, where a husband being ill and desiring to make a larger provision for his wife than the law would allow her upon his death intestate, at her request deeded property to her upon an understanding that, in the event of his death, the premises should be hers, and that if at any time during his life he should desire the premises returned to him, she would reconvey them, it was held that the agreement having been made for the benefit of the wife, and she having obtained the title under the arrangement, she could not be heard to say that it could not be enforced, because not in writing.

In *Gallagher v. Gallagher*, 135 App. Div. 457, 120 N. Y. Supp. 18 (affirmed without opinion in 202 N. Y. 572, 96 N. E. 1115), where a husband had conveyed certain realty to his wife for the purpose of enabling her to qualify as a surety on bonds given by him in the conduct of his business as a contractor, upon an oral agreement that, after the bonds were satisfied, she should reconvey the premises to him or to anyone he might name, on demand, it was held that, in view of the confidential relation in reliance upon which property had been conveyed, equity would enforce the agreement.

In *Parrish v. Parrish*, 33 Or. 486, 54 Pac. 352, where a wife obtained from her husband, who was old and feeble, deeds to his property, representing to him that because of his infirmity he could not efficiently manage it, and that if he would place the title in her name she would safely keep, manage, and protect the same for his use and benefit and to his best interest, it was held that she would be declared a trustee *ex maleficio*.

Where a wife conveyed property through an intermediary to her husband, at his suggestion, and under the representations of a relative that he might be relied upon, under a parol agreement that he would settle the fee upon the wife's heirs, and he died before doing so, it was held that the promise would be enforced as against his heirs, the court taking the view that his failure to perform was a fraud in law, which would take the case out of the statute of frauds. *Thomson v. White*, 1 Dall. 424, 1 L. ed. 206, 1 Am. Dec. 252.

But in *McCartney v. Fletcher*, 11 App. D. C. 1, the natural and reasonable confidence subsisting between husband and wife, and their motive for mutual co-operation 39 L.R.A. (N.S.).

for success in life, seems to have been regarded as insufficient to establish such a fiduciary relation as will raise a constructive trust.

5. Where parties are parent and child, grandparent and grandchild, father-in-law, son-in-law, etc.

A father bears no such confidential or fiduciary relations to his adult children as to bring transactions between them, relating to the land of either, under suspicion. *Gregory v. Bowlsby*, 115 Iowa, 327, 88 N. W. 822.

The fact that the instrument was made from father to daughter, and the alleged fact that it was without consideration, do not, in and of themselves, raise a presumption of fraud. *Smith v. Mason*, 122 Cal. 426, 55 Pac. 143.

The fact that the grantee was the daughter-in-law of a grantor is not of itself sufficient to prove a fiduciary relation, but is an important circumstance bearing upon the existence of such relation. *Chamberlain v. Chamberlain*, 7 Cal. App. 634, 95 Pac. 659.

And in many instances a constructive trust has been raised upon an oral promise between parties sustaining the relationship to each other of parent and child.

In *Butler v. Hyland*, 89 Cal. 575, 26 Pac. 1108, where the grantor, a girl of sixteen, conveyed property to her aunt, who stood to her *in loco parentis*, at the request of the aunt, who desired to protect the grantor from the importunity of her brother, and upon the oral understanding that the aunt would hold it in trust for her, it was held that equity would enforce the trust.

Where, at and about the time when a deed from a daughter to her mother was made and delivered, it appeared that the position of the mother was one of dominance and authority over the daughter, and of the daughter of dependence upon the mother; that the daughter confided in and trusted her mother implicitly; that she was an invalid and unacquainted with business affairs; that nothing was paid or agreed to be paid to her for the property so conveyed; that she had no independent advice, and did not understand that she was divesting herself absolutely of all her property rights,—equity will convert the holder of the legal title into a trustee for the party who, in equity, is regarded as the beneficial owner. *White v. Ross*, 160 Ill. 56, 43 N. E. 336.

Where a grantor conveyed to his father-in-law without consideration other than his promise to hold it in trust for the benefit of the grantor or his heirs, and the conveyance was made because of the confidential and influential relation which existed between the parties, equity will enforce the trust. *Bowler v. Curler*, 21 Nev. 158, 37 Am. St. Rep. 501, 26 Pac. 226.

In *Cardiff v. Marquis*, 17 N. D. 110, 114

N. W. 1088, where a conveyance of real estate was delivered by a daughter to her father without any consideration, for the purpose of selling and conveying the land, and by reason of the father's death before payment of the consideration by the party to whom the land was sold by him, his promise to hold for his daughter's benefit remained unperformed, it was held that a court of equity will enforce the trust, upon the ground of constructive fraud, based on the relations of confidence existing between the parties.

In *Young v. Peachy*, 2 Atk. 254, where a father, in order to protect an entailed estate from the creditors of his daughter's husband, persuaded her to join in a common recovery, by virtue of which he became vested with the absolute title, it was held that, in view of the father's breach of trust in attempting to make use of the property for a different purpose than that for which the conveyance was obtained, and of the confidential relationship existing between the parties, equity would relieve from the conveyance, on the ground of fraud.

Where a mother, in consequence of a suggestion made by her son, with whom she resided, and upon whom she relied for the transaction of her business, canceled her will and conveyed her property to him, relying upon his promise to hold it in trust for his sister, equity will raise a constructive trust. *Cooney v. Glynn*, 157 Cal. 533, 108 Pac. 506.

Where a son took advantage of his mother's confidence to obtain title from her without consideration, by a promise to remove the encumbrances, and then reconvey to her an undivided third of the premises, and refused to reduce the agreement to writing or to reconvey the land, there is such an abuse of confidence as to vest of court of equity with jurisdiction to inquire thoroughly into the entire transaction, and set aside the conveyance, or administer other proper relief. *Bohm v. Bohm*, 9 Colo. 100, 10 Pac. 790; *Jerome v. Bohm*, 21 Colo. 322, 40 Pac. 570.

Where a grantor, who had a life estate in certain property, conveyed it to the remainderman, who, until his marriage, had lived with her as her son, in order that a portion of the property might be sold to pay accumulated taxes and assessments, upon the latter's representation that, immediately after making the sale, he would make a declaration of trust of an estate for life in the balance of the property in the grantor's favor, there is a constructive trust. *Brophy v. Lawler*, 107 Ill. 284.

Where a daughter obtained a conveyance from her father, then 80 years old and feeble, with the understanding that it was to be in full of her share in his estate, at the same time deeding land owned by her to him, with the understanding that it was to be a sister's portion, agreeing that if the father should die without having the deed

recorded, it should be returned to her, and she would then convey the property to the sister, and the proof tends strongly to show that she did not intend to perform her promise, but made the agreement with a fraudulent intent and purpose in her mind to influence her father not to convey the land to her sister, in order that she might profit thereby, equity will raise a constructive trust. *Crossman v. Keister*, 223 Ill. 69, 8 L.R.A. (N.S.) 698, 114 Am. St. Rep. 305, 79 N. E. 58.

Where a favorite grandson, under the pretense of aiding his grandparents, obtained a conveyance by representing that, if they would deed the property to him, he would take care of it, see to the liens and taxes, and sell it and account for the proceeds, charging whatever his services were worth, and would at any time reconvey any portion not sold, there is a constructive trust. *Giffen v. Taylor*, 139 Ind. 573, 37 N. E. 392.

In *Goldsmith v. Goldsmith*, 145 N. Y. 313, 39 N. E. 1067, where a mother owning premises used as a home for the family, having met with an accident which incapacitated her for the further care and management of the property, conveyed it to a son, upon a promise upon his part to hold it for the benefit of the other four children, in common with himself, the arrangement being founded upon the trust and confidence growing out of the family relationship, and being intended as a settlement of the family affairs; and it was a further part of the arrangement that the son should pay interest on a mortgage and taxes, but should receive his board in the family without charge; and the plan was carried out for some years, until the promise was finally repudiated by the grantee, it was held that upon the whole transaction, including the confidential relation of the parties, and its nature as a family arrangement, equity would impose upon the property and its proceeds an implied trust for the benefit of the children.

In *Foot v. Foot*, 58 Barb. 258, where realty, the title to which was in the grantee's father, but the consideration for which had mainly been furnished by the mother, had been, for the purpose of protecting the property and of keeping it for the mother's use, conveyed without consideration to two of their sons, one of whom subsequently conveyed it to the other, who conveyed to a third son without consideration, and upon the agreement that he should hold it for the mother's benefit, and the son, during his life, recognized her as the owner of the property, and made a will devising it to her, which, however, was inoperative, it was held that equity would raise a trust *ex maleficio* which would preclude his heirs from claiming the property.

A complaint alleging that a deed, absolute in form, from parents to their sons, was executed solely in reliance on the confidence existing between them and their

sons, and in reliance on their sons' promise to accept the deed in trust for the use of the grantors while they lived, and after their death to convey the land equally among all the children of the grantors, states a cause of action for declaring the deed to have been executed in trust for said purpose, and a court of equity will enforce the promise, as the refusal to carry it out is constructively fraudulent. *Hanson v. Svarverud*, 18 N. D. 550, 120 N. W. 550.

In *Landrum v. Landrum*, — Tex. Civ. App. —, 130 S. W. 907, where the grantor conveyed to his son to enable him to sell property to a third person, who contemplated purchasing it, it being understood and agreed that the son would turn over to his parents the entire amount received as purchase money, and the presumption arising from the transaction is that, but for the son's promise, which was violated, the grantor would have inserted in the deed some condition of defeasance, or the deed would have been so drawn as to show the true agreement between them, it was held that the son was chargeable with constructive fraud.

6. Where parties are brother and sister.

The relationship of brother and sister is not in itself a fiduciary relation, although it is a material circumstance in considering the question whether in fact such a relation existed. *Odell v. Moss*, 130 Cal. 352, 62 Pac. 555.

No confidential relation between a brother and sister from which constructive fraud in a conveyance from the former to the latter may be inferred is created by such relationship, where, although he lived with her, he supported himself, and had charge of his own business. *Biggins v. Biggins*, 133 Ill. 211, 24 N. E. 516.

In *Bullenkamp v. Bullenkamp*, 43 App. Div. 510, 60 N. Y. Supp. 84, where a sister owning property which had become so encumbered by taxes and assessments that unless a considerable payment was made thereon, it would be sold, conveyed it at the instance of her brother to his wife, with full understanding of the situation and of the effect of her act, the circumstances being such that necessity, and not the influence of the brother, was evidently the inducing cause, it was held that no such relation of trust and confidence existed as would warrant the enforcement of an oral agreement to reconvey.

d. Accident or mistake.

Where it was intended that the grantee in an absolute conveyance should, as part of the transaction, execute a declaration of trust, but within a few days he suddenly died, leaving the contract yet incomplete, equity will enforce the trust. *Barnard v. Flinn*, 8 Ind. 204.

When the grantor, on her deathbed, was

led by her advisers, who, however, were not actuated by unworthy motives, to believe that a will only was to be executed by her, which would provide for a devise of property to, or in trust for the benefit of, her children, and did not know that she was signing an absolute conveyance, the grantee is chargeable as a trustee for the grantor and her heirs. *Newis v. Topfer*, 121 Iowa, 433, 96 N. W. 905.

e. Part performance of oral agreement taking case out of statute.

It is a familiar doctrine of equity that part performance may take an oral contract out of the operation of the statute of frauds. The following decisions deal with the question as to when an agreement that the grantee shall hold in trust the property conveyed falls within the operation of this doctrine.

The giving of the deed is not such part performance as will take out of the statute of frauds an oral promise to hold upon trust to reconvey to the grantor. *Feeney v. Howard*, 79 Cal. 525, 4 L.R.A. 826, 12 Am. St. Rep. 162, 21 Pac. 984.

And in *McCartney v. Fletcher*, 11 App. D. C. 1, it was held that even where a parol agreement or understanding that property conveyed shall be held upon trust is clearly proved, the mere making of the deeds, or directing them to be made, to the grantee, is not a sufficient part performance to take the case out of the statute of frauds, for if so, the statute would simply be rendered nugatory and without effect.

Where the conduct of the parties pending and following the giving of a deed conditioned for the support of the grantor during his lifetime, but otherwise absolute in its terms, was throughout entirely consistent with its provisions, and there is nothing to suggest, even remotely, that there was any other agreement between the parties than that which the deed evidences, the giving of the deed cannot be regarded as such a part performance as to take an alleged oral agreement to hold in trust for the grantor's heirs after his death out of the statute of frauds. *Verzier v. Convard*, 75 Conn. 1, 52 Atl. 255.

But in *Hayden v. Denslow*, 27 Conn. 335, it was held that as an agreement to convey land without consideration, upon the understanding that it should be reconveyed to the grantor's wife, either by deed or by will, had been executed on the one part by the making of the conveyance, it was by this part execution taken out from the operation of the statute of frauds. Compare *Teague v. Fowler*, 56 Ind. 569, hereinbefore set forth under heading, "Actual fraud."

And in *Gallagher v. Northrup*, 215 Ill. 563, 74 N. E. 711, where a father transferred land to a son without other consideration than his verbal agreement to reconvey to his mother, and the son never had possession, and under the agreement was

not to become entitled to possession, but the possession remained in the mother, it was held that she could, under these circumstances, invoke the aid of a court of equity to enforce the execution of a deed by the son.

In *Jeremiah v. Pitcher*, 26 App. Div. 402, 49 N. Y. Supp. 788, affirmed without opinion in 163 N. Y. 574, 57 N. E. 1113, where a real estate dealer having an insane wife, in order to deal in property free from any claim of dower therein on the part of his wife, who was incompetent to release it, purchased property in the name of his daughter, upon her promise to convey it as he might thereafter direct, it was held that equity would enforce the agreement, the court saying: "The case at bar does not come within the statute of frauds; it is a parol agreement, fully performed on the part of the plaintiff. He has paid the purchase price of this property, entered into possession, received the rentals and other incomes, paid the taxes, discharged the purchase-money mortgages making use of the property in his business as a dealer in real estate, for the benefit of himself and family, relying upon the promise of his daughter to reconvey such property upon his order, and the defendant cannot now plead the statute of frauds to protect her in the ownership of this property. The transaction took place under circumstances which made it impossible, without defeating the end which was sought, to have the trust appear in writing; under circumstances which peculiarly obligated the daughter to accept the trust; and the plaintiff having parted with the legal title to his property, with no intent to defraud, but to enable him to carry on his business advantageously, and thus to provide for his unfortunate wife and his family, a court of equity would fail in its duty if it refused to decree a specific performance on the part of the defendant of her part of the agreement."

The continued possession of the grantor is not such a part performance of an alleged parol agreement on the part of the grantee to hold the property for the grantor's benefit as will take the case out of the statute of frauds. *Spaulding v. Collins*, 51 Wash. 488, 99 Pac. 306.

Where a purchaser of land, having made partial payment, and being unable to complete the payment of the purchase money, procures a third person to loan or advance the money for that purpose, to whom he causes a conveyance to be made by his vendor, the title to be conveyed to him on repayment, and has been permitted to continue in possession of the land, and has repaid the money advanced, equity will compel the execution of the trust by enforcing specific performance of the contract. *Spies v. Price*, 91 Ala. 166, 8 So. 405.

In *Jenkins v. Eldredge*, 3 Story, 181, Fed. Cas. No. 7,266, where a vendee under a land contract, being unable to comply with its terms, procured a third person to aid him by satisfying the vendor and taking the title

himself, executing a release of his own claim, it was held that as the release would not have been executed but upon the faith that the property was to be held in trust for his benefit, its execution was a part performance of the agreement, which would take it out of the statute of frauds.

E. S. O.

KENTUCKY COURT OF APPEALS.

HERMAN LEWIS'S ADMINISTRATOR.
Appt.,
v.

BOWLING GREEN RAILWAY COMPANY.

(147 Ky. 460, 144 S. W. 377.)

Appeal — amendment — absence from record.

1. A suggested amendment to a pleading not made part of the record by order of court or bill of exceptions cannot be considered on appeal.

Carrier — rights of boy forcibly kept on car by motorman.

2. A street railway company is liable for the death of a boy whom the motorman in charge of the car has received for transportation to the police station, where he refuses to permit him to leave the car, and in attempting to restrain him from doing so the boy falls under the wheels and is killed, since the boy, being a passenger, is entitled to treatment as such, and to have the car stopped at his request to give him an opportunity safely to alight.

(March 12, 1912.)

APPEAL by plaintiff from a judgment of the Circuit Court for Warren County in defendant's favor in an action brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Note. — *LEWIS v. BOWLING GREEN R. Co.* seems to be a case of first impression as to the duty and liability of a carrier toward one who is detained upon its cars against his will; as a careful search has failed to disclose other cases discussing the question involved in that case.

The liability of a carrier for an assault by its servant upon a passenger while on its train is discussed in a note to *Houston & T. C. R. Co. v. Bush*, 32 L.R.A. (N.S.) 1201. And as to the liability of a carrier for an assault by an employee upon a passenger outside the car or train, see *Blomness v. Puget Sound Electric R. Co.* 17 L.R.A. (N.S.) 764, and note.

As to the liability of a carrier for the wrongful arrest of a passenger by its servant, see notes to *Schmidt v. New Orleans R. Co.* 7 L.R.A. (N.S.) 162, and *Moore v. Louisiana & A. R. Co.* 34 L.R.A. (N.S.) 299.

Messrs. Bradburn & Basham and J. H. Gilliam for appellant.

Messrs. T. W. Thomas, R. C. P. Thomas, and Sims & Rodes for appellee.

Nunn, J., delivered the opinion of the court:

This action was instituted by appellant against the Bowling Green Railway Company, Hubert Meyers, and W. C. Brownfield. Appellee filed a demurrer to the petition, and the court sustained it, and appellant offered to file an amended petition; but appellee objected, and the court sustained its objection and refused to allow it to be filed.

The amended petition was not made a part of the record by either an order of court or by a bill of exceptions; therefore it cannot be considered on this appeal, although it is copied into the record. *Hortman v. Covington & L. R. Co.* 18 B. Mon. 218; *Nolan v. Feltman*, 12 Bush, 119; *Dehoney v. Bell*, 17 Ky. L. Rep. 76, 30 S. W. 400; *Stafford v. Dyer County Bank*, 19 Ky. L. Rep. 155, 39 S. W. 708, and *McGrew v. Congleton*, 139 Ky. 515, 102 S. W. 1185. Therefore the only question for consideration is: Did the allegations of the original petition state a cause of action against the railway company?

It is not necessary for us to consider the petition with reference to the allegations against Meyers and Brownfield, as appellant, at the time he offered his amended petition, dismissed his action against them. The petition was inartfully drawn. We glean from it, however, the following facts: The railway company had a passenger car upon its track in the suburbs of Bowling Green, which was moved, or intended to be moved, through the city; that the car was stopped upon the track near the home of the parents of appellant's decedent, who was only thirteen years of age and small for his age; that Meyers and Brownfield forcibly took charge of the boy and dragged him to the rear of the car; that he was there received by the motorman of the car and dragged to the front platform; that the motorman held him with one hand and undertook to operate the car with the other; that he put the car in motion and ran it very fast; that he told the boy, while he was dragging him along the aisle of the car to the front platform, that he was going to take him downtown and deliver him to the police; that the boy was very much frightened and was crying; that he begged the motorman to let 39 L.R.A. (N.S.)

him off the car, and said he wanted to go home to his parents; that the motorman refused to let him off, and he attempted to leap from the car, and the motorman tried to jerk him back, which caused him to fall under the wheels of the car, which ran over and killed him. It was alleged that all this was wrongfully and negligently done; that the railway company was negligent in employing and placing on its car to manage and control it an inexperienced youth, with but little, if any, knowledge of how to operate and control cars propelled by electricity, and that the motorman, on account of his youth and inexperience, was not capable of discharging the duties assigned to him. Many other allegations were made in the petition; but it is unnecessary to refer to them. The allegations already referred to, admitted as they were by the demurrer, authorized a recovery on behalf of appellant.

Appellee's counsel contend that the railway was not responsible for assaults and batteries committed by its agents and servants. This is true when they are not committed in their line of duty, or in the apparent scope of their employment. It is true the petition says that Meyers and Brownfield assaulted the boy; that they laid violent hands upon him and put him on the rear platform of the car; that he was assaulted by the motorman of the car, who laid violent hands upon him and took him through the car to the front platform, as before stated. The petition gives the particulars of the assault and battery committed by the agent of the railway company. The facts alleged show that the boy was carried onto the car for the purpose of carrying him into the city; therefore he became a passenger, and the motorman should have exercised care to conduct him safely. If he had a right to receive him as a passenger, under the facts stated in the petition, he had no right to compel him to remain a passenger upon the car, and it was negligence upon the part of the motorman in not stopping the car, so the boy could get off, when he requested that it be done; and the motorman was negligent in jerking the boy, when he attempted to leap off the car, which caused him to fall under the wheels.

Therefore we are of the opinion that the lower court erred in sustaining the demurrer, and the judgment is reversed, and the case remanded for further proceedings consistent herewith.

LOUISIANA SUPREME COURT.

C. C. CORDILL

v.

MAYER ISRAEL, Appt.

(130 La. 138, 57 So. 778.)

Party wall — presumption — vacant property.

1. The presumption of article 677 of the Civil Code that a division wall betwixt two buildings is a wall in common does not apply to a division wall between a building and a vacant lot.

Same — payment for use — sale — warranty.

2. A division wall between a building and a vacant lot remains the exclusive property of the owner of the building until the owner of the adjoining lot pays its value or one half of the cost of construction. Where, in such a case, the owner of the vacant lot sells the same with the buildings and improvements thereon, the warranty clause of the deed does not cover that portion of the division wall resting on the vacant lot. *Quoad* the division wall, such sale transfers only the right of the vendor to make the division wall a wall in common by paying one half of its value or cost of construction.

(February 12, 1910.)

APPEAL by defendant from a judgment of the Civil District Court for the Parish of Orleans in plaintiff's favor in an action brought to compel contribution to the cost of a party wall. Affirmed.

The facts are stated in the opinion.

Messrs. Rouse, Grant, & Grant for appellant.

Messrs. Howe, Fenner, Spencer, & Cocke for New Orleans Real Estate, Mortgage, & Securities Company.

Land, J., delivered the opinion of the court:

Plaintiff sued the defendant for one half of the cost of a division wall, erected at the expense of the plaintiff, and used by the defendant in the construction of a building on his adjoining vacant lot.

Headnotes by LAND, J.

Note. — For cases on the question whether the mere existence of a party wall is sufficient to charge grantee with notice of agreement by predecessor to contribute to cost in event of using wall, see the note to *Hawkes v. Hoffman*, 24 L.R.A. (N.S.) 1038. For the general subject of enforcement of obligation to contribute to cost of party walls, by or against grantees or successors in title, see the note to *Cook v. Paul*, 66 L.R.A. 673.
39 L.R.A. (N.S.)

The defendant answered, denying liability, and averring that he purchased the adjoining lot with all the buildings and improvements thereon, including the portion of the party wall on his lot, with full warranty of title, from the New Orleans Real Estate, Mortgage, & Securities Company, called his "vendor in warranty."

The said company, for answer to the call in warranty, averred that it sold to defendant the vacant lot next to the building of the plaintiff, and that respondent did not sell or undertake to sell any interest in the adjoining wall of plaintiff's building. There was judgment in favor of the plaintiff against the defendant for \$2,453.92, with legal interest from May 20, 1909, until paid, and for costs, and also against the defendant on the call in warranty. The defendant has appealed.

Counsel for appellant admits the correctness of the judgment in favor of the plaintiff, and submits that the only question for this court to determine is the liability of the warrantor. The contention of the appellant is thus stated in his brief: "Where a lot of ground is sold with the buildings and improvements thereon, with full warranty, and the only buildings and improvements thereon, are the party walls erected on either side, the purchaser has a right to assume that he acquired by his purchase the right to use such party walls for the support of his buildings, without being obliged to pay the owners of the adjoining lots on either side for such use."

On the other hand, counsel for the warrantor contend that the defendant acquired by his purchase, so far as the adjoining wall of plaintiff was concerned, nothing more than a right to make it a party wall by paying one half of the value thereof.

It appears that the buildings on three lots fronting on Canal street were destroyed by fire. Buildings were reconstructed on two of the lots, leaving the intervening lot vacant. This vacant lot was purchased by defendant after the reconstruction of the building on either side. Plaintiff rested one half of his wall on the vacant lot, but had no right to compel the owner thereof to contribute to the raising of this wall. Civ. Code, art. 675. The vendor of defendant contributed nothing to the building of the wall, but preserved the right of making it a wall in common by paying to the plaintiff one half he had paid out for its construction. Civ. Code, art. 676. Hence it follows that the vendor of the defendant had no ownership in the wall that it could transfer to him or any other person. *Nemo plus juris ad alium transferre potest quam ipse habet*. Defendant does not dispute the

above proposition, but contends that his vendor nevertheless did transfer to him, with warranty, that portion of the wall that rested on the vacant lot. The argument of defendant is that such portion of the wall was included in the term "buildings and improvements thereon," used in the act of sale, and that the presumption was that the wall was one in common. In support of the last contention, the defendant cites article 677 of the Civil Code, which reads as follows: "Every wall which is a separation betwixt buildings as high as the upper part of the first story, or betwixt the yard and garden in the cities and towns, and their suburbs, of this state and even any other inclosure in the fields, shall be presumed to be in common, if there be no title, proof, or mark to the contrary."

On the face of this article, the presumption is only *prima facie*, and must yield to proof that the adjoining owner, claiming to own one half of the wall erected by his neighbor, did not contribute to the building of the wall, and has not paid one half of the cost of its construction. Moreover, the article relates to a wall which is a separation betwixt buildings, and neither the letter nor the reason of the law apply to a wall which rests in part on vacant ground.

Article 653 of the Code Napoléon reads as follows: "*Dans les villes et les campagnes, tout mur servant de séparation entre batiments jusqu'a l'herbage, ou entre cours et jardins, et meme entre enclos dans les champs, est présumé mitoyen, s'il n'y a titre ou marque du contraire.*"

This article corresponds substantially with article 677 of the Civil Code of 1870, which, however, contains the additional word "proof." Fuzier Herman, in his annotations under C. N. 653, cites the court of cassation and commentators to the effect that this presumption does not apply where there is an edifice on one side and a court or garden on the other, or where one of the buildings was constructed after the erection of the wall. See *Id.* vol. 1, pp. 901 and 902. We do not deem it necessary to consider the opposite views of a few of the French commentators.

Baudry-Lacantinerie, in commenting on the same article, argues that the law says between houses, then between yards and gardens; but it does not say between a house and a yard or a garden. An analysis of article 677 of our Civil Code will lead to the same conclusion. When plaintiff's wall was constructed, the lot now owned by the defendant was vacant, and there is no presumption in law or in reason that the wall was the common property of the plain-

tiff and the vendor of the defendant. In fact, the wall belonged to the plaintiff alone, and the defendant had no just reason for thinking otherwise when he purchased the adjoining vacant lot.

A dividing wall between yards and gardens necessarily benefits the adjoining proprietors from the time of its completion. It is otherwise with a division wall between a house and a vacant lot.

The contention of the defendant that his vendor sold him the portion of the wall resting on the vacant lot is repelled by the decision of the court, on rehearing, in the case of *Lavergne v. Lacoste*, 26 La. Ann. 509. This case was carefully considered, and, on rehearing, the opinion was handed down by Ludeling, Ch. J., who said, in part, as follows: "In our former opinion and decree, we refused to allow the plaintiff anything for the half of the cost of wall A. This was an error. When wall A was built, the owner of the contiguous lot refused to pay for the wall. The owner of that lot, however, could always make the wall a wall in common by paying half of its cost. He sold the lot to the plaintiff, who subsequently sold it to the defendant. Did said sales relieve the owner of the Burgunder lot from paying for the wall in common when he desired to use it? We think not. The right which the original owner had to make the wall a wall in common by paying for it, passed with the lot to the vendee, but nothing more. The vendor of the defendant did not sell his wall, but only the lot which he had bought from Burgunder."

The facts of that case may be briefly stated as follows:

In 1841, Blasco purchased a vacant lot, upon which he erected a building; the wall resting one half on his own lot and the other half on the adjoining lot. In 1859, the Lavergne minors purchased the Blasco lot, with the buildings and improvements thereon, and in the same year purchased the adjoining lot from Burgunder. In 1866, the Lavergne minors sold to Mrs. Lacoste the Burgunder lot. Immediately after her purchase, Mrs. Lacoste caused buildings to be erected on her lot, resting them on the wall of the building on the Blasco lot. The Lavergne minors brought suit to recover from Mrs. Lacoste one half of the value of said wall. Counsel for defendant argue that the sale in the *Lavergne-Lacoste* Case did not include the buildings and improvements. The answer is that a division wall between a building and a vacant lot forms no part of the buildings and improvements on the lot. Such a wall remains the exclusive property of the owner of the building

until the owner of the adjoining lot pays one half of its value or cost of its construction. In the Lavergne-Lacoste Case, *supra*, one of the justices dissented, and we do not consider the decision as having the weight of *stare decisis*. We, however, are of opinion that the *dictum* of the court in that case is fully sustained by reason and authority.

It is therefore ordered that the judgment below be affirmed, and that the defendant and appellant pay costs of appeal.

NEBRASKA SUPREME COURT.

ELIZABETH A. NEFF

v.

EMIL BRANDEIS, Appt.,

and

ARTHUR D. BRANDEIS.

(— Neb. —, 135 N. W. 232.)

Automobile — collision — owner's liability.

1. To sustain a recovery for injuries

Headnotes by BARNES, J.

Note. — *Liability of automobile owner for negligence of chauffeur furnished by third person.*

As indicated by the title, this note includes only cases which pass upon the liability of automobile owners for injuries resulting from the negligence of chauffeurs furnished by third persons. It does not include cases where the title to the automobile had not passed to one sought to be held liable, as, for example, where such a machine is being demonstrated for the purposes of sale at the time of the accident. Neither does the note cover the question of the liability of an owner for injuries caused by his automobile while it is being used by a servant or a third person for his own business or pleasure. The latter question is covered in the note to *Riley v. Roach*, 37 L.R.A.(N.S.) 834, and in the notes there referred to.

The question under consideration is also, of course, distinct from that involved in *Gerretson v. Rambler Garage Co.* — Wis. —, — L.R.A.(N.S.) —, 136 N. W. 186, and similar cases passing upon the question of who is liable for an injury occurring while a leased automobile is being driven by a chauffeur furnished by the lessor. In these cases the lessor is the owner of the car, for which he furnishes the chauffeur, whereas in the cases under consideration in this note the automobile is owned by one person and the chauffeur is furnished by another.

But two cases have been disclosed which deal with the question involved in the present note.

In *Norris v. Wolseley Tool & Motor Car* 39 L.R.A.(N.S.)

caused by being run down by an automobile owned by the defendant, the plaintiff must show by a preponderance of the evidence that the person in charge of the machine was the defendant's servant, and was at the time of the accident engaged in the master's business or pleasure, with the master's knowledge and direction.

Master and servant — chauffeur — borrowed car.

2. The defendant agreed with a third party, for a stated monthly compensation, to take charge of his automobile, keep it at a garage, wash it, polish it, keep it ready for running at all times, and furnish a chauffeur to the defendant whenever he might desire to use his car. Defendant loaned the car to another, and the keepers of the garage sent it out in charge of their man for the use of the borrower. After such use, and while the chauffeur was returning the car to the garage, he ran into a vehicle driven by the plaintiff and her husband, and injured her. Held, that at the time of the accident no such relation of master and servant or of principal and agent existed between the defendant and the chauffeur as would render defendant liable for such injuries.

(March 12, 1912.)

Co. (1907) 52 Sol. Jo. 116, cited in 2 *Butterworth's Dig. 834*, it was held that there was evidence upon which a jury could find that the chauffeur was the servant of a proprietor of a garage where the owner of the machine had contracted with such proprietor to garage his car and supply a chauffeur at so much a week, and, through the negligence of a chauffeur furnished, a person was injured while the car was being driven by the chauffeur for his own purposes; contrary to the orders of the owner of the car.

A different conclusion, however, was reached in *Perkins v. Stead*, 23 *Times L. R. 433*, where the facts were somewhat different.

In that case, where the defendant purchased and paid for a motor car and his vendor agreed to provide a driver to drive the car to a certain point outside of London and deliver it there, it was held that the driver, while managing the car on the way to that point, was under the control of the purchaser of the car, and that the latter was liable to one who was injured by it while under the control of the driver referred to. Quoting from 23 *Times L. R. 434*: "Mr. Justice Ridley, in giving judgment, said that they thought that the learned judge was right in his decision. It must be remembered that cases of this kind differed very materially in the particular facts upon which they arose. It was not very easy to reconcile all the cases, and he was not going to endeavor to do it. He wished to put what he had to say upon the ground given by *Lord Russell in Jones v. Scullard*, 14 *Times L. R. 580*, [1898] 2

A PPEAL by defendant Emil Brandeis from a judgment of the District Court for Douglas County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been sustained by plaintiff as the result of a collision with an automobile of which appellant was the owner. Reversed.

The facts are stated in the opinion.

Messrs. Greene, Breckenridge, & Maters, for appellant:

No such relation of master and servant or of principal and agent existed between the chauffeur and defendant as would render the latter liable.

State v. Sarlls, 135 Ind. 195, 34 N. E. 1129; Turner v. Cross, 83 Tex. 218, 15 L.R.A. 262, 18 S. W. 578; McCroskey v. Hamilton, 108 Ga. 640, 75 Am. St. Rep. 79, 34 S. E. 111; Kingan v. Silvers, 13 Ind. App. 80, 37 N. E. 414; Butler v. Townsend, 126 N. Y. 105, 26 N. E. 1017; Louisville & N. R. Co. v. Pendleton, 126 Ky. 605, 104 S. W. 382; Dorsey v. Redford, — R. I.

—, 67 Atl. 367; Doran v. Thomsen, 74 N. J. L. 445, 66 Atl. 897, 76 N. J. L. 754, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296; King v. New York C. & H. R. R. Co. 66 N. Y. 181, 23 Am. Rep. 37; Wyllie v. Palmer, 137 N. Y. 248, 19 L.R.A. 285, 33 N. E. 381; Higgins v. Western U. Teleg. Co. 156 N. Y. 75, 66 Am. St. Rep. 537, 50 N. E. 500; Lotz v. Hanlon, 217 Pa. 339, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 66 Atl. 525, 10 Ann. Cas. 731; Herlihy v. Smith, 116 Mass. 265; Cunningham v. Castle, 127 App. Div. 580, 111 N. Y. Supp. 1057; Jones v. Hoge, 47 Wash. 663, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915, 92 Pac. 433; Reynolds v. Buck, 127 Iowa, 601, 103 N. W. 946; Clark v. Buckmobile Co. 107 App. Div. 120, 94 N. Y. Supp. 771; Slater v. Advance Thresher Co. 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133.

Messrs. W. J. Connell and W. P. Thomas for appellee E. A. Neff. Mr. John L. Kennedy for appellee A. D. Brandeis.

Q. B. 565, 67 L. J. Q. B. N. S. 895, 79 L. T. N. S. 386, when he said: 'It is clear upon the authorities that it is not at all impossible for a man to be in the practical relation of servant to two different employers. It is clear that, although Loveday (the driver of the carriage in that case) was in the general employment of Walker (a livery stable keeper), he may at the time have been in the particular employment of the defendant, and the servant of the defendant in relation to the particular matter of driving the defendant's carriage. The question is whether he was so.' Dealing, in his judgment in the same case, with the case of Rourke v. White Moss Colliery Co. (L. R. 2 C. P. Div. 205), Lord Russell said: 'That case makes it quite clear that a man may be the general servant of one person and yet at the same time be the servant of another in relation to a particular matter, and it also shows that the important element whereby to determine whether he is the servant of the one person or of the other, in relation to the particular business on which he is engaged, is which of the two persons had the control of him in the conduct of that business.' Lord Russell, taking that as the principle which he had to apply, held that in the case before him, inasmuch as the brougham, the horse, the harness, and the livery belonged to the person hiring the services of the driver, there was evidence upon which a jury would be justified in coming to the conclusion that the driver was upon the occasion in question acting as the servant, not of the livery stable keeper, but of the person who hired him. In the present case there was no horse or harness, but they had the motor car and

the power in the machinery itself. Making the distinctions which it was necessary to make on account of the facts, the case was one, in his opinion, in which the driver who was lent for the purpose of taking the motor car to Barnet was in the position of being the servant of the defendant, whilst he still remained in his general character of servant to the Argyll Company. He failed to distinguish this case from Jones v. Scullard. The facts differed, but if the judge was right in saying that the bargain was complete, and that the defendant became the owner of the car and had possession of it, and that the servant of the Argyll Company was only lent for the purpose of taking the car to Barnet, he thought he was in the service of the defendant for this particular purpose. It was unnecessary to decide whether he also remained in the service of the Argyll Company at that time. They had before them, not the Argyll Company, but the defendant; and, applying the principle as well as he could, he thought the judge had arrived at the right conclusion, and the appeal must therefore be dismissed."

For a note on cartman as independent contractor, see note accompanying Burns v. Michigan Paint Co. 16 L.R.A.(N.S.) 816.

For a note on who is responsible for acts of drivers furnished with hired vehicles, see notes to Frerker v. Nicholson, 13 L.R.A.(N.S.) 1122, and Morris v. Tredo, 25 L.R.A.(N.S.) 33.

And see exhaustive note in 37 L.R.A. 33, on the general question as to which of two or more persons is master of another who is conceded to be the servant of one of them.

J. T. W.

Barnes, J., delivered the opinion of the court:

Action in the district court of Douglas county by Elizabeth A. Neff against Emil Brandeis and Arthur Brandeis to recover damages alleged to have been sustained by the plaintiff as the result of a collision with an automobile of which Emil Brandeis was the owner. There were two trials in the district court. On the first trial the jury were directed to return a verdict in favor of the defendant Arthur Brandeis, and upon the question of the liability of Emil the jury disagreed. On the second trial the plaintiff had the verdict and judgment, and the defendant (Emil Brandeis) has appealed.

It appears that in April, 1906, Emil Brandeis was the owner of two automobiles, one of which was called the "White Steamer," which was kept for him by the Powell-Bacon Automobile Company of Omaha, Nebraska, under an agreement which was described by Mr. Powell in substance as follows: "I was to wash the machine, polish it, store it, and keep it ready for running at all times. I was to furnish a man at any time Mr. Brandeis might call for it. Mr. Brandeis was to pay me so much a month for storing the machine, washing it, keeping it in good shape, and was also to pay me a stated sum for the man. Mr. Brandeis could call on the man,—for that man any time of day or night, and keep him as long as he wanted him. Mr. Brandeis said that he did not want to have the care of a man, to keep his eye on him all the time, and he would prefer to pay me a certain sum per month with the understanding that I should keep the man at work, but have him subject to his call. I told Mr. Brandeis that I was perfectly willing to do that; that a man would be at his call and disposal at any time he should phone or give instructions to have him sent out."

The defendant corroborated this statement, and further testified as follows:

Q. Who furnished the chauffeur that drove your cars on April 15, 1906, and prior to that time?

A. The Powell-Bacon Automobile Company.

Q. Did you have some agreement or arrangement under which the chauffeurs were furnished by them?

A. Yes, sir.

Q. What was it? State what was said as nearly as you can.

A. I kept my automobiles at the Powell-

Bacon garage. They looked after them in the way of furnishing oil and gasoline and repairs and extras, and furnishing the chauffeurs whenever I wanted to use the cars.

Q. How much did you pay? . . .

A. \$80 a month.

It appears from the record that on the 15th day of April, 1906, the defendant loaned his automobile to his brother, Mr. Arthur Brandeis; that he did not use or even see his car on that day.

Defendant also testified as follows:

Q. Who did use it, if you know?

A. My brother.

Q. Your brother, which one? A. D.?

A. A. D.

Q. That is Arthur Brandeis?

A. Yes, sir.

Q. State whether that car was used at all or out for your personal pleasure or business.

A. No, sir. . . .

Q. How did your brother Arthur happen to be using this machine on this particular day in question?

A. Well, he asked me, I believe it was in the forenoon, whether he could use my car, and I think he said he wanted to go out to his farm, and I said, "Yes," and he telephoned up to the Powell-Bacon garage.

Q. In other words, you loaned it to him for that afternoon?

A. Yes, sir.

Q. You made no use of it yourself at all?

A. No, sir.

With respect to the delivery and return of the machine, Mr. Brandeis further testified:

Why, I had an arrangement at any time I wanted to use either of the cars I would telephone, and they would furnish a man to take me out riding, and take the car back to the garage.

Q. Who would take the car back?

A. The man that ran it,—the chauffeur that ran the car.

Q. You may state whether or not the driver, Bell, Arthur Bell, who drove that car on the afternoon of the day when the collision with Mr. and Mrs. Neff occurred, had to your knowledge ever driven you?

A. Why, I did not know Mr. Bell.

Q. And had he to your knowledge driven either of your cars before this particular day?

A. I would not know that either.

Q. State whether or not you had the same chauffeur continuously?

A. No. The agreement was that they were to furnish any chauffeur they had there that was at leisure that they could furnish. There wasn't any particular chauffeur.

Q. So you would have sometimes one and sometimes another?

A. Yes, sir. . . .

Q. You had nothing to do with selecting the particular chauffeur for a particular trip?

A. No; I just telephoned them to send the car around.

It also appears that the defendant never paid the chauffeur anything, but paid the Powell-Bacon Company for his services, which payment was included in the \$80 per month, as above stated. It further appears that on the afternoon of the 15th day of April, 1906, the Powell-Bacon Company sent the defendant's automobile out in charge of a chauffeur named Arthur Bell, who testified that, acting upon the order of Mr. Powell, he took the car in question to the home of Arthur Brandeis, and waited there for some time; that Mr. Arthur Brandeis and his family came out, got into the car, and he drove them to Arthur's farm; that upon his return he left them at their home, and started to take the car back to the garage; that on his way there he had a collision with a vehicle driven by the plaintiff and her husband, which caused the injuries of which she complained.

On cross-examination Mr. Powell stated: "I cannot give the exact conversation, but the substance was that I told Mr. Brandeis that he could have the man any time he saw fit, and that the man would be subject to his direction when he left my place. . . . There was something said. I told Mr. Brandeis that he had the direction of the man, and that he was responsible for the man after he left my place."

On cross-examination the defendant gave the following testimony:

Q. It was your arrangement with the Powell-Bacon Company that while he was out in the service with your automobile, running it for you or your friends by your authority, that he was doing that for you, was it not? . . .

A. I presume so.

Q. And he would so continue to run the machine for you and by your authority until he returned the machine to the garage, was not that true? And is not that correct under the arrangements you had with the Powell-Bacon Company?

A. It would be if he took the car to the garage after he got through. . . .
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Q. Then after he got back to the garage and had delivered it, he then would be out of your direction and no longer subject to it, is that not correct?

A. Yes; Powell might send him out with some other man's car right away.

Q. When he came back and returned the machine to the garage, then he would no longer be subject to your control; his connection with you then ceased for the time being?

A. I suppose so.

The foregoing is the evidence, but not all of it, and about the facts thus established there seems to be no dispute. At the close of the evidence the defendant requested the court to instruct the jury to return a verdict in his favor. His motion was overruled, and that ruling is now assigned as error. It is strenuously contended by counsel that upon the evidence contained in this record there can be no recovery against the defendant. It appears from the pleadings and the evidence that this suit was brought against Emil Brandeis on the theory that Bell, the chauffeur, was his servant; and it is contended that the facts do not support that theory.

It is the well-settled rule that where one person has sustained an injury from the negligence of another, he must in general proceed against him by whose negligence the injury was occasioned. If, however, the negligence which caused the injury was that of a servant while engaged in his master's business, the person sustaining the injury may disregard the immediate author of the mischief and hold the master responsible for the damages sustained. The master selects the servant, and the servant is subject to his control, and, in respect to the civil remedy, the act of the servant is, in law, regarded as that of the master. But it is not enough, in order to establish a liability of one person for the negligence of another, to show that the person whose negligence caused the injury was, at the time, acting under an employment by the person who is sought to be charged. It must be shown, in addition, that the employment created the relation of master and servant between them. *King v. New York C. & H. R. R. Co.* 86 N. Y. 181, 23 Am. Rep. 37.

In *Wyllie v. Palmer*, 137 N. Y. 248, 19 L.R.A. 285, 33 N. E. 381, it was held that the doctrine of *respondent superior* applies only when the relation of the master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of some neglect or wrong at the time and in respect to the

very transaction out of which the injury arose. *Higgins v. Western U. Teleg. Co.* 156 N. Y. 75, 68 Am. St. Rep. 537, 50 N. E. 500; *Doran v. Thomsen*, 74 N. J. L. 445, 66 Atl. 897.

In *Lotz v. Hanlon*, 217 Pa. 339, 10 L.R.A. (N.S.) 202, 118 Am. St. Rep. 922, 66 Atl. 525, 10 Ann. Cas. 731, the court held that where plaintiff's suit is to recover for injuries received by being run down by an automobile owned by the defendant, he must show not only that the person in charge of the machine was the defendant's servant, but also that he was at the time engaged on the master's business with the master's knowledge and direction. It was said in the body of the opinion: "But it comes to nothing that the driver was the defendant's servant, if it appears that, at the time the accident happened, he was not on the master's errand or business."

In *Slater v. Advance Thresher Co.* 97 Minn. 305, 5 L.R.A. (N.S.) 598, 107 N. W. 133, the supreme court of Minnesota said: "The expression 'in the course of his employment' means, in contemplation of law, 'while engaged in the service of the master,' and nothing more. It is not synonymous with 'during the period covered by his employment.'"

Counsel for the plaintiff vigorously asserts that the cross-examination of the defendant and the witness Powell established the relation of principal and agent between the defendant and the chauffeur, and was sufficient to sustain the verdict. This seems to have been the theory upon which the trial court submitted the case to the jury.

We are of opinion that the testimony of witnesses on their cross-examination, and upon which plaintiff's counsel relies to sustain the judgment, is not sufficient to render the defendant liable for the negligence of the chauffeur. It did not change the terms of the agreement, as stated by the witnesses on their direct examination. It was nothing more than their opinion of the legal effect of that agreement. As such it was entitled to little, if any, consideration.

It must be remembered that the evidence clearly shows that the chauffeur whose negligence caused the injury of which the plaintiff complains was the hired servant of the Powell-Bacon Company, and not of the defendant; and where, as in the case at bar, the defendant had not used his car for any purpose, but had merely loaned it to another, and had no control over its movements or the conduct of the chauffeur, we are of opinion that the owner of the

car would not be liable for the negligence of the servant of another.

Again, it would seem clear, from the evidence, that if the chauffeur, in returning the defendant's car to the garage, had, by his negligence, injured or wrecked it, the Powell-Bacon Company, whose servant he was, would have been liable to the defendant therefor; and it cannot be said that the chauffeur was his agent to such an extent as to make defendant liable to third persons for the chauffeur's negligence while returning the car to the garage.

While the legal questions involved in this case have been often decided, it has been difficult to find an adjudicated case where the facts are the same as those in the case at bar. *Parsons v. Wisner* (Sup.) 113 N. Y. Supp. 922, is perhaps the nearest in point of any of the cases. There the owner of an automobile loaned it to his brother, and the keeper of a garage furnished the chauffeur to run it. The court, in passing on the liability of the owner, said: "Upon the case presented it is established by a clear preponderance of evidence that the chauffeur in charge of the machine at the time of the accident was not in the employ of the defendant, and never had been in his employ, and that he was not engaged in the business of the defendant, or under his direction and control, at that time." Upon the facts there stated and for those reasons, a judgment against the owner of the automobile was reversed. It appears that the rule there announced is approved and supported by *Babbitt, Law Applied to Motor Vehicles*, § 582; *Berry, Automobiles*, § 148; *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Supp. 1057; *Reynolds v. Buck*, 127 Iowa, 601, 103 N. W. 946. To hold the defendant liable upon the facts of this case, we are required to infer that the chauffeur whose negligence was the cause of the accident was at that point of time the servant of the defendant and under his control. We are of opinion that such an inference is too farfetched, and is not warranted by the evidence.

For the foregoing reasons, we are unable to sustain the judgment in this case upon either the law of master and servant, or of principal and agent. We are of opinion that the trial court erred in overruling the motion for a directed verdict. The judgment of the District Court is therefore reversed, and the cause is remanded for further proceedings in harmony with this opinion.

Letton, J., concurs in the conclusion.

IDAHO SUPREME COURT.

FRED B. DANIELS, Appt.,
v.
FRANK ENGLEHART, Resp't.

(18 Idaho, 548, 111 Pac. 3.)

Note — defense — failure of consideration.

1. The maker of a promissory note cannot avoid payment of the same on the grounds of failure of consideration, where the answer and proofs admit that there was not a total failure of consideration, and that he in fact received and retains a part of the consideration as the same was agreed upon.

Headnotes by AILSHIE, J.

Note. — Failure of consideration as a defense to action on a purchase price note.

- I. Distinction between action for purchase price and action on note for same, 938.
- II. Distinction between want and failure of consideration, 938.
- III. Doctrine that want or failure of consideration is defense, 939.
- IV. Doctrine that partial want or failure is no defense *pro tanto*.
 - a. In general, 943.
 - b. When amount is unliquidated, 945.
- V. Effect of warranty clause in contract.
 - a. In general, 946.
 - b. Rule that right is not affected by clause, 947.
 - c. Rule that remedy is limited to action on covenant, 948.
- VI. Statutory provisions, 948.
- VII. Pleading.
 - a. As affected by distinction between total want and partial want or failure of consideration, 949.
 - b. Necessity of special plea in order to make defense of total want or failure of consideration, 949.
 - c. Necessity of special plea in order to make defense of partial want or failure, 950.
 - d. Right to plead partial failure in bar of action, 950.
 - e. Right to prove partial failure of consideration under plea of total failure, 951.

I. Distinction between action for purchase price and action on note for same.

In *Obbard v. Betham, Moody & M.* 483, 8 L. J. K. B. 254, a distinction is made between an action for the price of goods and an action on a security given therefor, and it is said that in the former the value only can be recovered, while in the latter a full recovery may be had unless there has been a total failure of consideration, since 39 L.R.A.(N.S.)

Same — partial failure of consideration — remedies.

2. Where there has been a partial failure of consideration for the execution of a promissory note, the maker of the note, in order to obtain relief, must either rescind the contract and return the consideration received, or claim damages for breach of the contract, or pursue some remedy whereby the holder of the note may be enabled to receive just compensation for such part of the consideration as actually passed.

(September 19, 1910.)

APPEAL by plaintiff from a judgment of the District Court for Elmore County in defendant's favor in an action brought to recover the amount alleged to be

there can be no deduction for partial failure of consideration, as for inferiority of the article furnished to that ordered.

And *Washburn v. Picot*, 14 N. C. (3 Dev. L.) 390, quotes with approval from *Tye v. Gwynne*, 2 Campb. 346, to the effect that there is a distinction between the contract and the security. If part of the contract arises on a good consideration and part on a bad one, it is divisible, but it is otherwise as to the security, that being entire.

The objection to the defense of partial failure of consideration where the action is on a note given for the purchase price of property, while conceding that if the action is for the value of the property the defense is permissible, is not sound, and is now seldom, if ever, relied upon. It is answered in *Harrington v. Stratton*, 22 Pick. 510, wherein the court says: "It is difficult to perceive why the great principle upon which the necessity of a cross action was originally urged in such case, that the defense was founded upon an independent cause of action, is not substantially disregarded as much in the rule admitting evidence of a breach of warranty or fraudulent representation in reduction of damages, in the case of an action of assumpsit on a contract to pay for an article at an agreed price, as in a suit upon a promissory note given for the same article."

II. Distinction between want and failure of consideration.

A want of consideration for a note arises where the note at its inception was given and received without anything of value passing between the parties in consideration thereof, as where the note was given in payment of property the title to which has entirely failed owing to a defect therein at the inception of the note. *Hodgkins v. Moulton*, 100 Mass. 311. Failure of consideration, total or partial, occurs when a consideration good and sufficient at the time the agreement was made, by some

due on a certain promissory note. Reversed.

The facts are stated in the opinion.

Mr. E. M. Wolfe, for appellant:

The failure of the defendant to set up in his answer either a rescission of the contract by returning or offering to return the water right puts it beyond him to refuse the payment of the note.

Cowen v. Harrington, 5 Idaho, 329, 48 Pac. 1059.

A collateral contemporaneous agreement providing that the note should not be paid in the event that an executory contract which was the consideration of the note should not be performed does not defeat the negotiability of the note in the hands

of an indorsee, though he had notice of such agreement.

United States Nat. Bank v. Floss, 38 Or. 68, 84 Am. St. Rep. 752, 62 Pac. 751; Siegel, C. & Co. v. Chicago Trust & Sav. Bank, 131 Ill. 569, 7 L.R.A. 537, 19 Am. St. Rep. 51, 23 N. E. 417.

Failure of consideration after assignment is no defense.

Splivallo v. Patten, 38 Cal. 138, 99 Am. Dec. 358; 1 Beach, Priv. Corp. § 245.

Mr. J. G. Watts for respondent.

Allshie, J., delivered the opinion of the court:

This is an action on a promissory note. Plaintiff alleged that he was a bona fide

breach of contract, mistake, or accident, afterwards fails. Ibid.

In Washburn v. Picot, 14 N. C. (3 Dev. L.) 390, the language of Lord Ellenborough in Tice v. Gwynne, 2 Campb. 346, is quoted with approval, to the effect that there is a difference between want of consideration and failure of consideration, the former may be given in evidence to reduce the damages or defeat the plaintiff's action, the latter cannot, but furnishes a distinct and independent cause of action.

The distinction is also made in Walters v. Armstrong, 5 Minn. 448, Gil. 364, between partial failure of consideration and the want of consideration, and the former is said to presuppose a valid consideration to have been in existence at the inception of the note, while the want of consideration merely meant that the consideration at the inception of the note was inadequate or wholly lacking.

In Brown v. Roberts, 90 Minn. 314, 96 N. W. 793, however, it is said that a distinction has sometimes been made between a partial failure of consideration and a partial want of consideration, but that the latter is always a defense *pro tanto* as between the original parties to a note in an action thereon. And the general doctrine is also asserted that whatever doubt there may have been at one time on the question, in view of later decisions it must be held that a partial want or failure of consideration can be shown if properly pleaded as a defense *pro tanto* to a negotiable instrument in the hands of the original payee, or of a party standing in his shoes.

In Furber v. Fogler, 97 Me. 585, 55 Atl. 514, a distinction is made between want or failure of consideration, which is a complete defense or defense *pro tanto* to an action between the parties to a negotiable instrument, and the mere inadequacy of consideration, and it is said that the latter does not constitute a defense in whole or *pro tanto*.

As shown in the next subdivision, at the present time by the weight of authority no distinction is made between a want of consideration and a failure of consideration as 39 L.R.A. (N.S.)

regards the right to rely upon either as a defense to an action on a purchase price note. The one is now a defense to the same extent as the other.

III. Doctrine that want or failure of consideration is defense.

If the amount to be deducted is ascertainable, by the great weight of authority, even where not expressly authorized by statute, want or failure of consideration, total or partial, is a defense either *in toto* or *pro tanto* as the case may be, to an action on a note given for the purchase price of property, where the action is between the original parties or by a subsequent holder of the note chargeable with knowledge or notice of the equities of the buyer.

U. S.—Withers v. Greene, 9 How. 213, 13 L. ed. 109; Martin v. Bartow Iron Works, 35 Ga. 320, Fed. Cas. No. 9,157; American Nat. Bank v. Watkins, 56 C. C. A. 111, 119 Fed. 545, writ of certiorari denied in 190 U. S. 558, 47 L. ed. 1183, 23 Sup. Ct. Rep. 854; Williams v. Neely, 69 L.R.A. 232, 67 C. C. A. 171, 134 Fed. 1.

Ala.—Agnew v. Walden, 84 Ala. 502, 4 So. 672; Brown v. Freeman, 79 Ala. 406; Peden v. Moore, 1 Stew. & P. 71, 21 Am. Dec. 649.

Ark.—Wheat v. Dotson, 12 Ark. 699; Smith v. Capers, 13 Ark. 9; Keller v. Vowell, 17 Ark. 445.

Cal.—Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co. 120 Cal. 521, 65 Am. St. Rep. 186, 52 Pac. 995.

Ind.—Catlett v. McDowell, 4 Blackf. 556; Doremus v. Bond, 8 Blackf. 368; Davis v. Jackson, 22 Ind. 233; Schaffner v. Kober, 2 Ind. App. 409, 28 N. E. 871.

Iowa.—City Deposit Bank v. Green, 138 Iowa, 156, 115 N. W. 893.

Kan.—French v. Gordon, 10 Kan. 370; Scantlin v. Allison, 12 Kan. 85; Dodge v. Oatis, 27 Kan. 762; Thompson v. Wheeler & W. Mfg. Co. 29 Kan. 476.

Me.—Wadsworth v. Smith, 23 Me. 562; Herbert v. Ford, 29 Me. 546; Pratt v. Johnson, 100 Me. 443, 62 Atl. 242.

Md.—Beall v. Pearre, 12 Md. 550.

purchaser of the note prior to maturity. Defendant answered, admitting the execution of the note and that the same had not been paid, but denied that the plaintiff was a bona fide holder of the note by indorsement prior to maturity thereof. The defendant also alleged as a defense that the note was executed as part payment for a water right from the Great Western Beet Sugar Company, and that the company promised and agreed to construct reservoirs, canals, and ditches, and furnish the defendant with water for his tract of land, comprising 160 acres, which constituted the consideration for the note sued upon. It was also alleged in the answer that the

plaintiff was vice president and agent of the Great Western Beet Sugar Company at the time the contract was made and the note was executed, and that he had full knowledge of the consideration and the terms of the agreement entered into. The defendant by way of showing failure of consideration, alleged in paragraph 9 of his answer as follows: "That said ditch was not completed as agreed by the said Great Western Beet Sugar Company on the 31st day of May, 1907, and is not now completed of sufficient capacity to deliver water to this defendant and others entitled to water under said ditch, and that water was not delivered to the land of defendant

Mass.—Perley v. Balch, 23 Pick. 283, 34 Am. Dec. 56; Haycock v. Rand, 5 Cush. 26; Daggett v. Daggett, 8 Cush. 520; Burnett v. Smith, 4 Gray, 50; Davis v. Elliott, 15 Gray, 90; Stacy v. Kemp, 97 Mass. 166; Hodgkins v. Moulton, 100 Mass. 311; Davis v. Bean, 114 Mass. 358; Black v. Ridgway, 131 Mass. 80; Shoe & Leather Nat. Bank v. Wood, 142 Mass. 563, 8 N. E. 753.

Mich.—Sebring v. Hazard, 128 Mich. 333, 87 N. W. 257.

Minn.—Stevens v. Johnson, 28 Minn. 172, 9 N. W. 677; Nichols & S. Co. v. Soderquist, 77 Minn. 509, 80 N. W. 630; Brown v. Roberts, 90 Minn. 314, 96 N. W. 793.

Miss.—Rasberry v. Moye, 23 Miss. 320; Brewer v. Harris, 2 Smedes & M. 84, 41 Am. Dec. 587.

Mo.—Wade v. Scott, 7 Mo. 509; Barr v. Baker, 9 Mo. 850; Smith v. Busby, 15 Mo. 388, 57 Am. Dec. 207; Gamache v. Grimm, 23 Mo. 38; Copeland v. Loan, 10 Mo. 268; Catterlin v. Lusk, 98 Mo. App. 182, 71 S. W. 1109.

Neb.—Lanning v. Burns, 36 Neb. 236, 54 N. W. 427; Snyder v. Johnson, 69 Neb. 266, 95 N. W. 692.

N. M.—Staab v. Ortiz, 3 N. M. 33, 1 Pac. 857.

N. Y.—Earl v. Peck, 64 N. Y. 596; Gillespie v. Torrance, 25 N. Y. 306, 82 Am. Dec. 355; Spalding v. Vandercook, 2 Wend. 431; Burton v. Stewart, 3 Wend. 236, 20 Am. Dec. 692; Judd v. Dennison, 10 Wend. 512; Payne v. Cutler, 13 Wend. 605; Battersman v. Pierce, 3 Hill, 171; Carter v. Hamilton, Selden, Notes, 251, reversing, 11 Barb. 147; Sawyer v. Chambers, 43 Barb. 622; Buhrman v. Baylis, 14 Hun, 608.

Okla.—Hagan v. Bigler, 5 Okla. 575, 49 Pac. 1011.

Or.—Davis v. Wait, 12 Or. 425, 8 Pac. 356.

Pa.—Steinhauer v. Witman, 1 Serg. & R. 438; Steigleman v. Jeffries, 1 Serg. & R. 477, 7 Am. Dec. 626; Hart v. Porter, 5 Serg. & R. 201.

S. C.—Gray v. Handkinson, 1 Bay, 278; Barnes v. Shelton, Harp. L. 33, 18 Am. Dec. 642; Rouse v. Sarratt, 74 S. C. 575, 54 S. E. 757.

Tenn.—Edwards v. Porter, 2 Coldw. 42, 39 L.R.A.(N.S.)

Tex.—Williams v. Finley, 99 Tex. 468, 90 S. W. 1087; Blanks v. Ripley, 8 Tex. Civ. App. 156, 27 S. W. 732; Stribling v. Gray, —Tex. Civ. App.—, 81 S. W. 789; Nations v. Thomas, 25 Tex. Supp. 221.

Wash.—Bay View Brewing Co. v. Tecklenberg, 19 Wash. 469, 53 Pac. 724.

Wis.—Norton v. Rooker, 1 Pinney (Wis.) 195; Butler v. Titus, 13 Wis. 430; Griffiths v. Parry, 16 Wis. 219; Peterson v. Johnson, 22 Wis. 21, 94 Am. Dec. 581; Steckbauer v. Leykom, 130 Wis. 438, 110 N. W. 217.

Eng.—Forman v. Wright, 11 C. B. 488, 20 L. J. C. P. N. S. 145, 15 Jur. 706; Agra & M. Bank v. Leighton, L. R. 2 Exch. 56, 4 Hurlst. & C. 656, 36 L. J. Exch. N. S. 33.

And failure of consideration may be used as a defense to mitigate the amount of recovery in an action on a note given for the property, for which some benefit admittedly has been received. Hansford v. Mills, 9 Port. (Ala.) 509.

Beall v. Pearre, 12 Md. 550, holds that the maker of a note given for the purchase price of personality may defend an action upon it by showing, in mitigation of the amount to be recovered thereon, a partial failure of consideration, and that this is the only remedy; he cannot bring a separate action for fraud or breach of warranty, even though he attempted to make the defense of partial consideration, and was erroneously denied the right to do so by the trial court.

The reason for permitting the defense of partial failure of consideration in an action on a note given for the purchase price of an article is well stated in Harrington v. Stratton, 22 Pick. 510. On this point it is said: "The strong argument for the admission of such evidence in reduction of damages in cases like the present is that it will avoid circuity of action. It is always desirable to prevent a cross action where full and complete justice can be done to the parties in a single suit, and it is upon this ground that the courts have of late been disposed to extend to the greatest length compatible with the legal rights of the parties, the principle allowing evidence in defense or in reduction of damages to be introduced, rather than to compel the de-

prior to the 31st day of May, 1908, and has not yet been delivered to said defendant in any sufficient quantity to water said land, or in any quantity whatever more than sufficient to water $1\frac{1}{2}$ acres as above stated."

The plaintiff moved for judgment on the pleadings, and this motion was predicated on the theory that the answer did not show a failure of consideration, and that, under the authority of *Cowen v. Harrington*, 5 Idaho, 329, 48 Pac. 1059, and *Caldwell v. Ruddy*, 2 Idaho, 5, 1 Pac. 339, the defendant could not successfully defend on the ground of want of consideration, where his answer showed on its face that a part

consideration had in fact been received, and that there had not been a total failure of consideration, and that defendant had not returned the water contract and consideration received, and had never attempted to rescind the contract, and set up no claim, by way of cross complaint or otherwise, for damages for breach of the contract. Under the authority of *Cowen v. Harrington* and *Caldwell v. Ruddy*, supra, the answer was not sufficient to defeat plaintiff's recovery on the grounds of failure of consideration. A party cannot execute his promissory note, and let the matter run until after its maturity and suit is brought on it, and then successfully defend on the

defendant to resort to his cross action. As it seems to us, the same purpose will be further advanced, and with no additional evils, by adopting a rule on this subject equally broad in its application to cases of actions on promissory notes between the original parties to the same, as to actions on the original contract of sale, and holding that, in either case, evidence of false representations as to the quality or character of the article sold may be given in evidence to reduce the damages, although the article has not been returned to the vendor. Under the rules of this court, the plaintiff may require notice of the defense relied upon to be given seasonably, to prevent surprise, and thus obviate all objections arising from that source."

And in *Peden v. Moore*, 1 Stew. & P. 71, 21 Am. Dec. 649, one of the early cases on the subject, the doctrine is asserted that "wherever a defendant can maintain a cross action for damages on account of a defect in personal property purchased by him, or for a noncompliance by the plaintiff with his part of the contract, he may in defense to an action upon his note, made in consequence of such purchase or contract, claim a deduction corresponding with the injury he has sustained."

On the same point, and in holding that a partial failure of consideration for a note given for goods sold and delivered is a good defense *pro tanto* in a suit between the parties to the note, in *Wadsworth v. Smith*, 23 Me. 562, the court reasons: "Why should the payee recover the full amount of the bill, when it is perceived that he will be obliged to return a part of that amount upon a recovery against him by the defendant in another suit, and that suit arising out of no covenant of a higher nature, and expressly affording a remedy, as it would in the case of a suit upon a note given for the price of real estate conveyed? It is no sufficient reason to allege that he might be surprised by the defense of a partial failure of the consideration; for it is admitted that he must expect to be prepared for the defense of a total failure; and one can rarely occasion greater surprise than the other."
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Courts are to be presumed so to administer the law as to prevent injustice by the surprise of a defense which could not have been anticipated. It is not perceived that there can be more difficulty or inconvenience in receiving and acting upon the testimony to prove a partial failure of consideration, when the suit is upon the bill or note, than when it is for the price of goods sold and delivered. In both cases, by admitting the defense, circuity of action may be avoided. There may not unfrequently be absolute injustice in the exclusion of such a defense. The promisee or payee may be destitute of all other property than the bill or note, or be otherwise so situated that to refuse to admit such a defense is for all beneficial purposes to refuse all means of redress to the party aggrieved."

The rule is thus stated in *Hathorn v. Wheelwright*, 99 Me. 351, 59 Atl. 517, 2 Ann. Cas. 428: "Whenever a promissory note is given for two or more independent considerations, and there is a failure of consideration as to one, as where the title to one of the articles sold is not in the vendor at the time of the sale, or where there is a breach of warranty or a misrepresentation as to quality, for the purpose of avoiding circuity of action the law will allow the defendant, in an action between the original parties, or between others standing in no better position, to show such partial failure of consideration in reduction of damages."

A failure of consideration, either total or partial, is a defense complete or *pro tanto* to an action at law on a note, since such defense may diminish the multiplicity and circuity of actions, which it is the policy of the law to discourage. *Brewer v. Harris*, 2 Smedes & M. 84, 41 Am. Dec. 587. The defendant, if he can establish a total failure of consideration, is entitled to a general verdict in his favor; if he establishes only a partial failure of consideration, he is entitled to a deduction in accordance with the facts. *Byrd v. Campbell Printing-Press & Mfg. Co.* 94 Ga. 41, 20 S. E. 253.

The early rule as stated by the Minnesota court was that where the consideration

ground of want of consideration, where he himself admits that there was not a total failure of consideration, and that he in fact received a part of the consideration. He certainly has a remedy unless the note has passed into the hands of an innocent third party, and in this case the evidence was sufficient from which to conclude that plaintiff was not an innocent holder of the note. But the maker of the note cannot retain such consideration as he has received, and at the same time successfully resist the payment of the obligation. He must either rescind, or seek damages for breach of the contract, or pursue some other rem-

edy which will permit the party to whom the obligation is due to receive such compensation as is justly due him under the contract, or have a return of the consideration.

The judgment is reversed, and the cause is remanded, with direction to the trial court to permit the defendant to amend his answer, or to file a cross complaint, if he sees fit so to do.

Judgment reversed, with costs in favor of appellant.

Sullivan, Ch. J., concurs.

in a note was admittedly a valuable one, in the absence of fraud or mistake the note is not subject to impeachment for partial want or failure of consideration. Leighton v. Grant, 20 Minn. 345, Gil. 298. In Walters v. Armstrong, 5 Minn. 448, Gil. 364, the rule is asserted that a partial want of consideration or mere inadequacy of consideration cannot be interposed as a defense to a note. Walters v. Armstrong is referred to in Torinus v. Buckham, 29 Minn. 128, 12 N. W. 348, and it is pointed out that that was a case of partial want of consideration, rather than of partial failure of consideration. And the doctrine therein asserted is held not to apply to a case involving a note the consideration for which has partially failed. And in Stevens v. Johnson, 28 Minn. 172, 9 N. W. 677, the rule is asserted that the better doctrine is that partial want or failure of consideration may be shown in defense to an action on notes although negotiable, if in the hands of the original holder or other person affected by the equities existing between the parties; and it is said that a partial want or failure of consideration may properly be pleaded and proved in defense, to reduce the damages recoverable. And the rule now obtains that want or partial failure of consideration, if properly pleaded, may be shown as a defense in whole or *pro tanto*, in an action on a negotiable instrument; and in later decisions it is said that while a distinction has sometimes been made between a partial failure of consideration and a partial want of consideration, either is a defense *pro tanto* as between the original parties to the note or holder with notice. Brown v. Roberts, 90 Minn. 314, 96 N. W. 793; Nichols & S. Co. v. Soderquist, 77 Minn. 509, 80 N. W. 630. And this is true although the note is given for the purchase price of real estate. Durrant v. Tuttle, 50 Minn. 426, 52 N. W. 909; Torinus v. Buckham, 29 Minn. 128, 12 N. W. 348.

In New York it has been said that the defense of total failure of consideration is proper, but where the consideration is only partial the defense can go only by way of recoupment, which, except for the form of pleading, means substantially the same 39 L.R.A. (N.S.)

thing. Batterman v. Pierce, 3 Hill, 171. But this distinction is not maintained by the New York cases. Thus, Spalding v. Vandercook, 2 Wend. 431, holds that partial failure of consideration may be given in evidence to reduce the amount of complainant's recovery in an action on a note; and reference is made to Beecker v. Vrooman, 13 Johns. 302, holding that deceit in a sale of the chattel may be shown in bar or in mitigation, and it is said that the same principle will admit the defense of partial failure of consideration. And in Burton v. Stewart, 3 Wend. 236, 20 Am. Dec. 692, partial failure of consideration of a note is held a proper defense *pro tanto* in a suit on a note between the parties, thereto, where notice of the defense is given. And the rule is stated in Lewis v. Wilson, 1 Edw. Ch. 305: "In an action at law founded upon the original consideration of a sale, or upon the security given for the purchase money, the defendant may give in evidence under a notice with his plea, a fraud or deceit in the sale, or a breach of warranty, and may show a total or partial failure of consideration; and he will either defeat the action altogether, or lessen the amount of the recovery against him, according to circumstances."

Another court drawing the same distinction as the early New York case mentioned (Batterman v. Pierce) holds that a failure of consideration, to be a defense to an action on a note, must be total, and when some portion of the consideration yet remains, the defense can go in only by way of recoupment of damages for the partial failure. Packwood v. Clark, 2 Sawy. 546, Fed. Cas. No. 10,656.

A distinction has sometimes been made between cases involving a partial failure of the consideration for a note given for personal property, and when given for real estate. This distinction is made in Herbert v. Ford, 29 Me. 546, holding that partial failure of consideration is a defense *pro tanto* to an action on a note given for the purchase price of property other than real estate, conveyed by instrument containing covenants of warranty; and it is unnecessary in making this defense that there

should be a restoration by the defendant of what he received under the contract. Other cases drawing the same distinction may be found under subdivision v. c.

And in *Peden v. Moore*, 1 Stew. & P. 71, 21 Am. Dec. 649, it is said that "when real estate is the consideration, the law perhaps is different, and a partial defect in title, so long as the contract is unrescinded, could not be alleged as a defense to an action for the purchase money; and this difference is to be attributed to the extensive jurisdiction exercised by chancery over the title to real estate, by causing it to be perfected; and to the additional cause that the vendee sustains no injury by a defect of title so long as he retains the possession."

But by the weight of authority a partial failure of consideration for a note given for the purchase price of real estate may be availed of as a defense *pro tanto* in an action on the note, to the same extent as when the consideration of the note is personal property. *Durment v. Tuttle* and *Torinus v. Buckham*, supra.

In an early Georgia case it is held that in an action on a note given for the purchase price of land, partial failure of consideration is no defense. *Jordan v. Jordan*, *Dudley* (Ga.) 181. At least, unless that part which has failed may be clearly and distinctly ascertained. *Hinton v. Scott*, *Dudley* (Ga.) 245. But in *Gauldin v. Shehee*, 20 Ga. 531, it is held that the defense of partial failure of consideration may be made in an action on a note for the purchase price of land, where the failure of consideration is based upon misrepresentations as to the quantity of the land. And the general rule is asserted in *Satterfield v. Spier*, 114 Ga. 127, 39 S. E. 930, that partial failure of consideration is a good defense *pro tanto* to an action on a note given for the purchase price of land, where it is specially pleaded. And this rule is recognized in *Krauss v. Flournoy*, 7 Ga. App. 322, 66 S. E. 805. In other cases it is held that the general rule sustaining the right to reduce the amount to be recovered by showing a partial failure of consideration applies to an action on a note given for the purchase price of real estate, where the partial failure does not relate to the title. *Wheat v. Dotson*, 12 Ark. 699; *Smith v. Capers*, 13 Ark. 9.

So, where there is a partial failure of the consideration for a note given for land, it may be relied upon as a defense *pro tanto* to the note where not based upon a defect in the title, but some other fact, such as fraud or misrepresentation. As where the purchaser obtains a perfect title to the whole estate and yet finds the estate to be different from what it was fraudulently represented to be, he can have no remedy upon any covenants usually found in the conveyance, and hence must rely upon the remedy which the law provides. This might be by independent action for the fraud, but to avoid circuity of action, as well as to protect the purchaser against insolvency of

the grantor, the former may make his defense in an action by the latter on the note given for the land. *Hammatt v. Emerson*, 27 Me. 308, 46 Am. Dec. 598, followed in *Coburn v. Ware*, 30 Me. 202; *Morrison v. Jewell*, 34 Me. 146; *Thompson v. Mansfield*, 43 Me. 490; *Hodgdon v. Golder*, 75 Me. 293.

It has been held that a failure of the consideration of a purchase price note, in whole or in part, after a valid assignment thereof before maturity, will not avail the makers as a defense in a suit by the assignee, even though the latter had full knowledge of the original consideration for which the note was given prior to acquiring it. *Spilvallo v. Patten*, 38 Cal. 138, 99 Am. Dec. 358.

IV. Doctrine that partial want or failure is no defense *pro tanto*.

a. In general.

In other jurisdictions, while it is conceded that total failure of the consideration for a note given for the purchase price of property is a defense *in toto* to an action on the note, it is, however, apparently denied that a partial failure of consideration constitutes a defense even *pro tanto*, and the defendant is denied the right to assert such a defense either under a general plea or by a special plea or answer.

U. S.—*Boone v. Queen*, 2 Cranch, C. C. 371, Fed. Cas. No. 1,643; *Varnum v. Mauro*, 2 Cranch, C. C. 425, Fed. Cas. No. 16,889; *Greenleaf v. Cook*, 2 Wheat. 13, 4 L. ed. 172; *Scudder v. Andrews*, 2 McLean, 464, Fed. Cas. No. 12,564. But see later Federal cases, supra, III.

Del.—*Mills v. Gilpin*, 2 Harr. (Del.) 32. D. C.—*Brown v. Ohio Nat. Bank*, 18 App. D. C. 609.

Ky.—*Ousley v. Beasley*, 4 Bibb, 277; *Coleman v. Harper*, 1 A. K. Marsh. 602; *Wood v. Waters*, 1 Litt. 176, 13 Am. Dec. 228; *Wise v. Kelly*, 2 A. K. Marsh. 545; *Ball v. Jackson*, 1 A. K. Marsh. 176; *Williams v. Briscoe*, 1 A. K. Marsh. 168.

N. J.—*Bouker v. Randles*, 31 N. J. L. 335; *Allen v. Bank of United States*, 20 N. J. L. 620, disapproved in *Wyckoff v. Runyon*, 33 N. J. L. 107 (quoted from *infra*).

N. C.—*Jones v. Rhea*, 122 N. C. 721, 30 S. E. 346; *Johnston v. Smith*, 86 N. C. 498; *Evans v. Williamson*, 79 N. C. 86; *Washburn v. Picot*, 14 N. C. (3 Dev. L.) 390.

W. Va.—*Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917.

Eng.—*Morgan v. Richardson*, 1 Campb. 40, note, 7 East, 482, 3 Smith, 487, 10 Revised Rep. 624, note; *Archer v. Bamford*, 3 Stark. 175, 1 L. J. K. B. 228; *Obbard v. Betham*, *Moody & M.* 483, 8 L. J. K. B. 254. But see English cases, supra, III.

Disapproving the doctrine that partial failure of consideration is not a defense *pro tanto*, *Beasley*, Ch. J., in *Wyckoff v. Runyon*, 33 N. J. L. 107, remarked that "it has never given satisfaction either to the bench or to the legal profession. And it would

have been singular if this distaste of the rule had not prevailed, for to reject a defense merely on the ground that a note has passed between the parties, in cases in which such defense would otherwise be legitimate, certainly savors more of superfluous refinement than of practical wisdom. In the absence of the note now in suit, a partial failure of the subject of the sale could have been shown as a defense *pro tanto*. Why then between the same parties should the giving of the note cut off such defense? There is clearly no more inconvenience in trying the question of a partial failure of consideration in the one case than in the other; nor is a plaintiff in any degree more liable to be taken by surprise when his action is based upon a note than he would be if he resorted to the consideration of the note as the foundation of his action. While, on the other hand, the obvious inconvenience, not to say palpable injustice, of the operation of the rule in question, is often painfully manifest. Its inevitable result, whenever applied, is to double litigation, for the failure of the consideration, the proof of which is excluded, lays the ground for a cross action; and in those cases in which the plaintiff in the first suit chances to be insolvent, such cross action fails altogether to retrieve the money which has been unjustly taken from the defendant. In such a formula I can see nothing but an obstacle to the attainment of an ultimate decision on the merits of the case."

While the foregoing cases may be said to sustain the doctrine as stated and language is to be found in the opinions supporting the same, yet it cannot be said that the opinions are entirely clear on the subject. The difficulty is that, as a rule, the facts appearing in the opinions in many of the cases do not clearly show whether or not the court had squarely before it the question whether a partial failure of consideration was a good defense *pro tanto* to an action on a note if properly pleaded, although as stated the reasoning of the court sustains the doctrine that a partial failure, even under such circumstances, is not a defense *pro tanto*. The same, however, may also be said of *Pulsifer v. Hotchkiss*, 12 Conn. 234, and yet in a later case in that court (*Avery v. Brown*, 31 Conn. 398), it is pointed out that this was really not the point before the court, and that it is not authority for this doctrine.

The *Pulsifer* Case has frequently been construed as supporting the doctrine that partial failure of consideration is not a defense *pro tanto* in an action on a note. Although there is language used in the opinion which gives some support to this view, the opinion as a whole, however, indicates that the question the court was really considering was whether a partial failure of consideration, the amount of which was unliquidated, was a bar to an action on a note, rather than whether or not it could be availed of in mitigation of the amount sought to be recovered; and this has been

the construction placed upon this decision in later decisions by the same court.

In *Avery v. Brown*, it is said that the *Pulsifer* Case "has sometimes been misunderstood, and we think does not sustain the position to support which it was cited by the counsel in the case before us. It was not in that case decided that the defendant could take no advantage of the plaintiff's false and fraudulent representations and the consequent failure of consideration for the note, because he had not repudiated the contract and restored or offered to restore the consideration, such as it was, to the plaintiff; but only that if the failure of consideration was partial only, and not entire, he could in that particular case take no advantage of such partial failure, because the defendant's damage, or the amount to be deducted from the plaintiff's demand, was merely conjectural, unliquidated, and incapable of liquidation by any known rule.

The judge does not mean, as the counsel assume, that if the partial failure of consideration was owing to the plaintiff's fraud, no advantage could be taken of it to reduce the plaintiff's recovery, because the defendant had not repudiated the contract and restored the consideration, but because the amount to be deducted was unliquidated, and incapable of liquidation by any known rule. . . . When personal property is sold with a warranty of soundness, and proves unsound, and suit is brought for the price of it, the defendant's damages by reason of such unsoundness are in one sense unliquidated and uncertain, but *id certum est quod certum reddi potest*. . . . There is no more difficulty in showing by evidence the damages which a party has sustained by reason of another's fraud or breach of contract in relation to the quantity, quality, or value of property of either kind, when as a defendant he seeks to have that damage applied in reduction of the plaintiff's claim against him for the stipulated price of such property, than there is when the purchaser sues for the recovery of the same damages in another suit."

The fact that the Connecticut decision referred to shows that the earlier Connecticut case on this point has been misconstrued raises a question as to whether or not other cases which also seemingly passed upon the point really had the question presented. Thus, in the opinions in the following cases, language may be found sustaining the general doctrine as stated; nevertheless a close examination of the cases fails clearly to show that the specific question was raised. The facts as they are disclosed in the opinions, would seem rather to indicate the real question before the court to have been whether a partial failure of consideration was a complete defense to the action, or whether the defense could be made under the pleadings.

In *Brown v. Ohio Nat. Bank*, 18 App. D. C. 609, the rule is stated that it is settled law that failure of consideration must be total to constitute a good defense to an action upon a promise, the case in this respect

citing and relying upon *Greenleaf v. Cook*, 2 Wheat. 13, 4 L. ed. 172.

And *Mills v. Gilpin*, 2 Harr. (Del.) 32, holds that partial failure of consideration cannot be set up as a defense to an action on a bill, but it must be the subject of a cross action.

In an action on a bill of exchange for goods purchased, a partial failure of consideration based on the bad quality of the goods is no defense. *Morgan v. Richardson*, 1 Campb. 40, note, 7 East, 482, 3 Smith, 487, 10 Revised Rep. 624, note. To the same effect, see *Tye v. Gwynne*, 2 Campb. 346.

Neither the defense of entire or partial failure of consideration may be made to an action on a note, unless there has been a rescission or an offer to rescind the contract out of which the note grew. *Stone v. Peake*, 16 Vt. 213; *Burton v. Schermerhorn*, 21 Vt. 289. And the rule is settled in Vermont that a partial failure of consideration is no defense, even *pro tanto*, unless the amount of the failure is liquidated. See *infra*, 6.

This doctrine, however, was questioned and disapproved in *Kelly v. Pember*, 35 Vt. 183, wherein, referring to the rule that a partial failure of consideration is no defense to a note where there has been no offer to rescind the contract, *Peck, J.*, says: "I never could see why such defense ought not to be allowed in actions on notes and bills of exchange as well as in other actions, except where the suit on such paper is by an innocent holder for value. If there is such a rule, there ought not to be; it is sustained by no principle of policy, convenience, or justice. While a promissory note remains in the hands of the original contracting parties, there is no sound reason why it should receive any more protection or immunity in this respect than any other contract."

d. When amount is unliquidated.

The New Hampshire court, while holding that partial failure is a good defense if the amount is liquidated (*Earl v. Page*, 6 N. H. 477, 28 Am. Dec. 711; *Haseltine v. Guild*, 11 N. H. 390), denies that a mere partial failure of consideration constitutes a defense to an action on a note given for the purchase price of the property, where the amount is not liquidated. *Chase v. Weston*, 12 N. H. 413 (note given for land conveyed with covenants of warranty; breach of warranty relied on for failure of consideration); *Fletcher v. Chase*, 16 N. H. 38 (facts similar to the preceding case); *Riddle v. Gage*, 37 N. H. 519, 75 Am. Dec. 151; *Nichols v. Hunton*, 45 N. H. 470 (Partial failure of consideration, if the amount is fraud); *Pike v. Taylor*, 49 N. H. 124.

It makes no difference whether the note is given for personality or realty; partial failure of consideration, if the amount is not liquidated or readily subject to computation, does not constitute a defense to the

note. *Riddle v. Gage*, 37 N. H. 519, 75 Am. Dec. 151.

Thus, where a note is given for different tracts or parcels of land, and the title as to one of the tracts entirely fails, and hence the amount of the failure of consideration may be ascertained by mere computation, a defense of partial failure of consideration can be made as to such parcel, but not as to the other parcels where there has been a partial failure merely. *Drew v. Towle*, 27 N. H. 412, 59 Am. Dec. 380.

But now, by statute, partial failure of consideration, wherever total failure or want of consideration would be a defense, is also a defense, and the amount need not be liquidated. *Pike v. Taylor*, 49 N. H. 124; *Butler v. Northumberland*, 50 N. H. 33.

In Vermont, except as changed by statute, the rule obtains that partial failure of consideration is not a defense *pro tanto* to an action on a note, unless the amount to be deducted by reason of the failure is liquidated or of certain computation. *Walker v. Smith*, 2 Vt. 539; *Stone v. Peake*, 16 Vt. 213; *Richardson v. Sanborn*, 33 Vt. 75; *Foster v. Phaley*, 35 Vt. 303; *Thrall v. Horton*, 44 Vt. 386; *Hoyt v. McNally*, 66 Vt. 39, 28 Atl. 417; *Craigie v. Hall*, 73 Vt. 104, 50 Atl. 806.

In order that the defendant be entitled to an abatement from the sum for which a note is given, in assessing the damages in an action thereon, fraud must be shown in procuring the note for the sum named, and an offer by the defendant to rescind, also the ability by computation to fix the amount to be deducted. *Harrington v. Lee*, 33 Vt. 249.

Partial failure of consideration is no answer to an action on a note given for the purchase price of an article, unless the amount is certain and liquidated. *Goldie & Mc. C. Co. v. Harper*, 31 Ont. Rep. 284. The amount sought to be deducted must be liquidated and a matter of definite computation. *Day v. Nix*, 9 J. B. Moore, 159, 2 L. J. C. P. 133.

Thus, a plea to an action on a bill of exchange, in substance that the defendant accepted the bill on the faith of the goods being shipped at certain times, some of which were shipped, but not all, but admitting acceptance and liability for those shipped, constitutes a good defense *pro tanto* to the action, the plea clearly showing the value of the goods received and accepted. *Agra & M. Bank v. Leighton*, L. R. 2 Exch. 56, 4 Hurlst. & C. 656, 36 L. J. Exch. N. S. 33. In reaching this conclusion, the court points out that it is not intended to throw doubt upon the cases holding that, where the defendant seeks to discharge himself on the ground of partial failure of consideration he cannot do so by setting up partial failure where based upon unliquidated damages.

In *Pulsifer v. Hotchkiss*, 12 Conn. 234, in an action of assumpsit in which the general issue is pleaded, the rule is recognized that the amount to be recovered on a note given for the purchase price of property may be

reduced by showing a partial failure of consideration if the amount is liquidated.

Where the parties have agreed upon the amount, a partial failure of consideration may be relied upon as a defense *pro tanto*, but not where the extent of the failure is open. *Elminger v. Drew*, 4 McLean, 368, Fed. Cas. No. 4,416.

In Massachusetts it is well settled that where there is a partial want of consideration, as in case of a note given on two distinct considerations, one of them invalid, it is no objection to the reduction of the damages that the amount to be deducted is unliquidated. *Parish v. Stone*, 14 Pick. 198, 25 Am. Dec. 378; *Harrington v. Stratton*, 22 Pick. 510. And this is the general rule supported by the weight of authority. See cases *supra*, III.

But even where the rule obtains that the amount of the failure of consideration need not be liquidated, it is clear that where, in a suit on a note, the matter as to which there has been a partial failure of consideration is so uncertain in its character that there is no method by which the damage arising therefrom may be estimated or determined, the partial failure will not affect the recovery. *Schaffner v. Kober*, 2 Ind. App. 409, 28 N. E. 871.

V. Effect of warranty clause in contract.

a. In general.

Whether the right to defend *pro tanto* an action on a note for failure of consideration is affected by the existence in the contract which constitutes the consideration for the note, of covenants of warranty relating to the subject-matter of the failure of consideration, is a question as to which the courts are not in entire accord. In some cases a distinction is made between the right to make such defense when there are no covenants in the contract, and the right as to contracts containing such covenants. These cases are disposed of apparently on the theory that a grantee in a deed containing covenants of warranty must pay the purchase money and rely upon the covenants for redress. But this doctrine does not prevail in many jurisdictions. Another remedy is afforded the purchaser. He may defend an action on a note for the purchase money by showing a total or partial failure of consideration, based upon a defect in his title, although he is also protected by covenants of warranty. In the latter class of cases the courts refuse to distinguish between contracts containing warranty clauses and those in which there are no such contracts, and, in effect or expressly, deny the soundness of the distinction between the two classes of contracts as made by some courts.

The fallacy of this distinction is pointed out in *Peden v. Moore*, 1 Stew. & P. 71, 21 Am. Dec. 649. The court reasons: "Where 39 L.R.A. (N.S.)

fraud enters into the transaction, it is competent for the defendant, upon proof of it, to show a defect in the consideration in diminution of damages. This qualified admission of the defense originated from the rule that fraud avoids a contract *ab initio*. In point of justice I can discover no sufficient reason for permitting the defense to be set up, where there is a fraud in the transaction, and denying it where there is a false warranty unaccompanied by a fraud. In either case it is the duty of the jury to graduate the plaintiff's recovery by the injury which the defendant has sustained."

Considering the question with reference to a warranty in the sale of land, breached by a defect in title, thereby destroying the consideration for a note given for the land, in *Tallmadge v. Wallis*, 25 Wend. 107, the court said: "I can see no good reason why the defendant, to avoid circuity of action, should not be permitted to plead such total failure of consideration as an absolute bar to the suit, in the same manner as if the note or bond had been given upon the sale of a horse warranted sound, which turned out to be unsound and entirely valueless. In either case it may be said that the whole consideration had not failed, as the warranty itself formed a part of the consideration for the note or bond given upon the purchase. But the effect of setting up such a defense would operate as an estoppel to the purchaser, if he should attempt to bring an action for a breach of warranty after he had been once satisfied for his damages in this manner; or if the jury found a verdict which, in terms or by necessary implication, negatived the existence of the facts set up in his plea."

On the same point in *Wade v. Scott*, 7 Mo. 509, it is said that "it is more reasonable that when a suit is brought to recover the price of an article, that any reduction of the stipulated price to which the defendant may be entitled, either from a fraud or breach of warranty in the sale, should be made in the action in which the price is sought to be recovered, than that he should be driven to his cross action for a redress of the injury. This course avoids circuity of action. A second suit about the same matter should not be tolerated, where a fair opportunity can be afforded by the first to do complete justice to the parties. And when individuals are apprised that this defense will attach to the security they may receive for an article sold, they will be less eager to obtain an advantage in their contracts, than if they are taught that a note, when once given, must be paid and the injured party driven to his cross action for redress. Many would submit to the imposition sooner than redress themselves by a suit, who would readily make a defense, were it permitted in an action for the price of an article in the sale of which they have been wronged. The better opinion seems to be that this defense will not be allowed, unless the party relying on it has previously given his adversary notice that he would insist on it at the trial."

b. Rule that right is not affected by clause.

A buyer may plead want of consideration, partial or complete, to an action upon a note given for the purchase price of property, where there has been a breach of warranty. *Huntington v. Lombard*, 22 Wash. 202, 60 Pac. 414. And where pleaded, the defense of partial failure of consideration for breach of warranty may be made. *Cornish v. Friedman*, 94 Ark. 282, 126 S. W. 1079. And it constitutes a good defense *pro tanto*. *Comparet v. Johnson*, 6 Blackf. 59.

For the purpose of avoiding circuity of action, the defendant in an action on a note may allege and prove in defense, either of the entire action or *pro tanto*, total or partial failure of consideration, based upon a breach of warranty or fraud in the sale of property in payment of which the note was given. *Hodgkins v. Moulton*, 100 Mass. 311.

And where a partial failure of consideration is relied upon, a rescission of the contract or offer to return the property is not a prerequisite to the right to make the defense, and although the defendant may be able to sustain an independent action for fraud or breach of warranty, he may also prove in reduction of damages such fraud or breach of warranty as constituting a partial failure of consideration. *Herbert v. Ford*, 29 Me. 546.

And it is immaterial whether the warranty is express or implied. The purchaser of goods in either case may show a partial failure of consideration in defense *pro tanto* of an action against him on a note given for the purchase money, without returning the goods. *Brantley v. Thomas*, 22 Tex. 270.

In an action on a note given for land, although a deed of conveyance contains covenants of warranty and seisin, total failure of title may be depended upon as a defense to the note on the ground of total failure of consideration, the covenants themselves not being sufficient consideration. *Rice v. Goddard*, 14 Pick. 293, disapproving *Lloyd v. Jewell*, 1 Me. 360, 10 Am. Dec. 73.

And by the weight of authority, the defendant may mitigate damages recoverable on a note given for land, where there has been a partial failure of consideration owing to a defective title, provided the defense is specially pleaded. *Davis v. Bean*, 114 Mass. 358; *McHenry v. Yokum*, 27 Ill. 160; *Schuchmann v. Knoebel*, 27 Ill. 175; *Tallmadge v. Wallis*, 25 Wend. 107.

In *Williams v. Neely*, 69 L.R.A. 232, 67 C. C. A. 171, 134 Fed. 1, the rule is stated that a partial failure of consideration wrought by a defective title is a good defense *pro tanto* to an action upon a note for the purchase price of land conveyed by warranty deed.

Unless the purchaser of land has agreed to run the risk of title, he may defend himself in an action on a note given for the purchase money, by showing that the title

is defective, either in whole or in part, without reference to whether or not there are covenants of general warranty and title in the instrument of conveyance. *Roland v. Miller*, 3 Watts & S. 390; *Wilson v. Cochran*, 46 Pa. 229; *Cross v. Noble*, 67 Pa. 74.

In many jurisdictions, however, in order that this defense be availed of, the defect in the title must expose the purchaser to the danger, or in fact to the certainty, of eviction. *Cooper v. Singleton*, 19 Tex. 260, 70 Am. Dec. 333.

According to the holding of these cases, although a deed contains a warranty clause, if a legal eviction is shown or a liability to an eviction, a defense of partial failure of consideration may be made in an action on a note given for the purchase price of the land. *Price v. Blount*, 41 Tex. 472; *Zimpelman v. Hipwell*, 4 C. C. A. 615, 2 U. S. App. 568, 54 Fed. 851.

In *Frisbie v. Hoffnagle*, 11 Johns. 50, the defense of failure of consideration of a note given for land was permitted where it appeared that the title had failed by reason of the sale of the land under a judgment against the grantor, although the defendant had not been evicted and the conveyance was by warranty deed. The rule, however, in New York, as announced in later cases, is that eviction or something tantamount to eviction, is necessary to entitle the defendant to make the defense of failure of consideration. *Bibbard v. Johnson*, 19 Johns. 77; *Whitney v. Lewis*, 21 Wend. 132; *Tallmadge v. Wallis*, 25 Wend. 107. In the latter case, referring to *Frisbie v. Hoffnagle*, it is said that the court probably proceeded upon the ground that there was a moral certainty that the defendant must be turned out of possession under the sheriff's deed.

The reason for limiting the right to set up failure of consideration as a defense to cases where there has been an eviction, or something tantamount to an eviction, is thus stated in *Tallmadge v. Wallis*, 25 Wend. 107: "Where there is a covenant of warranty merely, which covenant is not broken until there has been an eviction, or something equivalent to an eviction, there appears to be great difficulty in permitting the purchaser to show a total or a partial failure of title, either in bar of the suit or to reduce the amount of the recovery. It is a well-known fact that land is frequently conveyed with general warranty, which is warranty against eviction only, when both parties to the sale perfectly understand that the title is doubtful, or that there is some outstanding contingent interest which may, perhaps, at a future period, be the means of evicting the purchaser; and to protect the purchaser and enable him to recover against the vendor in case of eviction, the covenant of warranty is inserted in the deed. And yet in many cases of this kind, the purchaser continues to hold and enjoy the land until all question as to the title is removed, by lapse of time or otherwise. Now, in such cases, if the purchaser were permitted to set up an outstanding title in the original patentees or their heirs, or in some-

reduced by showing a partial failure of consideration if the amount is liquidated.

Where the parties have agreed upon the amount, a partial failure of consideration may be relied upon as a defense *pro tanto*, but not where the extent of the failure is open. *Elminger v. Drew*, 4 McLean, 388, Fed. Cas. No. 4,416.

In Massachusetts it is well settled that where there is a partial want of consideration, as in case of a note given on two distinct considerations, one of them invalid, it is no objection to the reduction of the damages that the amount to be deducted is unliquidated. *Parish v. Stone*, 14 Pick. 198, 25 Am. Dec. 378; *Harrington v. Stratton*, 22 Pick. 510. And this is the general rule supported by the weight of authority. See cases *supra*, III.

But even where the rule obtains that the amount of the failure of consideration need not be liquidated, it is clear that where, in a suit on a note, the matter as to which there has been a partial failure of consideration is so uncertain in its character that there is no method by which the damage arising therefrom may be estimated or determined, the partial failure will not affect the recovery. *Schaffner v. Kober*, 2 Ind. App. 409, 28 N. E. 871.

V. Effect of warranty clause in contract.

a. In general.

Whether the right to defend *pro tanto* an action on a note for failure of consideration is affected by the existence in the contract which constitutes the consideration for the note, of covenants of warranty relating to the subject-matter of the failure of consideration, is a question as to which the courts are not in entire accord. In some cases a distinction is made between the right to make such defense when there are no covenants in the contract, and the right as to contracts containing such covenants. These cases are disposed of apparently on the theory that a grantee in a deed containing covenants of warranty must pay the purchase money and rely upon the covenants for redress. But this doctrine does not prevail in many jurisdictions. Another remedy is afforded the purchaser. He may defend an action on a note for the purchase money by showing a total or partial failure of consideration, based upon a defect in his title, although he is also protected by covenants of warranty. In the latter class of cases the courts refuse to distinguish between contracts containing warranty clauses and those in which there are no such contracts, and, in effect or expressly, deny the soundness of the distinction between the two classes of contracts as made by some courts.

The fallacy of this distinction is pointed out in *Peden v. Moore*, 1 Stew. & P. 71, 21 Am. Dec. 649. The court reasons: "Where 39 L.R.A. (N.S.)

fraud enters into the transaction, it is competent for the defendant, upon proof of it, to show a defect in the consideration in diminution of damages. This qualified admission of the defense originated from the rule that fraud avoids a contract *ab initio*. In point of justice I can discover no sufficient reason for permitting the defense to be set up, where there is a fraud in the transaction, and denying it where there is a false warranty unaccompanied by a fraud. In either case it is the duty of the jury to graduate the plaintiff's recovery by the injury which the defendant has sustained."

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one who had received a title directly or indirectly from them, it might be very difficult, if not impossible, for the vendor to trace a perfect claim of title from the original patentee to himself, although he was in fact the legal owner of the premises at the time of the sale. Permitting the purchaser to set up such a defense before eviction would, as a general rule, be making a new contract for the parties which they never intended to make for themselves."

And in *Hoy v. Taliáferro*, 8 *Smedes & M.* 727, it is said that where there has been an eviction, the defense of failure of consideration may be let in because the superiority of the outstanding title is then established by a judicial determination.

o. Rule that remedy is limited to action on covenant.

It has been held that where there is a remedy by action for breach of warranty, if the defendant has been put in possession of a portion of the land purchased, he cannot successfully defend an action on a note given for the purchase price by showing a partial failure of consideration, based upon his inability to obtain possession of all the land. *Johnson v. Lewis*, 10 *Mo.* 153.

And it is held in early Maine cases that, in an action on a note or notes given for the purchase price of real estate conveyed by deed containing the usual covenants of warranty and seisin, it is not competent to show, by way of defense, failure of title or partial failure of title or want of title in the grantor, the theory being that the remedy is by action on the covenants, and that the covenants themselves are a sufficient consideration for the note. *Lloyd v. Jewell*, 1 *Me.* 352, 10 *Am. Dec.* 73; *Howard v. Witham*, 2 *Me.* 390; *Wentworth v. Goodwin*, 21 *Me.* 150.

If there are no covenants of title, failure of title is a defense. *Howard v. Witham*, 2 *Me.* 390.

Notwithstanding a covenant of general warranty in a deed of land, if the grantor has no title thereto, this fact may be given in evidence in defense of an action on notes given for the purchase price, brought either by the grantor or a subsequent holder standing in the shoes of the grantor; but a defect of title must be entire, so that nothing valuable passes by the deed; if anything actually passes to the grantee, although less than an absolute interest, it becomes a case of unliquidated damages, the remedy for which is by action for breach of covenant. *Jenness v. Parker*, 24 *Me.* 289.

The rule obtaining in Maine, that a partial failure of title constituted no defense to a suit on a note given for the real estate, has been abrogated by a statute authorizing such a defense in any proceeding in which the amount due on a note given for the price of land is in question and a total failure of consideration would be a defense. *Hathorn v. Wheelwright*, 99 *Me.* 351, 59 *Atl. 39 L.R.A. (N.S.)*

517, 2 *Ann. Cas.* 428; *Tuttle v. Tuttle*, 101 *Me.* 287, 64 *Atl.* 496, 8 *Ann. Cas.* 260.

In *Wheat v. Dotson*, 12 *Ark.* 699, it is held that partial failure of consideration may be relied upon as a defense to an action on a note given for real estate, providing the failure does not relate to title. It cannot, however, be relied upon if failure of consideration does relate to the title.

But it has been held that as to the acceptor of a bill of exchange accepted in part payment of real estate who receives some consideration therefor, and does not rescind the contract, it is no defense that, by reason of false representations of the vendor, consideration for the bill has in part failed. *Archer v. Bamford*, 3 *Stark.* 175, 1 *L. J. K. B.* 228.

Although in Florida by statute partial failure of consideration may be shown with like efficiency as where the failure is total, nevertheless a partial failure of consideration where based on a failure to receive the quantity of land described in a deed is not a good defense to an action on a note given for the land, even to the extent of the deficiency. *Reddick v. Mickler*, 23 *Fla.* 335, 2 *So.* 698.

And it has been held that partial failure of the consideration for a note given for the purchase price of land, based on an encumbrance on the title which the defendant has paid, is no defense, although the encumbrance constitutes a breach of the covenant. *Hassam v. Dompier*, 28 *Vt.* 32.

VI. Statutory provisions.

The matter is now regulated in many states by statutes which provide that total or partial failure of consideration is a defense to an action on a purchase price note to the extent of the failure, providing the plaintiff is not a bona fide holder for value of the note sued on.

Ill.—*Davis v. McVickers*, 11 *Ill.* 327; *Beers v. Williams*, 16 *Ill.* 69; *Bryant v. Sears*, 16 *Ill.* 288; *Hill v. Enders*, 19 *Ill.* 163; *Marsh v. Bennett*, 22 *Ill.* 313; *Morgan v. Fallenstein*, 27 *Ill.* 31; *McHenry v. Yokum*, 27 *Ill.* 160; *Schuchmann v. Knoebel*, 27 *Ill.* 175; *Great Western Ins. Co. v. Rees*, 29 *Ill.* 272; *Christy v. Ogle*, 33 *Ill.* 295; *Keith v. Maftt*, 38 *Ill.* 303; *Vining v. Leeman*, 45 *Ill.* 246; *Oertel v. Schroeder*, 48 *Ill.* 133; *Jones v. Buffum*, 50 *Ill.* 277; *Leggat v. Sands Ale Brewing Co.* 60 *Ill.* 158; *Honeyman v. Jarvis*, 64 *Ill.* 366; *Gage v. Lewis*, 68 *Ill.* 604; *Wadhams v. Swan*, 109 *Ill.* 46; *Mann v. Smyser*, 76 *Ill.* 365; *Day v. Milligan*, 72 *Ill. App.* 324; *Robertson v. Merriam*, 106 *Ill. App.* 610.

Iowa—*Griffey v. Payne, Morris* (*Iowa*) 68; *Plano Mfg. Co. v. Farrell*, 110 *Iowa*, 577, 81 *N. W.* 772.

Mo.—*Shepherd v. Padgitt*, 91 *Mo. App.* 473; *Danforth v. Crookshanks*, 68 *Mo. App.* 311; *Robinson v. Powers*, 63 *Mo. App.* 290; *Brown v. Weldon*, 27 *Mo. App.* 251; *Briscoe v. Kinealy*, 8 *Mo. App.* 76; *Bank of Chilli-*

cothe v. Ornsdorff, 126 Mo. App. 654, 105 S. W. 664.

But under such a statute the vendee of land cannot retain the title, although only colorable, and remain in undisturbed possession, and defend an action on notes given for the purchase price. Vining v. Leeman, 45 Ill. 246.

In Florida by statute partial failure of consideration may be pleaded as a defense to an action on a purchase price note, with like efficiency as where the failure is total. Stafford v. Anders, 8 Fla. 34; Jones v. Streeter, 8 Fla. 83.

But where the action is on a note given for land, a partial failure of consideration based on the fact that in area the land is less than that described in the deed is not a good defense, even to the extent of the deficiency. Reddick v. Mickler, 23 Fla. 335, 2 So. 698.

In Maine the rule formerly obtained that a partial failure of title constituted no defense to a suit on a note given for real estate, but this rule has been abrogated by statute authorizing such defense in any proceeding in which the amount due on a note given for the price of land is in question, and a total failure of consideration would be a defense thereto. Hathorn v. Wheelwright, 99 Me. 351, 59 Atl. 517, 2 Ann. Cas. 428; Tuttle v. Tuttle, 101 Me. 287, 64 Atl. 496, 8 Ann. Cas. 260.

In Maryland by statute absence or failure of consideration is now a matter of defense, and a partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained or unliquidated amount, or otherwise. Burke v. Smith, 111 Md. 624, 75 Atl. 114.

In Vermont by statute partial failure of consideration may be pleaded and relied upon as a defense *pro tanto* to an article on a note between the original parties. This statute, however, does not extend to actions on a note by the subsequent holder thereof, without reference to any question of notice. Thrall v. Horton, 44 Vt. 386; Hoyt v. McNally, 66 Vt. 38, 28 Atl. 417; Burgess v. Nash, 66 Vt. 44, 28 Atl. 419; Russell v. Rood, 72 Vt. 238, 47 Atl. 789; Craig v. Hall, 73 Vt. 104, 50 Atl. 806.

In Williamson v. Cline, 40 W. Va. 194, 20 S. E. 917, it is asserted that at common law a partial failure of consideration or want of consideration is not a defense *pro tanto*, even to an action on a note, but it is said that by statute a partial failure of consideration is now a good defense *pro tanto*, but as the statute does not specifically cover cases involving a want of consideration, such defense cannot be made.

The rule is asserted in Acme Food Co. v. Older, 64 W. Va. 255, 17 L.R.A.(N.S.) 807, 61 S. E. 235, that an action may be maintained upon a purchase price note and the whole amount recovered in the absence of proof of failure of consideration; but if the thing for which the note is given fails, this can be shown by way of defense in whole or in part as the case may be. 39 L.R.A.(N.S.)

VII. Pleading.

a. As affected by distinction between total want and partial want or failure of consideration.

The defenses of want of consideration and total or partial failure of consideration are distinct, and either defense must be specifically pleaded in order to be availed of. The defendant cannot plead one defense and prove another under this plea. If there has been only a partial failure of consideration, it must be specifically pleaded, and cannot be proved under a plea of total failure of consideration. Wadhams v. Swan, 109 Ill. 46.

Making the same distinction in Moore v. Boyd, 95 Ind. 134, the rule is stated that want of consideration is a good defense, and may be pleaded generally, while failure of consideration to be good must be pleaded specifically; and a want of consideration may be pleaded to a part as well as to the whole of a cause of action.

And in Billan v. Hercklebrath, 23 Ind. 71, it is said that a general answer of no consideration is good, but a general answer of entire or partial failure of consideration is not good, since an answer of entire or partial failure of consideration must be set up the facts showing the failure, and if they do not show such failure, a mere averment of failure as a conclusion is not sufficient.

Want of a sufficient consideration for a promise, or failure of consideration after the promise is made, is a good defense to an action on a note, and may be made under a plea of nonassumpsit, but a partial failure of consideration cannot be set up as a defense to such an action under this plea. Williams v. Hicks, 2 Vt. 36, 19 Am. Dec. 693.

A total or entire failure of consideration on the ground of fraud or otherwise may be given in evidence under the general issue without notice, but a partial failure cannot be given in evidence without a special notice, since it does not go to the foundation of the case and show that the plaintiff is not entitled to recover anything, but is merely in mitigation of damages. People ex rel. Fleming v. Niagara, C. P. 12 Wend. 246; Jones v. Swan, 6 Wend. 589.

Where the article is of any value, notice must be given of the defense of partial failure of consideration, but if the consideration entirely fails, the defense of total failure of consideration may be given under the general issue. Wade v. Scott, 7 Mo. 509.

b. Necessity of special plea in order to make defense of total want or failure of consideration.

To avail himself of a defense of total failure of consideration for a note, the defendant need not plead the same, although based on a charge of fraud. Sill v. Rood, 15 Johns. 230.

The failure of consideration may be

shown under plea of general issue. *Carlisle v. Terra Haute & R. R. Co.* 6 Ind. 318; *People ex rel. Fleming v. Niagara C. P.* 12 Wend. 246; *Jones v. Swan*, 6 Wend. 589; *Williams v. Hicks*, 2 Vt. 36, 19 Am. Dec. 693; *Wade v. Scott*, 7 Mo. 509; *Cragin v. Fowler*, 34 Vt. 326, 80 Am. Dec. 680.

Under a plea of nonassumpsit, although no notice of special defense is given, the defendant has the right to show a total failure or want of consideration for the note sued on. *Ferguson v. Oliver*, 8 Smedes & M. 332.

A plea going to the entire failure of consideration, based upon the fraud of the plaintiff, is a good defense to the note if established. *Bates v. Hinton*, 4 Mo. 78; *Casey v. Smales*, 4 Mo. 77.

Where the defendant has received no consideration for a note, he may plead and rely upon the failure of consideration as a defense to an action thereon, without showing or offering to show a rescission of the contract. *Russ Lumber & Mill Co. v. Muscupieable Land & Water Co.* 120 Cal. 521, 65 Am. St. Rep. 186, 52 Pac. 995.

In Indiana by statute, where there is a total failure of consideration for a note, the defendant in an action thereon may plead same as a defense. *Davis v. Clements*, 2 Blackf. 3 (note given for land); *Bowles v. Newby*, 2 Blackf. 364 (note given for goods thereafter to be delivered); *Kernodle v. Hunt*, 4 Blackf. 57 (note given for purchase price of goods).

Under the general issue, the defendant may defeat an action of assumpsit on a promissory note by showing a want or failure of consideration, or he may reduce the damages by showing partial failure of consideration. *Catlett v. McDowell*, 4 Blackf. 556; *Tucker v. Tipton*, 4 Blackf. 529.

c. Necessity of special plea in order to make defense of partial want or failure.

To be entitled to set up a defense of partial want or failure of consideration in mitigation of damages in an action on a note, special notice thereof must be given. *Eldridge v. Mather*, 2 N. Y. 157; *Pike v. Taylor*, 49 N. H. 124; *Anderson v. Young*, 74 N. H. 428, 69 Atl. 122.

And evidence of a partial failure of consideration is not admissible under a general denial, and it does not justify a defendant in repudiating a note *in toto*. *Wray v. Miller*, 120 N. Y. Supp. 787.

But it has been held that the defense of partial failure of consideration is admissible under the general issue. *Catlett v. McDowell*, 4 Blackf. 556; *Tucker v. Tipton*, 4 Blackf. 529; *Comparet v. Johnson*, 6 Blackf. 59.

In *Desha v. Robinson*, 17 Ark. 228, the doctrine is asserted that "in all that class of cases commonly called partial failure of consideration, whether involving bad faith or not, or where fraud has intervened, 39 L.R.A. (N.S.)

whether in the obtaining or in the performance of contracts, or there has been a breach of warranty, fraudulent or not, or of any other stipulation of the contract sued upon, entitling the defendant to a cross action against the plaintiff to recover damages for such failure, fraud, or breach, he may, if he elects to do so, instead of resorting to such cross action, plead the matter by special sworn plea, under the provisions of our statute, or, if upon a verbal contract, plead the general issue, and give notice of the matter relied upon, and claim a reduction of the amount the plaintiff would otherwise recover, corresponding with the injury he has sustained."

It is clear that the defense of partial failure of consideration may be made in an action on a note or bill if introduced under a special plea; and in such a case no offer to return the article purchased is necessary. *Raspberry v. Moye*, 23 Miss. 320.

So, the defense of partial failure of consideration may be made to an action on a note or on a bond if specially pleaded or set up by way of recoupment, or as a bar to so much of the demand as may be thus answered. *Keller v. Vowell*, 17 Ark. 445.

In reduction of damages under the rule which permits such defense when it is properly pleaded, to avoid circuity of action, a partial want of consideration is always a defense *pro tanto*. *Hodgkins v. Moulton*, 100 Mass. 311.

The defendant may avail himself of false representations or fraud of the plaintiff as showing a partial failure of consideration for a note. *Burnett v. Smith*, 4 Gray, 50.

In *Reese v. Gordon*, 19 Cal. 147, an action on a note given for the purchase price of land conveyed without warranty, the right to assert a partial failure of consideration as a defense *pro tanto* to such an action for the purchase price is denied. It is, however, said that in cases of fraud or warranty, a partial failure may sometimes be given in evidence in reduction of damages, but that the practice in this respect proceeds upon the principle of a cross action, and an affirmative right of action must exist in favor of the party seeking relief in that form.

And in *Lattin v. Vail*, 17 Wend. 188, it is held that the existence of an outstanding encumbrance is not a defense of total failure of consideration for a note given for the purchase price of land conveyed with covenants of warranty; but this decision is apparently based on the ground that the plea did not show either fraud or failure of consideration.

d. Right to plead partial failure in bar of action.

A plea of partial failure of consideration does not set up a complete defense, but only a bar to the extent of the failure of the consideration. *Lowenstine v. Males*, 3 Ohio Dec. Reprint, 330.

Hence it is not proper to plead partial failure of consideration as a complete bar to the action. *Billan v. Hercklebrath*, 23 Ind. 71. (And see *DANIELS v. ENGLEHART*.)

The plea is not good as a plea in bar, but only as a plea in mitigation. *Desha v. Robinson*, 17 Ark. 228.

And a plea to an action on a note setting up partial failure of consideration, based upon the fraud of the seller, is not a good plea, since it does not go to the entire consideration. *Montgomery v. Tipton*, 1 Mo. 446.

It is, of course, true that before a defendant can entirely defeat an action on a note given for the purchase price of property, he must show an entire want or failure of consideration. Partial failure of consideration cannot be alleged in bar. *Lewis v. McMillen*, 41 Barb. 420.

It does not constitute a bar to an action upon a note, and can be availed of only by way of set-off or by original action for damages. *Brevoort v. Hughes*, 10 Colo. App. 379, 50 Pac. 1050.

On a plea of failure of consideration, if the failure is only partial, the defendant is not entitled to keep back the full amount of the note. *Pettillo v. Hopson*, 23 Ark. 196.

e. Right to prove partial failure of consideration under plea of total failure.

Under an answer setting up facts showing an entire failure of consideration, a partial failure of consideration for the note sued upon may be proved and allowed. *Billan v. Hercklebrath*, 23 Ind. 71; *Landry v. Durham*, 21 Ind. 232; *Sinex v. Toledo, L. & B. R. Co.* 27 Ind. 365; *Schaffner v. Kober*, 2 Ind. App. 909, 28 N. E. 871; *Webb v. Deitch*, 17 Ind. 340.

Although a plea is not good as setting up a total failure of consideration, since it does not aver a rescission of the contract and the return of the property, or an offer to return it, or any excuse for not doing so, nevertheless it may be sufficient to entitle the defendant to show the facts relied upon in mitigation. *Rotan v. Nichols*, 22 Ark. 244.

And it has been held that a plea of total failure of consideration includes a partial failure of consideration, and under such a plea the defendant may obtain an abatement in the sum agreed to be paid, if the evidence show a partial failure and the extent thereof. *Otis Bros. v. Holmes*, 109 Ga. 775, 35 S. E. 119; *Morgan v. Printup*, 72 Ga. 67.

Brantley v. Thomas, 22 Tex. 270, 73 Am. Dec. 264, also holds that the defense of partial failure of consideration may be made in the plea alleging as a defense a total failure of consideration. Followed in *Gutta Percha & Rubber Mfg. Co. v. Cleburne*, 102 Tex. 36, 112 S. W. 1047.

A. G. S.

MAINE SUPREME JUDICIAL COURT.

GEORGE E. CARLETON

v.

PATRONS' ANDROSCOGGIN MUTUAL FIRE INSURANCE COMPANY.

(— Me. —, 82 Atl. 649.)

Insurance — time of inception — notification of protection.

1. A notification from an insurance company that it would protect until the application is acted upon does not place the insurance in force from that date, for the purpose of determining the truthfulness of statements in the application at the inception of the contract.

Same — representations — truthfulness — time of testing.

2. A representation in an application for insurance as to the existence of other insurance on the property must be true when the application is accepted, to comply with a requirement that all facts stated in the application must be true under penalty of avoiding the contract, and if untrue at that time, its truthfulness when made is immaterial.

Same — intent to secure additional insurance — motive — effect.

3. The mere suggestion to an insurance agent that other insurance may be secured upon the property will not estop the insurer from contesting the validity of the policy issued by it if other insurance is obtained contrary to the terms of its policy, if neither it nor its agent had notice that additional insurance was in fact obtained.

Same — assessment of premium note — waiver.

4. An inadvertent assessment against the premium note of a mutual insurance policy will not waive an objection to the validity of the policy on the ground that other insurance existed upon the property contrary to its terms, nor amount to a ratification of the contract.

Same — additional insurance — avoiding policy.

5. Existing additional insurance upon property unknown to the one issuing a policy thereon avoids the latter policy, which provides that if assured now has or shall hereafter make any other insurance

Note. — Duty to notify insurer of facts which develop after submission of application, but before delivery of policy or certificate.

This note is supplementary to the one to *Merriman v. Grand Lodge Degree of Honor*, 8 L.R.A.(N.S.) 983.

The question indicated by the title to this note is modified in form in *CARLETON v. PATRONS' ANDROSCOGGIN MUT. F. INS. CO.*, where it is stated as being whether or not

on the property without assent of the insurer, the policy shall be void.

Same — divisibility of policy — building and contents.

6. A policy of insurance upon a building and contents, which is void as to building because of the existence of additional insurance contrary to its provisions, is void also as to the contents.

(March 25, 1912.)

REPORT by the Supreme Judicial Court for Oxford County for the determination by the Law Court of an action brought to recover an amount alleged to be due on a fire insurance policy. Judgment for defendant.

The facts are stated in the opinion.

Mr. Artease E. Stearns for plaintiff.

Mr. John A. Morrill, for defendant:

The policy was rendered void by breach of the covenants, and by misstatements of material facts, contained in the written application signed by the plaintiff.

1 May, Ins. 4th ed §§ 49 et seq. p. 83; Wainer v. Milford Mut. F. Ins. Co. 153 Mass. 335, 11 L.R.A. 598, 28 N. E. 877; Allen v. Massachusetts Mut. Acci. Asso. 187 Mass. 18, 44 N. E. 1053; Thayer v. Middlesex Mut. F. Ins. Co. 10 Pick. 326; Whiting v. Massachusetts Mut. L. Ins. Co. 129 Mass. 241, 37 Am. Rep. 317; Hoyt v. Mutual Ben. L. Ins. Co. 98 Mass. 539; Markey v. Mutual Ben. L. Ins. Co. 103 Mass. 78; Real Estate Mut. F. Ins. Co. v. Roessle, 1 Gray, 336; Markey v. Mutual Ben. L. Ins. Co. 118 Mass. 178; Piedmont & A. L. Ins. Co. v. Ewing, 92 U. S. 377, 23 L. ed. 610; Steidle v. New York L. Ins. Co. 28 C. C. A. 491, 52 U. S. App. 235, 81 Fed. 489; Phenix Ins. Co. v. Schultz, 25 C. C. A. 453, 42 U. S. App. 483, 80 Fed. 337; Blumer v. Phoenix Ins. Co. 45 Wis. 622;

it is necessary that a representation in an application for insurance shall be true at the time when the application is accepted and the contract completed, and the question is answered in the affirmative.

On the contrary, in *Schroeder v. Trade Ins. Co.* 109 Ill. 157, where an application made to one insurance company was, by agreement between the applicant and another insurance company, made the application on which a policy was issued by the latter company, it was held that the application is to be regarded as stating the condition of the property at its date, and where subsequent to that date and before the policy was issued a chattel mortgage had been placed on the property, it is not a breach of the policy rendering it void, although the policy referred to the application and made it a part of the contract, and a warranty by the assured of the conditions, situation, or occupancy of the property; and provided, further, that any omis-

Kimball v. Aetna Ins. Co. 9 Allen, 540, 85 Am. Dec. 786; *Lynn v. Burgoyne*, 13 B. Mon. 400; *Betcher v. Capital F. Ins. Co.* 78 Minn. 240, 80 N. W. 971; *Johnson v. American Ins. Co.* 41 Minn. 396, 43 N. W. 59; *Philbrook v. New England Mut. F. Ins. Co.* 37 Me. 137; *Gardiner v. Piscataquis Mut. F. Ins. Co.* 38 Me. 439; *Knowlton v. Patrons Androsoggin F. Ins. Co.* 100 Me. 481, 2 L.R.A. (N.S.) 517, 62 Atl. 289; *Towle v. Dirigo Mut. F. Ins. Co.* 107 Me. 317, 78 Atl. 374.

The policy was rendered void by the prior valid insurance in the Connecticut Fire Insurance Company, existing when the application was accepted.

Lindley v. Union Farmers' Mut. F. Ins. Co. 65 Me. 368, 20 Am. Rep. 701; *Bigelow v. Granite State F. Ins. Co.* 94 Me. 39, 46 Atl. 808; *Jackson v. Massachusetts Mut. F. Ins. Co.* 23 Pick. 418, 34 Am. Dec. 69; *Thomas v. Builders' Mut. F. Ins. Co.* 119 Mass. 121, 20 Am. Rep. 317; *Jersey City Ins. Co. v. Nichol*, 35 N. J. Eq. 291, 40 Am. Rep. 625; *Keyser v. Hartford F. Ins. Co.* 66 Mich. 664, 33 N. W. 756; *Clark v. New England Mut. F. Ins. Co.* 6 Cush. 342, 53 Am. Dec. 44; *Hardy v. Union Mut. F. Ins. Co.* 4 Allen, 217; *Hayes v. Milford Mut. F. Ins. Co.* 170 Mass. 492, 49 N. E. 754; *Gale v. Belknap County Ins. Co.* 41 N. H. 170; *Gee v. Cheshire County Mut. F. Ins. Co.* 55 N. H. 65, 20 Am. Rep. 171; *Schenck v. Mercer County Mut. F. Ins. Co.* 24 N. J. L. 447; *Fireman's Ins. Co. v. Holt*, 35 Ohio St. 189, 35 Am. Rep. 601; *Lovejoy v. Augusta Mut. F. Ins. Co.* 45 Me. 472; *Day v. Charter Oak F. & M. Ins. Co.* 51 Me. 91.

Whitehouse, Ch. J., delivered the opinion of the court:

This is an action upon a policy of fire

sion to make known every fact material to the risk or any misrepresentation whatsoever, either in the written application or otherwise, should render the policy void.

In *Day v. Hawkeye Ins. Co.* 72 Iowa, 597, 34 N. W. 435, a foreclosure proceeding begun after the date of the application and before the same was approved and the policy issued was held not to be a breach of the provision in the policy that the commencement of foreclosure or other proceedings upon any mortgage, lien, or other encumbrance of any kind should render the policy void. The view is taken in this case that it was the duty of the company to have issued the policy at once, but having allowed several days to elapse before so issuing the policy, and knowing that the condition of the property was liable to change in the interval, and having employed no means to inform itself of any change, it took the risk in regard to such change.

W. A. E.

insurance bearing date July 1, 1910, but actually issued by the defendant to the plaintiff July 25, 1910, in the form prescribed by law for the Maine standard policy, with a rider attached thereto. It contains the following stipulation: "This policy shall be void if any material fact or circumstance stated in writing has not been fairly represented by the insured; or if the insured now has or shall hereafter make any other insurance on the said property, without the assent in writing or in print of the company."

Two defenses to this action are interposed by the defendant: First, that the policy was rendered void by misstatement of material facts contained in the written application signed by the plaintiff; and, second, that by a stipulation in the policy itself it was rendered void by a prior valid insurance policy in the Connecticut Fire Insurance Company existing when the application for the policy in suit was accepted. The case comes to the law court on report.

The following facts are either established by agreement of the parties or by satisfactory evidence in the case. July 1, 1910, the plaintiff made a written application to the directors of the defendant company through W. M. White, its licensed agent, for an insurance of \$1,550 upon the property described in the policy, and at the same time executed a premium note to the company for the sum of \$77.50, but the application was returned by the secretary for the reason that in his opinion the amount of insurance named was excessive.

July 6, 1910, the plaintiff made an amended application to the directors of the company for an insurance of \$1,050 upon the same property, and at the same time reduced the amount of the premium note to \$52.50; both application and premium note being redated July 6, 1910, and the receipt of this revised application and premium note was duly acknowledged by the secretary of the company in a letter to the agent, White, dated July 9, 1910, in which he said: "I will refer George E. Carleton's application to the directors on the 25th, and I think it will be accepted in its present form, but am not sure. We will protect until they decide and I notify him."

At the next regular meeting of the board of directors held July 25, 1910, the plaintiff's application with others was accepted, and soon after the policy of insurance in suit was issued and forwarded to the plaintiff by mail.

In the application of July 6th were the following question and answer, namely: "Q. Is there any other insurance on this property, if so, give name of company and 39 L.R.A. (N.S.)

amount? A. \$1,000, expires next Friday, Connecticut Fire Insurance Company."

Thereupon the following covenant is appended to the application: "I hereby covenant to and agree to and with the said company that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured so far as the same are known to the applicant and are material to the risk."

July 15, 1910, the plaintiff obtained a policy of insurance through the local agent at Rumford Falls, of the Connecticut Fire Insurance Company, for \$1,250 upon the same buildings described in the policy in suit, without disclosing to that agent the pendency of his application to the defendant company, and this policy was held by the plaintiff August 8, 1910, when the plaintiff's buildings were destroyed by fire. The Connecticut Company at first denied their liability on the plaintiff's policy, claiming that the other insurance had been obtained by the plaintiff without the knowledge or consent of that company or its agent, but later, without admitting their liability, the company paid to the plaintiff the sum of \$700 as a compromise. It satisfactorily appears from the testimony that no officer or agent of the defendant company had knowledge of the Connecticut policy until after the fire. It also appears from the plaintiff's own testimony that the secretary's letter to Mr. White of July 9th, in which he stated that the plaintiff's application would be referred to the directors on the 25th, was read to the plaintiff July 14, 1910. At their next regular meeting August 29, 1910, the directors of the defendant company discussed the plaintiff's loss, and the next day the secretary notified him that the company denied its liability for the loss of his buildings.

It appears that, in making an assessment of 5 per cent on premium notes, the plaintiff's note was included, and that he was notified that an assessment of \$1.67 had been made on his note. This assessment the plaintiff paid on the 5th of the following October, but it was claimed on the part of the defendant that the plaintiff's premium note was erroneously included in the assessment through inadvertence, and on November 2, 1910, the cash premium, premium note, and assessment were returned to the plaintiff by the defendant company.

It is not in controversy that, in an interview with the agent, White, before the policy in suit was actually issued, July 25th, the plaintiff stated to the agent that he did not think \$1,050 was enough, and that he

was going to Rumford and get some insurance up there, and that the agent told him if he was not satisfied with that amount he could get more insurance in some other company the same as he himself had done. But the plaintiff admits that, at the time of the application for the policy in suit was filled out, the agent suggested to him that he should state when his former Connecticut policy expired, and told him that the company would want to know about that other insurance, and when it expired.

It has been seen that the question of the acceptance of the plaintiff's revised application of July 6th, for the policy in suit, was referred to the decision of the directors of the defendant company at their meeting of July 25th, and that the plaintiff was duly informed on July 14th that it would not be accepted until the 25th, if at all; and it is not in controversy that the application was not accepted until July 25th, and that the policy was not in fact made out and delivered to the plaintiff until a short time thereafter.

It is obviously unnecessary to cite authorities in support of the proposition that upon the facts above stated there could be no perfect contract of insurance between these parties until the plaintiff's application was accepted by the directors of the defendant company, although the policy, which was actually made after July 25th, bears date July 1st. A policy of insurance is a contract between the parties, and, like all other contracts founded upon a proposal on one side and acceptance on the other, it does not become operative as a complete and valid contract until the application for it is accepted. *Wood, F. Ins. §§ 6 et seq.*; *May, Ins. §§ 49 et seq.*; *Wainer v. Milford Mut. F. Ins. Co.* 153 Mass. 339, 11 L.R.A. 598, 26 N. E. 877; *Allen v. Massachusetts Mut. Acci. Asso.* 167 Mass. 18, 44 N. E. 1053; *Hoyt v. Mutual Ben. L. Ins. Co.* 98 Mass. 539; *Markey v. Mutual Ben. L. Ins. Co.* 103 Mass. 78.

But it appears that in his letter of July 9, respecting the probable action of the directors upon the application of the plaintiff, the secretary of the company wrote, "We will protect until they decide and I notify him;" and it is contended by counsel that "the plaintiff had a right to rely upon this representation that from that time he was insured as fully as if he had the written policy in his possession. But it is important to remember that the plaintiff's loss did not occur between the date of the application and the time of its acceptance, but after its approval by the directors on July 25th, and after the delivery of the policy to the plaintiff. Whether the secretary's assurance of protection 39 L.R.A. (N.S.)

in the meantime would have created any liability on the part of the company for a loss which occurred before the company's acceptance of the application and delivery of the policy is a question not now before the court. The plaintiff has declared upon a policy of insurance which could not take effect as a completed contract until July 25th, and he must recover, if at all, upon that contract, and not upon the personal assurances of the secretary prior to that time, with reference to the possible contingency of a loss occurring before the acceptance of the application and issuance of the policy.

The covenants and representations contained in the application of July 6th have already been recited in the statement of facts; and it has been seen that, when the application was made, the agent called the plaintiff's attention to the question and answer in regard to other insurance, and stated to him that the directors would wish to know about other insurance. It was necessary that such representation in the application should be true at the time when the application was accepted and contract completed.

In *May on Insurance*, vol. 1, § 190, p. 385, 4th ed. it is said: "A representation is a continuous statement from the time it is made during the progress of the negotiations, and down to the time of the completion of the contract; so that though in point of fact the representation be true when actually made, yet, if by some change intervening between that time and the time of completion of the contract it then becomes untrue, it will avoid the contract, if the change be material and to the prejudice of the insurers, or be such as might probably influence their opinion as to the advisability of accepting the risk. The law regards it as made at the instant the contract is entered into. And the same rule applies in case of concealment." See also *Piedmont & A. Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. ed. 610; *Blumer v. Phenix Ins. Co.* 45 Wis. 622.

In the case at bar the plaintiff's representation in regard to other insurance in his application of July 6th, which he covenanted to be a full and true exposition of all the facts, etc., was not a full statement in regard to other insurance on July 25 when his application was accepted and the contract made, for the reason above stated that in the meantime, namely, July 15th, the plaintiff had procured other insurance on the same buildings for \$1,250 in the Connecticut Fire Insurance Company, without the knowledge of the defendant company, and was still the holder of that policy at the time of the fire on August 8th.

The contract made with the defendant company applied to a risk materially different from that described in the plaintiff's application. The minds of the parties did not meet in mutual understanding of the situation existing at the time the application was accepted, and the policy never became a valid contract between the parties. The fact that the feasibility of procuring further insurance was mentioned between the plaintiff and the agent, and that the plaintiff expressed an intention to obtain other insurance, will not constitute a waiver or estoppel on the defendant; it being admitted that no officer or agent of the company had any knowledge until after the fire that the plaintiff had in fact obtained other insurance. *Schenck v. Mercer County Mut. F. Ins. Co.* 24 N. J. L. 447; *Gray v. Germania F. Ins. Co.* 155 N. Y. 180, 49 N. E. 675; *Stone v. Howard Ins. Co.* 153 Mass. 475, 11 L.R.A. 771, 27 N. E. 6; *Parker v. Rochester German Ins. Co.* 162 Mass. 479, 39 N. E. 179; 2 May, Ins. p. 1183, note "a."

Nor did the assessment by the directors of 5 per cent on the plaintiff's premium note constitute sufficient evidence of either a waiver or ratification on the part of the company. The defendant's claim that the plaintiff's note was inadvertently included in the assessment is rendered probable by the fact that the plaintiff's claim for insurance was rejected at the same meeting, and that his assessment of \$1.67, the cash premium and premium note, were subsequently returned to the plaintiff. But, in any event, it has been frequently held that a premium note, given on a policy which does not become operative, cannot be enforced, and it is not even necessary for the company to make a formal declaration that the note is void. 2 May, Ins. § 345, p. 750; *Betcher v. Capital F. Ins. Co.* 78 Minn. 240, 80 N. W. 971. And in this state it has been frequently held that when the note was originally valid, and the policy was rendered void by a subsequent breach, a subsequent assessment is no waiver of the breach. *Knowlton v. Patrons Androscoggin F. Ins. Co.* 100 Me. 481, 2 L.R.A. (N.S.) 517, 62 Atl. 289, and cases cited; *Towle v. Dirigo Mut. F. Ins. Co.* 107 Me. 317, 78 Atl. 374.

But the stipulation in the policy itself, that it shall be void "if the insured now has, or shall hereafter make, any other insurance on the said property without the assent in writing or in print of the company," constitutes another insuperable objection to the maintenance of this action. At the time the plaintiff's application of July 6th was accepted by the defendant company, it has been seen that the plain-

tiff in fact had other valid insurance to the amount of \$1,250 in the Connecticut Fire Insurance Company, which he had procured on July 15th, and that no officer or agent of the defendant company had any knowledge of such prior insurance until after the fire.

Upon this state of facts under such a stipulation, the plaintiff's policy in the defendant company, if otherwise operative, was rendered void by the existence of a prior valid insurance. *Lindley v. Union Farmers' Mut. F. Ins. Co.* 65 Me. 368, 20 Am. Rep. 701; *Bigelow v. Granite State F. Ins. Co.* 94 Me. 39, 46 Atl. 808. The last-named case is cited by counsel as authority for the plaintiff; but it distinctly appears that the agent of the Imperial Insurance Company, one of the companies involved in that case, had knowledge of the fact of the prior insurance there in question, admitted its liability, and paid its proportion of the loss, and it was properly held upon these facts that that company had waived the stipulation in this policy in regard to the assent in writing. On the other hand, it appears that the defendant company in that case had no knowledge of a prior insurance in the Imperial Company, and, there being no stipulation in the policy permitting other insurance, judgment was rendered for the defendant.

It is also familiar law that such a contract of insurance is entire, and, if void on account of prior insurance on the buildings, insurance on the furniture cannot be recovered. *Day v. Charter Oak F. & M. Ins. Co.* 51 Me. 91; *Dolloff v. Phoenix Ins. Co.* 82 Me. 266, 17 Am. St. Rep. 482, 19 Atl. 396.

The certificate must accordingly be judgment for the defendant.

MARYLAND COURT OF APPEALS.

BIRDIE J. DUDROW et al., Appts.,

v.

JAMES R. KING et al.

(— Md. —, 83 Atl. 34.)

Descent — property purchased by heir — half blood.

The joining by one of several children in a deed of property inherited from their

Note. — Effect of conveyance and reconveyance of estate acquired by inheritance upon its course of descent.

It was a rule of the common law that descent must be traced from the first purchaser; hence, where there was a failure of lineal heirs, the inheritance descended to the heirs of the body of that ancestor from

father, to a stranger, for the purpose of securing a title to himself in the whole property, which was done under the erroneous belief that he could not take title directly from the coheirs, does not change the character of the title held by him as heir from inheritance to purchase, and therefore it will descend under the statute providing for inherited land descending to heirs of the half blood as well as of the whole blood, and not under the provision for the descent of land secured by purchase; at least where the intention of the parties was that he should not alienate the property, but permit it to return to the cogramtors at his death.

(January 9, 1912.)

APPPEAL by plaintiffs from an order of the Circuit Court for Frederick County ratifying an auditor's account distributing

whom, either in reality or by fiction of law, it originally descended. In the United States, the common law of descent has been so completely superseded by statute that, in the absence of some express statutory provision, the source of the intestate's title is not regarded as material. (See 14 Cyc. 28, note 5, 28 Am. & Eng. Enc. Law, 298, note 5.) The rule above referred to is, however, preserved to some extent by statutory provisions of the type involved in *DUBROW v. KING*, which recognize a distinction between land acquired by the intestate by purchase,—the term "purchase" being here used in its colloquial sense,—and land which has been derived from some ancestor, and direct that the latter shall go to those of the intestate's next of kin who are of the blood of the ancestor from which it came. The same idea is found in statutes providing that lands inherited by a wife from her husband cannot be aliened by her during a subsequent marriage, and, in the event of her death during coverture, shall go to the children of the husband from whom the lands came.

The basis of the difference of opinion which is disclosed by a few decisions upon the question under discussion appears to lie in the circumstance that, while some courts look only at the legal title under which the intestate held, in determining the character of the property as ancestral or nonancestral, others regard the continuity of the intestate's equitable title as the test.

In *Doe ex dem. Harman v. Morgan*, 7 T. R. 104, where one seised in fee of an inheritance by descent *ex parte materna* conveyed the property in fee by way of mortgage, and the mortgagee, on repayment, reconveyed to the mortgagor, it was held that the line of descent was thereby broken, and that the estate descended to the paternal heir.

In *Holme v. Shinn*, 62 N. J. Eq. 1, 49 Atl. 151, where the life tenant, his wife, and the remainderman had conveyed property taken by them under a devise, to a third party who immediately reconveyed the property to them as joint tenants, it was held that

to defendants a certain amount, part of the proceeds of sale of the real estate of Edmund Dorsey King, deceased. Affirmed.

The facts are stated in the opinion.

Mr. Glenn H. Worthington for appellants.

The two deeds of conveyance and reconveyance break the descent and change the title from one by descent to one by purchase.

14 Cyc. 33; *Nesbitt v. Trindle*, 64 Ind. 183; *Holme v. Shinn*, 62 N. J. Eq. 1, 49 Atl. 151; 1 Co. Litt. chap. 1, § 4, p. 13; 2 Bacon, Abr. **302, 303; *Freeman v. Allen*, 17 Ohio St. 527; *Price v. Langford*, 1 Salk. 337; *Doe ex dem. Harman v. Morgan*, 7 T. R. 104.

Messrs. Urner & Urner, for appellees:

It is not necessary for the intestate to

the survivor of them, who was the original remainderman, took, not under the devise, but by purchase; and therefore that those of his heirs who were not of the blood of the original devisor were not excluded from inheriting. The court said: "It is true that the conveyance of James [the remainderman] to Van Meter was without consideration, but it was made for the purpose of passing the title to Van Meter in fee, and it was good for that purpose, though voluntary, for it was part of their joint purpose that Van Meter should reconvey such title as he acquired to James. When he made such conveyance, James's title came from him by conveyance. No one was entitled to question what James did with the lands. He might convey them or devise them. His prospective or presumptive heirs at law, though of the blood of Ann Smith, had no interest in the lands, and he might at will transmute by proper conveyance the estate he had received by her devise into an estate by purchase, inheritable by his heirs generally."

In *Kihlken v. Kihlken*, 59 Ohio St. 106, 51 N. E. 969, where an owner of ancestral lands, in view of a possible adverse judgment against him, conveyed them to his brother on a written agreement that they should be reconveyed on request, and before his death made the request, but died before a reconveyance was made, it was held that the lands had lost their ancestral character, and that the persons who, had there been no conveyance, would have inherited them, had no standing to object to a reconveyance to the widow.

In *Nesbitt v. Trindle*, 64 Ind. 183, where a widow contemplating a second marriage, with the view of avoiding the operation of a statute providing that a woman cannot, during coverture, alien lands inherited from a former husband, and that if she shall die during such subsequent marriage, the land shall go to the children of the husband from whom the lands came, conveyed in fee, with covenants of general warranty and for an expressed consideration, although without any actual money consideration, to a third

get his title by direct descent from the father in order for it to go to all of his brothers and sisters or their descendants, of the blood of the father.

Stewart v. Evans, 3 Harr. & J. 287; Stewart v. Jones, 8 Gil. & J. 1; Freeman v. Allen, 1/ Ohio St. 527; Carter v. Day, 59 Ohio St. 96, 69 Am. St. Rep. 757, 51 N. E. 967; Helfinger v. Wolff, 11 Ohio Dec. Reprint, 906; Abbot v. Burton, 2 Salk. 591.

Pearce, J., delivered the opinion of the court:

This is an appeal from an order of the circuit court of Frederick county, ratifying an auditor's account distributing the sum of \$1,045.10, part of the proceeds of sale of the real estate of Edmund Dorsey King, of Frederick county, deceased, and the sole

question presented is whether the distribution shall be to the next of kin of the whole blood alone, or to the next of kin of both the whole and half blood.

Singleton King died intestate in 1897, seized of a farm in Frederick county, Maryland, containing 155 acres, and leaving a widow, Caroline King, and eight children, his only heirs at law. Four of these children Singleton L. King, James Harrison King, Mary Jane Browning, and William King were by the first wife of the deceased, and four, *viz.*, Mrs. Manzella Bell, J. Beall King, E. Dorsey King, and Caroline C. Harris, were by the second wife. His widow, Caroline King, was his third wife, and had no children. The real estate in question, therefore, descended upon the death of Singleton King to the above-named eight

person who, in pursuance of the understanding of the parties, reconveyed to her after the second marriage had taken place, it was held that the effect of the transaction was to break the descent, the court saying: "While said Harriet remained a widow, she had the right to dispose of said property, either for or without a consideration; her motives in the conveyance were not material; and she could not be chargeable with fraud upon her children, by conveying it without consideration, because they had no legal interest in, or, at that time, right to, it. She did so dispose of it, and subsequently acquired it by a new title. After that she did not hold the land by virtue of her previous marriage, and the restriction upon her right to alienate, contained in § 18 of the statute of descents, ceased to be operative upon it; and the only right of her children to inherit it was contingent upon her owning it at her death."

On the other hand, in Helfinger v. Wolff, 11 Ohio Dec. Reprint, 906, it is held that the owner of property acquired by descent does not, by conveying it without consideration to one who immediately reconveys, thereby interrupt the course of descent and become a taker by purchase. The court said: "The deed to L. J. D. [the intermediary] was clearly not intended to give him anything but a naked legal title in trust to reconvey. No motive appears unless it be an intent to break the course of descent. Mrs. Wolff still retained the entire equitable title, and had there been a statute of uses in Ohio, and the use been expressed in the deed, the statute would itself have executed the use at once by giving her the legal title again."

Where, pursuant to a direction by a testator that his lands should be equally divided among all his children, the division to be made by three persons to be appointed by his executors, the lands were allotted among the children, after which there was an exchange of lands between two of the children, each conveying to the other for a nominal money consideration, each is to be regarded as taking as a purchaser, and not under the devise from their father. Brower v. Hunt, 18 Ohio St. 311.

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It may be of interest in the present connection to note that it has been held that the exchange of deeds of release between heirs of property for the purposes of partition, even though purporting to be for a valuable consideration, does not affect the character as ancestral property of the tract taken by each in severalty. This is because partition acts only on the possession, and not on the title. See Martin v. Martin, 98 Ark. 93, 135 S. W. 348 (*dictum*); Conkling v. Brown, 8 Abb. Pr. N. S. 345; Carter v. Day, 59 Ohio St. 96, 69 Am. St. Rep. 757, 51 N. E. 967; *contra*, Wilson v. Hall, 6 Ohio C. C. 570, 3 Ohio C. D. 589.

And the same is the case where property is set off to an heir in partition proceedings. Carter v. Day, 59 Ohio St. 96, 69 Am. St. Rep. 757, 51 N. E. 967; Schumucker v. Adams, 45 Pa. Super. Ct. 58.

But in Freeman v. Allen, 17 Ohio St. 527, it is held that where a party to a proceeding for partition elects to take it at its appraised value, so much of the title as comes to him by descent remains in him unchanged by the proceedings, but that the balance of his title is a title by purchase; and this although the appraised value of the lands thus acquired by him happens to be the exact equivalent of his share in the property.

A widow purchasing property of her deceased husband upon a partition sale, paying no money, but instead receipting for her distributive share of the estate, takes by purchase, and not by descent. Spencer v. McGonagle, 107 Ind. 410, 8 N. E. 266.

Allusion only need here be made to the English decisions to the effect that the inheritable quality of an estate is not affected where the person receiving it by inheritance makes a feoffment, or levies a fine, and declares the use to himself or his right heirs, or where a portion thereof remains unlimited. Among these are Abbot v. Burton, 2 Salk. 591; Godbold v. Freestone, 3 Lev. 406; Harris v. Bishop of Lincoln, 2 P. Wms. 135; Hutcheson v. Hammond, 3 Bro. Ch. 128.

E. S. O.

children, subject to the dower of the widow, Caroline King. Edmund Dorsey King became the administrator of his father, and entered into an agreement with his brothers and sisters and with Caroline King to purchase all their interest in said real estate for the sum of \$6,986.25, but being advised erroneously that he could not purchase directly from them, because he was the administrator of their father, he united with them in conveying said real estate by deed dated January 8, 1898, to Wm. P. N. Lawson, with the understanding among all said parties that said Lawson should immediately convey the same to said Edmund Dorsey King by a deed then prepared, and intended to be of even date with the deed to said Lawson. This deed to Lawson was not acknowledged by all the grantors until January 27, 1898, as they resided in different places, but, when it was acknowledged by all, Lawson, by deed dated February 2, 1898, conveyed the property to Edmund Dorsey King, it being described in the deed to Lawson as the same which descended from Singleton King to his eight above-named children, subject to the dower of Caroline King, and being described in the deed from Lawson as the same described in "a deed from Caroline King and others of even date herewith, and intended to be recorded herewith, to the said Wm. P. N. Lawson." The same consideration was expressed in both deeds, viz., \$6,986.25, but Lawson did not pay the same nor any sum whatever to any of the grantors in the deed to him, nor did he receive, nor was he intended to receive, any beneficial interest whatever in said real estate; but he accepted said conveyance to him, in trust to convey the property to said Edmund Dorsey King, in the manner and for the purpose for which he did convey it, and Edmund Dorsey King, concurrently with the delivery of both said deeds, paid the entire purchase money to his stepmother and his brothers and sisters. Edmund Dorsey King died intestate in 1910, leaving surviving him no child or descendant, no father or mother, brother or sister, but leaving two nieces, Mabel S. King, a child of his deceased brother, J. Beall King, and Birdie J. Dudrow, a child of his deceased sister Manzella Bell, as the only descendants of his brothers and sisters of the whole blood, and leaving also a number of nieces and nephews, descendants of his brothers and sisters of the half blood, all of whom are named in the proceedings.

The real estate in question was sold under a decree of court by the trustee appointed for that purpose for \$15,530, and, the sale being reported, the purchaser filed exceptions thereto, because of the claim of the 39 L.R.A. (N.S.)

nieces and nephews of the half blood to an interest in said real estate; they not having been made parties to the proceedings. They were thereupon made parties by order of court, upon petition of the purchaser, and all appeared and answered said petition, setting up their claim in their answers, and the two nieces of the whole blood demurred to said answers. The sale was ratified and an auditor's account was stated distributing the net proceeds equally between the two nieces of the whole blood, upon the theory that Edmund Dorsey King took title to the whole tract by purchase. Exceptions were filed to this account by the nieces and nephews of the half blood, which exceptions were sustained, and the said auditor's account was rejected, and the auditor was directed to state another account distributing seven eighths of the net proceeds to the two nieces of the whole blood, and one eighth to the nieces and nephews of the whole and half blood. Upon this basis, the sum of \$1,045.10 is distributed to the nieces and nephews of the half blood, and to that distribution the two nieces of the whole blood except, and their exceptions being overruled, and the auditor's account being ratified, they have appealed.

Sections 3 and 4 of article 46 of the Code provide that where the estate descended to the intestate on the part of the father, if there be no child or descendant or father living, shall descend to the brothers and sisters of the intestate of the blood of the father and their descendants equally. Section 19 of article 46 provides that if the estate shall be vested in the intestate by purchase, or shall descend to or vest in him in any other manner than by descent on the part of the father or mother, and there be no child or descendant of the intestate, then the estate shall descend to the brothers and sisters of the intestate of the whole blood and their descendants in equal degree equally. Section 26 provides that there shall be no distinction between brothers and sisters of the whole and half blood, all being descendants of the same father, where the estate descended on the part of the father.

Upon the death of his father intestate, Edmund Dorsey King took one eighth of the land in question by descent from him, and the only question for us is whether the effect of the two conveyances above mentioned broke this descent and changed his title to that one eighth from a title by descent to one by purchase. The learned judges of the circuit court held that no change of title was effected, and we are of opinion their decision was correct. It is quite clear from the admitted facts in the

case that there was no actual intention on the part of Edmund Dorsey King, by adopting the course of conveyancing used, to effect any change in the title which he took from his father to that one eighth of the estate, and that no change could have been effected, if he had taken a conveyance, as he contemplated, from his brothers and sisters of their seven eighths of the estate. The question could not have arisen but for the erroneous advice given him that he could not acquire any title by direct purchase from them. It may be observed here that the demurrer of the appellants to the answer of the appellees admits the averments of the eighth and ninth paragraphs of the answer, that "it was understood between Edmund Dorsey King and his brothers and sisters that he should not dispose of said farm," and "that, on his death, it would descend by inheritance to all of his said brothers and sisters, if living, and if not, then to their descendants *per stirpes*, . . . as they did not know there was any difference in law as to the right of inheritance between the children of the first wife and those of the second wife. . . . And that they would not have agreed to sell him their interests in said farm at the valuation of \$45 per acre, being \$20 less per acre than the land was worth, if it had not been for their understanding that he was not to dispose of said farm, and that it would come back to them or their descendants on his death." This consideration could not, of course, defeat an intention to break the course of descent by an apt conveyance, nor could it control the operation of a conveyance, the clear legal effect of which was to break the descent, although not so intended; but it is an element of this case not to be disregarded in the light of all the cases upon the subject.

The general rule is that if one who is in by descent conveys his interest away, and it be conveyed back to him, he holds thereafter by purchase, and not by descent. The rule is stated thus in 1 Coke upon Littleton, 12b: "If a man be seised of lands as heir of the part of his mother, and maketh a feoffment in fee, and taketh back an estate to him and to his heirs, this is a new purchase, and if he dyeth without issue, the heirs of the part of the father shall first inherit." The authorities, ancient and modern, agree that this is the general rule. But in a note by Mr. Hargrave to the above text of Coke, it is said: "But here Lord Coke must be understood to speak of two distinct conveyances in fee; the first passing the use as well as the possession to the feoffee, and so completely divesting the feoffer of all interest in the land; and the second regrantee the estate

to him. For, if in the first feoffment the use had been expressly limited to the feoffer and his heirs, or if there was no declaration of uses, and the feoffment was not on such a consideration as to raise an use in the feoffee, and consequently the use resulted to the feoffer, in either case he is in of his ancient use, and not by purchase." It is upon the doctrine of this note of Mr. Hargrave that the court below was satisfied to rest its decision. That doctrine, however, is supported by law writers of high authority, and by cases illustrating its application. 3 Greenleaf's Cruise on Real Property, title "Descent," pp. 338, 341, states the law in almost the exact words of Mr. Hargrave's note, to which he refers on page 338, and on page 341 cites Godbold v. Freestone, 3 Lev. 406, in support of the rule. He states that case as follows: "A person seised of lands by descent *ex parte materna* made a feoffment of them to uses, . . . to the use of himself for life, remainder to his wife for life, remainder to the heirs of his body on his wife begotten, remainder to his own right heirs. . . . Adjudged that upon the death of the husband without issue, the remainder descended to the heirs of the feoffer *ex parte materna*, because the ancient fee remained in him." And he adds on page 341: "Where a fine was levied or a common recovery suffered, if the use was not altered, the mode of descent was not changed." In a more modern work, Broom & Hadley's Commentaries, top page 660, the same doctrine is stated thus: If one seised *ex parte materna* "made a feoffment in fee so as to part with the estate absolutely, and then took a reconveyance, the descent was broken, but if he made a conveyance for the purpose of creating particular estates and limited the ultimate fee to himself, this was held to be the same estate that he had before, and it descended to the heir *ex parte materna*. The estate which is taken back must be in reality a new estate, and not merely a part of the old estate," unless it comes within the statute of 3 & 4 William IV. chap. 106, § 1, enacted in 1833, which changed the rule previously stated, but which is, of course, not in force in Maryland.

The great case of Cave v. Holford, 3 Ves. Jr. 650, is the most interesting discussion of the principles here involved which we have examined. In that case the opinions of Justices Rooke, Heath, and Buller given in the court of common pleas controlled the decision, while Chief Justice Eyre dissented, and the opinions of each of these justices are reported in full, the editor of the Reports referring to it as a case involving deep research of authority.

The judgment of the court of common

pleas was affirmed by the high court of chancery, but that decision, having been rendered in 1798, is not binding upon us as authority, and we are free to consider it with that deference which is due to all the cases of the higher courts of England. In this spirit we have examined that case, and in our judgment the conclusion of Chief Justice Eyre rests upon principles more in accord with justice, and with an enlightened view of the application of legal principles, and more in consonance with the views of the courts of this country upon this question. The form in which the question was there presented was whether the conveyance by a testator of property devised by his will was a revocation of the will as to that property upon the ground that after-acquired property could not pass by the will. The conveyances which were there held to operate as a revocation of the will were of lease and release, and Chief Justice Eyre said: "Let the operation of . . . [this] conveyance be what it may, the testator died seised of that estate which he had at the time he executed the will; . . . and that I may be clearly understood when I say the same estate, I do not mean the identity of the land, but the quality of estate and interest in that land. I mean to argue that he died seised of the old use to which the new estate, right, title, and possession (to use the words of the statute) that was for a moment in the trustees, under the conveyance, had united itself, not as a new estate, right, title, and possession, but according to the quality, manner, form, and condition of that old use, for those are the words of the statute. Here I take my ground . . . The intent of the parties in . . . [this] deed and the whole substantial effect (be its formal operation what it may) was simply to secure a jointure of £1,400, and the estate subject to that was not intended to be altered or in any manner affected; and, as far as the form of the conveyance purports to alter the nature and quality of the estate, it goes beyond the object of the conveyance. Courts of justice not only do not incline to allow the form of the conveyance to go beyond the intention, but will be ready to adopt all expedients to prevent it, and to confine the operation of every conveyance to the special purpose,"—citing for this purpose Lord Hardwicke in *Parsons v. Freeman*, 3 Atk. 741. Referring to *Tickner v. Tickner*, the chief justice said: "They [the judges] wisely determined the purpose of the conveyance was everything, the form nothing; . . . and upon that authority, supported by that of Lord Hardwicke in *Parsons v. Freeman*, . . . I am of opinion that the authorities will be 39 L.R.A. (N.S.)

better supported by declaring that this conveyance is not a revocation, . . . than by the contrary determination." It is significant, moreover, that in the opinion of Mr. Justice Rooke he observes "you must distinguish between an intention to have the land as a new purchase, and an intention to revoke the will,"—thus intimating a distinction between the case of a mere conveyance and reconveyance to accomplish some collateral purpose, and a case involving also the question of the revocation of a will as to the special property under consideration as a result of a conveyance and reconveyance after the execution of the will. And in the opinion of Mr. Justice Buller in the same case, he refers to *Godbold v. Freestone*, 3 Lev. 406, and *Abbott v. Burton*, 2 Salk. 590, in both of which the estate taken back was held to be of the old use, and therefore to go to the heir *ex parte materna*, and he says: "In these two last cases there was no question about a revocation." The principles thus announced are not without support by analogy in our own decisions. In *Lynn v. Gephart*, 27 Md. 563, where the question before the court was as to changing the quality of property from real to personal by a deed of trust, our predecessors said: "The inclination of courts of equity upon this branch of jurisprudence is not generally to change the quality of the property, unless there is some clear intention or act by which a definite character, either as money or land, has been unequivocally fixed upon it throughout."

The views expressed by Chief Justice Eyre above are in exact accord with the language of Judge Robinson in *Rawlings v. Lowndes*, 34 Md. 643, where he said: "At common law the widow was entitled to dower in the lands and tenements by which the husband was seised as of an estate of inheritance during the coverture. If, however, the seisin was merely instantaneous, intended as a means of accomplishing some ulterior purpose in regard to the estate, the husband being, as it were, a conduit through which the estate passed, without any intention to clothe him with a beneficial interest, the widow would not be entitled to dower, as for instance a conveyance to a trustee to reconvey, or as put in the old books, a levy by way of a fine, the conveyance rendering back by the same fine the lands and tenements to the conusor. The husband in such cases holds the bare legal title without any beneficial interest." 2 Crabb, Real Prop. 61; Washb. Real Prop. 176; Co. Litt. 31b." And in *Glenn v. Clark*, 53 Md. 606, this is said to be "the established law in Maryland." The cases of *Freeman v. Allen*, 17 Ohio St. 527, and

Carter v. Day, 59 Ohio St. 96, 69 Am. St. Rep. 757, 51 N. E. 967, both cases for partition of land of which the ancestor died seised, support the conclusion reached in this case by the circuit court, and the case of *Helfinger v. Wolff*, 11 Ohio Dec. Reprint, 906, which is not a case for partition, will be found especially instructive. That case is fully and clearly reasoned, and the conclusion reached by the court is thus expressed: "Where . . . one owning both the legal and equitable estates by descent momentarily parts by her own act with the mere technical legal title, retaining the entire beneficial interest, which standing alone would have descended as ancestral, thus creating a mere dry trust, which is held to her unqualified use, the immediate reacquirement of the naked title does not break the descent and constitute her a new source of title, for she conveyed the legal title to her own use."

This case has been argued for the appellants with great zeal and very ably, and their argument is sustained by the decision in *Holme v. Shinn*, 62 N. J. Eq. 1, 49 Atl. 151, in an elaborate opinion by the chancellor, and also by the case of *Nesbitt v. Trindle*, 64 Ind. 185, but we are not able to adopt the views there held for the reasons already stated.

Order affirmed, with costs to the appellees above and below.

MISSISSIPPI SUPREME COURT.

ÆTNA INDEMNITY COMPANY, Appt.,
v.
STATE OF MISSISSIPPI FOR USE OF
EVA MAE GALLASPY et al.

STATE OF MISSISSIPPI FOR USE OF
EVA MAE GALLASPY et al., Cross
Appts.,
v.

J. B. McALPIN et al.

(— Miss. —, 57 So. 980.)

Bond — substitution — effect on existing liability.

1. Sureties on a guardian's bond are not

Note. — *Liability of sureties on guardian's bond for defalcation prior to the execution thereof.*

Under the general rule that a bond is prospective only in operation, and that sureties are not liable for defaults of their principal which took place before the execution of the bond, unless made so by its terms (*Moore v. Hanscom*, — Tex. Civ. App. —, 103 S. W. 665), it has been held that, 39 L.R.A. (N.S.)

relieved from liability for an existing defalcation by an order, upon their petition for the execution of a new bond by the guardian, that a new bond be recorded, and that the petitioning sureties be relieved from further liability on the bond.

Same — prior defalcation — liability.

2. Sureties on the bond of a guardian, executed after he has converted property of his ward to his own use, are liable for the defalcation if, after the bond is executed, he continues solvent, so that he could have restored the funds to the trust, which he failed to do.

Party — character — guardian ad litem — next friend.

3. That one seeking to hold the bond of a guardian liable to restore to the ward money converted by the guardian to his own use designates himself as guardian *ad litem*, rather than as next friend, will not defeat the action.

(March 25, 1912.)

CROSS APPEALS from a decree of the Chancery Court for Newton County in favor of plaintiffs against the Ætna Indemnity Company, but in favor of J. B. McAlpin et al., in a suit on the bonds of G. M. Gallaspy, guardian of the use plaintiffs; the Indemnity Company appealing from so much of the decree as held it liable as surety, and the state appealing from so much as exonerated the sureties on the other bond. Reversed on the cross appeal. The facts are stated in the opinion.

Messrs. W. I. Munn and Amis & Dunn for appellant.

Mr. J. R. Byrd and Byrd & Wilson, for appellees:

The bondsmen of a guardian are liable for the neglect or failure of the guardian to collect any outstanding indebtedness due the ward, where the same could have been collected, had he exercised reasonable diligence. This includes money he might have collected from himself.

15 Am. & Eng. Enc. Law, 2d ed. pp. 118, 119; *Parker v. Medsker*, 80 Ind. 155; *State v. Dennis*, 58 Mo. App. 568; *Clark v. Wilkinson*, 59 Wis. 543, 18 N. W. 481; *Matthews v. Mauldin*, 142 Ala. 434, 38 So. 849, 4 Ann. Cas. 344.

in the absence of a plain expression of intention in the bond that it is to be retrospective in its operation, sureties on the bond of a guardian are not liable for his misapplication or conversion of property of the ward to his own use prior to the execution of the bond (*Lowry v. State*, 64 Ind. 421; *Parker v. Medsker*, 80 Ind. 155; *Williams v. State*, 89 Ind. 570; *Howe v. White*, 162 Ind. 74, 69 N. E. 684; *State ex rel. Towler v. Shackelford*, 56 Miss. 848; *Freed-*

Mayes, Ch. J., delivered the opinion of the court:

On the 27th day of June, 1899, G. M. Gallaspy was appointed as guardian of his three minor children by the chancery court of Newton county. At the time of the appointment there seems to have been very little personal estate for him to take charge of, and the court required only a \$500 bond to be executed for each child. It appears that each of these bonds had the same sureties. It appears that, after the guardian assumed the duties as such, he paid little attention to his accounting with the court for a long while, and there seems not to have been much necessity for the same, since little money came into his hands which required accounting to the court, and

the court itself seems to have made some orders excusing the guardian from accounting. None of these things become of importance in deciding this case, so we give this only passing notice.

In December, 1905, the guardian received for each of the wards \$1,712.13 as the proceeds of the sale of their interest in certain timber sold to a lumber company. The validity of this sale is not drawn in question. When this amount due each ward was received by the guardian, he was only under a bond of \$500 to each ward, and, although the guardian filed an inventory in the court on December 25, 1905, reporting the sale, and disclosing that on December 1, 1905, he had received for each of his wards the amount of \$1,712.13, the court did not at

man v. Vallie, — Tex. Civ. App. —, 75 S. W. 322), although the guardian, during the time the bond is in force, has reported to the proper court and acknowledged his true indebtedness to the ward, but has had no assets in his hands belonging to the ward (Lowry v. State, 64 Ind. 421).

So, the sureties on a bond conditioned for the future faithful performance of a guardianship are not liable for an actual waste of the ward's money by the guardian before the execution of the bond. Sebastian v. Bryan, 21 Ark. 447.

And the sureties on a guardian's bond, not being liable for the value of property of the ward which the guardian has sold and converted to his own use before the execution of the bond, are not liable for the guardian's failure to account for the value of such property, although the bond is conditioned that the guardian shall faithfully account with the court for the management of the ward's estate. State ex rel. Towler v. Shackelford, 56 Miss. 648.

On the other hand, in Matthews v. Mauldin, 142 Ala. 434, 38 So. 849, 4 Ann. Cas. 344, it was held that the sureties on a new bond given by a guardian are liable, upon the ground of the guardian's obligation to make a true account, for a misappropriation of the ward's funds which took place before the giving of the bond.

And in Fogarty v. Ream, 100 Ill. 366, it was held that a surety on a guardian's bond is liable for funds due from the guardian to his ward, and so reported by the guardian at and subsequent to the time of his appointment and the execution of the bond, although the guardian had previously wasted the funds, and did not have them in his possession at that time, and was then, and has ever since continued to be, insolvent.

And sureties on a guardian's bond, though liable only for defaults of the guardian occurring after the execution of the bond, are liable for the amount of a loan of the ward's money, previously made by him, without an order of the court for that purpose, to a firm of which he was a member, for which, at the time of the execution of 39 L.R.A. (N.S.)

the bond, he held a note made by the firm and payable to him, as guardian, where the firm was then, and for several years afterward remained, solvent, so that the note could have been collected by proper attention, but the guardian made no effort to collect it, and the money due thereon was lost through the subsequent insolvency of the firm. McWilliams v. Norfleet, 63 Miss. 183.

In several cases, the form of the bond has been held to render the sureties thereon liable for a prior defalcation of the principal. Thus, sureties of a guardian have been held liable for his prior misappropriation, waste, or conversion of property of the ward to his own use, under bonds conditioned as follows:—

—that he shall pay to the ward all sums due him upon the determination of the guardianship. State v. Buck, 63 Ark. 218, 37 S. W. 881.

—that he "shall faithfully discharge the office and trust of such guardian, according to law." Knox v. Kearns, 73 Iowa, 286, 34 N. W. 861.

—that he shall "well and faithfully perform all the duties imposed upon him by law." Douglass v. Kessler, — Iowa, —, 7 N. W. 619.

—that he shall faithfully execute his guardianship and render an account thereof, and deliver up or pay to the ward all such estate as he ought to be possessed of, or to such other person as shall be lawfully authorized to receive the same, and do and perform all and every other act and duty which by law guardians are required to do and perform. Steele v. Reese, 6 Yerg. 263.

And the surety on the bond of a guardian, conditioned that he shall well, truly, and faithfully execute and discharge his office as guardian, and render a true account, is liable for money received by the guardian for property of the ward prior to the execution of the bond, for which he has never accounted. Merrells v. Phelps, 34 Conn. 109.

So, also, sureties on the bond of a guardian, executed upon his appointment in a county to which he has removed after hav-

that time require any additional bond, although the guardian's report showed that he held three times as much money for his wards as his bonds covered. On May 13, 1907, nearly eighteen months after the filing of the inventory showing the sale of the wards' property, and when this amount had been in possession of the guardian since December 1st under the \$500 bonds, it appears that an application was filed by the sureties on the first bonds, seeking to be released therefrom, and the court made an order that the sureties on the first bonds be relieved from further liability, and that a new bond be executed, which was accordingly done on the 13th day of May, 1907. This new bond was executed in the sum of \$6,000, and was given as a security for all

three of the children. Accordingly, after the execution of the new bond, the guardian, without ever having made any settlement of his accounts up to this time under the old bonds, was continued as guardian under this bond until some time in 1910, when he died.

It indisputably appears that when the guardian sold the timber to the lumber company, in December, 1905, he received therefor the sum of \$12,400, one-seventh of which, or the sum of \$1,712.13, belonged to each of the wards. It further appears that the whole amount, including the minors' interest, was deposited in the Bank of Decatur to the individual credit of G. M. Gallaspy, then engaged in a mercantile business, and all of said money was checked out

ing served as guardian in another county, and conditioned that he shall faithfully discharge all the duties required of him by law, shall faithfully account with the probate court for the management of the property and estate of the ward, and shall also deliver up said property agreeably to the order of the court or the directions of law, and shall in all respects perform the duty of guardian according to the law,—are liable for moneys of the ward received by the guardian and appropriated to his individual use, during the prior guardianship, and stated in his account and settlement of that guardianship as due the ward. *State v. Stewart*, 36 Miss. 652.

And sureties on the bond of a guardian, conditioned for the faithful discharge of his duties according to law, are liable for his failure to pay over the balance against him on his final settlement, although it is made up, in part, of sums carried forward in his settlement, but received and misappropriated by him before the execution of the bond. *State v. Bilby*, 50 Mo. App. 162.

But in *Lincoln Trust Co. v. Wolff*, 91 Mo. App. 133, it was held that the sureties on a bond of this kind are not liable for the guardian's conversion of property of the ward to his own use prior to the execution of the bond, unless the guardian's breach of duty is continued after the execution of the bond by his carrying the converted asset forward into a final settlement of his account as guardian, when the sureties will be bound by the judgment of final settlement, and estopped to go behind that judgment to show that the breach was actually committed before they became sureties.

Under a statute providing that "the sureties of any guardian who apprehend danger of pecuniary loss by reason of such suretyship may apply to the chancellor having jurisdiction, by petition, and on convincing the chancellor, in term time, that such danger really exists, an order shall be made requiring such guardian to give another bond," and "if the new bond be given, the sureties on the former bond shall not be liable thereon, except as to all acts of the guardian up to the time of executing the

new bond,"—sureties on the bond of a guardian, executed upon the petition of his original sureties for relief, are not liable for any default of the guardian prior to the execution of the new bond. *McWilliams v. Norfleet*, 60 Miss. 987.

But under a statute for the relief of sureties, providing that, upon the application of the surety of a guardian, who wishes to discharge himself from further liability on his bond, the guardian shall be required to execute "a further bond for the performance of the condition of the former bond, with such additional security as may be approved," a surety on the new bond of a guardian, conditioned that the guardian shall "faithfully perform the trusts of his guardianship, being the condition of the said former bond," is liable for all defalcations of the guardian, as well those which took place before the execution of his undertaking as those which happened afterward. *Armstrong v. State*, 7 Blackf. 81.

And under a statute providing that the surety of a guardian may complain, and the ordinary may discharge the surety, and such guardian shall be discharged from his trust unless he gives new and sufficient security, and that such new sureties shall be liable as well for past as future waste or misconduct of the guardian, the sureties on a substituted guardian's bond are liable for any waste of the guardian, and while, primarily, the sureties on both bonds are severally liable to the ward for waste prior to the second bond, as between themselves, the last sureties are first bound. *Sutton v. Williams*, 77 Ga. 570, 1 S. E. 175.

But while the sureties on a new bond of a guardian, executed pursuant to an order of the court upon the petition of former sureties for relief, and conditioned that the guardian shall faithfully perform his trust, become primarily liable with the former sureties for funds of the ward wasted by the guardian before the giving of the new bond, the ward is not entitled to recover the sum of the penalties of the two bonds, and if the first set of sureties have paid out of counter security furnished them an amount equal to the penalty of their bond,

to pay for the different indebtedness and for investments in conducting the business in which Gallaspy was engaged at the time, and that this was done between December 1, 1905, and May 13, 1907, the date of the new bond. In other words, Gallaspy took this whole sum and treated it as his own, and converted it to his own use and disposed of it prior to the giving of the second

bond, and that he had not only done this, but that he had overdrawn some \$4,000. While the record unquestionably shows that while acting under the first bonds he had converted to his own use the money belonging to his wards, it also appears that on May 13, 1907, when this bond was executed, Gallaspy was still solvent and worth several thousand dollars more than

which is equal to or greater than the penalty of the new bond, the penalties of both bonds must be regarded as satisfied. *Field v. Pelot, M'Mull. Eq. 369.*

Additional sureties on a guardian's bond, or sureties on an additional or cumulative bond, furnished under some statutory provision, without the discharge of the prior sureties, are generally held to have assumed liability for past as well as future defaults of the guardian. Thus, one who, as supplemental security, executes a guardian's bond which has been previously executed by the guardian and other sureties, becomes liable as an original obligor, and is liable for a default prior to his execution of the bond. *Ammons v. People, 11 Ill. 6.*

And sureties on a guardian's bond given as new and additional security for the proper conduct and accounting of the guardian, without the discharge of the sureties on the prior bond, become cosureties with those on the first bond for any past as well as future waste, and are liable to the ward, to the extent of their bond, for the full amount of the guardian's devastavit. *Remington v. Hopson, 137 Ga. 95, 72 S. E. 918.*

Likewise, a surety on a bond given by a guardian as additional security, on account of the supervening insufficiency of the surety on his original bond, who was not thereby released, which new bond is conditioned that the guardian shall faithfully account with the probate court, as directed by law, for the management of the property and estate of the ward, and deliver up the said property agreeably to the order of the court or the direction of law,—is liable for property which came into the guardian's hands and was maladministered by him before the execution of the new bond. *State use of Baird v. Hull, 53 Miss. 626.*

And sureties on the bond of a guardian, conditioned that he shall faithfully "discharge all the duties imposed upon him by law," and filed pursuant to an order of the court requiring an additional bond to be filed, on account of the insufficiency of the existing bond, the sureties on the old bond not being discharged, nor the guardian discharged or reappointed, but continuing to act under the original appointment,—are liable for a default of the guardian previous to the filing of such bond. *Douglass v. Kessler, 57 Iowa, 63, 10 N. W. 313.*

So, also, sureties on the bond of a guardian, given upon the petition of his prior sureties, under a statutory provision, as "other and further security," are liable equally with the prior sureties for all de-

faults of the guardian, including those for which he was responsible before the date of the second bond. *Com. v. Cox, 36 Pa. 442.*

And sureties upon a new and additional bond of a guardian, executed pursuant to a statutory notice given by sureties on a prior bond for the purpose of relieving themselves from future liability, which new bond is merely cumulative and does not relieve the sureties on the old bond, other than those giving such notice,—are liable equally with the remaining sureties on the old bond for money received and converted by the guardian before the execution of the new bond. *Abshire v. Rowe, 112 Ky. 545, 56 L.R.A. 936, 99 Am. St. Rep. 302, 66 S. W. 394.*

And sureties on a new bond of a guardian, executed under statutory provisions, upon a petition of his prior sureties, as an additional and cumulative security to the ward, for the entire guardianship, after the guardian has received the entire estate of the ward, and has used or wasted the ward's money, are liable as cosureties with the original bondsmen, in proportion to the amounts of the respective bonds, for the defalcation, and are liable to contribution to one of the original sureties against whom the amount of the guardian's default has been recovered, the guardian himself being insolvent. *Bell v. Jasper, 37 N. C. (2 Ired. Eq.) 597.*

In the same way, sureties on a "renewal" bond of a guardian, required by statute, and which is cumulative security for the performance of the duties of the guardianship, are liable as cosureties with the sureties on the prior bond or bonds of the guardian, in proportion to the amounts of the respective bonds, for all defaults of the guardian, no matter when such defaults occurred, whether wholly before they became sureties, or after; and all the sureties are liable to contribute to each other for any sums paid by one of them on account of defaults of the guardian. *Jones v. Hays, 38 N. C. (3 Ired. Eq.) 502, 44 Am. Dec. 78.*

But in Tennessee it has been held that the sureties on a "renewal" bond of a guardian, required by statute upon his periodical statement of his ward's estate, and which is cumulative to the prior bond or bonds, are liable in the first instance for all the delinquencies of the guardian, though committed before the execution of their bond. *Collins v. Knight, 3 Tenn. Ch. 183; Crook v. Hudson, 4 Lea, 448.*

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was due his wards. Therefore, when he executed this second bond, he was indebted to his wards for the amount of money which he had converted, and he was amply able to have paid their claim. It appears that in the latter part of the year 1909, and nearly two years after the giving of the second bond, and without ever having made any accounting to the court of the money of the wards previously converted by him, Gallaspy became insolvent, and in the early part of 1910 was put into bankruptcy, dying about May of the same year.

After his death a suit was instituted by J. R. Rowzee, in behalf of the wards, and describing himself in the suit "as guardian *ad litem*." This suit is instituted in the chancery court against the bondsmen on both bonds, seeking to hold both sets of sureties liable. The case was heard, and the chancery court held that the second bond alone was liable for the indebtedness due by the guardian to the wards, and dismissed the suit as to the sureties on the first bonds. From this judgment the Indemnity Company prosecutes a direct appeal, and the so-called "guardian *ad litem*" prosecutes a cross appeal. The bond company contends that the first bond is liable alone, and the "guardian *ad litem*" claims that both bonds are liable. The question is whether or not the first bond is liable, to the exclusion of the second, or whether or not the second bond is liable, to the exclusion of the first, or whether both bonds are liable. It appears that the total sum due all the wards is over \$8,000, more than the total amount of both bonds; the second bond being for \$6,000, and the first three bonds each being for the sum of \$500. We want to emphasize the fact that, although it appears that the actual conversion of the property by the guardian took place while he was acting as guardian under the first bonds, yet at the time the second bond was given, and for nearly two years after the guardian entered upon his duty as guardian under the second bond, he was solvent, and the amount due the wards could have been made out of him at any time up to the latter part of 1900.

It appears from the record that the sureties on the first bonds applied to the court, under the authority of § 2407 of the Code of 1906, authorizing the court, on petition of the sureties, to require the guardian to execute a new bond. It is practically conceded on both sides that this petition was filed, and that the court required the execution of a new bond. No question is raised as to the validity of the court's action in this regard. The order is made by the court on the 13th day of May, 1907, 39 L.R.A. (N.S.)

and recites that "it is ordered by the court that the sureties be relieved from further liability on said bond, and that the new bond be recorded." From the order made by the court it plainly appears that a new bond, and not an additional bond, was taken, and it is also plain that this new bond was intended to be a security for further, and not past, derelictions of duty on the part of the guardian. In the case of *State ex rel. Towler v. Shackelford*, 56 Miss. 648, this court held that a guardian's bond had no retrospective operation, unless such bond plainly indicates an intention that it should have a retrospective effect. To the same effect are the cases of *Lewenthall v. State*, 51 Miss. 645; *State use of Baird v. Hull*, 53 Miss. 626; *McWilliams v. Norfleet*, 60 Miss. 987; *McWilliams v. Norfleet*, 63 Miss. 183.

In view of the above decisions, and since it is plain that the guardian converted the funds of the wards to his own use while acting as guardian under the first bonds, it must follow that appellant is not liable on its bond for the actual conversion of the funds; but the first bondsmen are, and the court erred when it dismissed this suit as to them.

This breach having occurred while the first bonds were current, those bonds are liable to all damages that accrue to the wards on account of that breach; but this conclusion does not result in releasing the sureties on the second bond. The amount of both bonds is not sufficient to make the wards whole, so there can arise in this case no conflicting rights as between the bondsmen themselves, or as to their liability between themselves. While the court held in the case of *McWilliams v. Norfleet*, 63 Miss. 183, when it was before the court for the second time, that the new bond of a guardian was prospective, and not retrospective, it also held that a guardian's bond "imports responsibility for losses occasioned by negligence or inattention, as well as for the corruption, of the guardian. It cannot be that a breach of the first bond confers any immunity upon . . . the sureties on his second bond for an infraction of the latter. They are liable not only for money and assets of the wards' estate which 'actually came into the hands' . . . after the second bond was executed, but also for such as he might and could have collected and reduced to possession by a faithful administration of his office. Any other doctrine would be a novelty in the law in relation to guardians and trusts." And the court further holds that it is the duty of a guardian, whether acting under a first or a second bond, to "exercise reasonable care and diligence in the management

of the ward's estate, to collect debts and securities belonging to the estate, and to administer the trust confided to him for the benefit of the wards, and not for the advantage of himself." In the *McWilliams Case*, 63 Miss. 183, after declaring the above rule of law, the court held the second bond of a guardian liable for the failure of the guardian to collect from himself and partners, while solvent, a note which was lost to the wards on account of this neglect and the subsequent insolvency of himself and partners, although it appeared that the improper dealings with the fund of the wards took place under a former bond. This rule was declared in the cases of *Crump v. Gerock*, 40 Miss. 765, *Banks v. Machen*, 40 Miss. 256, *Moffatt v. Loughridge*, 51 Miss. 211, and in *Ames v. Williams*, 74 Miss. 404, 20 So. 877. The law announced by the above cases is the universal law, so far as we have been able to ascertain it.

When this second bond was given, although the actual conversion of these wards' property had taken place under the first bond, the guardian was solvent and fully able to pay the amount then due the wards. The amount was lost to them because the guardian failed and neglected to pay over the amount to them as he should have done, and it was because of this neglect that they lost their money. It is true that in this case it was a debt owing by the guardian to the wards, and not the debt of a third party. It is also true that the neglect of the guardian was the failure to pay over for the wards, while he was solvent, and from himself, a sum of money which he had converted, and which belonged to them. But this fact cannot affect the legal principle. The duty imposed by law for him to protect his wards from loss by neglect to exercise reasonable diligence to collect debts owing to them rested more heavily upon him when he was their debtor by his own wrongful act than it would if he had merely failed to collect a debt from some third party. Under these circumstances the law would hold his bondsmen liable under a state of facts that might exculpate them under other circumstances. A rule of law that would exculpate a guardian for failing to collect from himself when he had wrongfully converted the funds of his ward, merely because the debt was owing by him, and he as an individual would have to make the payment to himself as guardian, would be a perversion of the right, and we apprehend that no court will ever so hold. Of course, it must appear in every case that the guardian was solvent and could have been made responsible during the currency of the second bond. In 39 L.R.A. (N.S.)

short, it must be shown that the wards have actually suffered loss by reason of the neglect. If it were shown that the guardian was insolvent, and that at no time during the life of the second bond could the amount have been collected, the second bond would not be liable for the neglect, because no damage was done by it.

In the case of *Johnson v. Hicks*, 97 Ky. 116, 30 S. W. 3, the court held that, "if one was solvent when he qualified as guardian, a note then due from him to the ward's estate will be treated as cash assets, thereby rendering the sureties on his bond liable for the amount of the note" if he subsequently becomes insolvent without having paid the ward the amount due him; the bond is liable for this failure on the part of the guardian to do his duty and collect the debt, and, of course, it can make no difference whether the debt due the ward is a note or an open account. The evidence of the indebtedness does not affect, in any way, the liability of the bondsmen for same. So, also, in the case of *United States Fidelity & G. Co. v. State*, 40 Ind. App. 136, 81 N. E. 226, it is held that where one is appointed guardian of a minor's estate, who, at the time of assuming the trust, is personally indebted to the estate, the guardian must pay the debt, separate the amount of it from his own funds, and invest it for the benefit of the ward, if he be solvent at the time, and his failure to so invest it is a conversion of that amount of the ward's funds to his own use, and the bond is liable. See also *State ex rel. McClamrock v. Gregory*, 119 Ind. 503, 22 N. E. 1; *Sargent v. Wallis*, 67 Tex. 483, 3 S. W. 721; *Mattoon v. Cowing*, 13 Gray, 387; *McGill v. O'Connell*, 33 N. J. Eq. 256; *Martin v. Davis*, 80 Wis. 376, 50 N. W. 171.

There was a breach of both bonds, and the amount adjudged to be due the minors absorbs both bonds. Both having been breached during the currency of each, neither had right to complain that both are made liable for the breach that occurred during the currency of each bond. Both are independently and separately liable in the full penalty, since the damage done to the wards exceeds the penalty of both. The burden that either bond is made to bear is neither lessened nor increased by the fact that the other is also liable for a different breach of faith in regard to the preservation of the same fund. Both bonds were given to make secure the fund, and, if it takes them both to do that for which they were given, neither has any ground of complaint. If no second bond had been given, the first would have been liable, because the actual conversion had taken place dur-

ing its currency. If the money had simply been owing the guardian from a third person, and had been lost to the wards by the neglect of the guardian, the second bond would have been liable; and this is just what occurred, except that the debtor was the guardian himself.

But it is further argued that this suit cannot be maintained, because brought by Rowzee as "guardian *ad litem*," and not as next friend. In answer to this argument we have only to say that where a minor's interests are at stake, and when the record shows that a person instituting a suit is in reality acting as the "next friend" of the minor, this court will not look with critical eyes on the characterization which the next friend chooses to give himself in the pleadings. We shall treat him as in truth what he is,—the friend of the minor,—and trust to the sound judgment of the infants' court to require of him the full discharge of his duty to the minor, by whatever name such person chooses to designate his representative character.

It follows that this case is affirmed on direct appeal, and reversed on cross appeal, with direction to enter judgment here on cross appeal against the sureties on the first bond for the full penalty of the bond. So ordered.

Suggestion of error overruled.

NEW YORK COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK,
Respt.,
v.

MICHAEL COSMO, Appt.

(205 N. Y. 91, 98 N. E. 408.)

Jury — property qualifications — waiver.

The statutory property qualification for a trial juror may be waived in a criminal

case, and is so by failing to object to his serving until after verdict.

(March 26, 1912.)

APPEAL by defendant from a judgment of a Trial Term of the Supreme Court for Orange County, convicting him of murder in the first degree. Affirmed.

The facts are stated in the opinion.

Messrs. William A. Parshall, with H. B. Fullerton and Howard M. Starr, for appellant:

There can be no doubt that Barnes was not a qualified juror.

Kelley v. People, 55 N. Y. 565, 14 Am. Rep. 342; Armsby v. People, 2 Thomp. & C. 157; People v. Dunn, 157 N. Y. 528, 43 L.R.A. 247, 52 N. E. 572; Hudson v. Caryl, 44 N. Y. 553; Sands v. Kimbark, 27 N. Y. 147; Cancemi v. People, 18 N. Y. 128; Wynehamer v. People, 13 N. Y. 378; People v. Ransom, 7 Wend. 417; Shepherd v. People, 25 N. Y. 406; Vose v. Cockcroft, 44 N. Y. 415; Pierson v. People, 79 N. Y. 424, 35 Am. Rep. 524; People v. Bradner, 107 N. Y. 1, 13 N. E. 87.

Messrs. Thomas C. Rogers and Jonathan D. Wilson, Jr., for the People:

The jury which tried defendant was legally constituted.

People v. Thayer, 132 App. Div. 593, 116 N. Y. Supp. 821; Eggleston v. Smiley, 17 Johns. 133; Hayes v. Thompson, 15 Abb. Pr. N. S. 220; Seacord v. Burling, 1 How. Pr. 175; Bennett v. Matthews, 40 How. Pr. 428; Stedman v. Batchelor, 49 Hun, 390, 3 N. Y. Supp. 580; Dayharsh v. Enos, 5 N. Y. 531; People v. Jewett, 6 Wend. 389; People v. Rathbun, 21 Wend. 542; People v. Mack, 35 App. Div. 114, 54 N. Y. Supp. 698; Stephens v. People, 19 N. Y. 549; Pierson v. People, 79 N. Y. 424, 35 Am. Rep. 524; Stokes v. People, 53 N. Y. 173, 13 Am. Rep. 492; People v. Dunn, 157 N. Y. 528, 43 L.R.A. 247, 52 N. E. 572; Wassum v. Feeney, 121 Mass. 94, 23 Am. Rep. 258.

Note.—*Waiver of property qualification of juror.*

The general rule as to waiver of lack of qualification of a juror appears to be that qualifications, the lack of which do not affect the ability of the juror to render a fair and impartial verdict, are waived by failure to object to such juror till after verdict, although the disqualification was not known till that time.

Upon the general question of disqualification of a juror as ground for a new trial, see the note to Jewell v. Jewell, 18 L.R.A. 473, in subdivision 4 of which will be found some earlier cases within the scope of the present note.

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The property qualification for jury service is obviously one the lack of which does not effect the ability of a juror to render a fair and impartial verdict, and the overwhelming weight of authority is that such disability is not a ground for objection after verdict. Hammer v. Eddins, 3 Stew. (Ala.) 192; Frank v. State, 39 Miss. 705; State v. Crawford, 3 N. C. 2 Hayw. 298; State v. Davis, 126 N. C. 1007, 35 S. E. 464; Schuster v. La Londe, 57 Tex. 28; Ohio River R. Co. v. Blake, 38 W. Va. 718, 18 S. E. 957.

In Kingen v. State, 46 Ind. 132, it was held that an objection to a juror on this ground came too late after the jury was sworn.

Werner, J., delivered the opinion of the court:

The defendant has been found guilty of murder in the first degree upon evidence which amply supports the verdict, and his appeal to this court is based upon a record which presents but one question worthy of discussion. That question is whether the trial court should have granted the defendant's motion to set aside the verdict, on the ground that a juror, accepted without challenge by the prosecution and the defense, did not have the property qualifications required by the statute.

The defendant was indicted on the 12th day of December, 1910, by a grand jury of Orange county, and charged with the crime of murder in the first degree, in shooting and killing one Dominick Marone, in the city of Middletown, in Orange county, on the 13th day of November, 1910. He was arraigned, pleaded not guilty, and was brought to trial on the 22d day of May, 1911. In the selection of a jury, fifty-eight of the summoned jurors were examined before the panel of twelve was completed. The sixth juror called was one Charles W. Barnes, who was accepted by both sides. The trial proceeded, and the prosecution established, by abundant evidence, the shooting by the defendant, the death of his victim as the result, and the surrounding circumstances which clearly warranted the conclusion that the homicide was a deliberate and premeditated murder. The defendant pleaded self-defense, and produced some evidence to support his plea. The case was submitted to the jury under a charge that was fair and free from substantial error, and the jury returned a verdict of guilty of murder in the first degree. Counsel for the defendant challenges this verdict as unsupported by the evidence; but a careful review of the record has convinced us that the jury came to a just conclusion.

After the imposition of sentence, and on

the 15th day of July, 1911, counsel for the defendant made a motion to set aside the verdict, as stated, on the ground that Barnes was incompetent to serve as a juror, because he lacked the property qualifications which the statute requires a trial juror to have.

As to the facts bearing upon this question, there is no dispute. It appears that on the 15th day of July, 1908, the proper functionaries of Orange county made and filed a list of jurors for the ensuing three years. At that time, Charles Barnes was a resident of Goshen, in Orange county, and living with Ada Barnes, his wife, who was then the owner of real estate in that town of the value of at least \$2,000, for which she was assessed. The husband then owned no real estate, or any interest in any; and he was not assessed for any personal property. He was qualified, however; for he was the husband of a woman who was the owner of a freehold estate of the value of \$150, belonging to her in her own right. Judiciary Law, art. 16, § 502. In less than a year after the name of Barnes had thus been placed on the jury list, his property qualification was removed. On or about April 1, 1909, Mrs. Barnes sold her real estate, and from that time forth neither husband nor wife appear to have had any interest of any kind in real estate. Neither was he thereafter assessed for any personal property. This was the condition of affairs when, on the 8th day of May, 1911, a special panel of fifty jurors was drawn for the defendant's trial. Barnes was one of the fifty, and when he was summoned he informed the deputy sheriff who served him with the notice that he did not think he was qualified to serve as a juror because he was not the owner of property. The deputy sheriff very properly concluded that the question was not for him to decide; and he served his notice. At the opening of the trial, Barnes appeared, but said nothing.

At least, the fact that a juror was not a freeholder is not a ground for a new trial unless it is further shown that probable prejudice resulted from his sitting on the jury. *Martinez v. State*, — Tex. Crim. Rep. —, 57 S. W. 838; *Williamson v. State*, 36 Tex. Crim. Rep. 225, 36 S. W. 444; *Leeper v. State*, 29 Tex. App. 63, 14 S. W. 398.

And in *Orcutt v. Carpenter*, 1 Tyler (Vt.) 250, 4 Am. Dec. 722, where a juror was qualified when his name was put in the jury box, his subsequent disqualification by divesting himself of his freehold cannot be taken advantage of after verdict.

Especially will the fact that a juror is not a freeholder furnish no ground for a new trial when the parties failed to interrogate the jury as to their qualification in this respect. *People v. Sanford*, 43 Cal. 39 L.R.A. (N.S.)

29; *Estep v. Waterous*, 45 Ind. 140; *Gillooley v. State*, 58 Ind. 182; *Corley v. State*, — Tex. Crim. Rep. —, 65 S. W. 1073.

And in *International & G. N. R. Co. v. Woodward*, 26 Tex. Civ. App. 389, 63 S. W. 1051, it is held that the fact that a juror was not a freeholder was not a ground for new trial, though the juror answered on his *voir dire* that he was qualified, as it was the duty of appellant to inform himself as to the qualification of the juror so as to make the objection at the proper time.

However, in *Lamphier v. State*, 70 Ind. 317, a new trial was awarded because it appeared that the court and counsel were deceived by a juror's answers as to his qualification as a freeholder. R. L. S.

ing of his lack of property qualifications. He was the sixth man drawn, and was accepted by both sides without challenge. He sat through the trial, and participated in the deliberations of the jury and in rendering the verdict.

The sacredness and importance of the right to trial by jury is attested by the arrangement, no less than by the language, of our Constitution. The first great command of that charter of our rights provides that "no member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers" (article 1, § 1); and the second is that "the trial by jury in all cases in which it has been heretofore used shall remain inviolate forever." Article 1, § 2. And, as if to lend solemnity and emphasis to this declaration in the second section, it is further ordained that "a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law." Article 1, § 2. The inevitable implication of this language is that the citizen is not only entitled to the trial by jury in all cases in which it has been heretofore used, but that in criminal cases in which it has been heretofore used it cannot be waived by either party. The period referred to in the expression "heretofore used" is the time which antedates the adoption of the original Constitution, when the common law was in force. *Duffy v. People*, 6 Hill, 75. It must follow that, if the right itself cannot be waived, neither can there be a waiver of anything that is essential to the full benefit or protection which the right is designed to safeguard. *Cancemi v. People*, 18 N. Y. 128, 136.

From time immemorial, a common-law jury has consisted of twelve men. When or how that number acquired its historic sacredness, no one can tell; for the origin of the institution itself has been lost in the darkness of antiquity. Much less does history inform us with exactness as to the ancient qualifications required of these twelve. There seems to have been a time when they were witnesses who decided cases upon their personal knowledge of the matters in controversy. In the feudal days, they were required to be freemen; and from this circumstance it may be surmised that some, if not all, were owners of property. With the development of civilization and the gradual establishment of property rights, there came a period when the ownership of property was probably regarded as something of an index to the intelligence, character, and standing of men in their communities, and as a convenient basis for the arbitrary fixing of a class from which the

ultimate selection of jurors was to be made. In England this qualification seems to have been at first confined to such capital cases as treason, misprison of treason, and murder (1 Hale, P. C. 283; 1 Bishop, Crim. Proc. 2d ed. § 921); and we know that later it was extended by statute, so that when the common law took root in American soil we ingrafted upon the jury system the property qualification which, to some extent, and in one form or another, has survived to this day. From this short and imperfect reference to the history of the subject, we perceive that, although the jury as an institution reaches backward beyond the memory or knowledge of man, it has had to be adapted to the ever-changing conditions brought about by the progress of the centuries. Through it all, only two things have remained fixed and immovable: The common-law jury must have twelve men, and these twelve, although taken from a class whose general qualifications may be arbitrarily fixed by law, are chosen by a selective process which, although constantly changing in form, is always designed to secure the service of intelligent and impartial citizens who will be alike the conservators of the obligations of the state and the rights of the individual.

Thus we see that the right of trial by jury, both in England and here, is imbedded in the Constitution; and with us it is a right which, in criminal cases, cannot be waived. But the method of securing that right, in respect of selecting men who are deemed qualified to act as jurors, is one of legislative cognizance which is subject to any change that does not trench upon the fundamental right. *People v. Dunn*, 157 N. Y. 528, 536, 43 L.R.A. 247, 52 N. E. 572; *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492.

None of the Constitutions of this state have ever prescribed the qualifications of jurors. From the earliest time, there has been legislation upon the subject, and it has been frequently changed. In 1699 the colonial legislature of New York passed an act prescribing that jurors should have in their own right a good house or messuage with 10 acres of freehold; and in the cities of New York and Albany a dwelling house, free from all encumbrances, or a personal estate of the value of £50 current money of the province. Colonial Laws of N. Y. vol. 1, chap. 66, p. 387. With various unimportant modifications in respect of property qualification, this continued to be the law in the colony and state (Laws 1788, chap. 41; Laws 1808, chap. 98; 1 Rev. Laws of 1813, chap. 4) until the adoption of the Revised Statutes, when, for the first time, jurors outside of the cities of New York, Albany,

and Hudson were put upon the same footing with jurors in those cities, and were qualified, if assessed for \$250 of personal property. Without pursuing this statutory history in detail, it is enough to say that we have now a variety of statutes, which have been collated in the judiciary law, setting forth different standards of qualification for jury service and various methods of selection. The general statute, relating to all parts of the state not governed by special laws, prescribes that a person to be qualified as a trial juror in a court of record must be: "1. A male citizen of the United States, and a resident of the county. 2. Not less than twenty-one nor more than seventy years of age. 3. Assessed, for personal property, belonging to him, in his own right, to the amount of \$250; or the owner of a freehold estate in real property, situated in the county, belonging to him in his own right, of the value of \$150; or the husband of a woman who is the owner of a like freehold estate, belonging to her, in her own right. . . . 4. In the possession of his natural faculties, and not infirm or decrepit. 5. Free from all legal exceptions; of fair character; of approved integrity; of sound judgment; and well informed." Consol. Laws, chap. 30, § 502.

The argument of the learned counsel for the defendant proceeds upon the theory that these statutory requirements are mandatory; that in capital cases nothing can be waived; that a person called as a juror in such a case, who has not every one of the prescribed qualifications, is in fact not a juror; and that therefore the defendant has not had a trial by such a common-law jury as the Constitution guarantees. We shall endeavor to point out, as briefly as possible, what we regard as the fallacy of this argument.

The one thing guaranteed by the Constitution is the right of trial by jury in all cases in which it had been used before the adoption of either of our successive Constitutions. We have already called attention to the fact that this means a common-law jury of twelve, drawn by some process in which the final right of selection is preserved to the citizen. This process of selection is necessarily a matter to be regulated by statute. The legislature, in the exercise of its undoubted power in the premises, has provided that in counties governed by the general law, as distinguished from special statutes of local application, there shall be made in every third year a list of the male citizens who have the statutory qualifications to serve as jurors in courts of record, and from these lists there shall be a drawing of jurors for the several terms of such courts. At the very inception of

this proceeding, a general list is to be made, which is to stand for three years or longer, if no new list is made within that time. It goes without saying that some such regulation is a necessity, because it would be practically impossible to make a new list for each of the many terms of court that are held in every year; and it is obvious that such a regulation must be supplemented by legislation to provide for such unforeseen contingencies as may arise during the time such a list is in existence. Some men die; others are shorn of their property qualifications; still others lose their natural faculties; many remove from the county in which they resided when the list was made; and a few are specifically disqualified for service in a particular case. To meet these contingencies, the legislature has further provided that "an objection to the qualifications of a juror is available only upon a challenge" (Code Civ. Proc. § 1180), and has enacted very definite provisions regulating this right of challenge. By still other statutes, it is prescribed that this provision governing procedure in civil cases shall be applicable in all criminal cases triable in courts of record. Code Civ. Proc. § 3347, subd. 7; Code Crim. Proc. §§ 362 et seq. In both of these Codes, it is further provided that "the first twelve persons who appear, as their names are drawn and called, who are approved as indifferent between the parties, and are not discharged or excused, must be sworn; and constitute the jury to try the issue." Code Civ. Proc. § 1166; Code Crim. Proc. § 387. In criminal trials, a challenge to the panel "must be taken before a juror is sworn, and must be in writing, specifying distinctly the facts constituting the ground of challenge" (Code Crim. Proc. § 363); and when the challenge is to an individual juror it "must be taken when the juror appears, and before he is sworn" (Code Crim. Proc. § 371), although in the latter case "the court may, in its discretion, for good cause, set aside a juror at any time before evidence is given in the action." Ibid. The reasons for these precise and definite rules of procedure are not far to seek. The jury system is a sacred institution; but it is also a very practical one. The individual has his rights; but so has the state. It would be no less intolerable than impracticable if, after every trial, there could be an investigation into matters affecting the qualifications of jurors which are readily ascertainable in advance. Such procedure would place a premium upon the neglect to ascertain whether a juror is qualified; for few men would challenge a juror if, by their failure to do so, they could gain a chance for a new trial in case of defeat. The public in-

convenience is, moreover, a matter of far-reaching importance. If defeated parties were in all cases to be permitted to move for new trials on such grounds as that a juror has passed the age of seventy when he sits in a case, or has disposed of his property, or that he is lacking in any other of the several technical qualifications which do not affect his intelligence and fairness, no judgment would ever be safe from attack, and no trial could ever be confined to anything like well defined or limited issues. It is not claimed that the juror Barnes was not fair or impartial; and, for aught we know, he may have been a much better juror than some others whose property qualifications are not questioned. The matter was one which was open to investigation when Barnes was called; and the defendant's failure to interpose a challenge must be deemed a waiver of the objection which might have been taken. "A known cause of challenge is always waived by withholding it, and raising it as an objection after verdict, since such a practice is incompatible with the good faith and fair dealing which should characterize the administration of justice. Therefore, in order to make an objection to a juror available after verdict, the objecting party must prove that it was unknown to him, and that it would not have been disclosed to him by a proper inquiry before the jury was sworn." 1 *Thomp. Trials*, § 114.

The trend of authority in those states where the question has arisen is in the direction of holding that a new trial will not be granted, as a matter of right, for a cause of challenge not discovered until after verdict, whether the case be civil or criminal. 1 *Thomp. Trials*, § 116, and cases in the notes. In Wisconsin the rule in criminal cases seems to be confined to those which are not capital (*State v. Vogel*, 22 Wis. 471), and in Michigan the doctrine of waiver has been held inapplicable, in any criminal case. *Hill v. People*, 16 Mich. 351. The supreme court of Illinois once held that objections to a juror could not be waived in a criminal case (*Guykowski v. People*, 2 Ill. 476), but later changed its views, and decided that a motion for a new trial, made after a verdict in a capital case, should not be granted where an unchallenged juror, who had not the statutory property qualifications, was one of the twelve who rendered the verdict. *Chase v. People*, 40 Ill. 352. This is also the position taken by the highest court of California, in *People v. Sanford*, 43 Cal. 29, and of Indiana, in *Croy v. State*, 32 Ind. 389, in which the question was identical with the one before us.

The precise question has not been decided 39 L.R.A. (N.S.)

in this state. The nearest approach to it is found in *People v. Morrissey*, 1 Sheldon, 295, a case of murder, where a juror was over the statutory age of sixty, and no objection was made until the question was presented on a motion for a new trial. Upon appeal, from the order denying the motion, the general term of the superior court of Buffalo held that the objection was made too late. In *People v. Mack*, 35 App. Div. 114, 54 N. Y. Supp. 698, Mr. Justice Merwin, in the third department, wrote for a unanimous court in a case involving the charge of assault in the first degree. There it was held that a motion in arrest of judgment would not be granted upon the ground that the wife of one of the jurors was related, within the prohibited degrees, to the father of the complainant, when no challenge had been interposed, and it did not appear that the defendant had been prejudiced; and in *People v. Thayer*, 132 App. Div. 593, 116 N. Y. Supp. 821, the same court, in a case of robbery in the first degree, decided that an objection to the qualifications of a juror, on the ground that he was over seventy years of age, could not be successfully raised for the first time on a motion for a new trial after verdict; and that a failure to challenge the juror was a waiver of the objection. In the case of *People v. Jewett*, 8 Wend. 386, 389, the defendant, who was indicted for conspiracy, pleaded the disqualification of one of the grand jurors, on the ground that he had not the property required by the statute. To this plea there was a demurrer, and upon the issue thus raised the matter came before Mr. Justice Sutherland of the supreme court. In a very interesting discussion, devoted principally to the question whether grand jurors were required to be freeholders, the learned justice held that an exception to a grand juror will not be heard or allowed after an indictment found. By way of illustration, he argued: "I apprehend a verdict, either in a civil or criminal case, would not be set aside merely on the ground that one or more of the jurors had not the property qualification required by law. It very frequently occurs that such mistakes are made in the panel; and jurors undoubtedly sometimes serve without the requisite legal qualifications. But, if the objection is not raised when the jury is drawn, the parties are concluded, although the fact may not have come to their knowledge until after the trial. I speak of strictly legal and technical objections, not of objections which go to the character of the juror, and show that he labored under prejudices and prepossessions which rendered him incapable of acting impartially in the case, and that in all human prob-

ability there has not been a fair trial. I have no doubt that cases of that description might exist, in which it would be competent and proper for the court to set aside a verdict; but they must be characterized by very strong and peculiar circumstances." (p. 389.)

Although this *dictum* was *obiter*, we quote it as an accurate expression of a sound rule, which may, without injustice, be applied in all criminal cases, including those of capital degree. In the case at bar, as we have already shown, the personal qualifications of the juror Barnes are not questioned; and it does not appear that the defendant was in any wise prejudiced by the juror's lack of property qualification. All the pertinent facts existed when the juror was called, and a few questions would have elicited the truth. Although the case involves the solemn issue of life and death, we think it would be trifling with the administration of justice to hold that the defendant is entitled to a new trial in these circumstances. He has had a trial, conducted according to the established forms of law, and his guilt has been certified, upon competent and sufficient evidence, by a jury of twelve in number, who were capable of deciding his case fairly and impartially. That is all that was guaranteed to him by the Constitution (*People v. Dunn*, 157 N. Y. 528, 536, 43 L.R.A. 247, 52 N. E. 572; *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492), and he should not now be heard upon technical and purely statutory objections, which do not affect the merits of his case, and which he might have made, but failed to make, at the trial, in the manner prescribed by law.

The cases relied upon by the defendant are not in point. His principal authority (*Cancemi v. People*, 18 N. Y. 128, 136) presents a condition radically different from that before us. There the defendant, on trial for murder, consented to the withdrawal of a juror and to the continuance of the trial with the remaining eleven. It was held that eleven men do not constitute such a jury as is guaranteed by the Constitution, and the defendant could not consent to being tried by eleven men any more than he could consent to be tried by two or three men; for neither of these numbers, nor any number less than twelve would make a common-law jury. In *Kelley v. People*, 55 N. Y. 565, 577, 14 Am. Rep. 342, and *Armsby v. People*, 2 Thomp. & C. 157, 161, both criminal cases arising out of one theft, a juror was challenged, because he had not the statutory property qualifications. The challenge was sustained, and the ruling was affirmed on appeal. In the early case of *People v. McKay*, 18 Johns. 213, 39 L.R.A. (N.S.)

where the defendant was convicted of murder, he moved in arrest of judgment, on the ground that the venire to summon jurors was not under seal. This was held a sufficient warrant for a new trial, and the reason is obvious. The district attorney there admitted that, in view of the clerk's failure to properly authenticate the venire, and the sheriff's neglect to make an official return thereto, it was as though there had been no venire whatever. That was a defect, moreover, which was not known to the defendant at the trial; and no examination of the jurors would have disclosed it. There are cases on the brief of defendant's counsel, such as *People v. Ransom*, 7 Wend. 417; *Pierson v. People*, 79 N. Y. 424, 429, 35 Am. Rep. 524; and *People v. Bradner*, 107 N. Y. 1, 13 N. E. 87, in all of which the regularity of the trials was sustained on appeal. They all contain some observations that are germane to the general subject of trial by jury; but they decide nothing that is helpful or authoritative in the case at bar.

The judgment of conviction should be affirmed.

Cullen, Ch. J., and Gray, Haight, Vann, Hiscock, and Collin, JJ., concur.

WASHINGTON SUPREME COURT. (Department No. 2.)

GEORGE H. THOMPSON, Resp't.,

v.

WASHINGTON NATIONAL BANK, Appt.

(—Wash. —, 122 Pac. 606.)

Judgment — action on building contract — conclusiveness — subsequent evidence.

A judgment denying relief in an action to recover the contract price and enforce a mechanics' lien for laying a tile floor, because the contract had not been substantially performed, is conclusive against another action to enforce the contract price, based upon evidence that since the former action the owner had completed the work at a nominal cost.

(April 3, 1912.)

Note. — Conclusiveness of judgment as affected by subsequent events disproving the ground on which it rested.

This note does not deal with the subject of direct attack upon judgments for newly discovered evidence or otherwise, and presupposes that the judgment in question is in full force and effect.

The reader will observe that in THOMPSON

APPEAL by defendant from a judgment of the Superior Court for Kittitas County in plaintiff's favor in an action brought to recover the contract price for the laying of a tile floor. Reversed.

The facts are stated in the opinion.

Mr. E. E. Wager, for appellant:

The judgment in the former action conclusively shows upon its face that it was a judgment upon the merits, and that no parol evidence can be introduced to vary its terms or to explain it.

State ex rel. Schmidt v. Superior Ct. 62 Wash. 556, 114 Pac. 427; Nunn v. Mather,

60 Wash. 484, 111 Pac. 566; State ex rel. Jensen v. Bell, 34 Wash. 185, 75 Pac. 641; Marble Sav. Bank v. Williams, 23 Wash. 766, 63 Pac. 511; Olson v. Title Trust Co. 58 Wash. 599, 109 Pac. 49; McGuire v. Bryant Lumber & Shingle Mill Co. 53 Wash. 425, 102 Pac. 237; Gould v. Austin, 52 Wash. 457, 100 Pac. 1029.

Where there is no substantial compliance with a contract, there can be no recovery.

Washington Bridge Co. v. Land & River Improv. Co. 12 Wash. 272, 40 Pac. 982; Edison General Electric Co. v. Canadian

v. WASHINGTON NAT. BANK, there was no new actionable fact in the second action, but the plaintiff simply offered additional evidence of what has been a fact before the first action, although the new evidence consisted of an evidential fact which came into existence after the first judgment; and in the latter respect the case differs somewhat from cases where the evidential fact, as well as the ultimate fact on which it bears, was in existence at the time of the judgment, though not discovered until afterwards. The case therefore emphasizes the strictness of the rule that the effect of a judgment as *res judicata* cannot be avoided by the discovery of new evidence bearing on a fact or issue involved in the original action as distinguished from a subsequent fact or event which creates a new legal situation.

To grant relief for what existed before, but was not made to appear, would be in effect a rehearing. Dewey v. St. Albans Trust Co. 60 Vt. 1, 6 Am. St. Rep. 84, 12 Atl. 224.

There is, however, at least one case where a judgment against a fact was held to be no bar to a new action. A suit was brought against the representative of an estate for an accounting and division, where the will, after making provision for the widow, directed that each surviving child should be entitled to a certain percentage, the shares of the daughters to be in trust for their benefit with remainders over. The decree was made upon the erroneous theory that there were four surviving children, and it directed a division to the trustee of the plaintiff, who was one of the daughters, of certain cash and security. Upon her death, in an action in which the remaindermen of her share were parties, it was admitted that at the time of the death of the testator, there were five surviving children, one brother dying after his father, but before the first suit, and that the said daughter at the time of the first suit was entitled, as one of her deceased brother's next of kin, to his share absolutely, and it was held that the first judgment was not an adjudication against her upon this point. The court states that the duties of the representatives of the estate were fully satisfied by the payment directed by the decree in the first action; that the duties of the

trustees of said daughter were fully satisfied by receiving funds in excess of what they were entitled to; that it was not necessary, either for the protection of the representative of the estate or of the trustees, that the question as to the time of the death of the brother should have been determined in the first action; that under the terms of the will the interest of the remaindermen in the trust could not have been determined until the death of the life beneficiary, and that therefore the representatives of the daughter should have an opportunity to raise and contest the subject in the second action with the remaindermen. Ashhurst v. Lippincott, 56 N. J. Eq. 840, 42 Atl. 1017. It is submitted that this decision cannot be supported on principle. But the reader will remember that there is an inveterate tendency of the courts to exclude if possible the question of *res judicata* where there are successive accountings in the same trust estate and the fund is undistributed.

Cases are rare where the question of *res judicata* has been considered by reason of a new-born evidentiary fact, but such may have been the circumstance which led to the later discovery in Fetter v. Beale, 1 Salk. 11, where the plaintiff, having recovered in assault and battery, discovering later that his skull was fractured, brought another action for the additional injury. But the court, in overruling his demurrer to a plea of former recovery, said, per Holt, Ch. J.: "Every new dropping is a new nuisance, but here is not a new battery, and in trespass the grievousness or consequence of the battery is not the ground of the action, but the measure of the damages, which the jury must be supposed to have considered at the [former] trial."

While the note does not purport to deal exhaustively with cases where it is held or contended that the subsequent events have created a new legal situation, some cases of that kind will be referred to for the purpose of illustrating the distinction between them and cases like THOMPSON v. WASHINGTON NAT. BANK, where the significance of the subsequent event is merely in its tendency to show, or its demonstration, that the judgment was rendered upon an erroneous assumption or finding upon an issue of fact then before the court.

P. Nav. Co. 8 Wash. 370, 24 L.R.A. 315, 40 Am. St. Rep. 910, 36 Pac. 260; Mortimer v. Dirks, 57 Wash. 402, 107 Pac. 184.

Messrs. Hovey & Hale, for respondent:

The first judgment being of dismissal only, the burden of proving its character as *res judicata* was upon defendant.

Fahey v. Esterley Mach. Co. 44 Am. St. Rep. 564, note.

Defendant offered nothing whatever in this direction beyond the pleadings; but the plaintiff showed affirmatively that the present action is upon changed conditions and after tender of performance of that which was held in the former trial to be a condition precedent, either one of which takes the case out of *res judicata*.

23 Cyc. 1161, 1290; 24 Am. & Eng. Enc.

Thus, former adjudications are not a bar where a new legal cause of action has come into existence since the first judgment, as, for example, successive matters of neglect of duty by a trustee, or of additional wrongs by a spouse, or new acts of nuisance, or successive breaches of a covenant to repair, or the fact of payment or tender or notice or any prerequisite by reason of the nonexistence of which the first action was lost.

So, of course, where the cause of action rests upon independent occurrences subsequent to the first judgment, the latter is no bar: As, judgment for the defendant in an action for money had and received is no bar to an action for money had and received since the judgment in the prior action (Morrison v. Beckey, 6 Watts, 349); nor is a judgment for the defendant in an action for conversion a bar to an action for a conversion committed after such judgment (Stone v. Addy, 168 Mass. 26, 46 N. E. 431); so, a judgment enjoining an individual from receiving any salary as a county officer under a general appointment is not conclusive against his receiving a salary as such county officer under an appointment subsequent to the prior judgment (Freman v. Marshall, 137 Cal. 159, 69 Pac. 986).

Again, where, after the plaintiff has been defeated in his action by reason of some defect, a valid statute is passed curing the defect, it is held that the first adjudication is no bar to an action resting upon the statute. Steele County v. Erskine, 39 C. C. A. 173, 98 Fed. 215, affirming 87 Fed. 630; Beals v. Amador County, 35 Cal. 624; Utter v. Franklin, 172 U. S. 416, 43 L. ed. 498, 19 Sup. Ct. Rep. 183.

See also in effect the decision in Wrought Iron Bridge Co. v. Attica, 119 N. Y. 204, 23 N. E. 542, where, however, the question does not seem to have been raised.

In Miles v. Strong, 68 Conn. 273, 36 Atl. 55, where a judgment went against the plaintiff in equity, because he had asked a court of equity to take jurisdiction of a mere legal question relating to the title to land, and afterwards the legislature passed 39 L.R.A. (N.S.)

Law, 777; Fahey v. Esterley Mach. Co. 44 Am. St. Rep. 568, note; Guilford v. Western U. Tele. Co. 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324; Whitlock v. Appleby, 49 Mo. App. 295.

ELMS, J., delivered the opinion of the court:

The material facts in this case are as follows: On February 23, 1909, the respondent, plaintiff below, contracted with appellant to furnish the tiling and lay a tile floor in the appellant's bank building at Ellensburg, Washington, for an agreed consideration of \$229.95. On March 2, 1909, the respondent claimed that the work was completed; but the appellant, claiming that the work was not performed in ac-

an act allowing questions of this character to be determined in equity, it was held that the first judgment was no bar to a second action after the statute.

So, there is a new cause when the first action was prematurely brought, and so was lost by reason of the lack of an element which cannot be proved on account of its lack of existence (McFarlane v. Cushman, 21 Wis. 401; Whitlock v. Appleby, 49 Mo. App. 295); such as notice (Peck v. Easton, 74 Conn. 456, 51 Atl. 134; New England Bank v. Lewis, 8 Pick. 113; Rose v. Hawley, 133 N. Y. 315, 31 N. E. 236), or payment, or tender (Dwyer v. Goran, 29 Iowa, 126; Naftzger v. Gregg, — Cal. —, 31 Pac. 612).

So, also, of course, where a claim or instalment sued on becomes due after the first judgment, a new legal situation is presented.

Similarly, a failure of consideration to a contracting party arising after a judgment against him may afford him ground of relief in a new action. Hurst v. Means, 2 Sneed, 546; Smith v. McCluskey, 45 Barb. 610.

But where the first action is lost because of an incurable defect, there is, of course, no new legal feature in the second action. Thus, where the plaintiff had lost his action on a promissory note, which was excluded in evidence because not stamped as required by the war revenue law, and later he had the note stamped and then brought another action in assumpsit for the debt covered by the note, it was held that the judgment in the first action was a bar to the second action, as there was in the first action a failure of evidence which could not be thereafter supplied. Roney v. Westlake, 216 Pa. 374, 116 Am. St. Rep. 772, 65 Atl. 807, 9 Ann. Cas. 184.

The same general reasoning which applies to actions prematurely brought includes those which rest on a subsequently acquired title (see Gore v. Gore, 101 Tenn. 620, 49 S. W. 737; Amesti v. Pastoro, 49 Cal. 325; Jones v. Petaluma, 36 Cal. 231; Compare in this connection Byers v. Neal, 43 Cal. 210); or on subsequent wrongs by a spouse done

cordance with the contract, refused to pay for it. The respondent thereafter, on May 26, 1909, filed his claim of lien for the full amount of the contract price, and, on June 29, 1909, commenced an action numbered 4,114, in the superior court for Kittitas county, to foreclose the lien. The appellant contested that action, alleging that the work was not completed in accordance with the contract; that the tiling was worthless and of an inferior grade; that it was carelessly and negligently laid, and, instead of being white, as agreed, was dark, dirty, stained, and discolored. That action was tried to the court, and, on January 25, 1910, a judgment was entered therein which, omitting formal parts, was as follows:

After listening to the testimony of the witnesses on behalf of both the plaintiff and the defendants, and the argument of counsel, the court took said cause under advisement. And now, therefore, on this the 24th day of January, A. D. 1910, the court being fully advised in the premises, and having duly considered the same, it is by the court ordered, adjudged, and decreed that the plaintiff take nothing by his said action, and that said cause be, and the same hereby is, dismissed. And it is further ordered and decreed that the defendant, Washington National Bank, have and recover of and from the plaintiff, George H. Thompson, its costs and disbursements expended in this action, taxed at the sum of thirty-seven and ⁸⁵/₁₀₀ dollars, and that

since a judgment refusing a divorce from him (*Wagner v. Wagner*, 104 Cal. 293, 37 Pac. 935; *Glaude v. Peat*, 43 La. Ann. 161, 8 So. 884); or on new conditions surrounding a child whose custody has been once adjudged (*Lemunier v. McCearly*, 37 La. Ann. 133; *Weir v. Marley*, 99 Mo. 484, 6 L.R.A. 672, 12 S. W. 798; *People ex rel. Barry v. Mercein*, 3 Hill, 399, 38 Am. Dec. 644); or on acts of a trustee subsequent to a judgment dismissing proceedings against him (see *Williamson v. Grider*, 97 Ark. 588, 135 S. W. 361); or on circumstances existing at the time of a second application for the appointment of a receiver of a debtor, where an earlier application has been denied (*Nash v. Meggett*, 89 Wis. 486, 61 N. W. 283).

The underlying ground of these decisions is that the judgment in the first action simply adjudicated that, as matters then stood, there was no cause of action. This may be illustrated further, for example, by the following cases:

In *Weis v. Meyer*, 55 Ark. 18, 17 S. W. 339, it was held that an adjudication that the plaintiff was entitled to an easement of access to a river was not conclusive in his favor in a subsequent action after the dominant tenement had been washed away, wherein it was found that the easement was appurtenant to the dominant tenement, and was gone with it.

Where the assignee of a mortgage brought an action to foreclose it, and was answered by the defendants that prior to the recording of the assignment they had obtained judgment against the mortgagee quieting their title to the land, they had judgment in the foreclosure suit on the ground that the judgment in the suit to quiet title was a bar. Thereupon the plaintiff in the foreclosure was granted leave to open the judgment in the suit to quiet title, under the statute allowing a judgment on publication to be set aside within three years under certain circumstances, and set up his mortgage and asked to have it foreclosed in the action; and it was held that the judgment in the first suit of foreclosure was not a bar. The court said that the 39 L.R.A. (N.S.)

first judgment in foreclosure simply decided that, as matters then stood, the plaintiff had no cause of action. *Messing v. Faulkner*, 83 Kan. 115, 109 Pac. 1001.

Where the plaintiff brought an action on a policy of insurance, it was stricken from the docket on motion of the defendant. Thereafter the plaintiff brought another action on the same policy and was defeated on the ground of the statute of limitations. Thereupon he took a writ of error from the motion striking the first case from the docket, and had the case restored to the docket, and it was held that the judgment in the second action was no bar to the action first brought, as the judgment decided only that there was no right of action at the time that the second action was begun. *Vincent v. Mutual Reserve Fund Life Asso.* 77 Conn. 281, 58 Atl. 963.

Where the plaintiff had lost certain certificates of stock in the defendant corporation and brought an action against it for new certificates, which it offered to issue on his giving a bond for double the par value of the stock, judgment went for the defendant, because the plaintiff would not give the bond. Six years later the same result was had in an action brought by the plaintiffs' assignee. Four years afterwards such assignee brought a third action, and it was held that the former actions were not *res judicata*, especially as greater time had elapsed in which nothing had been heard of the lost certificates. *Guilford v. Western U. Teleg. Co.* 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324.

In this connection it is interesting to refer to two cases which find their support on the ground of after acquired title. *Trumble* made an assignment to *Carmer* of her interest in a certain estate, and thereafter assigned the same interest to *Still*, who brought an action against *Carmer* to set aside his assignment on the ground that it was fraudulent, and recovered judgment. *Carmer* thereupon procured from *Trumble* a new assignment, and brought an action against *Still* to have her assignment set aside as fraudulent, and also to have the first judgment reformed. The court held

execution issue therefor. It is further ordered that the mechanics' lien filed by the plaintiff against the property of the defendant in the office of the auditor of Kittitas county, Washington, on the 26th day of May 1909, be, and the same hereby is, canceled and satisfied.

Ralph Kauffman, Judge.

No appeal was taken from that judgment.

In September, 1910, the respondent commenced this action in the same court, upon the same contract, to recover the contract price for the same work, but without seeking to assert any lien. The appellant in defense set up the judgment in the prior action as *res judicata*. The cause was tried to the court upon a statement of agreed facts, the material parts of which were as hereinbefore set out, and in addition it was admitted that in May, 1910, the plaintiff offered to complete the contract, which offer the defendant refused, and that the only defect in the work was the discoloration and stain of the tiling, and that the defendant, after the judgment was entered in the first action, had the discoloration and stain removed by an expert tile layer

at a cost of \$14. A statement of the trial judge, setting forth the grounds upon which the former judgment was rendered, was admitted in evidence, as follows: "At the trial of the cause No. 4,114, between the same parties to this action, embracing the same subject-matter as the cause on trial, the court held that the cause should be dismissed, for the reason that no substantial compliance with the contract had been proven, solely in that the tiled floor in question was by the plaintiff left in a stained and discolored condition, and the plaintiff had refused, on demand of the defendant, to remedy this defect, and the plaintiff contending and testifying to the effect that he had fully complied with the terms of the contract." The introduction of this statement was objected to by the appellant as incompetent to impeach the recitals of the former judgment. All objection to the trial judge testifying was waived.

The court found, as to the contract and prior suit, substantially as above set out, and in addition the further admitted facts that, about May 10, 1910, the respondent tendered a full performance and offer to clean the floor, which tender was refused by the appellant, and that the appellant

that the first judgment could not be modified, and that that part of his action must fail, but that the defense that the second assignment was fraudulent had not been available to Carmer in the first action, as that was something which belonged to Trumble to decide whether to raise such a defense or not, and therefore the judgment in the first action was not a bar to the present action. *Carmer v. Still*, 53 Misc. 443, 103 N. Y. Supp. 247.

A judgment creditor (Sterling) assigned his judgment. The assignee sued upon it and recovered a second judgment against the judgment debtor and issued execution. This was restrained in an action alleging that the assignment of the judgment was a fraud and a sham and for the benefit of the assignor, and to procure set-offs, and that since the second judgment he had acquired offsets against the judgment creditor under the original judgment; and it was held that the second judgment was not *res judicata* against him as to the assignee's cause of action, the appellate court reversing an order dissolving the injunction, and saying: "The contention that the judgment rendered in favor of appellee, Chamberlain, against the appellant, is conclusive of Chamberlain's ownership of the cause of action therein sued on, is not sound. The petition shows that at the time this judgment was rendered, appellant had no offsets against Sterling, and therefore had no such interest in the real or beneficial ownership of the original judgment upon which the suit was brought as would have entitled him to question Chamberlain's right to re-
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cover against him on the written transfer of said judgment, which placed the apparent legal title thereto in Chamberlain. If appellant can prove the allegations of his petition, equity forbids that he be required to pay this judgment, and, pending a hearing on the facts, he is entitled to have the enforcement of the judgment enjoined." *Trammel v. Chamberlain*, — Tex. Civ. App. —, 128 S. W. 429.

While not within the scope of this note, it may be noted that successive judgments for the plaintiff are permissible for successive acts of nuisance (*Platt Bros. & Co. v. Waterbury*, 80 Conn. 179; 125 Am. St. Rep. 111, 67 Atl. 508; see also *dictum* by Holt, Ch. J., in *Fetter v. Beale*, 1 Salk. 11); so also for successive damages from the same nuisance (*Gulf, C. & S. F. R. Co. v. Moseley*, 6 Ind. Terr. 369, 98 S. W. 129; *Haller v. Pine*, 8 Blackf. 175, 44 Am. Dec. 762; *Miles v. Wingate*, 6 Ind. 458).

In *Shafer v. Stonebraker*, 4 Gill. & J. 345, it was held that a judgment for the defendant in an action for causing water to flow back on the plaintiff's mill wheel was not a bar to another action setting up the same thing, but the case was decided on technicalities of pleading and of the nature of the record.

It may be noted that a judgment erroneous in law, as shown by subsequent decisions of the higher court, is still an adjudication in spite of the error. *People ex rel. Bryant v. Holladay*, 93 Cal. 241, 27 Am. St. Rep. 186, 29 Pac. 54; *Cain v. Union Cent. L. Ins. Co.* 123 Ky. 59, 124 Am. St. Rep. 313, 93 S. W. 622. B. B. B.

itself cleaned the floor at an expense of \$12. On these findings, the court entered judgment in favor of respondent for the amount prayed for, less \$12, and for costs. From that judgment, this appeal was prosecuted.

The sole question for our consideration is: Was the judgment in the first action a bar to the respondent's recovery in the second? The doctrine of *res judicata* is grounded in estoppel. In every such case, the burden of proof that the prior judgment disposed of the identical issues involved in the later suit rests upon him who seeks to assert the estoppel. In order to sustain this burden, two things only are essential: "(1) That the issue in the second action, upon which the judgment is brought to bear, was a material issue in the first action, necessarily determined by the judgment therein; (2) that the former judgment was upon the merits." 1 Freeman, Judgm. 4th ed. § 256.

In the case before us, there seems to be little necessity for looking beyond the record in the former suit, to ascertain what was the real issue brought before the court and necessarily determined by the former judgment. The complaint in that case set up but a single cause of action. It alleged the making of the contract, the performance of the work, and the defendant's failure to pay the contract price, and prayed for judgment for the contract price and a foreclosure of the lien. The answer admitted the making of the contract, admitted the failure to pay the contract price, denied the performance of the work, and set up as an affirmative defense and counterclaim that the tiling was so laid and was so stained and discolored as to be an injury to the property, and that the plaintiff refused to remedy the defect. The prayer was for judgment for damages on the counterclaim. The affirmative defense and counterclaim was traversed by the reply.

It is manifest that there was thus presented one issue, and but one; without a determination of which the judgment as entered could not have been reached, *viz.*: Had the plaintiff substantially performed his contract? A determination of that issue was essential to any judgment. It was the one issue going to the merits. The judgment was that the plaintiff take nothing by his action, and that the cause be dismissed. That judgment, whether right or wrong, necessarily determined that there had been no substantial performance of the contract by the plaintiff. If on the record there could be any doubt as to what issue the judgment determined, that doubt was

removed by the court's statement that the sole issue determined was that there had been no substantial performance of the contract.

There remains but one inquiry: What was the issue in the second action upon which the judgment in the first is brought to bear? The complaint in the second action sets up the same cause of action as that in the first, and in practically the same language, except that no lien is claimed. The issue tendered clearly was the same as that in the first action, *viz.*: Had the plaintiff substantially performed the contract? The fact that at the second trial he was able to prove what the court had adjudged he did not prove at the first did not change the issue. The fact that events subsequent to the first suit proved to a demonstration that the work was substantially completed when he turned it over to the defendant cannot alter the case, in the absence of a new trial regularly granted on motion. It was incumbent upon the plaintiff at the first trial to prove this substantial performance, since he claimed performance and had refused to further perform. *Washington Bridge Co. v. Land & River Improv. Co.* 12 Wash. 272, 40 Pac. 982; *Edison General Electric Co. v. Canadian P. Nav. Co.* 8 Wash. 370, 24 L.R.A. 315, 40 Am. St. Rep. 910, 36 Pac. 260. It is admitted that he had the opportunity to clean the tiling himself, and thus make the demonstration prior to the first trial. The means of proof of substantial performance were as available to him then as now, and that was the sole issue. We know of no rule of law or principle of equity which will permit a contractor who has turned over the work contracted for as completed, refused to further perform, sued for the contract price, submitted his evidence of substantial performance to the court, and failed to appeal from a judgment against him, to thereafter, by mere offer to further perform, reopen the issue and retry his cause of action on the same evidence, plus evidence of the subsequent offer to perform and evidence of the actual cost to complete performance. Additional evidence to the same issue does not change the issue. The respondent, at the time of the first suit, had either wilfully and intentionally refused to complete his contract, or had substantially performed it. The judgment determined that he had refused to substantially perform. Having elected his ground and stood upon his claim of performance, and the court having in effect found that he had broken his contract, he could not thereafter make the contract a basis of any

relief, in the absence of an appeal. *Mortimer v. Dirks*, 57 Wash. 402, 107 Pac. 184. If an adjudication against him on one tentative claim of performance is not *res judicata*, then a second would not be. There would be no end of the litigation. He might at various stages of a more or less complete performance of the work repeatedly invoke the court's decision as to whether there was a substantial performance, by a mere offer to further perform on each holding of the court that the prior performance was not complete. Such experimental use of the courts is not compatible with an orderly administration of justice. "No court, we think, has gone so far as to allow a litigant to experiment with a court by trying his case piecemeal." *Sweeney v. Waterhouse & Co.* 43 Wash. 613, 617, 86 Pac. 946.

While it is true, as said in 23 Cyc. 1161, that, "when new facts intervene before the second suit, furnishing a new basis for the claims and defenses of the parties, respectively, the issues are no longer the same, and consequently the former judgment cannot be pleaded in bar," the same text continues: "But the change of facts will not affect the estoppel, if no new element is introduced, and the legal rights and relations of the parties remain as before." 23 Cyc. pp. 1161, 1162. *Thomas v. Joslyn*, 36 Minn. 1, 1 Am. St. Rep. 624, 29 N. W. 344; *Givens v. Thompson*, 110 Mo. 432, 19 S. W. 833. The status of the parties, in their relation to each other and to the subject-matter of the actions, was fixed once for all by the respondent when he abandoned the work and turned it over as completed, refusing to do more. The issue in each action was as to whether the work was then substantially performed. "The rule is that, in an action between the same parties, a judgment therein is *res judicata* as to all points in issue, and also all points which might have been raised and adjudicated." *Olson v. Title Trust Co.* 58 Wash. 599, 109 Pac. 49; *State ex rel. Schmidt v. Superior Ct.* 62 Wash. 556, 114 Pac. 427; *McPherson Bros. Co. v. Okanogan County*, 61 Wash. 239, 112 Pac. 207.

The judgment in the first action, whether right or wrong, determined the issue now presented. No appeal having been taken therefrom, that determination was final. The defense of *res judicata* should have been sustained.

The judgment is reversed, and the cause remanded for dismissal.

Dunbar, Ch. J., and Mount, Morris, and Fullerton, JJ., concur.
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MISSISSIPPI SUPREME COURT.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appt.,

IDA MOORE et al.

(— Miss. —, 58 So. 471.)

Negligence — fog — inability to stop train.

1. A railroad company is reckless in running a train so rapidly through a town on a foggy night that it could not be stopped by the use of the ordinary means and appliances within the distance in which an object could be discovered on the track by the glare of the headlight.

Appeal — instruction — damages — absence of evidence.

2. Instructing a jury to allow damages for pain suffered by one killed by another's negligence, if any is shown by the record, is not reversible error, although the evidence shows instant death, since evidence of pain being absent, it must be presumed that the jury did not allow anything for it.

Trial — instruction — punitive damages — definition.

3. The court need not define punitive damages in authorizing the jury to allow such damages for wrongfully causing death. **Damages — death — loss of companionship.**

4. The damages to be awarded the widow and children of one killed by another's negligence may include compensation for the injury due to loss of his companionship, under a statute providing that the person suing shall recover such damages as the jury may allow, taking into consideration all damages of every kind to any and all parties interested in the suit.

(May 6, 1912.)

Note. — Rate of speed preventing stoppage of trains within distance disclosed by headlight.

This note is not intended to include cases where a locomotive was equipped with an improper or defective headlight.

As to liability for killing or injuring live stock on track because of lack of proper headlight, see note attached to *Hanger v. Chesapeake R. Co.* ante, 271.

As to duty of railroad employees to keep a lookout for live stock on track, see note in 24 L.R.A. (N.S.) 858.

As will be seen by the cases collected in this note, there is a conflict of opinion as to the duty of a railroad company under ordinary weather conditions so to run its trains that they can be stopped within the distance shown by the glare of the headlight.

Thus, in *Louisville & N. R. Co. v. Kelton*, 112 Ala. 533, 21 So. 819; *Louisville & N. R. Co. v. Davis*, 103 Ala. 661, 16 So. 10; *Central R. & Bkg. Co. v. Ingram*, 98 Ala.

APPREAL by defendant from a judgment of the Circuit Court for Lee County in plaintiffs' favor in an action brought to recover damages for the alleged negligent killing of plaintiffs' intestate. Affirmed.

The facts are stated in the opinion.

Messrs. E. O. Sykes, Jr., and J. W. Buchanan, for appellant:

Even where the railroad company violated the statute as to speed, one who, by the exercise of ordinary care, could have avoided injury from the act of the company, cannot recover for such injury.

Vicksburg & M. R. Co. v. McGowan, 62 Miss. 682, 52 Am. Rep. 205; Crawley v. Richmond & D. R. Co. 70 Miss. 340, 13 So. 74; Mobile & O. R. Co. v. Stroud, 64 Miss. 784, 2 So. 171; Winterton v. Illinois C. R.

Co. 73 Miss. 831, 20 So. 157; Howell v. Illinois C. R. Co. 75 Miss. 243, 36 L.R.A. 545, 21 So. 746; St. Louis & S. F. R. Co. v. Ruff, 95 Miss. 165, 48 So. 184; Alabama & V. R. Co. v. Carter, 77 Miss. 517, 27 So. 993; Collins v. Illinois C. R. Co. 77 Miss. 855, 27 So. 837; Vicksburg R. Power & Mfg. Co. v. Marlett, 78 Miss. 872, 29 So. 62; Cumberland Teleph. & Tele. Co. v. Baker, 85 Miss. 492, 37 So. 1012.

The charge on the measure of damages given plaintiff was erroneous.

Yazoo & M. Valley R. Co. v. Smith, 82 Miss. 658, 35 So. 168; Wagner v. Gibbs, 80 Miss. 63, 92 Am. St. Rep. 598, 31 So. 434; Yazoo & M. Valley R. Co. v. Williams, 87 Miss. 354, 39 So. 489; St. Louis & S.

395, 12 So. 801; Alabama Midland R. Co. v. McGill, 121 Ala. 230, 77 Am. St. Rep. 52, 25 So. 731; Central of Georgia R. Co. v. Main, 143 Ala. 149, 42 So. 108; Southern R. Co. v. Pogue, 145 Ala. 444, 40 So. 565, it was held that a railroad company injuring stock by running a train in the nighttime at such a rapid rate of speed that it was impossible, by the use of ordinary means and appliances, to stop the train and prevent injury within the distance within which stock upon the track could be seen by the aid of the headlight, is guilty of negligence.

And in Louisville & N. R. Co. v. Christian Moerlein Brewing Co. 150 Ala. 390, 43 So. 723, a charge to the jury "that if they believed from the evidence that defendant's locomotive was running at such a rapid rate of speed that it would have been impossible, by the use of ordinary means and appliances, to stop the locomotive to prevent the injury to the stock within the distance in which stock . . . could be seen by aid of the headlight, then the defendant was guilty of negligence," was held correct.

And also in Birmingham Mineral R. Co. v. Harris, 98 Ala. 326, 13 So. 377, it was held that a requested charge, "if the jury believe that at the rate of speed at which defendant's trains were running they could not have stopped within the distance within which the headlights would reveal stock, and that such headlights were used on many well-regulated railroads at the time, your verdict must be for defendants," was properly refused, as ignoring the engineer's duty not to run his train at a negligent rate of speed.

And in Memphis & C. R. Co. v. Lyon, 62 Ala. 71, in commenting on a charge to the jury in effect that it was negligence to run a train at such a speed that it could not be stopped in less than the distance shown by the glare of the headlight, it was said that "those who employ the tremendous yet easily controllable power of steam engines on railroads must be vigilantly careful to avoid committing with them the destruction they are capable of effecting; and due care to this end is not observed when 39 L.R.A.(N.S.)

a train is run thereon at such speed that it cannot be stopped within the limit at which the engineer can plainly see upon a straight track an object of the size of a man or a young mule."

But the rule followed by the supreme court of Alabama does not prevail in other jurisdictions, and so in Vizacchero v. Rhode Island Co. 26 R. I. 392, 69 L.R.A. 188, 59 Atl. 105, in criticizing the holding of the trial judge that the servant of an electric railroad company was negligent in running a car so rapidly that, with the appliances at his command, he could not stop the car after a man was distinguishable by the headlight, it was said that the distance at which the light of the car can be seen by travelers, so as to enable them conveniently to leave the track,—not the distance that the motorman could see ahead,—is the standard by which the speed of the car should be regulated; and as it is not the duty of the car to stop within the illumination of the headlight, its speed need not be restricted to the rate prescribed by such a necessity.

And in Winston v. Raleigh & G. R. Co. 90 N. C. 66, a charge in substance that a railroad company cannot run its trains in the nighttime faster than at a speed which would admit by the use of brakes of being checked, and the train brought to a stop before it has traversed the space illuminated by the headlight, without incurring liability for injury to stock straying on its roadbed, was held error, where, as in the case at bar, every reasonable precaution was taken. The court said that a railroad company cannot be held to the rigid rule of accountability laid down by the trial court, that unless a train can be stopped before reaching an object brought to view by the headlight, it must slacken its speed so that it can be brought to a standstill, as such a rule, if it prevailed, would seriously impair the usefulness of railroad transportation, which depends largely upon the regularity and rapidity of its runnings by night as well as by day.

And also in Louisville & N. R. Co. v. Milam, 9 Lea, 223, a charge in effect that

F. R. Co. v. Garner, 96 Miss. 577, 51 So. 273.

Messrs. Clayton, Mitchell, & Clayton, for appellees:

If the engineer saw the person, and it was apparent or ought to have been apparent to the engineer that the position occupied by such person was one of peril, and one from which he could not, by reasonable action, extricate himself, or that the person was unaware of his position of peril, then it was the duty of the engineer to exercise reasonable care to prevent injury.

Christian v. Illinois C. R. Co. 71 Miss. 237, 15 So. 71; Morehead v. Yazoo & M. Valley R. Co. 84 Miss. 124, 36 So. 151; Southern R. Co. v. Pittman, 97 Miss. 416, 52 So. 207; Jackson Electric R. Light & P. Co. v. Carnahan, 95 Miss. 73, 48 So. 617; 33 Cyc. 798; Southern R. Co. v. Chatman, 124 Ga. 1026, 6 L.R.A.(N.S.) 289, 53 S. E. 692, 4 Ann. Cas. 675; Florida C. & P. R. Co. v. Williams, 37 Fla. 406, 20 So. 559; Deans v. Wilmington & W. R.

Co. 107 N. C. 686, 22 Am. St. Rep. 904, 12 S. E. 77.

When the employees of the railroad attempt to exculpate themselves by giving an explanation of the cause of an injury, and the testimony or physical facts demonstrate or tend to do so, that the employees are not correct, then this question must be left to the jury.

Scott v. Yazoo & M. Valley R. Co. 72 Miss. 37, 16 So. 205; O'Kelly v. Yazoo & M. Valley R. Co. 94 Miss. 638, 47 So. 660; Cottrell v. Southern R. Co. 80 Miss. 617, 32 So. 1; Combs v. Mobile & O. R. Co. 92 Miss. 532, 46 So. 168; Harrison v. Southern R. Co. 93 Miss. 49, 46 So. 408.

If the night was dark and foggy, defendant was negligent in speed. This case should have been left to the jury.

New Orleans & N. E. R. Co. v. Brooks, 85 Miss. 275, 38 So. 40; Hopson v. Kansas City, M. & B. R. Co. 87 Miss. 796, 40 So. 872; Kansas City, M. & B. R. Co. v. Cantrell, 70 Miss. 331, 12 So. 344; Abernathy

though all prescribed precautions were observed, negligence could be predicated of running a train at such a rate of speed that it could not be stopped within the distance the headlight would discover objects on the track was held erroneous, as the fact that a train could not be stopped within the distance mentioned is not the true test of over-speeding or recklessness, nor one from which a jury could be authorized to infer the fact of recklessness. The question of recklessness or excessive speed is one to be determined by all the facts and circumstances at the time, and not by the arbitrary rule suggested as to the distance an obstruction could be seen by the aid of the headlight.

The only Texas case is Caldwell v. Houston & T. C. R. Co. 54 Tex. Civ. App. 399, 117 S. W. 488, which was an action against a railroad for negligent killing. The court said that to entitle recovery plaintiff had the burden of proving that the trainman could, by ordinary care after discovery of the decedent, have stopped the train in time to prevent a collision; and in its argument to show that such fact was impossible, alluded to the evidence that the headlights on that railroad were so adjusted that the focus fell upon the track from 300 to 400 feet in front of the engine, and that the train which killed decedent could not have been stopped in less than 510 feet; so it is reasonable to infer, though that point was not discussed, that that court would not predicate negligence upon a rate of speed which would prevent the stopping of a train within the distance shown by the glare of the headlight; and especially in view of the fact that the court did say that "after giving to every testimonial fact in the record its full probative force, we have failed to find any showing of negligence upon which a recovery could be sustained." 39 L.R.A.(N.S.)

Effect of fog, rain, or snow.

The general rule is that unusual weather conditions are a circumstance which a jury may well take into account in determining the negligence. Yet though inability to stop a train within the distance shown by the headlight may not of itself, under such conditions, be considered negligence, as will be seen, a failure to use due care under such conditions will enable a recovery for any resulting injury. *St. Louis & S. F. R. Co. v. Moore*, which, to support its decision, cites many of the cases collected in this note, seems to have gone farther than most of them in holding that, in spite of unusual weather conditions, the train must be under such control that it will be possible to stop it within the distance shown by the glare of the headlight.

In *Georgia R. & Bkg. Co. v. Wall*, 80 Ga. 202, 7 S. E. 639, it was held that uncontradicted evidence that a heavy fog prevented the glare of the headlight from penetrating to a distance within which it would be possible to stop a train from the time stock was first seen upon the track would be a complete defense to a charge of negligence on the part of the railroad.

And in *Atlantic Coast Line R. Co. v. Thomas*, 10 Ga. App. 45, 72 S. E. 514, which cites *Georgia R. & Bkg. Co. v. Wall*, supra, with approval, there is good ground for the inference that the same decision would be made where the stopping of a train within the distance shown by the glare of the headlight was prevented by the engineer's vision being obscured by falling rain and the natural accumulation of mist on the front window of the cab. It was said: "The law expects railroad companies to run their passenger trains on schedule so far as they may be able to do so; and they are not ordinarily required, when it is foggy

v. Mobile, J. & K. C. R. Co. 97 Miss. 851, 53 So. 539; O'Kelly v. Yazoo & M. Valley R. Co. 94 Miss. 635, 47 So. 660; Southern R. Co. v. Pittman, 97 Miss. 416, 52 So. 207.

McLean, J., delivered the opinion of the court:

The appellees, who are the widow and children of one L. D. Moore, brought suit against the appellant, alleging that their husband and father was killed by the defendant through the wilful, wanton, and gross negligence of the employees of the defendant, and that the killing occurred within the limits of the incorporated city or town of Nettleton. The suit was for \$15,000, and the jury returned a verdict for \$4,500. The evidence discloses the following facts:

Mr. Moore was killed within the corporate limits of the town of Nettleton, at about 12 o'clock midnight. The deceased had been to Memphis, and had returned that

night on the train to Nettleton, and had been drinking to some extent, and was perhaps under the influence of liquor. The train which killed him was not the train on which he returned to Nettleton. Just before his death, he was seen by the engineer and fireman in charge of the train that ran over him, sitting between the rails of the railroad track, and was within less than 200 yards of the regular passenger depot at Nettleton, and between the depot and the switch to the west of the depot. The train that killed him was going east, and was running, according to the testimony of the engineer and fireman in charge of the train, from 30 to 35 miles an hour. The engineer testified that he was on the lookout; that the track was perfectly straight for a distance of from a half mile to a mile west of the point where decedent was killed; that, when he first discovered the man on the track, the engine was about 200 feet from him; that the night was dark and foggy, and that it was impossible for

or raining, to reduce their trains to such a rate of speed as that the engineer may be in a position to discover live stock on the track in time to prevent injuring them."

And also in Louisville & N. R. Co. v. Melton, 2 Lea, 262, the court said: "We cannot admit that if the light becomes obscure from natural causes, without any defect in the light and appurtenances, without any fault upon the part of the employees, that in all cases, as a matter of law, the company is to be liable for the consequences,—or, in other words, they cannot run on a dark night. Instances might occur in which danger from collision and otherwise might imperatively demand that the train proceed at all events, and it would be difficult to lay down any rule by which it might be determined how far ahead the light should be thrown to make it lawful for the train to run."

In Hilliker-Krebs Bldg. & Mfg. Co. v. Birmingham R. & Electric Co. 100 Ala. 424, 14 So. 200, it was held that if the dampness on the headlights due to misting rain obscures the transparency of the glass, or if smoke from coke ovens near by had settled on and obscured the track, the running of the train with reasonable care, in view of these circumstances, could not be deemed negligent, though trains could not be stopped in time to avoid the killing of stock on the track.

And in Alabama G. S. R. Co. v. Jones, 71 Ala. 487, it was said that if, from fog or driving rain or snow, the light cast from a proper headlight was obscured, the running of the train with reasonable care, in view of that circumstance, could not be deemed negligent.

And this qualification of the rule predicated negligence of the running of the train at such speed that it is impossible to stop the train within the glare shown by the headlight was approved in Central 39 L.R.A. (N.S.)

R. & Bkg. Co. v. Ingram, 98 Ala. 395, 12 So. 801, if the injury is not attributable to the rate of speed in view of the ordinary darkness of the night, but results from intervening unusual causes, such as heavy or falling rain or snow. But it was held that if a bank or wall of fog appears ahead of the train, and the railroad company knowingly runs a train under such conditions as render it impossible for those in charge of the train to prevent injury to stock straying on the track, it should be held responsible for the loss.

And also in Alabama G. S. R. Co. v. McAlpine, 75 Ala. 113, in reaffirming the qualification made in Alabama G. S. R. Co. v. Jones, 71 Ala. 487, the court said that if a train had proper headlights and brakes in good order, if it was skillfully officered, was not running with undue speed, and if the officers and agents directing the movement of the train were attentive and vigilant and guilty of no negligence, then, if by reason of the weather or other unavoidable hindrance an animal was not seen on the track until it was too late to stop the train by the use of the appliances belonging to it, the railroad company is not liable for the loss.

And in Western R. Co. v. Mitchell, 148 Ala. 35, 41 So. 427, it was said that when a bank or wall of fog or strip of smoke appears ahead of the train and across the track, hiding from view objects that may be beyond it, on or near the track, common prudence should suggest to the engineer that he do not plunge heedlessly on, with undiminished speed, reckless of consequences, but that he secure control of the train and proceed with caution and care commensurate with the danger until the usual conditions are restored. And to the same effect is Alabama Midland R. Co. v. McGill, 121 Ala. 230, 77 Am. St. Rep. 52, 25 So. 731.

J. H. B.

him to have stopped his train, running at that rate of speed, within the distance shown by the glare from the headlight of the engine. The headlight was burning brightly, and ordinarily he could see an object on the track for a distance of from 200 to 300 yards; that the reason why he did not discover the man on the track that night was because it was dark and foggy, and the fog prevented him from seeing the man.

For the plaintiff the court instructed the jury that, even though they may believe from the testimony that the deceased was guilty of contributory negligence and was a trespasser, notwithstanding if they believe from the evidence that the injury was wilfully, wantonly, or recklessly inflicted, the jury should find for the plaintiff. The second instruction related alone to damages. The third instruction related to the form of the verdict. The fourth instruction told the jury that although they may believe from the testimony that the deceased, at the time of the injury, was guilty of contributory negligence, yet if they further believe from the evidence that the deceased was in a position of peril, and the engineer saw his position of peril and appreciated his danger, and that the deceased could not, by the exercise of reasonable effort, extricate himself from such position in time to have avoided the injury, and that the engineer saw the deceased in such position in time to have avoided the injury by the exercise of reasonable care, and that afterwards said engineer wilfully, wantonly, or recklessly ran the train upon the deceased and inflicted the injuries complained of, then they should find for the plaintiff.

For the defendant only one instruction was refused, which was a peremptory instruction to find for the defendant. Instruction No. 1 for the defendant charged that if the jury believed from the testimony that the engineer, as soon as he discovered the deceased on the track, did what he could to stop the train by applying his air brakes in emergency and sounding his track and also sounding the alarm, then the jury should find for the defendant. By the second instruction for the defendant the jury was charged that if the evidence in the case showed that the deceased was guilty of contributory negligence which was the proximate cause of his death, and unless the jury believed from a preponderance of the testimony in the case that the engineer saw the deceased on the track and appreciated his peril at a sufficient distance from the deceased for the engineer to have stopped his train before striking the deceased, and that unless the engineer wilfully, wantonly,

and recklessly failed to stop the train, then the verdict should be for the defendant. These were all of the instructions that were given for either the plaintiff or the defendant, except instructions as to the form of the verdict, and except as to the elements of damage. The instructions were too liberal for the defendant, but of this defendant cannot complain.

It is manifest from these instructions that the only question that was submitted to the jury as to the liability of the defendant was whether the injury was inflicted through the wilful, wanton, or reckless conduct upon the part of the defendant. The evidence in the case is conflicting as to when and from what point the engineer discovered, or could have discovered, the perilous position of the deceased, and as to the character of the night; the testimony for the plaintiff supporting the contention that the night was clear, and that there was nothing to prevent the engineer from seeing the perilous position of the plaintiff at such a point as he could, by the exercise of proper care, have avoided the injury. The testimony on the part of the defendant is to the effect that the night was dark and foggy; but, as the jury has passed upon the question of fact, this court has no power to disturb the verdict.

The ground upon which the defendant based its peremptory instruction is that the night was so dark and foggy it was impossible for the train to be stopped within the distance shown by the glare of the headlight. It may be said that, if the evidence of the defendant is true upon this proposition, it fastens liability upon the defendant. The law is well settled that it is negligence in a railroad company to run its train in the nighttime at such a speed that it is impossible, by the use of ordinary means and appliances, to stop the train within the distance in which obstructions upon the track can be seen by the aid of the headlight of the engine, and that, if anything in surrounding conditions and circumstances suggests an increase of care in the operation of a railroad train to avoid peril and damage, the duty to increase such care proportionately increases. Such is in accordance with the great weight of authority and with the better reason. *Central R. & Bkg. Co. v. Ingram*, 98 Ala. 395, 12 So. 801; *Memphis & C. R. Co. v. Lyon*, 82 Ala. 71; *Alabama G. S. R. Co. v. Jones*, 71 Ala. 487; *Louisville & N. R. Co. v. Gentry*, 103 Ala. 635, 16 So. 9; *Louisville & N. R. Co. v. Davis*, 103 Ala. 661, 16 So. 10; *Louisville & N. R. Co. v. Cochran*, 105 Ala. 354, 16 So. 797; *Alabama Midland R. Co. v. McGill*, 121 Ala. 230, 77 Am. St. Rep. 52, 25 So. 731. In *Cin-*

cinnati N. O. & T. P. R. Co. v. Com. 126 Ky. 712, 17 L.R.A.(N.S.) 561, 104 S. W. 771, it is held, affirming the rule in Louisville, C. & L. R. Co. v. Com. 80 Ky. 143, 44 Am. Rep. 468, that it is an indictable offense as a common-law nuisance for a railroad, at a crossing of the turnpike, to habitually run its trains at an unsafe and unreasonable rate of speed, and so rapidly as to endanger and injure persons traveling upon a turnpike, without giving warning signals and taking precautions to avoid injuring persons by approaching trains.

All of the authorities above cited are where the train was running in the country through a sparsely settled section, and where no speed limit by law was placed upon a railroad. To run at night a railroad train propelled by the powerful and dangerous agency of steam or electricity, through an incorporated city or town, and in violation of the statute, at such a rate as to make it impossible, by the exercise of ordinary care, to stop the train within the distance shown by the glare of the headlight of the engine, must, from the necessities of the case, be regarded and looked upon as reckless conduct. The common law, as contradistinguished from statutory law, is nothing more or less than common sense, honestly applied to the practical affairs of life; and it is manifest that to run a train of cars, propelled as aforesaid, at such a dangerous rate of speed, through a populous section of the country, is dangerous in the extreme, well calculated to produce injury, not only to persons on the track, but to the passengers on the train, and may well be characterized as reckless conduct, and such as the law denominates wilfulness. In *Stevens v. Yazoo & M. Valley R. Co.* 81 Miss. 195, 32 So. 311, this court held that it was gross negligence to run a train in the daytime, through a populous portion of a city or town, at a dangerous rate of speed. If this be true, it is even more reckless to run a train at night through an incorporated city or town, and within the yards, at such a rate that it cannot be stopped within the distance shown by the glare of the headlight.

Instruction No. 2, given for the plaintiff, is criticized by appellant upon the following grounds: First, that it instructed the jury that they might consider the pain suffered by the deceased up to the time of his death; second, that the instruction told the jury that they might return a verdict for punitive damages, in addition to the compensatory damages, but failed to instruct the jury what punitive damages are.

In answer to the first proposition: 39 L.R.A.(N.S.)

Granting that in the instant case death was instantaneous, and that intestate sustained no pain, either mental or physical, it is no ground for reversing, because, if it be conceded that there was no evidence from which the jury could infer pain, it must be presumed that the jury in its verdict did not include anything for the pain and suffering. The instruction reads: "The mental and physical suffering which he endured, if any be shown by the record." If it be error, it is therefore harmless; and looking through the entire record, and taking into consideration the amount of the verdict, we cannot say that the instruction is reversible error. The verdict was evidently right on the facts.

As to the second proposition, it is not at all necessary that the jury should be instructed as to what constitutes punitive damages. As this court has held, it is proper to do so; but it is to be presumed that a jury understands what is meant by punitive damages, as much so as they understand what is meant by actual or compensatory damages, and if the defendant in this case had desired, the court would have given it an instruction defining what is meant by punitive or exemplary damages.

The only portion of the instruction which has given us any difficulty, although the appellant does not complain of that portion of the instruction, is that which says that, in fixing the amount of the damages, "you may take into consideration the loss to the wife and the children of the deceased of the companionship of the husband and the father." According to the great weight of authority, both in England and in America, loss to the wife and children of the society and companionship of the husband and father is not an element of damage; but it is to be observed that all of these authorities are predicated upon a statute entirely different from the statute under consideration. Section 721 of the Code of 1906 provides, in actions for injuries producing death, that "in such action the party or parties suing shall recover such damages as the jury may award, taking into consideration all damages of every kind to the decedent, and all damages of every kind to any and all parties interested in the suit." It is to be observed that there is a very marked distinction between this statute and the former statutes in this state; and it is to be further observed that the law, in the progress of human events, has more and more, as the years succeed each other, become more liberal in allowing damages for the death of a party.

At common law an action for damages did not survive the death of the party injured. An action for the recovery of dam-

ages for the wrongful killing of a human being was the result of the statute of 9 & 10 Vict., passed in 1846, and known as "Lord Campbell's act." By that law it is provided that "the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought." [18 Stat. at L. 291, chap. 93.] Though varying considerably in their provisions, statutes of practically the same import have been enacted in most of the states of the American Union. Under Lord Campbell's act, and also under the statutes of almost all the states in this country, including the former statute of this state, it is a well-settled proposition that the jury, in estimating damages, are confined to the pecuniary loss sustained by the surviving husband, wife, parent, child, or other kindred of the deceased, and cannot take into consideration their mental suffering, nor is the jury authorized to give damages by way of the solatium. This was the rule of this state prior to the enactment of the law of 1898, which is brought forward in the Code of 1906, and is the statute now under consideration.

In order to determine the question, we may well look to the decisions of other courts construing statutes similar to the one now under consideration. The California statute (Code Civ. Proc. § 377) provided that "such damages may be given as, under all the circumstances of the case, may be just." The California court, in construing this statute, has repeatedly held that damages may be given for the mental anguish of the surviving wife, child, etc., as well as for the loss of society, and that the jury are not limited in assessing damages to the actual pecuniary loss of the plaintiff. In *Beeson v. Green Mountain Gold Min. Co.* 57 Cal. 20, it was said: "We think that the social and domestic relations of the parties, their kindly demeanor toward each other, the society, were parts of 'all the circumstances of the case,' for the jury to take into consideration in estimating what damages would be just from a pecuniary point of view, especially as there is nothing in the case to show that the jury were instructed that they might give damages by way of solace." The same was held in *Cook v. Clay Street Hill R. Co.* 60 Cal. 604; also in *Myers v. San Francisco*, 42 Cal. 215; *McKeever v. Market Street R. Co.* 59 Cal. 294; *Nehrbas v. Central P. R. Co.* 52 Cal. 320; *Cleary v. City R. Co.* 76 Cal. 240, 18 Pac. 269. In this latter case the chief justice said: "The mental anguish and suffering of the parents, in addition to the medical attend-

ance and funeral expense, are elements which, under our peculiar statute . . . are proper to be considered in determining the amount of the recovery." In the subsequent case of *Munro v. Pacific Coast Dredging & Reclamation Co.* 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303, the court says: "We are of opinion that the court erred in including in the instruction the words 'sorrow, grief, and mental suffering occasioned by the death of the son to his mother.' In thus directing the jury the court fell into an error. In our opinion the damage should be confined to the pecuniary loss suffered by the mother, and the loss of the comfort, society, support, and protection of deceased." The latest utterance of the California court is *Green v. Southern California R. Co.* — Cal. —, 67 Pac. 4, which was a suit by the husband and child for the death of the wife and mother, in which it was held that "as damages, all pecuniary loss suffered by them from loss of society," etc. (In this connection we call attention to the fact that in 13 Cyc. 371, it is stated that "in an action . . . by a husband or wife for the death of his or her spouse, . . . damages cannot be recovered for the loss of the society of the deceased;" and among other authorities refers to *Munro v. Pacific Coast Dredging & Reclamation Co.* and *Beeson v. Green Mountain Gold Min. Co.* supra. These authorities hold to the contrary, as we have shown above.)

The Virginia statute (Code 1873, chap. 145, § 8) provides that "the jury in any such action may award such damages as to it may seem fair and just." In construing this statute the court held, in *Matthews v. Warner*, 29 Gratt. 570, 26 Am. Rep. 396, and *Baltimore & O. R. Co. v. Noell*, 32 Gratt. 394, that the jury were not confined to mere pecuniary damages, but may award such damages as it may deem to be fair and just under all the circumstances of the case. The South Carolina statute is that "the jury may give such damages as they may think proportioned to the injury resulting." In *Petrie v. Columbia & G. R. Co.* 29 S. C. 303, 7 S. E. 515, it was held that under this statute it was not necessary for the plaintiffs, the children of the deceased, to prove that they had been pecuniarily damaged, or that they had any legal claim on the deceased for their support. In *Paterson v. Wallace*, 1 Macq. Sc. App. Cas. 748, damages are allowed by way of solatium. In *Matthews v. Warner*, supra, the court, in discussing this question, says: "It was argued very earnestly by the learned counsel for the appellant that such a construction of the statute as we have here given would result in great injustice, if juries are to be turned loose to

assess damages according to their own notions as to compensation for the mental suffering and agony of a mother losing her child, or of a wife losing her husband, unrestrained by statutory enactment, confining them to the actual pecuniary injury resulting in death. There are two answers to such arguments. One is: *Ita est scripta lex*. The other is: We must presume the legislature knew the force and effect of their own enactments. They must have been cognizant of the statutes and the decisions under them, and they must, with such knowledge, have known the force and effect of the language they used." The Virginia statute, which was being considered by the court, was that "the jury in any such action may award such damages as to it may seem fair and just;" and the instruction complained of simply followed the statute.

In *St. Louis & N. A. R. Co. v. Mathis*, 76 Ark. 184, 113 Am. St. Rep. 35, 91 S. W. 763, it was held that, in an action by minor children for the death of their father, the industry, commercial character, and parental care and affection of the deceased may be taken into consideration in estimating the damages. In *St. Louis, I. M. & S. R. Co. v. Haist*, 71 Ark. 258, 100 Am. St. Rep. 65, 72 S. W. 893, it was held that a minor, in a suit for the death of her father, is entitled to recover for the care, support, and maintenance, and such advantages and benefits in the way of training and education, both morally and intellectually, as she would have received from him if his death had not occurred.

By far the best-considered case upon this subject to be found in all the books is *Florida C. & P. R. Co. v. Foxworth*, 41 Fla. 1, 79 Am. St. Rep. 149, 25 So. 338. The Florida statute (Laws 1883, chap. 3439) provides that the jury may give such damages "as the party entitled to sue may have sustained by reason of the death of the party killed." After a very exhaustive and thorough investigation of the subject, the conclusion reached by the Florida court is as follows: "In estimating the pecuniary loss sustained by the widow, the jury may properly take into consideration her loss of the comfort, protection, and society of the husband, in the light of all the evidence in the case relating to the character, habits, and conduct of the husband as husband, and to the marital relations between the parties at the time of and prior to his death; and they may also consider his services in assisting her in the care of the family, if any, but the widow is not entitled to recover for her mental anxiety or distress over the death of her husband," etc.

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In determining what damages are recovered in actions like the one under consideration, we must look alone to the statute. This is the measure and the limit of the right; and after a full consideration of the question our conclusion is that, in a suit by a widow and children for the death of the husband and parent, the jury may take into consideration the loss to the wife and children of the companionship, protection, and society of the husband and father, but not by way of solatium. In *Cumberland Teleph. & Teleg. Co. v. Anderson*, 89 Miss. 732, 41 So. 263, the exact question now under consideration was not discussed, though the present statute was under review by the court.

Affirmed.

NEW YORK COURT OF APPEALS.

CELIA COHEN, Resp't.,

v.

CITY OF NEW YORK, Appt.

(204 N. Y. 424, 97 N. E. 866.)

Highway — defect — delay in placing barriers — negligence.

Delay for four hours by a municipality in placing barriers at a small ditch or gully washed by an unprecedented storm in a park road, which is not extraordinarily dangerous, to prevent injury to travelers, is as matter of law not negligence where the locality is neither central nor much traveled.

(Chase, J., dissents.)

(February 13, 1912.)

APPEAL by defendant from an order of the Appellate Division of the Supreme Court, Second Department, reversing a

Note. — The general subject of liability of municipal corporations for defects or obstructions in streets is treated in the note to *Elam v. Mt. Sterling*, 20 L.R.A.(N.S.) 513, including the degree of diligence or care as affecting liability (pp. 577 et seq.). And see specifically as to duty in respect of park paths p. 574, and as to duty to furnish barriers p. 676, of that note.

See also as to duty of town or municipality to provide barriers to protect travelers from obstructions outside the highway, note in 20 L.R.A.(N.S.) 980, and later case, *Speck v. Bruce Twp.* 35 L.R.A.(N.S.) 203; and as to duty to provide barriers against abandoned highways, note in 37 L.R.A.(N.S.) 1158. As to what injuries may be deemed to have been proximately caused by absence of guard rail in highway, see note to *Lyons v. Watt*, 18 L.R.A.(N.S.) 1135, and later case, *Mineral City v. Gilbow*, 25 L.R.A.(N.S.) 627.

judgment of a Trial Term for Kings County dismissing the complaint and granting a new trial in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. James D. Bell and Frank Julian Price, with Mr. Archibald R. Watson, for appellant:

The city cannot be held liable for the policeman's failure to give notice of the gully.

Woodhull v. New York, 150 N. Y. 450, 44 N. E. 1038; Gartland v. New York Zoological Soc. 135 App. Div. 170, 120 N. Y. Supp. 24.

Mr. Abraham C. Cohen, with Mr. Michael H. Harris, for respondent:

The defendant was negligent.

Corcoran v. New York, 188 N. Y. 131, 80 N. E. 660; Chisholm v. State, 141 N. Y. 246, 36 N. E. 184; Weed v. Ballston Spa. 76 N. Y. 329; McGuire v. Spence, 91 N. Y. 303, 43 Am. Rep. 668; Brusso v. Buffalo, 90 N. Y. 679.

The city is liable if the police officer knew of the gully before the accident.

Fisher v. Wakefield Park Realty Co. 135 App. Div. 808, 120 N. Y. Supp. 129; Farley v. New York, 152 N. Y. 222, 57 Am. St. Rep. 511, 46 N. E. 506; Rehberg v. New York, 91 N. Y. 137, 43 Am. Rep. 657; Twogood v. New York, 102 N. Y. 216, 6 N. E. 275; Hawley v. Gloversville, 4 App. Div. 343, 38 N. Y. Supp. 647; Parks v. New York, 111 App. Div. 839, 98 N. Y. Supp. 94.

Hiscock, J., delivered the opinion of the court:

While plaintiff was riding in a carriage at about half-past 12 in the afternoon of October 9, 1903, over one of the roads in Prospect Park in the borough of Brooklyn, the carriage ran into a gully at the side of the road and was tipped over, and she was injured, and she has brought this action on the theory that the defendant was guilty of negligence in respect to said defect.

Commencing on the morning of October 8th and continuing without interruption from that time until after the accident, there was a rainfall of very unusual extent in the city of Brooklyn. The result of this, amongst other things, was to so raise the water in one of the lakes in the park system that, notwithstanding the efforts of employees to prevent it, the water overflowed and, passing some distance, spread over the road at the point of accident and washed out a gully several inches in depth. One of the plaintiff's witnesses was a policeman stationed near the place

of accident; and, while his evidence was variable and unsatisfactory, the jury probably would have had the right to say that he discovered the defect in the roadway at about half-past 8 in the morning of the day of the accident. He thereafter telephoned to his police station, about a mile away, some message, the purport of which is not given, except that it is assumed that it related in some way to the conditions which have been detailed. There is nothing in the record to indicate whether the locality in question was a central one, or whether the roadway where plaintiff was traveling at that time was much used or not.

The question, of course, under these circumstances is whether a jury would have had the right to say that the defendant was guilty of negligence because it did not, by barriers or in some other manner, guard the defective highway; for it must be conceded that it was impossible to repair the road until the waters receded at some time after the accident. I am of the opinion that it would not have been permissible to allow the jury to say this, and that therefore the trial judge was correct in his disposition of the case.

It will be assumed, for the appellant's counsel seems to so assume, that the policeman was an agent of the city for the purpose of receiving notice of the condition of the highway, and that it was his duty to communicate his knowledge to his superiors, in order that it might be passed along to those officials who were charged with the duty of repairing or guarding against the defect. The rule in this case, where the defect arose without fault on the part of the city, is that it would not be charged with negligence until lapse of a reasonable time in which to communicate knowledge and notice of the defect, and of a reasonable time after such notice and knowledge within which to repair or guard against the same. Farley v. New York, 152 N. Y. 222, 57 Am. St. Rep. 511, 46 N. E. 506; Sprague v. Rochester, 159 N. Y. 20, 26, 53 N. E. 697.

Many times the question whether reasonable diligence has been exercised is one of fact for the jury; but at others, when there is no dispute of fact, the question is one of law. Hedges v. Hudson River R. Co. 49 N. Y. 223; Wright v. Bank of the Metropolis, 110 N. Y. 237, 249, 1 L.R.A. 289, 6 Am. St. Rep. 356, 18 N. E. 79. And in determining how speedily a municipality should be required to act in such a case as this to avert accidents a limit must some time be reached, where the period between discovery of the defect and the accident is so short that a jury should not be allowed

to say, as a question of fact, that due diligence has been lacking. I think that the present one is such a case, and that the defendant should not be held liable because it failed within about four hours to remedy a defect, not extraordinarily dangerous, caused by a storm of almost unprecedented severity in a locality not appearing to have been either central or much traveled at that time. It must be assumed that after such a rainfall as this was there were unusual demands on the city of many kinds and in many localities.

While no cases have been cited involving facts similar to those here presented, there are those which in a general way sustain our view.

Rehberg v. New York, 91 N. Y. 137, 144, 43 Am. Rep. 657, was an action to recover damages for injuries sustained by the fall of some bricks which had been piled in the street. The accident occurred about noon on May 5th. The pile was completed May 3d, and was commenced on or before April 29th, and, as the jury would have been warranted in finding, had reached the safety limit as early as Wednesday or Thursday previous to the accident. A policeman saw the pile from time to time while it was going up; but it did not appear that he notified any officer or department of the city government. It was said by the court: "Notice to the policeman of this unlawful obstruction was, we think, notice to the city, and the city is chargeable with any neglect on his part, . . . or for any negligence in permitting the obstruction to exist. Whether, in view of the distribution of municipal powers . . . and the time which would be required by the city after notice to cause the obstruction to be removed, the city acted with reasonable diligence after notice to the policeman of its existence, and whether there was time after such notice to have removed the obstruction before the happening of the accident, were questions of fact for the jury, to be determined upon all the circumstances of the case. The question presented is not free from difficulty; but we are of opinion that the case ought to have been submitted to the jury upon the question of negligence on the part of the defendant. If the city omitted to act with reasonable diligence after notice of an unlawful obstruction in the street, . . . we think it would be no defense that it may not have known that the obstruction was in fact dangerous."

It thus appears that in this case the question of the negligence of the city in not removing the bricks was regarded as "not free from difficulty," when it had had 39 L.R.A.(N.S.)

notice of the obstruction several days before the accident.

In *Blakeley v. Troy*, 18 Hun, 167, it was held, as a matter of law, that the neglect of the city to remove ice before 1 o'clock in the afternoon, which had formed the night before, was not enough to make the city liable.

In *Reed v. Detroit*, 99 Mich. 204, 58 N. W. 44, it was held that the existence of a hole in a culvert in a public street from 5 o'clock in the morning until 8 o'clock in the evening was not for a sufficient time to permit a jury to charge the defendant with constructive notice.

In *McKormick v. West Bay City*, 110 Mich. 265, 68 N. W. 148, an alderman of the city and a member of the committee on streets, at about noon discovered that a plank had been removed from a walk on one of the public streets. He replaced it without fastening it, and notified the street commissioner that evening, and the defect was repaired the next morning. It was held, as a matter of law, that there was no unreasonable delay, either in giving notice of or in repairing the defect.

I think that the insufficiency of the time which elapsed in the present case between discovery of the defect and the accident, for the purpose of charging the defendant with negligence, is also made very apparent by contrast with the facts in the cases cited by the plaintiff to sustain a right of recovery.

In *Kunz v. Troy*, 16 N. Y. S. R. 459, 1 N. Y. Supp. 596, the recovery was permitted for the negligence of the defendant in not removing a counter which had remained on the sidewalk from Tuesday until Saturday afternoon.

In *Higgins v. Brooklyn*, Q. C. & S. R. Co. 54 App. Div. 69, 66 N. Y. Supp. 334, it appeared as a basis for plaintiff's recovery that for one or two weeks prior to the date of the accident a railroad tie had been left in the gutter between the crosswalk and the curb of the street at an unlighted corner, and that one of defendant's police officers had been thrown by the same tie two nights before the accident, and had reported the occurrence to the captain of the police precinct.

In *Turner v. Newburgh*, 109 N. Y. 301, 4 Am. St. Rep. 453, 16 N. E. 344, the loose stone in the street which caused plaintiff's accident had been in such condition for a week or more before the accident.

As has been stated, no case has been cited, and a careful search has failed to find one, in which, under such conditions as surrounded this plaintiff's accident, a municipality has been held negligent because it has not repaired or guarded a defect in a street within about four hours after dis-

covery by such an agent as a policeman, and I think it would be going altogether too far to impose such a degree of liability.

In my opinion, the order of the Appellate Division should be reversed, and the judgment of the Trial Term affirmed, with costs in both courts.

Chase, J., dissenting:

The gully was 16 to 20 inches deep, concealed by water overflowing the entire roadway, and consequently the defect was an extraordinarily dangerous one. It was known to the city, and not discoverable by travelers without a special examination. In my judgment, it was a question of fact whether the failure to put up a barrier or give notice to travelers was negligence. The judgment should be affirmed.

Cullen, Ch. J., and Gray, Werner, and Collin, JJ., concur with Hiscock, J. Willard Bartlett, J., concurs in result.

Chase, J., reads dissenting memorandum.

NORTH CAROLINA SUPREME COURT.

RE HUGH ALDERMAN.

WILLIAM F. ALDERMAN, Appt.

(157 N. C. 507, 73 S. E. 126.)

Judgment — awarding custody of children — effect in other state.

A judgment in a divorce proceeding giving the father the right to receive visits from a child of the marriage, which is

Note. — Extraterritorial effect of judgment awarding custody of children upon divorce of parents.

As to jurisdiction to award custody of child temporarily within the state but domiciled elsewhere, see note to Lanning v. Gregory, 10 L.R.A. (N.S.) 690.

The earlier cases on the subject here annotated are to be found in a subdivision of the note to Benton's Succession, 59 L.R.A. 177.

Some apparent conflict is noticed in the cases which pass upon the extraterritorial effect of a judgment awarding the custody of children upon a divorce of the parents. Some cases hold that while the judgment is *res judicata* in the state of its rendition and elsewhere so far as the parents are concerned, it is not *res judicata* as to the right of some other state, where the children may subsequently be, to determine the custody of the children as their welfare may require. People ex rel. Hickey v. 39 L.R.A. (N.S.)

awarded to the mother, is not, under the full faith and credit clause of the Federal Constitution, binding upon the courts of another state to which the child and mother remove and where they take up their domicile.

(December 20, 1911.)

APPEAL by petitioner from a judgment of the Superior Court for Buncombe County in favor of defendant in a habeas corpus proceeding to secure possession of petitioner's infant child. Affirmed.

Statement by Brown, J.:

This is a proceeding in habeas corpus, instituted by the petitioner, Wm. F. Alderman, to determine the custody of Hugh Alderman, the infant son (four years of age) of petitioner and his former wife, the respondent, Sarah E. Alderman, who now resides with her child at Brevard, North Carolina. The cause was heard in the superior court of Buncombe county by his Honor, Judge Webb, who made findings of fact and rendered judgment as follows: "This cause coming on to be heard before the undersigned judge, James L. Webb, and being heard upon the affidavits filed by both plaintiff and defendant, I find the following facts:

"(1) I find as a fact that W. F. Alderman and Sarah E. Alderman were married in the state of Florida about 7th day of June, 1899, and lived together as man and wife until about the ——— day of ———, 1909.

"(2) I find as a fact that during the years 1909 and 1910 W. F. Alderman abandoned Sarah E. Alderman, and thereupon, Sarah E. Alderman, who was then with her child, Hugh Alderman, visiting her

Hickey, 86 Ill. App. 20; Thorndike v. Rice, 24 Month. L. Rep. 19, cited in People ex rel. Hickey v. Hickey, 86 Ill. App. 27; Re Bort, 25 Kan. 308, 37 Am. Rep. 255; Avery v. Avery, 33 Kan. 1, 52 Am. Rep. 523, 5 Pac. 419; Keenan v. Keenan, 5 Ohio N. P. N. S. 12, 17 Ohio S. & C. P. Dec. 581. RE ALDERMAN.

So a decree of divorce obtained by the wife, a resident of Colorado, against her husband domiciled in North Carolina, without personal service upon him, under which she is awarded the custody of a child, whose possession she seeks in North Carolina, is of no validity in the latter state, either as to the relation of the parties or as to the custody of the child, which at the time of the Colorado proceeding was domiciled with its father in North Carolina. Harris v. Harris, 115 N. C. 587, 44 Am. St. Rep. 471, 20 S. E. 187.

And a decree of divorce of a court of another jurisdiction awarding the custody of a child of the parties to one of them, passed

parents in the state of North Carolina, instituted divorce proceedings in the courts of the state of Florida, alleging wilful, continued, and obstinate desertion on the part of W. F. Alderman, and the said Sarah E. Alderman was on February 28, 1911, granted a divorce from the bonds of matrimony upon the ground of wilful, continued, and obstinate desertion.

"(3) I find as a fact that during the relationship of ~~man~~ and wife, between the plaintiff and the defendant, there was born Hugh Alderman, the child in question, who is now a little more than four years of age.

"(4) I find as a fact that in the decree that was signed in the divorce proceedings in the state of Florida, rendered February 28, 1911, the following clause and para-

graph appears: 'It is further ordered, adjudged, and decreed that the complainant, Sarah E. Alderman, have and she is granted the custody of the child, Hugh Alderman, provided that the defendant, W. F. Alderman shall be allowed to visit said child at such times as may to the said Sarah E. Alderman seem reasonable, and the child, Hugh Alderman, may visit the defendant, William F. Alderman, at such times and under such circumstances and conditions as are reasonable and expedient, and the child may at least be permitted to visit said William F. Alderman for two weeks at a time every three months if the said William F. Alderman so desires or elects.'

"(5) I find as a fact that the child, Hugh Alderman, is a frail and delicate

while the child is in the District of Columbia, does not preclude the courts of the District from determining the question of the custody of the child. Seeley v. Seeley, 30 App. D. C. 191, 12 Ann. Cas. 1058, wherein, upon a habeas corpus proceeding brought to enforce the foreign decree, it was held that the full faith and credit clause of the Constitution of the United States was not involved. The court said that the welfare of the child is the predominant consideration at all times and under all circumstances.

Of such prime importance is the welfare of the child that the court may disregard the fact that under a foreign judgment of divorce the custody of the children has been given to one of the parents, and give them to some third party. *Re Bort*, 25 Kan. 308, 37 Am. Rep. 255.

So the court in *Re Bort*, supra, after reaching the conclusion that the full faith and credit clause of the Federal Constitution has no application to cases of this kind, said: "We understand the law to be, when the custody of children is the question, that the best interest of the children is the paramount fact. Rights of father and mother sink into insignificance before that. Even when father and mother are living together, a court has the power, if the best interests of the child require it, to take it away from both parents and commit the custody to a third person."

Where a court of a sister state grants a divorce, without finding the father unfit temporarily, and awards the custody of the minor children to the mother, such decree does not deprive the father, who subsequently in another state sues out a writ of habeas corpus to obtain possession of the children, of his natural right to the custody of such children against any person except the mother; and upon her death, such right ceases to be affected by such award. *Clarke v. Lyon*, 82 Neb. 625, 20 L.R.A. (N.S.) 171, 118 N. W. 472.

Other cases, on the other hand, sustain the proposition that a decree of divorce, fixing the custody of the children of the marriage, rendered in accordance with the 39 L.R.A. (N.S.)

laws of another state, by a court having jurisdiction of the subject-matter and of the parties, will be given full force and effect in other states as long as the circumstances attending the adoption of the decree remain the same. *Hardin v. Hardin*, 168 Ind. 352, 81 N. E. 60; *People ex rel. Allen v. Allen*, 40 Hun, 611, appeal dismissed in 105 N. Y. 628, 11 N. E. 143; *Wilson v. Elliott*, 96 Tex. 472, 97 Am. St. Rep. 928, 73 S. W. 946; ruling on the question certified followed in 32 Tex. Civ. App. 483, 75 S. W. 368; *Bennett v. Bennett*, *Deady*, 299, Fed. Cas. No. 1,318.

In *Morrill v. Morrill*, 83 Conn. 479, 77 Atl. 1, it was held that where a court having jurisdiction of the parties and the subject-matter granted a divorce and awarded the custody of the children to one of the parties, its jurisdiction, even in the absence of a statute upon the subject,—there was a statute in the case at bar, Gen. Stat. § 4558,—is a continuing one, so that the power of the court to amend, modify, or annul its order of custody as the welfare of the children under existing conditions may demand, ever after remains, notwithstanding that the party to whose custody they were awarded by the original decree has become a resident, with the children, in a foreign country; and that the extraterritorial effect of any order modifying the original decree as to the custody of the children is that it should, according to the customary comity of states and nations, be recognized and enforced; and in the states of the American Union, by force of the full faith and credit clause of the Federal Constitution, must be recognized and enforced so long, and only so long, as the circumstances attending its adoption remain unchanged.

People ex rel. Allen v. Allen, 40 Hun, 611, which is set out in a note in 59 L.R.A. 177, was dismissed upon appeal in 105 N. Y. 628, 11 N. E. 143, for the reason that the courts below, upon a view of all the existing facts relating to the welfare and interests of the infants, exercised their discretion in awarding to the mother the custody of the children; and in so doing gave to the for-

child, and that said child was at the time of the institution of the divorce proceedings in the state of Florida, and prior thereto, and has been at all times since, residing with its mother, Sarah E. Alderman, and grandparents, Rev. Paul F. Brown and wife, at Brevard, Transylvania county, North Carolina.

"(6) I find as a fact that the child's health is such that it would jeopardize it to carry it from the mountains of Western North Carolina to the state of Florida, especially during the warm season of the year.

"(7) I find as a fact that the mother of the child, Sarah E. Alderman, is an intelligent, refined, Christian woman, living with her parents, Rev. Paul F. Brown and wife at Brevard, North Carolina, and that Rev. Paul F. Brown is the pastor of the Presbyterian Church in Brevard, North Carolina.

"(8) I find as a fact that Sarah E. Alderman, the mother of Hugh Alderman, and her parents, Rev. Paul F. Brown and wife, the grandparents of Hugh Alderman, are people of sufficient means to properly care for and make comfortable and educate the child, and I further find that the moral welfare of the child, Hugh Alderman, is being well guarded.

"(9) I further find as a fact that prior to the institution of the divorce proceedings in the state of Florida by Sarah E. Alderman v. W. F. Alderman, and since said proceedings were instituted, and prior to and since the decree of separation and divorce was rendered therein, the said William F. Alderman had in his employ a stenographer, one Georgia V. Farmer, and that he became infatuated with said woman,

conducting himself in a way not becoming a man of a family, with a living wife, that he showed the said Georgia Farmer many attentions in various ways, riding upon street cars with her, carrying her to restaurants, theaters, purchasing small articles of various kinds for her, taking trips with her on trains, visiting her boarding house, removing the photo of Sarah E. Alderman, his wife, from the locket on his watch chain, which locket contained the miniature photo of Sarah E. Alderman and one of their children, now dead, and placing in said locket the miniature of Georgia Farmer.

"I further find as a fact that William F. Alderman prior to the date of the decree in said divorce proceedings, and while the decree for alimony was being considered, had one Roena Floyd, a single woman, to deed to Georgia Farmer, his stenographer, for a nominal sum of \$10, a house and lot in the city of Jacksonville, Florida, and the said deed was not registered until after said decree for divorce was signed, to wit, on March 23, 1911.

"I further find that after the institution of this suit in the superior court of Buncombe county to obtain the child Hugh Alderman, the said William F. Alderman attempted to kidnap or get possession of the said Hugh Alderman by having a colored boy to secretly get him out of the possession of his mother, Sarah E. Alderman, carry him to Hendersonville, through the country, a distance of 20 miles, there to be turned over to William F. Alderman to be carried to the state of Florida.

"(10) I further find as a fact that William F. Alderman has no permanent place

to modify it, by proof that the situation and character of the respective parties have so changed as to render it to the interests of the infants that they be committed to the care of the mother. *Wilson v. Elliott*, 96 Tex. 472, 97 Am. St. Rep. 928, 73 S. W. 946; 1 *Parmelee's Wharton*, Conf. L. 531.

In *State ex rel. Hahn v. King*, 109 La. 161, 33 So. 121, the binding effect of a foreign judgment giving the custody of a child to one of the parents was recognized on the ground of estoppel. In that case, where a father was ordered under a writ of habeas corpus to place a minor child, of whom he had the possession, in the custody of its mother, under the terms of a judgment of divorce which the latter obtained in another state against her husband, it was held that the father of the child, the husband, was estopped from contesting that judgment, because on the trial of the writ he testified himself that under authority of that judgment he had contracted a second marriage.

As stated above the foreign decree or order is not a bar to a subsequent proceeding 39 L.R.A. (N.S.)

So a foreign decree giving the custody of the children to the mother is not binding in another state, where it appears that the father is the more suitable person to care for them. *Kentzler v. Kentzler*, 3 Wash. 166, 28 Am. St. Rep. 21, 28 Pac. 370.

Of *Thorndike v. Rice*, 24 Month. L. Rep. 20, it was said in *People v. Allen*, supra: "It was held that a decree of a tribunal as to the custody of a child was never final, but that the same tribunal, or another where the child was either temporarily or permanently staying, might consider the case upon the facts then existing, and, looking at the welfare of the child, should determine whether any and what change should be made in regard to its custody."

E. M. S.

of abode, no settled home, in which to properly care for the child, Hugh Alderman, and I further find as a fact that the said William F. Alderman is not a suitable person to have the care and custody of the child, Hugh Alderman, at this time.

"(11) I further find as a fact that Sarah E. Alderman, the mother of Hugh Alderman, is a fit and proper person to have the care and custody of Hugh Alderman, the child in question, in looking after the health, training, and moral development of the child.

"(12) I further find as a fact that Sarah E. Alderman does not object to W. F. Alderman visiting and being allowed to see the child, Hugh Alderman, under proper and reasonable conditions.

"The foregoing facts are found from the large number of affidavits, perhaps fifty or more, filed by both plaintiff and defendant, and from the facts appearing and found by me, I conclude as a matter of law:

"(1) That the court is of the opinion that this is not a proper case where the writ of habeas corpus will lie.

"(2) That if it is a case where such writ will lie, from the foregoing findings of fact, the court is of opinion that it is for the best interest of the child, Hugh Alderman, to be left in the possession of and under the care and custody of its mother, Sarah E. Alderman, and it is so ordered.

"(3) It is further ordered that W. F. Alderman be allowed to visit said child, Hugh Alderman, at the home of its mother at such times and under such conditions as the mother of said child may deem advisable.

"(4) It is further ordered that the prayer of the petitioner be and the same is hereby refused, and it is further ordered that the petitioner, W. F. Alderman, pay all the costs of this action to be taxed by the clerk of the superior court of Buncombe county."

Messrs. D. L. English and Mark W. Brown, for appellant:

A foreign decree determining the custody of a child in a suit for divorce in which the court has jurisdiction of the subject-matter and of the parties is conclusive of all questions as to the right of custody which might have been urged at the time the decree was rendered.

Bidwell v. Bidwell, 139 N. C. 402, 2 L.R.A.(N.S.) 324, 111 Am. St. Rep. 797, 52 S. E. 55; *Wakefield v. Ives*, 35 Iowa, 238; *Wilson v. Elliott*, 96 Tex. 472, 97 Am. St. Rep. 928, 73 S. W. 946, 32 Tex. Civ. App. 483, 75 S. W. 368; *Dubois v. Johnson*, 96 Ind. 6; *Umlauf v. Umlauf*, 27 Ill. App. 375; *Jennings v. Jennings*, 56 Iowa, 288, 39 L.R.A.(N.S.)

9 N. W. 222; *State ex rel. Lembke v. Bechdel*, 37 Minn. 360, 5 Am. St. Rep. 854, 34 N. W. 334, 7 Am. Crim. Rep. 227; *White v. White*, 75 Iowa, 218, 39 N. W. 277; *Teter v. Teter*, 88 Ind. 494; *Mercein v. People*, 25 Wend. 64, 35 Am. Dec. 653; *Taylor v. Jeter*, 33 Ga. 195, 81 Am. Dec. 202; *Bennett v. Bennett*, Deady, 299, Fed. Cas. No. 1,318; *Barber v. Barber*, 21 How. 582, 16 L. ed. 226; *Christmas v. Russell*, 5 Wall. 299, 18 L. ed. 478; *Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604.

The primary right to the custody and control of children, without regard to sex, and with slight qualification as to early infancy, is in the father.

14 Cyc. 806, note 90; *Newsome v. Bunch*, 144 N. C. 15, 56 S. E. 509; *Latham v. Ellis*, 116 N. C. 30, 20 S. E. 1012; *Stetson v. Stetson*, 80 Me. 485, 15 Atl. 60; *Hammond v. Hammond*, 90 Ga. 527, 18 S. E. 265; *People ex rel. Allen v. Allen*, 40 Hun, 611; *Baily v. Schrader*, 34 Ind. 260.

Mr. Welch Galloway, for appellee:

Habeas corpus will not lie in this case.

Re Parker, 144 N. C. 175, 56 S. E. 878; *Wilson v. Elliott*, 96 Tex. 472, 97 Am. St. Rep. 928, 73 S. W. 946.

The courts of this state will not allow the child to be taken out of their jurisdiction.

Harris v. Harris, 115 N. C. 587, 44 Am. St. Rep. 471, 20 S. E. 187; *Re Turner*, 151 N. C. 474, 66 S. E. 431.

The physical, moral, and spiritual welfare of the child is the only safe guide in cases of this kind; and the courts will be guided by those surroundings.

Re Lewis, 88 N. C. 34; *Jones v. Cotten*, 108 N. C. 458, 13 S. E. 161; *Re Turner*, 151 N. C. 474, 66 S. E. 431; *Hurd*, *Habeas Corpus*, 528; *Schouler*, *Dom. Rel.* 248.

Brown, J., delivered the opinion of the court:

It appears from the findings of his Honor that the petitioner and respondent were divorced by the courts of the state of Florida, where they resided in 1909 and 1910, at the instance of the respondent, upon the ground of wilful, continued, and obstinate desertion by petitioner of his wife and only child, and the general custody of the child was awarded to the mother, who afterwards removed with her child to Brevard, North Carolina, where she now resides with her father.

The custody of children in cases of the divorce and separation of their parents is a subject as delicate as any with which courts have to deal. The good of the child should be, and always is, the chief thing to be regarded and the governing principle which guides the judge. All other con-

siderations sink into insignificance. Many cases and text writers can be cited where the principle is announced that the physical, moral, and spiritual welfare of the child is the only safe guide in cases of this kind; and the courts will be guided by those surroundings. *Re Lewis*, 88 N. C. 34; *Jones v. Cotten*, 108 N. C. 458, 13 S. E. 161; *Re Turner*, 151 N. C. 474, 66 S. E. 431; *Hurd*, *Habeas Corpus*, 528; *Schouler*, *Dom. Rel.* 248; 2 *Bishop*, *Marr. & Div.* § 529; *Umlauf v. Umlauf*, 27 Ill. App. 378. One who reads the findings and the judgment of the just and learned judge who heard this matter in the court below must conclude that no other consideration than the child's welfare influenced his decision to remand the child to the care of its best friend, the mother. The love of the mother for her child, regardless of conditions and environments, has been proven by the history of the ages, and, while her devotion can be counted upon almost unfaithfully, it is sad to say that sometimes the tie between father and child is a different matter, and requires the strong arm of the law to regulate it with some degree of humanity and tenderness for the child's good.

But the petitioner contends that under the Florida decree he has a vested right in the partial custody of the child, which this court is bound to respect and enforce under the full faith and credit clause of the Federal Constitution. That part of the decree of the Florida court which petitioner invokes reads as follows: "W. F. Alderman shall be allowed to visit said child at such times as may to said Sarah E. Alderman seem reasonable, and the child, Hugh, may visit the defendant, W. F. Alderman, at such times and under such circumstances and conditions as are reasonable and expedient, and said child may at least be permitted to visit W. F. Alderman for two weeks at a time, etc., if W. F. Alderman desires." The language used would seem to indicate that the mother is expected to exercise careful supervision and control over the child, and that her consent or permission is necessary before the child can visit its father even for two weeks at a time. But nevertheless, if the language used was compulsory in its terms, that clause of the decree is not such a judgment of another state which the courts of this state are bound to enforce.

All states and governments possess inherent power over the marriage relation, its formation and dissolution, as regards its own citizens, and, as both the husband and wife were citizens of Florida and properly before its court as parties to the suit, we must give full faith and credit to the annulment of their marriage. *Atherton v. Atherton*, 130 L.R.A. (N.S.)

ton, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544; *Haddock v. Haddock*, 201 U. S. 563, 50 L. ed. 867, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1.

But the infant child of their union is not property, and the father can have no vested right in the child or its services under a decree divorcing the parents. Such decree as to the child has no extraterritorial effect beyond the boundaries of the state where it was rendered. The child is now a citizen of North Carolina, and, as such peculiarly under its guardianship, and the courts of this state will not remand it to the jurisdiction of another state, especially where, as in this case, it is so manifestly against the true interests of the child. "Minors are the wards of the nation, and even the control of them by parents is subject to the unlimited supervisory control of the state." 1 *Tiedeman*, *State & Federal Control*, p. 335; *Starnes v. Albion Mfg. Co.* 147 N. C. 559, 17 L.R.A. (N.S.) 602, 61 S. E. 526, 15 Ann. Cas. 470. In this case it is said: "The supreme right of the state to the guardianship of children controls the natural rights of the parent when the welfare of society or of the children themselves conflicts with parental rights." Therefore it follows that, when this child became a citizen and resident of this state and duly domiciled here, it is no longer under the control of the Florida courts. In *Re Bort*, 25 Kan. 308, 37 Am. Rep. 255, the full faith and credit clause of the Federal Constitution was invoked by the petitioner in support of his supposed right under a decree in another state. Mr. Justice Brewer (afterwards of the Supreme Court of the United States) denied the correctness of such position, saying: "This claim seems to rest on the assumption that the parents have some property rights in the possession of their children, and is very justly repudiated by the courts of Massachusetts. 2 *Bishop*, *Marr. & Div.* 5th ed. 204." The same question was before the Kansas court again in 1885, and it held that the decree of the foreign court in no manner concluded other courts of the state where the child is then residing, as to the best interests of the child. *Avery v. Avery*, 33 Kan. 1, 52 Am. Rep. 523, 5 Pac. 419, citing and approving *Re Bort*. To the same effect is the decision of the court of appeals of New York in *People ex rel. Allen v. Allen*, 105 N. Y. 628, 11 N. E. 143. In *Wilson v. Elliott*, 96 Tex. 474, 73 S. W. 946, 75 S. W. 368, the same question was considered by the supreme court of Texas, and it was held that the decree of the court of another state awarding the custody of a child was not binding upon the courts of Texas under the full faith and credit clause

of the Federal Constitution after the child had become domiciled in Texas. The court says: "Were the subject-matter of the decree property or a matter in which the parents were solely concerned, the decree would, by reason of said article, be entitled to the effect which the trial court has given it. But neither of these propositions is true. The child is not in any sense property of the parents. It is also equally well established that the government has an interest in the welfare and consequently in the question of the custody and environments of the child, and to this the rights of the parents are entirely subordinate." See also *Legate v. Legate*, 87 Tex. 252, 28 S. W. 281; *State ex rel. Lasserre v. Michel*, 105 La. 741, 54 L.R.A. 927, 30 So. 122.

The judgment is affirmed.

KANSAS SUPREME COURT.

STATE OF KANSAS EX REL. W. R. STUBBS, Governor,

JOHN S. DAWSON, Attorney General.

(86 Kan. 180, 119 Pac. 360.)

Governor — powers — constitutional provision.

1. The provision of article 1, § 3, of the Constitution, which vests the supreme executive power in the governor, implies that the governor is the highest in authority in the executive department, with such power as will secure a faithful execution of the laws in the manner and by the methods prescribed by the Constitution and statutes, enacted in harmony with that instrument. **Attorney general — duty prosecution of actions.**

2. The statute, making it the duty of the attorney general, when required by the governor, to appear for the state and prosecute in any court or before any officer, in any cause or matter, civil or criminal, in which the state may be a party or interested, in mandatory.

Same — liquor law — examination of witnesses.

3. A proceeding for the examination of witnesses under the provisions of the prohibitory law (Gen. Stat. 1909, § 4366) is a matter before an officer, in which the state is interested; and when required by the governor the attorney general has no

Headnotes by BENSON, J.

Note. — While no cases exactly in point have been found upon the power of the governor of a state to require the institution and prosecution of criminal proceedings, that power is sustained indirectly by *State v. Bowles*, 70 Kan. 821, 69 L.R.A. 176, 39 L.R.A. (N.S.)

discretion to refuse to prosecute in such a proceeding.

Governor — naming witness.

4. In such a proceeding as that referred to in the above paragraph, and in the situation shown by the facts in this case, it is within the authority of the governor to name the witness to be subpoenaed and examined.

(Porter and West, JJ., dissent.)

(December 9, 1911.)

ON DEMURRER to the answer to an application by the state for a writ of mandamus to require the Attorney General to issue a subpoena and summon a witness relative to the violation of the prohibitory law. Demurrer sustained.

The facts are stated in the opinion.

Mr. S. D. Bishop, for plaintiff:

The governor has power and authority to execute the laws.

Re *Railroad Comrs.* 15 Neb. 679, 50 N. W. 276; Re *Davies*, 168 N. Y. 89, 56 L.R.A. 855, 61 N. E. 118; *Petterson v. State*, — Tex. Crim. Rep. —, 58 S. W. 100; *People v. Salsbury*, 134 Mich. 537, 96 N. W. 936; *State ex rel. Jameson v. Denney*, 118 Ind. 382, 4 L.R.A. 79, 21 N. E. 252.

The duty of the attorney general to issue a subpoena for the said J. E. House, and compel him to testify as prayed for, upon request of the governor, is mandatory.

State ex rel. Haskell v. Huston, 21 Okla. 782, 97 Pac. 982; *Wilkinson v. Winne*, 15 Minn. 159, Gil. 123; *Hening v. Nelson*, 20 Ga. 583; *Grimball v. Marshall*, 3 Smedes & M. 359; *State v. Bowles*, 70 Kan. 821, 69 L.R.A. 176, 79 Pac. 726; *Emery v. State*, 101 Wis. 627, 78 N. W. 149; *Atchison. T. & S. F. R. Co. v. People*, 5 Colo. 60; *State ex rel. Nolan v. District Ct.* 22 Mont. 25, 55 Pac. 916.

Even if the attorney general is clothed with discretion, to refuse to call a witness who openly declares he was an eyewitness to the commission of a crime would be an abuse of discretion, and mandamus should issue.

Jackson County v. State, 147 Ind. 476, 46 N. E. 908; *People ex rel. Green v. Cook County*, 176 Ill. 576, 52 N. E. 334; *State ex rel. Hathaway v. State Bd. of Health*, 103 Mo. 22, 15 S. W. 322; *State ex rel. Kelleher v. St. Louis Public Schools*, 134 Mo. 296, 56 Am. St. Rep. 503, 35 S. W.

79 Pac. 726; *Emery v. State*, 101 Wis. 627, 78 N. W. 145; and *State ex rel. Haskell v. Huston*, 21 Okla. 782, 97 Pac. 982, which are sufficiently set out in **STATE EX REL. STUBBS v. DAWSON.**

617; State ex rel. Folk v. Talty, 166 Mo. 529, 66 S. W. 361.

Messrs. S. N. Hawkes and S. M. Brewster for defendant.

Benson, J., delivered the opinion of the court:

This is an action in mandamus to require the attorney general to prosecute a proceeding under a section of the prohibitory liquor law, which authorizes the attorney general and prosecuting attorneys who may be notified, or who have knowledge of the violations of that act, to issue subpoenas and examine witnesses touching its violation. Laws 1909, chap. 164, § 6, Gen. Stat. 1909, § 4366.

The application for the writ states the following facts: In June, 1911, a newspaper writer, residing in Topeka, wrote a letter to a syndicate of newspapers, published throughout the state, containing the following statement: "The writer spent a portion of an evening in a club in a small Kansas town not long ago. The town is in territory supposed to be strictly dry. Still they were selling beer openly over a bar. With these conditions prevailing everywhere, why should all the odium of the situation be hung on Cherokee and Crawford counties?"

On July 1st following, the governor directed the attorney general to subpoena the writer of the letter, and hold an inquiry, as provided in § 4366 of the General Statutes of 1909, as shown by the following communication: "Dear Mr. Dawson: In a recently published newspaper article signed by J. E. House, of Topeka, Kansas, appears the statement that he spent a portion of an evening in a club in a small Kansas town not long since, where they were selling beer openly over a bar. He also asserted that the cities of Lawrence and Emporia are overrun with bootleggers, and that the situation at Leavenworth, Wichita, and Topeka were such, and nobody conversant with the situation believes there is not law violation. Judging from this public admission, I am constrained to believe Mr. House to be in possession of evidence of law violation that would serve to speedily and justly punish the guilty. Therefore you are hereby directed to subpoena the said J. E. House, hold an inquiry, and take his testimony relative to this violation of the prohibitory liquor law, and from such testimony, if specific, base a prosecution of the violators. I will appreciate a prompt action upon the part of your department."

The attorney general answered as follows: "Your Excellency: Your letter of July 7, erroneously dated July 1, at hand. 39 L.R.A. (N.S.)

In it you call my attention to the signed newspaper article of J. E. House, junior editor of the Topeka Capital. That article stated, among some general and indefinite allegations relating to violations of the prohibitory law, that Mr. House has recently attended a dinner at a private club in a small town, at which liquors were sold. I had already taken up this matter on June 30th by correspondence with Mr. House, and obtained such information as he cared to give. Perhaps this occasion is a good time for your Excellency and myself to understand our relative positions concerning matters of this sort. You 'directed' me to subpoena Mr. House and make him tell what he knows about the matters contained in his article. That 'direction' is not within the scope of your authority; neither was your telegram of some time ago, that I should subpoena Judge Sapp and make him come to Topeka on a similar errand. These are matters left to my discretion. The law authorizes the senate of the state of Kansas, or the house of representatives, or the governor to 'direct' the attorney general to prosecute or defend any case of public concern, but such 'direction' must give the attorney general the facts concerning the specific subject-matter to be litigated, the parties to the litigation, and the names of the witnesses by whom the facts can be proven. Anything less definite than this is not a 'direction' at all; anything more is beyond the scope of your authority. I trust that you will believe that this letter is written in the most kindly and courteous spirit, and is only done to set your Excellency right as to the relationship of our respective departments, and to avoid misunderstanding in the future. As heretofore, my department will prosecute or defend any specific case in which your Excellency is interested; but I must have the facts and the witnesses in all such cases, for only in such manner and by such means can any litigation be successful."

Thereupon the governor replied, calling attention to certain constitutional provisions, quoting the statement contained in the letter as copied above, and saying: "In your reply of the 7th you say: 'I had already taken up this matter on June 30th, by correspondence with Mr. House, and obtained such information as he cared to give.' Under the Constitution of this state I am held responsible for the execution of the laws of the state. I may not be satisfied to accept 'such information as he cared to give.' I request that you subpoena Mr. J. E. House, under the provisions of paragraph 4366 of the General Statutes of 1909, and compel him under oath to disclose all the information and knowledge he has re-

garding the incident referred to, and all other information he has respecting the violation of the laws of this state relating to intoxicating liquors; and I further request that this be done at once, and such proceedings instituted as the evidence so secured warrants."

The attorney general responded, saying that his attention was first called to the article referred to on June 30th, and that he had that day addressed a letter to the writer (Mr. House), setting out a copy, and adding: "His reply was strictly of a personal nature, and I do not think it proper to furnish it. But in addition to his written reply, I took the matter up with him personally, and learned what I surmised, which was that Mr. House, being a guest and a stranger, did not know who were selling liquors nor the persons who were buying liquors, and he had nothing to tell of any consequence, nor upon which to base a prosecution. So, too, his general statements that Wichita, Leavenworth, Topeka, and Lawrence were overrun with bootleggers. Mr. House only knows such matters by mere hearsay, and on that subject he is possessed of no information that would be of the slightest assistance to a prosecuting officer."

The governor, in another letter, then called attention to the positive nature of the statement contained in the article published in newspapers over the state, and said: "It is impossible for me to conceive of ordinary social functions where 'they were selling beer openly over a bar.' Likewise it is impossible for me to conceive of an answer to your official communication as attorney general calling for information respecting infractions of the prohibitory law of this state, being 'of so strictly a personal nature' that you do not think it proper to furnish it to the chief executive officer of the state, whose duty it is, under the Constitution, to see that the laws are faithfully executed. Your letter was signed in your official capacity. It would be impossible to reply thereto in a manner that would be so 'strictly personal' as to be improper to be seen." References were again made in this letter to the Constitution and certain statutory provisions, followed by the statement: "For the purpose of enabling me to faithfully execute the laws of this state, it is necessary that a proceeding be instituted, and that Mr. J. E. House be subpoenaed to testify and give information as to the city and the building wherein he was present when intoxicating liquors were sold over a bar, and also that he be required to give the names of any persons who were present, known to him; that he give under oath a full statement of persons who have

told him of the violations of law, to the end that such persons may be subpoenaed. . . . If these statements made by Mr. House over his signature are pure fabrication and without foundation, I want the world to know it, in order that the good name of this state may be protected. . . . I therefore once again request that you institute proceedings of inquiry, and that you subpoena Mr. J. E. House, of Topeka, Kansas, to appear before you at a time and place to be designated in the subpoena, then and there to testify under oath concerning any violations of the provisions of the prohibitory law of this state."

This letter indicated the purpose of the governor to apply to this court for a writ of mandamus. The attorney general responded: "Yours of to-day at hand. I am entirely willing to arrange a test case in the supreme court to determine whether the subpoenaing of witnesses by the attorney general is left to his discretion or to the governor, and therefore, and for that purpose, for the present I most respectfully decline to issue a subpoena for Mr. J. E. House."

The application states that Mr. House has knowledge and information that would enable the attorney general to prosecute suits to suppress violations of the law referred to, which cannot be obtained from him otherwise than by proceedings under the section referred to, and which it is alleged, it is the duty of the attorney general to institute; wherefore the relator prays that he be compelled by mandamus to so proceed as requested, and to furnish to the governor a copy of the testimony when taken. The defendant answered the application without issuance of an alternative writ, the relator demurred to the answer, and thus the issue is presented.

The answer admits the material facts stated in the application, but denies that the writer referred to has knowledge or information concerning violations of the prohibitory law which could be of value to a prosecuting officer in the prosecution of suits to suppress such violations. The answer also sets out various reasons why the attorney general believed it unwise to comply with the governor's requirement, and avers that he has acted in entire good faith in the matter. Among the reasons so given, it is stated, in substance, that he had proceeded in another way to investigate the transaction referred to in the newspaper article; that from such investigation he believed the writer of the latter was mistaken as to the intoxicating quality of the beverage; that Mr. House, through his weekly letters to Kansas newspapers, reaches a circulation of 150,000; that the

writer of the letter has heretofore criticized the attorney general; and that the exercise of the power, as requested, might appear to be for political purposes, but that he would nevertheless have faced this dilemma, had it not been for his confidence that the necessary information could be obtained by less drastic methods. The answer avers that the investigation so begun has not been concluded, and contains the following averment: "That he [the attorney general] has at all times acknowledged the right of the governor to direct the attorney general to prosecute or defend any action in which the state is interested or a party, and defendant has always complied therewith; but defendant denies the right of the governor to dictate the management of any such a cause, and alleges that any such cause must be prosecuted according to the judgment and discretion of one trained in the profession and practice of law." It is not believed to be necessary to set out the answer more fully. The attorney general in his brief says: "The attorney general, believing that no good would be accomplished by subpoenaing [the witness], declined to do so."

The real question, then, to be determined is whether the attorney general is subject to the direction of the governor with respect to the matter concerning which he was required to act, or whether he may in his discretion refuse to comply with such requirement. If it be a matter within his discretion, the answer is sufficient; otherwise it is not. The good faith and zeal of that officer is not questioned.

The Constitution declares: "The supreme executive power of the state shall be vested in a governor, who shall see that the laws are faithfully executed." Article 1, § 3. "He may require information in writing from the officers of the executive department, upon any subject relating to their respective duties." Article 1, § 4. "The officers of the executive department, and of all public state institutions, shall, at least ten days preceding each regular session of the legislature, severally report to the governor, who shall transmit such reports to the legislature." Article 1, § 16. We do not find that the meaning of the phrase, "the supreme executive power," as contained in our Constitution and the Constitutions of many other states of this Union, has ever been precisely defined, although the matter is referred to in some decisions. Perhaps the term itself, taken in connection with the context, is sufficiently explicit. An executive department is created, consisting of a governor and the other officers named, and he is designated as the one having the supreme executive power; that is, the highest in authority 39 L.R.A. (N.S.)

in that department. In the same connection, it will be noticed that the other executive officers are required to furnish information upon subjects relating to their duties, and to make annual reports to him, and withal he is charged with the duty of seeing that the laws are faithfully executed. It is manifest from these various provisions that the term "supreme executive power" is something more than a verbal adornment of the office, and implies such power as will secure an efficient execution of the laws, which is the peculiar province of that department, to be accomplished, however, in the manner and by the methods and within the limitations prescribed by the Constitution and statutes, enacted in harmony with that instrument. "When a Constitution gives a general power, or enjoins a duty, it also gives, by implication, every particular power necessary for the exercise of the one, or the performance of the other. The implication under this rule, however, must be a necessary, not a conjectural or argumentative one. And it is further modified by another rule, that, where the means for the exercise of a granted power are given, no other or different means can be implied, as being more effectual or convenient." *Field v. People*, 3 Ill. 79, 83.

In harmony with the provisions of the Constitution, and to provide the governor with means to execute the laws as required by that instrument, the legislature has declared that he may require the attorney general to prosecute or defend for the state in any cause or matter in which the state is interested. The statute declares: "The attorney general shall appear for the state, and prosecute and defend all actions and proceedings, civil or criminal, in the supreme court, in which the state shall be interested or a party, and shall also, when required by the governor or either branch of the legislature, appear for the state and prosecute or defend, in any other court, or before any officer, in any cause or matter, civil or criminal, in which this state may be a party or interested." Laws 1879, chap. 168, § 71, Gen. Stat. 1909, § 8906.

This provision is mandatory in its terms: but it remains to be considered whether the proceeding referred to under the prohibitory law is a cause or matter within the purview of the statute; whether the duty to prosecute includes the commencement of such proceedings, and whether it also includes the duty to summon and examine a particular individual, when so directed, in the circumstances appearing in this case. That such a proceeding is "a matter" in any . . . court, "or before any officer, . . . in which this state may be a party or interested," is too clear

to admit of serious debate. It would be difficult to find language more comprehensive reaching to all public official proceedings in which the state has an interest.

The word "prosecute" implies the commencement, as well as the continuance, of a proceeding, and the term is so used in common speech, as well as in legal parlance; and it was so held in *State v. Bowles*, 70 Kan. 821, 69 L.R.A. 176, 79 Pac. 726, where a prosecution, instituted by an indictment signed by an assistant attorney general, who acted under the direction of the governor in pursuance of this statutory provision, was upheld. Construing a statute of Wisconsin of the same import, it was held, in *Emery v. State*, 101 Wis. 627, 646, 78 N. W. 145, 151: "So that the attorney general rightly appeared and assisted in the prosecution of this case does not admit of question. It was not within his discretion to comply or refuse to comply with the governor's request, or within the discretion of the circuit court to permit or refuse to permit him to participate in the trial." This construction is in harmony with the decision in the *Bowles Case*, and with the constitutional declaration that the supreme executive power is vested in the governor.

The remaining question is whether the designation of the witness is fairly incidental to the authority of the governor to direct a proceeding under this statute, not whether the governor, in an ordinary trial or proceeding, may direct what particular witnesses shall be examined, nor whether the executive may control the ordinary details of judicial proceedings. Such controversies will be infrequent, and when they do arise will probably be considered in the light of the emergency disclosed by the facts of the particular case. We are not required to explore and delimit the frontiers of the supreme executive power upon this general subject, but only to decide the question presented upon this record. The determination of a single controversy arising within the circle of a co-ordinate department of government will not be used as an opportunity to foreshadow opinions upon possible controversies which may never arise.

The section of the statute under which the governor directed the prosecution to be instituted provides for a distinct proceeding quite unlike ordinary actions or proceedings, where the examination of witnesses is merely incidental. Here the examination of a witness constitutes the proceeding. It is instituted for that purpose. It provides that "if a county attorney, attorney general, or assistant attorney general . . . shall be notified . . . of any violation of any of the provisions . . . [of this law] it shall be his duty forthwith 39 L.R.A. (N.S.)

diligently to inquire into the facts of such violation, and . . . is authorized to issue subpoenas for such persons as he shall have reason to believe have any information concerning or knowledge of such violation." Gen. Stat. 1909, § 4366.

The attorney general, having been notified, was bound to investigate, and he did so by correspondence and otherwise, but refused to institute the proceeding, or prosecute in the definite matter, as required. This could be done only by examining the particular witness. The witness and the incident to which he referred in the newspaper article were not to be separated in the proceeding ordered by the governor. The proceeding, or, as the statute designates it, the matter in which he was directed to prosecute, was the examination of that witness. Suppose after the governor had directed the prosecution referred to in *State v. Bowles*, supra, the attorney general had concluded to investigate the subject in some other way, and, instead of presenting the matter to the grand jury, had called the witnesses to his office, and upon inquiry thus made had determined to proceed no further, would such disposition have been permissible? If it was within the attorney general's discretion to do so, and thus finally dispose of the matter, there is little virility in the statute, which in express terms gives the governor the power to require prosecutions. The conclusion is that the matter, to use the statutory term, which the attorney general was required to prosecute, was the examination of the witness as provided in the statute, and it was the duty of the attorney general to do so.

While, as pointed out in his brief, manifold and arduous duties rest upon the attorney general, the governor is charged with the execution of the law, and this can only be done through means provided by the Constitution and laws. Among these is the assistance of the attorney general, and, in the enforcement of the prohibitory law, the power of that officer to examine witnesses touching its violation. If the governor may not invoke that power, then he is denied recourse to means which the legislature believed to be necessary to its enforcement.

The question decided arises upon the interpretation of constitutional and statutory provisions. We have not found it necessary to go far afield for authorities, although many have been considered. It may be added, however, that the recent case of *State ex rel. Haskell v. Huston*, 21 Okla.

782, 97 Pac. 982, has been found illuminating and instructive. A statute of Oklahoma contains a provision like our own, requiring the attorney general to prosecute and defend actions and proceedings when requested by the governor. Construing this statute, and the constitutional provisions that the governor shall cause the laws to be faithfully executed, it was held that the governor of Oklahoma, under the Constitution and statutes of that state, had the power to dismiss an action, brought by the attorney general in the name of the state, and that he might himself maintain an action in the name of the state to prohibit the attorney general from carrying on the action brought by that officer. Whether under our laws the governor would have this power of dismissal does not arise here, but the decision cited is instructive concerning the principles involved, and reviews many authorities.

For the reasons stated, the answer is held insufficient, and the demurrer thereto is sustained.

West, J., dissenting:

The state government is not modeled on the cabinet system. On the contrary, the Constitution expressly provides (art. 1, § 1) that the executive department shall consist of a governor, lieutenant governor, secretary of state, auditor, treasurer, attorney general, and superintendent of public instruction. These officers are all chosen by the people, all under like oath, and alike subject to impeachment. Each has a field of official discretion which cannot be invaded by any other officer. It is the unquestioned and unchanging law that official discretion cannot be controlled by mandamus. As said in *Martin v. Ingham*, 38 Kan. 651, 17 Pac. 168: "The only acts of public functionaries which the courts ever attempt to control by either injunction or mandamus are such acts only as are in their nature strictly ministerial; and a ministerial act is one which a public officer or agent is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed." Here, in order to form the basis for the issuance of the writ, it has been necessary to rule that the act directed to be done is one clearly ministerial and outside the pale of discretion. This conclusion is founded on a provision of the statute that the attorney general shall, "when required by the governor or either branch of the legislature, appear for the state and prosecute or defend, in any other

court, or before any officer, in any cause or matter, civil or criminal, in which this state may be a party or interested." Laws 1879, chap. 166, § 71, Gen. Stat. 1909, § 8906. This section vests no other or greater power in the governor than in either branch of the legislature, and the effect of the decision is that the requirement by the latter would be compulsory upon the attorney general to subpoena, before himself or some other officer, any certain witness which either house of the legislature should deem requisite.

While the word "prosecute" does doubtless imply the commencement, as well as the continuance of a proceeding, it is well to notice the language of the statute under which inquisitions may be held. Section 4366 of the General Statutes of 1909 (Laws 1909, chap. 164, § 6), provides that it shall be the duty of the attorney general, upon proper notification, forthwith diligently to inquire into the facts of the alleged violation of the prohibitory law, and for that purpose he is "authorized" (not required) to issue subpoenas for such persons as he shall have reason to believe have any information, etc. The same section expressly provides that "if the testimony so taken shall disclose the fact that an offense has been committed, . . . the attorney general . . . shall prosecute the person or persons committing such offense." Hence, under this statute, the duty to prosecute, and the beginning of a prosecution, can arise only after the testimony has been taken, and the taking of such testimony is not a prosecution, or the beginning thereof, but a mere step preparatory thereto. A mere preliminary step, taken in view of a possible future prosecution, cannot, without wresting language from its ordinary meaning, be held to be included in the section requiring the attorney general to appear for the state and prosecute or defend in any cause or matter. In an inquisition, the attorney general is not defending anyone, and is not prosecuting anyone, but is merely procuring testimony in order to see whether a prosecution shall be instituted.

In a county where the county attorney fails or refuses to enforce the law, § 4378 of the General Statutes of 1909 (Laws 1887, chap. 165, § 5), makes it the duty of the attorney general to enforce it himself. "And for that purpose he may appoint as many assistants as he shall see fit." Would it be contended that any other officer can dictate to him who his appointees shall be, or whom he shall "see fit" to appoint? He is merely authorized to make such appointments, as he is by the other section authorized to subpoena witnesses. There is no mandatory requirement contained in either.

If once the domain of discretion is invaded, if the attorney general cannot be permitted to exercise in good faith his own judgment touching the steps preliminary or preparatory to a prosecution no reason suggests itself why he should be permitted to exercise it in respect to the witnesses he shall call during a trial, the order in which they shall be introduced, the questions he shall propound, or the policy to be pursued. Anyone who has had experience in conducting prosecutions arising out of the prohibitory law knows that caution and tact, as well as good judgment and legal learning, are necessary; and it is often essential that the prosecutor, instead of putting a hostile witness in position to warn the culprit, let not his left hand know what his right hand doeth. To require my mandamus the performance of an act so manifestly within the realm of official discretion, one at most authorized, but not required, by the statute, sets, in my judgment, a dangerous precedent, and departs from the theory upon which the executive department of the government has heretofore been conducted.

Porter, J., dissenting:

I concur in the foregoing dissenting opinion of Mr. Justice West. I think it is due to the attorney general to say that no pretense is made that he has been or is opposed to the enforcement of the prohibitory law, or that he has even been lukewarm in the performance of his duties in that respect. On the contrary, the record in this case discloses, that every person familiar with public affairs knows to be true, that the attorney general has devoted a very large portion of his time and energies since he took his office to the vigorous enforcement of the liquor law in every part of the state where it has been violated. It is to be regretted that this court has been called upon to give serious and grave consideration to what turns out to be a mere "temptation in a teapot." From the correspondence between the two officials, which was conducted entirely through the public press, instead of in the usual and ordinary course, it seems to be the desire of one of the parties to have a certain person compelled to testify as a witness concerning his knowledge of alleged violations of the prohibitory law. If the only purpose of the governor was to bring about the prosecution of some person or persons supposed to have violated the law, it seems quite obvious that all that was necessary for him to do in the discharge of his supreme executive duty of enforcing the law was to direct the attorney general to investigate the alleged violation, and to prosecute the guilty persons, furnishing such information as he

possessed as to names of witnesses, and leaving it to that officer to use his own judgment and discretion as to the means to be employed in such prosecution. The statute prescribes what the duties of the attorney general are when he has been notified that the law has been violated. It authorizes, but does not require, him to issue subpoenas for such witnesses. If, in his judgment, he has sufficient information to warrant the filing of an information, he may proceed at once, without causing any witness to be examined before an officer.

Ample means are provided by the Constitution for removing from office an unfaithful constitutional officer. If the attorney general fail to perform his duty, or acts corruptly, he can be removed by impeachment; but we have no right to compel him to perform any act which is discretionary. This court has in a number of instances ousted from office a county attorney who so neglected the prosecution of criminal cases as to forfeit his right to the office; but no one has ever supposed the court could by mandamus compel a county attorney to perform an act which involves his discretion; for instance, to call a particular witness to the stand, or to conduct a prosecution in a particular way. The effect of the decision in this case is that at the suit of the governor, this court can by mandamus compel the attorney general to conduct the prosecution of any criminal or civil proceeding in the way the governor has directed, and to call to the stand any witness whom the governor, for any purpose of his own, may desire to have testify, and without regard to whether to do so would, in the judgment and discretion of the chief law officer, prejudice the best interests of the state. If the governor has this authority, he necessarily has the power to direct when the examination of such witness shall end, what questions shall be asked, and may direct and control the conduct of any prosecution which the attorney general has instituted for the enforcement of any law.

Petition for rehearing denied.

KENTUCKY COURT OF APPEALS.

MORRIS C. GAINES et al., Appts.,
v.

ELI HILL.

(147 Ky. 445, 144 S. W. 92.)

Marshaling — double mortgages —
compelling resort to wife's land.

1. One having a second mortgage lien

on property of a man alone, cannot, under the doctrine of marshaling, compel a prior mortgagee having a lien on that property and also on property of the debtor's wife as security for the husband's debt, to resort primarily to the wife's property, so as to permit him to make his claim out of that of the husband.

Subrogation — wife's heirs — mortgages — husband's land.

2. Children of a wife who mortgaged her real estate as surety for her husband's debt may, in case the mortgagee resorts to her property, be subrogated to the right of the mortgagee against property of the husband on which he also had a lien, as against the claim of a second mortgagee of the husband's property alone.

(March 8, 1912.)

Note. — Right of junior creditor to compel paramount creditor to resort primarily to property of third person which may be subjected to payment of his claim.

While the question herein discussed, whether a junior claimant having right of recourse to property of the debtor only may compel a paramount creditor having a right to resort both to the common debtor and a third person, first to exhaust his remedy against the third person; and the question whether a junior claimant is entitled to be subrogated to the claim of the paramount creditor against the third person, are closely related, cases of the latter character do not fall within the scope of this note.

It is a well established qualification of the general rule that where there are two creditors of one debtor, the first having two funds to which he may resort for the satisfaction of his debt, and the second being able to reach only one of the funds, the first shall resort for the satisfaction of his debt to that fund which he alone can reach, and thus leave to the junior creditor the only means he has for obtaining payment of his demand; that both funds must be derived from a common source, or be in the hands of the common debtor. *Ex parte Kendal*, 1 Rose, 71, 17 Ves. Jr. 514, 11 Revised Rep. 122; *Robinson v. Lehman*, 72 Ala. 401; *Ayres v. Husted*, 15 Conn. 504; *Stevens v. Church*, 41 Conn. 369; *Quinnipiac Brewing Co. v. Fitzgibbons*, 73 Conn. 196, 47 Atl. 128; *Wise v. Shepherd*, 13 Ill. 41; *Boone v. Clark*, 129 Ill. 466, 5 L.R.A. 276, 21 N. E. 850; *Carter v. Tanners' Leather Co.* 196 Mass. 163, 12 L.R.A. (N.S.) 965, 81 N. E. 902; *Lee v. Gregory*, 12 Neb. 282, 11 N. W. 297; *Haas v. Bank of Commerce*, 41 Neb. 754, 60 N. W. 85; *Citizens State Bank v. Iddings*, 60 Neb. 709, 84 N. W. 78; *Cooper Wagon & Buggy Co. v. Irvin*, 83 Neb. 832, 120 N. W. 430; *Mason v. Hull*, 55 Ohio St. 256, 45 N. E. 632; *Ebenhardt's Appeal*, 8 Watts & S. 327; *Lloyd v. Galbraith*, 32 Pa. 103; *Fessler v. Hickernell*, 82 Pa. 150; *Jones's Estate*, 15 Phila. 584; 39 L.R.A. (N.S.)

A PPEAL by petitioners from a decree of the Circuit Court for Henderson County dismissing their petition for subrogation to the rights of the Ohio Valley Banking & Trust Company in certain land upon which it had foreclosed a mortgage, and which had belonged to their mother and had been mortgaged as security for the debt of their father, in a proceeding to foreclose another mortgage upon the individual property of their father. Reversed.

The facts are stated in the commissioner's opinion.

Messrs. Vance & Heilbronner, for appellants:

The children of the wife have the right, during the life of the husband, to be substituted to the rights of the mortgagee

Fish's Estate, 16 Phila. 373; *Blank v. Eichelberger*, 6 W. N. C. 25; *House v. Thompson*, 3 Head, 512; *Foy v. Sinclair*, 93 Tenn. 296, 30 S. W. 28; *Rogers v. Blum*, 56 Tex. 1; *Rixey v. Pearre Bros.* 89 Va. 113, 15 S. E. 498; *Blakemore v. Wise*, 95 Va. 269, 64 Am. St. Rep. 781, 28 S. E. 332; *Peery v. Elliott*, 101 Va. 709, 44 S. E. 919.

And see, as supporting the same proposition, although not laying it down in express terms, the other cases cited throughout this note.

This qualification of the general rule is, however, subject to the exceptions that where, from independent equities, there is a duty on the part of the third person to exonerate the common debtor, the courts will enforce that duty at the instance of the inferior creditor. This exception has already been discussed in a note to *Carter v. Tanners' Leather Co.* 12 L.R.A. (N.S.) 965, and therefore need here be pursued no further.

Creditors having a lien on the property of a husband cannot compel another creditor of the husband having security on property of both husband and wife, to resort primarily to that of the wife. *Buck v. Bransford*, 58 Ark. 289, 24 S. W. 103; *Ayres v. Husted*, 15 Conn. 504; *Trentman v. Eldridge*, 98 Ind. 525; *Woollen v. Hillen*, 9 Gill. 185, 52 Am. Dec. 690; *Johns v. Reardon*, 11 Md. 465; *Cooper Wagon & Buggy Co. v. Irvin*, 83 Neb. 832, 120 N. W. 430; *Stewart v. Stewart*, 207 Pa. 59, 56 Atl. 323; *Norman v. Norman*, 26 S. C. 41, 11 S. E. 1096; *Hall v. Hyer*, 48 W. Va. 353, 37 S. E. 594; *Swift v. Kortrecht*, 50 C. C. A. 429, 112 Fed. 709.

Especially where other creditors have a lien on the wife's property. *Ayres v. Husted*, 15 Conn. 504.

Or where the pledgee has agreed that the wife's property shall not be resorted to as a means of satisfying the principal debt, unless the husband's property proves insufficient. *Buck v. Bransford*, 58 Ark. 289, 24 S. W. 103.

The general creditors of an insolvent cannot require another creditor having a lien upon the property of the insolvent and his

under said mortgage, and have the land of the husband subjected to their claim, and placed in a condition to make it available when the time shall arrive at which they will be entitled to the use of the estate.

Brightwell v. Com. 79 Ky. 537; *Simmons v. McKay*, 5 Bush, 25; *Bickel v. Judah*, 3 Ky. L. Rep. 728; *Weakley v. Davis*, — Ky. —, 44 S. W. 637.

Mr. W. P. McClain, with *Mr. Thomas E. Ward*, for appellee:

The principle of subrogation rests mainly upon the ground that one pays the debt of another which he was legally bound to pay.

Allen v. Perrine, 103 Ky. 521, 41 L.R.A. 351, 45 S. W. 500.

These plaintiffs have never paid anything

at all. The father of these plaintiffs, who are seeking subrogation, inveigled the defendant, Hill, into signing his notes as surety and accepting a mortgage on this property, by telling him this mortgage was paid and would be released.

Clay, C., delivered the opinion of the court:

On April 14, 1893, W. T. Gaines borrowed of the Ohio Valley Banking & Trust Company the sum of \$1,150, for which he executed and delivered his two promissory notes, one for \$400, payable in four months, and one for \$750, payable in twelve months from date. To secure the payment of the notes, W. T. Gaines and his wife, Mary Gaines, the mother of appellants, Morris

wife, first to exhaust the property of the wife. *Hughes v. Shannon*, 13 Ky. L. Rep. 782.

It is therefore error to direct that the residue of the proceeds of the sale of property of which husband and wife were joint tenants, remaining after the satisfaction of debts for which the wife was the husband's surety, shall be divided between the wife and other creditors of the husband; but where the payment of the debts for which the wife was surety has exhausted more than one half of the proceeds, the residue belongs to the wife. *Glaser v. Hellman*, 1 Ohio L. J. 140.

And so, where one cotenant is joined with the other in a mortgage given to secure the debt of the other, he is entitled to one half the surplus arising on foreclosure in his own right, and to the other half as against a judgment creditor of his cotenant, to the extent to which his interest has been taken to pay the other's debt. *Weaver v. Keith*, 3 Del. Co. Rep. 516.

The owner of a junior judgment cannot require a judgment against the judgment debtor and his surety to be satisfied out of the property of the latter. *Wise v. Shepherd*, 13 Ill. 41.

The seniority of a mortgage belonging to a trust estate is not affected by the circumstance that the trustee may have a right to make the debt out of the bond of his predecessor in the trust, in consequence of the improper conduct of the latter in making the loan for which the mortgage was given. *Shuey v. Latta*, 90 Ind. 136.

The holder of a note with sureties will not, in favor of the holder of an unsecured obligation of the same debtor, be compelled to resort to the sureties for payment, in preference to the debtor's estate. *Re Hobson*, 81 Iowa, 392, 11 L.R.A. 255, 46 N. W. 1095.

In *Bradley v. Bond*, 101 Md. 691, 61 Atl. 504, it appeared that C, being pressed by his creditor for a sum of money with which to purchase certain property, raised part of the sum and guaranteed a mortgage taken on the property for the balance of the purchase money. The holder of the mortgage

chase money. The holder of the mortgage becoming dissatisfied with the security, C confessed judgment by way of further security. Upon this state of fact it was held that the debt represented by the mortgage being really the debt of C, which he ought to have paid and promised to pay, subsequent judgment creditors could not require the holder of the judgment to resort primarily to the mortgage security.

The assignee in bankruptcy of a mortgagee cannot require the mortgagee to resort to a surety for the debt. *Thompson v. Spittle*, 102 Mass. 207.

The vendor of land cannot be required by a subsequent purchaser thereof at an execution sale, to resort to a surety for the purchase money before enforcing his lien against the land. *Cole County v. Angney*, 12 Mo. 132.

A subsequent encumbrancer cannot require the paramount creditor to resort in the first instance to the property pledged by a surety. *Lee v. Gregory*, 12 Neb. 282, 11 N. W. 297; *Rogers v. Blum*, 56 Tex. 1.

A subsequent lienor cannot require a paramount judgment creditor first to exhaust the land belonging to a surety, on which the judgment is a lien. *Mason v. Hull*, 55 Ohio St. 256, 45 N. E. 632.

The holder of a mechanics' lien cannot require a mortgagee having a superior lien to exhaust his remedies by action against the maker and indorser of the note secured by the mortgage. *Jenkins v. Smith*, 21 Misc. 750, 48 N. Y. Supp. 126.

The assignee of a stock which has been pledged by a debtor cannot compel the pledgee to resort in the first instance to an indorser. *Union Bank v. Laird*, 2 Wheat. 390, 4 L. ed. 269.

The creditors of a corporation cannot require a secured creditor to proceed against the indorsers and guarantors of a note representing the debt secured, before resorting to the security. *Garrett v. Burlington Plow Co.* 70 Iowa, 697, 59 Am. Rep. 461, 29 N. W. 395.

Creditors of a corporation cannot require the holder of its bonds to have recourse in

and Sarah Gaines, mortgaged to the Ohio Valley Banking & Trust Company three lots of ground in Henderson, Kentucky. Two of these lots belonged to W. T. Gaines, while the third belonged to Mary Gaines; it having been conveyed to her by Alexander Rankin and wife by deed dated December 1, 1885, and recorded in Deed Book No. 11, p. 250, Henderson county clerk's office. On August 27, 1896, W. T. Gaines executed to appellee, Eli Hill, a mortgage on his individual property theretofore mortgaged to the Ohio Valley Banking & Trust Company to secure Hill as surety in two notes to the Henderson Trust Company of Henderson, Kentucky. On April 22, 1897, the Ohio Valley Banking & Trust Company brought suit to enforce its mortgage lien, and to subject the mortgaged property to the payment of the two notes executed to it by

W. T. Gaines. In December, 1899, appellee, Eli Hill, alleging that he had paid the indebtedness for which he was surety, brought suit to recover a personal judgment against W. T. Gaines, and to enforce his mortgage lien.

These actions were brought during the lifetime of Mary Gaines, and were afterwards consolidated. On February 26, 1898, and after the death of Mary Gaines, the Ohio Valley Banking & Trust Company amended its petition, and set forth the death of Mary Gaines and the names of her surviving children, to wit, Morris C. Gaines, Sarah Gaines, William Gaines, Harris Gaines, Mamie Gaines, and Virginia Gaines, all infants, who were thereafter brought before the court by proper process. At that time, the ages of the children were as follows: Morris, fifteen; Sarah, thirteen;

the first instance to the personal liability of the stockholders thereon. *Carter v. Neal*, 24 Ga. 346, 71 Am. Dec. 136.

Where money has been loaned by a corporation on its bond and mortgage, and its stockholders have bound themselves as sureties for the repayment of the loan, other creditors of the corporation cannot compel the lender to exhaust first his remedy against the sureties. *South Carolina Mfg. Co. v. Bank of the State*, 6 Rich. Eq. 227.

Conversely, but in accordance with the same principle upon which the foregoing decisions are based, it has been held that the creditors of a surety may compel a resort in the first instance to the property of the principal debtor. *Foy v. Sinclair*, 93 Tenn. 296, 30 S. W. 28.

So, the holder of a judgment against a husband who, by deed voidable by his creditors, had conveyed property to his wife, who had mortgaged it, together with property of her own, for her own benefit, may require the mortgagee to resort in the first instance to the land of the wife. *Quinnipiac Brewing Co. v. Fitzgibbons*, 73 Conn. 191, 47 Atl. 128.

And persons to whom land has been conveyed by a surety may require a creditor to apply on his claim any available property of the principal, provided it can be done without too great delay or prejudice to the rights of the creditor. *Rixey v. Deitrick*, 85 Va. 42, 6 S. E. 615.

But equity will not compel the paramount creditor to proceed against the principal debtor before having recourse to the surety, where such course would involve a considerable delay, and the funds arising from the sale of the surety's property are in court and immediately available; but in such case the equities will be preserved by subrogating the creditors of the surety to the judgment against the principal debtor. *Neff's Appeal*, 9 Watts & S. 36.

A creditor of an insolvent partnership will not be required to resort to the person-

al estate of a deceased partner at the instance of those who have become creditors of the firm subsequently to the partner's decease. *Ex parte Kendall*, 17 Ves. Jr. 514, 1 Rose, 71, 11 Revised Rep. 122.

The mortgagee of partnership property cannot insist that a judgment against the firm shall be satisfied from the proceeds of the sale of the property of an individual partner. *Bertolet's Estate*, 1 Woodw. Dec. 8.

But where by statute all obligations and assumptions of partners are made several as well as joint, so that a judgment against the firm is a lien on separate as well as joint property of the partners, a creditor of an individual partner cannot require one having a judgment against the firm to proceed against the firm property in the first instance. *House v. Thompson*, 3 Head, 512.

The holder of a note cannot be required to exhaust collaterals deposited by the payee in order to receive a proportional share of the assets of the insolvent maker. *Campbell v. J. I. Campbell Co.* 117 La. 402, 418, 41 So. 696, 702.

The innocent holder of a note who has taken it as collateral cannot be required by the maker, who claims that the note was obtained by fraud, to resort to other collateral before proceeding to judgment. *Haas v. Bank of Commerce*, 41 Neb. 754, 60 N. W. 85.

A similar decision was made in *Moyes v. Bell*, 62 Wash. 534, 114 Pac. 193, where the maker claimed that the consideration for the note had failed.

Where the paramount creditor has a judgment against two persons, and the junior creditor against one of them only, the latter cannot compel the former to take the land of the other only, it not appearing which of the two ought to pay the debt due the paramount creditor, nor any equitable right being shown in one of them to have the debt charged on the other alone. *Dorr v. Shaw*, 4 Johns. Ch. 17.

"In case of a joint debt due to one creditor by two persons, and a several debt due

William, eleven; Harris, ten; Mamie, seven, and Virginia, three. Prior thereto, certain property belonging to W. T. Gaines had been sold, and the greater portion of the bank's debt was satisfied. There remained unsold the lot belonging to Mrs. Gaines and the lot involved in this controversy. On September 13, 1902, it was adjudged that there was still due the bank on its original judgment the sum of \$338.58, with interest from July 23, 1900, and costs, and that the lot belonging to Mary Gaines be sold for the payment thereof. This lot was appraised at \$600. It was purchased by Thos. E. Ward, attorney for W. T. Gaines, for the latter; but, he having declined to pay for it, it was turned over to the bank.

As a defense to the suit of Eli Hill, W. T. Gaines pleaded a discharge in bankrupt-

cy. Hill charged fraud on the part of Gaines. This contention was sustained, and on January 29, 1904, personal judgment was rendered in favor of Hill. Subsequently it was found that one lot belonging to W. T. Gaines remained unsold, and the court ordered a sale of this lot to satisfy Hill's judgment. The lot was sold, and appellee, Hill, became the purchaser at the price of \$510. To this branch of the case, the infant children of Mary Gaines were not parties, as their father, who was alive, was sole owner of the property mortgaged to Hill. After the sale, however, appellants, Morris and Sarah Gaines, filed their petition, asking to be made parties, and that it be taken as an answer, counterclaim, and cross petition against appellee, Hill. In addition to the foregoing facts, the petition alleges that appellants, as children

by one of them to another creditor, if the joint creditor obtains a judgment against the joint debtors, and the several creditor subsequently obtains judgment against his several debtor, a court of equity will not compel the joint creditor to go against the funds of one of his joint debtors, so as to leave the second judgment in full force against the funds of the other several debtor; at least, it would not do so, unless it should appear that the debt ought to be paid by one of the debtors only, or there should be some other supervening equity which should furnish a ground for the interposition of the court." *Ayres v. Husted*, 15 Conn. 504.

A junior judgment creditor cannot require a paramount creditor holding a judgment against several joint debtors to resort primarily to the funds of one of them, where it does not appear that the debt, though joint in form, ought to be paid by one of the debtors only, or that there is some other supervening equity; and the death and insolvency of the common debtor is not such a supervening equity. *Sanders v. Cook*, 22 Ind. 436.

Creditors obtaining judgments subsequently to the alienation of part of his lands by their debtor cannot require a creditor whose judgment antedates the alienation to have recourse in the first instance to the lands aliened. *Reynolds v. Tooker*, 18 Wend. 591; *Blackemore v. Wise*, 95 Va. 269, 64 Am. St. Rep. 781, 28 S. E. 332.

A creditor whose judgment is enforceable against the unpaid balance of the purchase money of land sold by the debtor cannot insist that a creditor whose judgment, having been recovered prior to the sale, is enforceable against the land, shall go against the land. *Withers v. Carter*, 4 Gratt. 407, 50 Am. Dec. 78.

A conveyed certain realty to B, subject to the lien of a certain judgment against him, which B undertook to pay out of the purchase price. B mortgaged the property,

and subsequently reconveyed to A a portion thereof, which the mortgagee released from the lien of his mortgage. Upon this state of fact it was held in *Blank v. Eichelberger*, 6 W. N. C. 25, that the mortgagee could not require the judgment creditor to resort in the first instance to the proceeds of the property reconveyed to A.

A legatee has no right to require a judgment which is a charge upon the property of his decedent and also upon land of which the decedent was tenant in tail, to be satisfied primarily out of the latter property. *Douglas v. Cooksey*, Ir. Rep. 2 Eq. 311.

Where land has been sold by order of the court to facilitate the distribution of an estate, and purchased by the administrator, who sold it to another, the heirs cannot be required by the purchaser to resort to the sureties on the administrator's bond, before enforcing their equitable lien against the land for the purchase money. *Strange v. Keenan*, 8 Ala. 816.

A shipped grain to B, sending him by mail the bill of lading, which B pledged to a bank as security for a loan. The railway company delivered the grain to B without authority from the bank, and over the objection of A, who had learned while the grain was in transit that B had failed. Afterward A, on the theory that the sale to B had been rescinded, replevied the grain and disposed of it for his own benefit. During the pendency of the replevin action, the bank intervened and asserted its rights under the bill of lading. The court found that A was entitled to the property as against B, but that the bank was entitled to it as against A. Judgment was accordingly given for the value of the grain in favor of the bank, and against A. Upon this state of fact it was held, in *Citizens State Bank v. Iddings*, 60 Neb. 709, 84 N. W. 78, that the bank could not be required by A to satisfy its claim against B by enforcing against the railway company a right of action resulting from the wrongful delivery of the grain.

E. S. O.

of their mother, succeeded to two-sixths interest in their mother's property on her death, subject to their father's right of curtesy; that, the lot in controversy having been sold to pay their father's debt, they were entitled to be subrogated to the rights of the bank in the remaining lot owned by their father, and to have the lot sold to repay them for their lot sold to satisfy his debt. Appellee filed an answer, admitting practically all the allegations of the petition, but denied that the debt to the Ohio Valley Banking & Trust Company was the debt of W. T. Gaines, and alleged that the money was borrowed for the benefit of appellants' mother, Mary Gaines. This latter allegation was denied by reply. Upon submission of the case, judgment was entered dismissing appellants' petition, and confirming the commissioner's report of sale. From that judgment, this appeal is prosecuted.

As the two notes executed to the Ohio Valley Banking & Trust Company, and the mortgage by which they are secured, show that the money was borrowed by W. T. Gaines, we must hold, in the absence of evidence to the contrary, that the debt was his, and that Mary Gaines, his wife, mortgaged her property merely to secure his debt. With this question eliminated, we have the following case: W. T. Gaines borrowed from the bank \$1,150. To secure this indebtedness, he and his wife mortgaged, not only his, but her, property. Her property being pledged as security for his debt, she, though incurring no personal liability, was in effect his surety to the extent of the property so mortgaged. The mortgage to the bank was duly recorded. Subsequently appellee, Hill, took a mortgage from W. T. Gaines, in which the latter's wife did not join, covering only W. T. Gaines's individual property embraced in the mortgage to the bank. Pending the proceedings by the mortgagees to enforce their liens, Mary Gaines, the mother of appellants, died. She left six children, appellants and four others, all of whom were infants. Their mother's property descended to them, subject to their father's right of curtesy. The property descending to them was subjected by the bank to the payment of their father's debt, leaving unsubjected the lot in controversy, which belonged to their father, the principal debtor. The question is, "Are they entitled to be subrogated to the rights of the bank in this lot as against appellee, the second mortgagee?"

For appellee, it is insisted that, as he had a lien on the husband's property only, while the bank had a lien on both the husband's and wife's property, he could have

compelled the bank, under the doctrine of marshaling, to exhaust the wife's property before proceeding against the husband's property. The doctrine of marshaling, however, applies where the two funds or pieces of property belong to a common debtor, and therefore has no application to the facts of this case. On the contrary, it is well settled that a creditor who has a claim against two debtors, one a principal and the other a surety, cannot be compelled by another creditor of the principal debtor to exhaust his remedy against the surety before proceeding against the principal. *Trentman v. Eldridge*, 98 Ind. 525; *Garett v. Burlington Plow Co.* 70 Iowa, 697, 59 Am. Rep. 461, 29 N. W. 395; *Thompson v. Spittle*, 102 Mass. 207; *Mason v. Hull*, 55 Ohio St. 256, 45 N. E. 632; *Stewart v. Stewart*, 207 Pa. 59, 56 Atl. 323.

For a like reason a second mortgagee having a lien on a husband's property cannot require a prior mortgagee having a lien on the same property, and also on the property of the wife, which was pledged merely to secure the husband's debt, first to exhaust the wife's property before proceeding to subject the husband's property. In this case, the bank's mortgage was on record. Appellee acquired his mortgage with notice of the fact that all of the property covered by it was embraced in the mortgage to the bank, and that the bank, if necessary, could subject it to the payment of the debt. Therefore, if appellants are held subrogated to the rights of the bank in the property in controversy, appellee's position is no worse than if the bank had first subjected the property in controversy, which, manifestly, it had the right to do. That being true, there can be no doubt that the mother of appellants, if alive, could have successfully asserted her right to subrogation. Consequently appellants, who stand in her shoes, and whose property was taken to pay their father's debt, should have the same right. *National Exch. Bank v. Silliman*, 65 N. Y. 475. Nor is the fraud of appellants' father sufficient to defeat their right. They do not claim through him, and what he did, therefore, cannot affect them. Nor can laches be imputed to them; for, being infants, it cannot be said that they have failed for an unreasonable length of time to assert their rights.

The lot formerly owned by Mary Gaines descended to appellants and her other children, subject to their father's right of curtesy, which was a life estate in the whole thereof, as he and Mary Gaines were married, and the lot was acquired, and they had issue born alive, before the enactment of the Weissinger act in 1894 (*Laws*

1894, chap. 76). *Rose v. Rose*, 104 Ky. 48, 41 L.R.A. 353, 84 Am. St. Rep. 430, 46 S. W. 524; *Mitchell v. Violett*, 104 Ky. 77, 47 S. W. 195. This lot sold for \$350, a sum sufficient to pay the balance of the bank's lien. Being subrogated to the bank's lien on the lot in controversy, which belonged to their father, to the extent of the value of their interest in the lot that belonged to their mother, and which was sold to pay their father's debt, it follows that they are entitled to a lien on the lot in controversy for the sum of \$350, the price the lot brought, less the cash value of their father's life interest therein on the day the lot formerly belonging to their mother was sold. As the other children of Mary Gaines are necessary parties to the action, appellants, on the return of the case, will make them parties plaintiff with their consent, or parties defendant, in case they refuse to unite as plaintiffs. The court will then adjudge appellants and the other children of Mary Gaines a lien on the lot in controversy as above indicated, which, if voluntarily discharged by appellee, will entitle him to have the sale confirmed. In the event of his refusal to pay off the lien so adjudged, the court will set aside the sale, and order a resale of the property, and apply the proceeds thereof, first, to the payment of the lien in favor of the children.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

NORTH CAROLINA SUPREME COURT.

W. P. BURRUS, Appt.,

v.

H. WITCOVER.

(158 N. C. 384, 74 S. E. 11.)

Conflict of laws — gambling transaction — enforcement of contract.

1. The courts of a state where gambling transactions are illegal will not enforce a

Note. — Right to refuse payment of draft the proceeds of which are used in an illegal transaction.

Stated in another way, the inquiry to which this note is addressed is whether the illegality of a transaction affecting the validity of, or title to, a draft, is available as a defense to a drawee who was not, nominally at least, a party to the transaction, when sued upon his acceptance. The note does not, therefore, include decisions as to the effect, as between the parties, of the transfer of a negotiable instrument to secure money for gambling (as to which, 39 L.R.A. (N.S.)

contract growing out of such transaction made in another state, even though the transaction is valid there.

Gaming — transaction in futures — draft for margins — right of acceptor to repudiate.

2. That the acceptor of a draft the proceeds of which are to furnish margins in an illegal transaction in futures was not a party to the illegal transaction does not prevent his setting up the illegality of such transaction out of which the consideration for the acceptance grew, to defeat liability thereon.

(March 13, 1912.)

A PPEAL by plaintiff from a judgment of the Superior Court for Craven County in defendant's favor in an action brought to enforce payment of the amount due on an accepted draft. *Affirmed.*

Statement by Allen, J.:

This is an action to recover on a draft for \$800, drawn June 4, 1906, at Marion, South Carolina by W. A. Godbold, in favor of Burrus & Strakley, and accepted by the defendant Witcover. The defendant set up as a defense that the consideration for his acceptance was a gambling contract between the said Godbold and the plaintiff for the purchase of cotton. The plaintiff offered evidence that he was the owner of the draft, and admitted that the firm of Burrus & Strakley had negotiated a number of contracts for Godbold for the purchase of cotton on margin, known as "future contracts," and that the draft, which is the basis of this action, was drawn to enable the said Godbold to furnish margins for other contracts, or to pay debt for margins. The defendant introduced a certified copy of the law of South Carolina, from which it appears that contracts for the sale of cotton and other things are illegal, when it is not the intention of the parties to deliver the property, the subject of the contract, and for settlements to be made upon the basis of the difference in market values; and the plaintiff said, on his

see note to *Burke v. Buck*, 22 L.R.A. (N.S.) 627) or other unlawful purposes; or as to the right of an innocent holder to enforce payment of an instrument which, as between the parties thereto, is invalid as having grown out of an illegal transaction.

In *Commercial Nat. Bank v. Spaid*, 8 Ill. App. 493, recovery was denied on a draft indorsed by the payee over to the winner in a gambling transaction. The court following *Chapin v. Dake*, 57 Ill. 295, 11 Am. Rep. 15, which involved the question of title as between the indorser and indorsee of a draft transferred in consideration of a gaming debt, in holding that such

examination, that he did not commence his action in South Carolina, because he knew he could not collect a gambling debt in the courts of that state. Upon these admissions by the plaintiff, his Honor directed a judgment of nonsuit to be entered, and the plaintiff excepted and appealed.

Messrs. Gulon & Gulon, for appellant:

In order to set up the statute law of a foreign state the same must be pleaded and proved.

Hall v. Southern R. Co. 146 N. C. 351, 59 S. E. 879; Lassiter v. Norfolk & C. R. Co. 136 N. C. 91, 48 S. E. 642, 1 Ann. Cas. 456.

Defendant could not take advantage of the illegal transaction.

Kingsbury v. Suit, 66 N. C. 603; Calvert v. Williams, 64 N. C. 168; Ballard v. Green, 118 N. C. 392, 24 S. E. 777; Gooch v. Faucett, 122 N. C. 275, 39 L.R.A. 835, 29 S. E. 362; Scott v. Duffy, 14 Pa. 18.

Messrs. Abernathy & Davis for appellee.

Allen, J., delivered the opinion of the court:

The plaintiff objected to the introduction of the certified copy of the laws of South Carolina; and, while we think it was competent, it is not, in our opinion, material to the decision of this case, as our courts would not aid in the enforcement of the contract, if it is a gaming contract, although valid in South Carolina. Gooch v. Faucett, 122 N. C. 272, 39 L.R.A. 835, 29 S. E. 362; Cannaday v. Atlantic Coast Line R. Co. 143 N. C. 443, 8 L.R.A.(N.S.) 939, 118 Am. St. Rep. 821, 55 S. E. 836.

contract of indorsement is void under the statute against gaming, and that the property in the draft still remained in the payee.

And in Dade v. Madison, 5 Leigh, 401, there is a *dictum* to effect that a draft drawn for money won at unlawful gaming would be invalid in the hands of an innocent holder.

In Flower v. Sadler, L. R. 10 Q. B. Div. 572, there is a *dictum* to the effect that in an action by an indorsee of a bill of exchange against the acceptor for a valuable consideration, it is no defense that the bill was indorsed by the drawer to a third party in order to stifle a prosecution for felony.

A case which, although not in point, may be of interest in the present connection, is Johnson v. Lansley, 12 C. B. 469, where two parties jointly made bets on a horse race and the one who received the winnings gave the other a bill for his share, which was accepted by a third person who was not a part to the betting. It was held that recovery on the bill was not precluded by § 18, 8 & 9 Vict., which enacted "that all contracts or agreements, whether by parol or in writ- 39 L.R.A.(N.S.)

In the latter case, after stating that ordinarily matters bearing upon the execution, interpretation, and validity of a contract are determined by the law of the place where it is made, Justice Connor says: "The exceptions to the general rule are thus stated by Mr. Lawson, the editor of the excellent and exhaustive article on 'Contracts,' in 9 Cyc. 674: 'The general doctrine, that a contract, valid when it is made, is valid also in the courts of any other country or state, when it is sought to be enforced, even though, had it been in the latter country or state, it would be illegal, and hence unenforceable, is subject to several exceptions: (1) When the contract in question is contrary to good morals; (2) when the state of the forum, or its citizens, would be injured by the enforcement by its courts of contracts of the kind in question; (3) when the contract violates the positive legislation of the state of the forum,—that is, is contrary to its Constitution or statutes; and (4) when the contract violates the public policy of the state of the forum. These exceptions are grounded on the principle that the rule of comity is not a right of any state or country, but is permitted and accepted by all civilized communities from mutual interest and convenience, and from a sense of the inconvenience which would otherwise result, and from moral necessity to do justice, in order that justice may be done in return.'"

That the contract between Godbold and the plaintiff, as described by the plaintiff, is one condemned by the laws of this state, cannot be questioned (Revisal 1905, §§ 1689,

ing, by way of gaming or wagering, shall be null and void, and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." Jervis, C. J., said: "There is nothing there to show this transaction illegal, Hunt [one of the winners] was bound upon by every principle of justice to pay this money to Johnson [the other winner]. And the circumstance of Lansley [acceptor of bill] being substituted for Hunt cannot make that illegal which, as between Johnson and Hunt, would not have been so." And Maule, J., said: "The money which was the consideration for this bill was money which Hunt was bound to account for to Johnson. The losers could not get it back from Hunt, and it would be a very unjust thing that he should keep the whole. Before the statute 8 & 9 Vict. chap. 109, he clearly would have been bound to pay over the money, and I find nothing in that statute to excuse him from doing so."

J. H. B.

3823, and 3824), and one who is a party to such a contract is not only indictable, but the statute says, in language that cannot be misunderstood, that "no action shall be maintained in any court to enforce any such contract, whether the same was made in or out of the state, or partly in and partly out of this state, and whether made by the parties thereto by themselves, or by or through their agents, immediately or mediately; nor shall any party to any such contract, or any agent of any such party, directly or remotely connected with any such contract in any way whatever, have or maintain any action or cause of action on account of any money or other thing of value paid or advanced or hypothecated by him or them in connection with or on account of such contract and agency."

It would seem to follow necessarily that the plaintiff cannot maintain his action in our courts, except upon the ground that the defendant was not a party to the illegal contract, and that he is bound by his acceptance. The difficulty with this position is that both the plaintiff and the defendant were parties to the contract, and the only consideration for the acceptance of the draft by the defendant was to enable Godbold to continue his illegal transactions.

The exact question seems to have been decided in England in 1794, in *Steers v. Lashley*, 6 T. R. 61, which was approved on this point in *Embrey v. Jemison*, 131 U. S. 347, 33 L. ed. 176, 9 Sup. Ct. Rep. 776, and this last case was cited with approval by our court in *Garseed v. Sternberger*, 135 N. C. 502, 47 S. E. 603.

The case of *Steers v. Lashley*, supra, "was an action on a bill of exchange drawn by Wilson on the defendant, and indorsed over by the former to the plaintiff after it had been accepted by the defendant. At the trial at the sittings at Westminster before Lord Kenyon, it appeared that the defendant had engaged in several stockjobbing transactions with different persons, in which Wilson was employed as his broker, and had paid the differences for the defendant. That, a dispute arising between Wilson and the defendant respecting the amount of those differences, the matter was referred to the plaintiff and three others, who awarded £306, 12s. 6d. to be due from the defendant to Wilson; for £100 part of which Wilson drew the bill, on which this action was brought." Lord Kenyon nonsuited the plaintiff, being of opinion that, as the bill grew out of a stockjobbing transaction, which was known to the plaintiff, he could not recover upon it, and in delivering his opinion he said: "If the plaintiff had lent this money to the defendant to pay the differences, and had 39 L.R.A. (N.S.)

afterwards received the bill in question for that sum, then, according to the principle established in *Petrie v. Hannay*, 3 T. R. 418, he might have recovered. But here the bill on which the action is brought was given for these very differences; and therefore Wilson himself could not have enforced payment of it. Then the security was indorsed over to the plaintiff, he knowing of the illegality of the contract between Wilson and the defendant, for he was the arbitrator to settle their accounts; and, under such circumstances, he cannot be permitted to recover on the bill in a court of law."

This language was quoted in *Embrey v. Jemison*, supra, and the court further says in that case: "While there are authorities that seem to support the position taken by the defendant in error, we are of opinion that, upon principle, the original payee cannot maintain an action on a note, the consideration of which is money advanced by him upon or in execution of a contract of wager; he being a party to that contract, or having directly participated in the making of it in the name of or on behalf of one of the parties."

The cases of *Williams v. Carr*, 80 N. C. 299, and *Ballard v. Green*, 118 N. C. 392, 24 S. E. 777, are not in conflict with these views, as they are interpreted in the latter case, where the court says, after referring to parts of the charge of the judge of the superior court: "This means, if the jury believed that Duke loaned the money and had no connection with the speculations, that it was a valid contract, and plaintiff would be entitled to recover. *Williams v. Carr*, 80 N. C. 294."

We are therefore of opinion that the consideration for the acceptance by the defendant was illegal, and that there is no error.

KENTUCKY COURT OF APPEALS.

ED RIDER, Appt.,
v.

JOHN G. DELKER & SONS COMPANY.

(145 Ky. 634, 140 S. W. 1011.)

Corporation — preferred stock — rights of creditors.

1. A holder of preferred stock in a corporation cannot enforce its redemption at par,

Note. — Right of preferred stock to preference as to capital.

The earlier cases on this question are collected in a note to *Field v. Lamson & G. Mfg. Co.* 27 L.R.A. 136, which is supple-

as provided in his contract, if the assets of the company are not sufficient to pay its debts.

Receiver — corporation — right of preferred stockholders.

2. A holder of preferred stock in a corporation, whose contract entitles him to have his stock redeemed at par, is not entitled to have the concern placed in the hands of a receiver, in a proceeding to enforce his contract right of redemption, by showing that it is a losing venture, and that its assets are not sufficient to pay its debts, where his right to redemption fails because of insufficiency of assets.

(December 1, 1911.)

APPEAL by plaintiff from a judgment of the Circuit Court for Daviess County in defendant's favor in an action brought to recover the par value of stock held by plaintiff in the defendant corporation, together with accumulated dividends thereon. Affirmed.

The facts are stated in the opinion.

mented by a note to *Lloyd v. Pennsylvania Electric Vehicle Co.* 21 L.R.A. (N.S.) 228.

As shown in the earlier notes, the cases support the rule that, in the absence of statutory or contractual provisions to the contrary, preferred stock is not entitled to any preference over common stock in relation to the capital; and that the terms "preferred stock" or "preferred shares" ordinarily have reference to the income only, and do not import a preference as to capital. And see, in this connection, *RIDER v. JOHN G. DELKER & Sons Co.* and *Fryer v. Wiedemann*, post, 1009.

Where, however, by the articles of incorporation the holders of preferred stock are given a first lien on its property and assets, the rights of the holders of such stock will be protected and enforced as against the holders of the common stock. *Kent v. Honsinger*, 187 Fed. 619.

The mere fact that upon the expiration of the patents in which the whole of the capital is invested there may not be sufficient property with which to pay the par value of the preferred stock will not entitle the holders thereof to compel the corporation to maintain a sinking fund to secure payment of their stock upon dissolution, under a charter provision that, upon liquidation or dissolution of the corporation, the holders of preferred stock should receive the par value of the stock from the assets, and the balance be divided among the common stockholders, in the absence of an express contract so to do. *Mellon v. Mississippi Wire Glass Co.* 77 N. J. Eq. 498, 78 Atl. 710.

As shown in the earlier notes referred to, holders of preferred stock, in the absence of statutory or contractual provisions to the contrary, cannot claim a preference over the creditors of the corporation. To the 39 L.R.A. (N.S.)

Messrs. Gilbert Holbrook, F. J. Laswell, and Sweeney, Ellis, & Sweeney for appellant.

Messrs. George W. Jolly and C. S. Walker, for appellee:

No part of the capital stock can be returned to a stockholder or used in redemption of his stock until all debts are paid or provided for.

Marshall, Corp. 595, 597; *Hamlin v. Toledo, St. L. & K. C. R. Co.* 36 L.R.A. 826, 24 C. C. A. 271, 47 U. S. App. 422, 78 Fed. 671; *Taft v. Hartford, P. & F. R. Co.* 8 R. I. 310, 5 Am. Rep. 576; *Cook, Corp.* 3d ed. § 271.

The appointment of a receiver to take charge of and administer the entire corporate property "is a purely ancillary remedy, and cannot be maintained in a proceeding instituted solely for that purpose."

Vila v. Grand Island Electric Light, Ice & Cold Storage Co. 68 Neb. 222, 63 L.R.A. 791, 110 Am. St. Rep. 400, 94 N. W. 136, 97 N. W. 613, 4 Ann. Cas. 65.

Where a party may resort to an injunction

same effect are *Weaver Power Co. v. Elk Mountain Mill Co.* 154 N. C. 77, 69 S. E. 747 (holding provision on stock certificates that they "shall be a preferred lien on the assets of the company" not to place holder in position of a creditor, but only to give him a preferred lien on the assets of the corporation when in liquidation over the common stockholders); *Fryer v. Wiedemann*, post, 1009; *RIDER v. JOHN G. DELKER & Sons Co.*

Holders of preferred stock cannot, as against subsequent creditors, claim the proceeds of a policy of insurance taken out by the corporation upon the life of its manager to secure the retirement of the preferred stock, when it was paid for out of the assets of the company, and the holders of such stock are treated as stockholders, and not creditors, by the statute of incorporation. *Ellsworth v. Lyons*, 104 C. C. A. 1, 181 Fed. 55.

And it makes no difference that creditors are not shown to have extended credit upon the supposition that the life insurance policy was a corporate asset for the payment of debts. *Ibid.*

The holders of preferred stock, who purchased the stock in consideration of the agreement by the corporation to permit them to act as their factors and handle the entire production of their mill as long as they were holders of the stock, and that the corporation would redeem the stock at par upon the change of account or engagement of other factors, are not creditors or entitled to share as such upon the voluntary liquidation of the company, but are only entitled to share with the other holders of preferred stock. *Farrish-Stafford Co. v. Charlotte Cotton Mills Co.* 157 N. C. 188, 72 S. E. 973.

A. L. R.

tion or attachment, a receiver will not be appointed. Moreover, in a case where the chancellor has the power to make such appointment, the appointment is within his sound discretion.

34 Cyc. 25, 26; *Tarvin v. Walker's Creek Coal & Coke Co.* 109 Ky. 582, 60 S. W. 185; *Harmon v. Kentucky Coal, Iron & Development Co.* 15 Ky. L. Rep. 12, 21 S. W. 1055.

Lassing, J., delivered the opinion of the court:

The John G. Delker & Sons Company is a Kentucky corporation. It has an issue of both common and preferred stock. Under the provisions of the articles of incorporation of said company the preferred stock "shall be subject to redemption by the corporation at its option at any time after five years from the organization of the corporation, upon six months' previous notice to the holder or holders of said stock, by the payment of its par value and any accumulated dividends; and any holder of said stock, or any part thereof, shall likewise have the right at any time after five years from the date of the organization of the corporation, to have his stock redeemed upon six months' previous notice to the corporation, by the payment to him of its par value and any accumulated dividends." Upon the certificates of preferred stock there is the following indorsement: "The said stock represented by this certificate is subject to redemption by the corporation, at its option at any time after five years from the organization of the corporation, upon six months' previous notice to the holder of this certificate, by the payment of the par value of said stock and any accumulated dividends; and any holder of this certificate shall likewise have the right at any time after five years from the date of the organization of said corporation, to have the stock represented by this certificate redeemed upon six months' previous notice to the corporation, by the payment to him of the par value of said stock and any accumulated dividends."

Ed Rider was the owner of five shares of the preferred stock in this corporation. He brought a suit in which he sought to recover of the corporation the par value of the five shares of stock held by him, together with the accumulated dividends thereon. He alleged that the notice required by the articles of incorporation had been complied with; and that he was entitled to have the corporation receive his certificate and pay him in cash therefor, as in the contract provided. A demurrer was sustained to this petition; and in the second amended petition he alleged, in substance, that the corporation was hopelessly insolvent; and

he asked that a receiver be appointed to take charge of and wind up its affairs. A demurrer was sustained to the petition as amended. He declining to plead further, it was dismissed. He appeals.

It is insisted for appellee that the notice was insufficient; but from the conclusion which we have reached it is unnecessary to pass upon this question, as the case must turn ultimately upon the larger question, to wit, the right of the holder of preferred stock in a corporation to have the corporation return to him his money with interest when the financial condition of the corporation is such that it is unable to pay its debts. This is the real question.

For appellant it is urged that, under the articles of incorporation and by virtue of the indorsement on the certificate of stock which was issued to him, he has a contract with the company which he is entitled to have enforced; that he is in fact a creditor of the corporation. As between appellant and the holders of the common stock in this corporation, he is undoubtedly, by virtue of the provision in the articles of incorporation and indorsement upon this certificate of stock, above referred to, entitled to have the relief sought granted, unless the rights of creditors would be affected thereby. The capital of a corporation is the sum total of its stock, whether common or preferred. Certificates of stock are mere evidences that the holders thereof have invested the sums called for in the certificates in the enterprise. They run the risk of losing their stock if the business is not a success. As between themselves and third persons who deal with the corporation and give it credit, their stock is equally liable. It is only in cases where the corporation is solvent and the rights of creditors will not be injuriously affected thereby that agreements as to preferences among themselves may be enforced. The entire capital, without regard to any arrangement which may exist between common and preferred stockholders, is at all times subject to and liable for the debts of the corporation, and no part of the capital can be withdrawn from the business until the debts of the corporation are satisfied.

In *Thompson on Corporations*, 2d ed. vol. 4, § 3608, the rights of preferred stockholders, as between themselves and creditors of the company, are fully discussed, and that learned author adopts as the correct rule the opinion of the court in *Heller v. National Marine Bank*, 89 Md. 606, 45 L.R.A. 438, 73 Am. St. Rep. 212, 43 Atl. 800. It was there held that, as between creditors and ordinary preferred stockholders, the latter, as owners of the property of an insolvent corporation, are, upon a dis-

tribution of its assets, entitled to nothing until its creditors are first fully paid; that no part of the capital stock of a corporation can be withdrawn for the purpose of repaying the principal of the capital until the debts of the corporation are paid; and that ordinary preferred stock has no lien on the property of a corporation. In this state there is no statute giving to the holders of preferred stock a lien upon the property of the company, and hence the stock in question is what is termed by the author "ordinary preferred stock." The same authority announces the principle that "a preferred stockholder will not be allowed to share in any surplus money in the treasury of the corporation in accordance with an agreement to that effect, where it will work gross injustice to creditors;" and the cases of *Culver v. Reno Real Estate Co.* 91 Pa. 367, and *Phillips v. Eastern R. Co.* 138 Mass. 122, are cited as supporting this view.

In 10 Cyc. 568, preferred stock is defined as "not an indebtedness of the corporation, or an absolute agreement to pay certain dividends upon its shares, but is merely a pledge of its profits in favor of certain shares in preference to the others; in other words, an agreement to give a preference to particular shares over the other shares in the division of profits, but only in case there shall be profits to divide. Hence, if it appears in any case that no profits have been earned, the holders of preferred stock cannot maintain actions against the company to enforce payment of the guaranteed dividends." And again, on page 575, same volume, we find the following: "It may be stated generally that preferred shareholders occupy the status of shareholders or members, and that their right of preference is only a right of preference in the distribution of dividends over the common shareholders. It seems that such a shareholder has no preference over creditors upon the winding up of the corporation; but that his rights are to have his preferred dividend, in case there is a surplus which can properly be divided among shareholders, and there can be no such surplus so long as debts of the corporation remain unpaid as they mature."

In *Hamlin v. Toledo, St. L. & K. C. R. Co.* 36 L.R.A. 826, 24 C. C. A. 277, 47 U. S. App. 422, 78 Fed. 670, the distinction between a creditor and a stockholder, whether common or preferred, in a corporation, is thus stated: "There is a wide difference between the relation of a creditor and a stockholder to the corporate property. One cannot well be a creditor as re-

spects creditors proper, and a stockholder by virtue of a certificate evidencing his contribution to the capital of the corporation. Stock is capital, and a stock certificate but evidences that the holder has ventured his means as a part of the capital. It is a fixed characteristic of capital stock that no part of it can be withdrawn for the purpose of repaying the principal of the capital stock until the debts of the corporation are paid. These principles are elementary.

. . . The chance of gain throws on the stockholder, as respects creditors, the entire risk of the loss of his contribution to capital. 'He cannot be both a creditor and debtor by virtue of his ownership of stock.'

. . . If the purpose in providing for these peculiar shares was to arrange matters so that, under any circumstances, a part of the principal of the stock might be withdrawn before the full discharge of all corporate debts, the device would be contrary to the nature of capital stock, opposed to public policy, and void as to creditors affected thereby. . . . If that was the purpose of this arrangement, most doubtful language was employed. There is a sense in which every shareholder is a creditor of the corporation to the extent of his contribution to the capital stock. In that sense every incorporation includes its capital stock among its liabilities. But that creditor relation is one which exists only between the corporation and its shareholders. It is a liability which is postponed to every other liability, and no part of the capital stock can be lawfully returned to the stockholders until all debts are paid or provided for. The violation of this well-understood principle is a breach of trust, and a creditor affected thereby may pursue the stockholders, and recover as for an unlawful diversion of assets.

. . . Although appellants were not creditors proper, yet they show a case, on the face of their certificates, entitling them to a preference over common stockholders in relation to both dividends and capital. Ordinarily preferred stock is entitled to no preference over other stock, in relation to capital. But where there is an expressed agreement giving such a preference, not prohibited by local law nor the charter, we see no reason why it is not a valid contract, as between the corporation and such preferred stockholders, and binding upon the common stockholders." To the same effect is *Taft v. Hartford, P. & F. R. Co.* 8 R. I. 310, 5 Am. Rep. 575. We are cited to no authority holding to the contrary in any case where preferred stockholders are not by special statute given a lien upon the

property of the company; and the chancellor correctly held that the plaintiff failed to state a cause of action in the petition or either of the amendments offered thereto.

Nor was he entitled, under the prayer of his petition, to have the corporation placed in the hands of a receiver. The allegations on the part of a stockholder that a corporation is insolvent and that it is a losing venture are not sufficient to warrant a receivership, for, as said in Thompson on Corporations, vol. 5, 2d ed, § 6346, "in the absence of statutory provisions to the contrary, the mere insolvency of a corporation is not sufficient in equity to authorize the appointment of a receiver, unless there is some evidence of waste, extravagance, carelessness, dissensions, or fraud which gives ground to apprehend that the property will suffer, and there is no reasonable prospect that, if let alone, the corporation will soon become safely solvent." There is no charge of fraud, waste, extravagance, or mismanagement in the conduct of the business on the part of the company, and in the absence of such a charge the chancellor would not have been authorized in the appointment of a receiver for the purpose of winding up the affairs of the company. To the same effect is the text in 10 Cyc. 1305, where it is said: "In the absence of enabling statutes, courts of chancery have no jurisdiction to decree the dissolution of a corporation; nor, as a general rule, can such a court, during the life of the corporation, wind up its business and sequester its property and effects, on the application of a shareholder as such."

In *Worth Mfg. Co. v. Bingham*, 54 C. C. A. 119, 116 Fed. 785, a majority of the shareholders of a private corporation prayed its dissolution on the ground of insolvency, and that its business was being carried on at a loss. The court refused to appoint a receiver with a view to winding up its affairs, on the ground that, in the absence of some charge that its officers were guilty of some illegal, fraudulent, or other wrongdoing in the conduct of the business, a court of equity was without authority to decree its dissolution. See also *Cronin v. Potters' Co-op. Co.* 11 Ohio Dec. Reprint, 749. The application for a receivership was merely an incident to the relief sought, and appellant, not being entitled to the relief sought under the original petition, the chancellor did not err in sustaining a demurrer thereto and in refusing his application for a receiver.

Judgment affirmed.

39 L.R.A. (N.S.)

KENTUCKY COURT OF APPEALS.

ROBERT N. FRYER, Intervener, Appt.,
v.

CHARLES WIEDEMANN et al.

(148 Ky. 379, 146 S. W. 752.)

Corporation — preferred stock — priority over creditors.

1. A holder of preferred stock in a corporation, whose certificate provides that no lien shall be placed upon the corporate property without his consent, is not entitled to priority over corporate creditors in the distribution of its assets.

Same — advances by directors — priority.

2. Directors and holders of common stock in a corporation, although occupying a position of trust towards preferred stockholders, do not, by lending money to the corporation to enable it to carry on its business, even as to such an amount as to render the preferred stock worthless, postpone their claims to repayment to the retirement of the preferred stock, which was issued under an agreement that no lien should be placed on the property of the corporation without consent of the preferred stockholders.

Same — failure to wind up — effect.

3. The claims of directors and holders of common stock of a corporation for money advanced to keep it a going concern will not be postponed in the winding up of the corporation to the retirement of preferred stock, because at the time they assumed the management, the assets were sufficient to pay preferred stockholders in full, had the concern been wound up at that time.

(May 16, 1912.)

A PPEAL by intervener from a decree of the Circuit Court for Campbell County allowing claims of appellees in an action for the appointment of a receiver of the Highland Hotel Company, and dismissing intervener's petition for the establishment of priority in favor of the preferred creditors in the distribution of the assets of the company over the claims of appellees and all creditors whose indebtedness was incurred subsequent to the issuance of the preferred stock. Affirmed.

The facts are stated in the opinion.

Messrs. Aubrey Barbour and Fred B. Bassman for appellant.

Messrs. Dolle, Taylor, & O'Donnell and Ramsey Washington, for appellee Wiedemann:

As against creditors a holder of preferred stock has no greater rights than com-

Note. — As to right of preferred stock to preference as to capital, see *Rider v. John G. Delker & Sons Co.* ante, 1005, and notes referred to in the footnote under that case.

mon stockholders, and the corporation cannot give them greater rights in the assets of the corporation, as against creditors, unless by virtue of an express statutory provision.

Ellsworth v. Lyons, 104 C. C. A. 1, 181 Fed. 55.

Officers, directors, or stockholders who advance money to a corporation are entitled to share in its assets with other general creditors.

Standard Cotton Seed Oil Co. v. Excelsior Ref. Co. 108 La. 74, 32 So. 221; *Hooven Mercantile Co. v. Evans* Min. Co. 193 Pa. 28, 44 Atl. 277; *Welch v. Sargent*, 127 Cal. 72, 59 Pac. 319; *Hill v. Standard Teleph. Mfg. Co.* 209 Pa. 231, 58 Atl. 147.

Mr. James C. Wright for appellee Crawford.

Clay, C., delivered the opinion of the court:

The Highland Hotel Company was a corporation organized for the purpose of conducting a hotel in the district of Highlands, Campbell county, Kentucky. Its original capital stock was \$50,000, divided into 500 shares of \$100 each. In July, 1905, its capital stock was increased from \$50,000 to \$80,000; the additional \$30,000 being preferred stock, divided into 300 shares of \$100 each. The certificates of preferred stock contained the following provision: "The holders of this preferred stock are entitled to receive cumulative dividends at the rate of not over six per cent (6%) per annum, out of the profits of the company, payable quarterly on the 1st day of January, April, July, and October of each year, and to have preference over the common stockholders both as to assets of the company, in the event of the distribution thereof by reason of dissolution or otherwise, and as to dividends, and to have priority in these respects over the holders of any other issue of stock. No mortgages or lien of any nature shall be placed upon the property of the company without the unanimous consent of the preferred stockholders; otherwise, said preferred stock shall have no voting power. The company may at any time, cumulative dividends at the rate of six per cent (6%) per annum having been paid thereon, retire any of the shares of the preferred stock at the rate of \$110 per share."

In August, 1906, the corporation was authorized to increase its common stock from \$50,000 to \$80,000; the additional \$30,000 of common stock to be divided into 300 shares of \$100 each. Only 10 of these additional shares were ever issued. The highest indebtedness authorized by the original articles of incorporation was \$30,000. In July, 1907, the limit of indebtedness was, 39 L.R.A., (N.S.)

by amended articles of incorporation, increased to \$100,000. By another amendment, in August, 1908, the limit was increased to \$125,000.

On January 22, 1909, Charles Wiedemann, one of the appellees, filed an action in the Campbell circuit court against the hotel company for the appointment of a receiver, on the ground that it was impossible to conduct the company with profit, and that it was hopelessly insolvent. A receiver was appointed, and the cause referred to the master commissioner, to hear proof and report on claims. Claims of appellees Wiedemann and Crawford were allowed. Appellant, Robert N. Fryer, the holder of 10 shares of the preferred stock, intervened in the action. He alleged that, at the time of the issue of the \$30,000 preferred stock, the assets of the company were amply sufficient to pay all of its outstanding indebtedness, including the preferred stock; that a large portion of Wiedemann's indebtedness was incurred by the company after the issue of the preferred stock, and without the consent of the preferred stockholders; that the assets of the company were insufficient to pay its indebtedness, not by reason of any destruction or depreciation of the property, but by reason of its excessive indebtedness; that \$30,000 was the limit of indebtedness permitted by the articles of incorporation to be incurred by said company. It was further alleged that Wiedemann had been a large stockholder in the company since its organization. At the time of the creation of the indebtedness to himself, he was the owner of a large majority of the common stock, and was also a director. The intervening petitioner asked that he be allowed to prosecute the cause set up in his intervening petition on behalf of the preferred stockholders, and prayed for a decree adjudging that the preferred stockholders have priority in the distribution of the assets of the company over the claims of Wiedemann and all creditors, whose indebtedness was incurred subsequent to the issue of the preferred stock. To this petition a demurrer was sustained.

By amended petition it was alleged that, at the time of the organization of the Highland Hotel Company, appellees, Wiedemann and Crawford, subscribed for and became the owners of 75 and 20 shares, respectively, of the common stock; that on or about February 1, 1907, Wiedemann became the owner of 320 shares, and Crawford of 150 shares, of the 510 shares of common stock; that one Clarence Wagner was the owner of 5 shares, and one Robert Nagel the owner of 5 shares; that about that time Wiedemann, Wagner, and Nagel were elected di-

rectors, and Wiedemann was elected president; that said persons continuously served and acted in said capacity up to the time of the institution of the action for the appointment of a receiver; "that during all of said time the said Clarence Wagner was only a nominal director in said company, and acted as such in the interest of said Wiedemann, and that said Robert Nagel was only a nominal director, and acted in all respects as such in the interest of said L. J. Crawford." It was further alleged in the amended petition that, at the time Wiedemann and Crawford acquired control of the company, its total indebtedness, including mortgage indebtedness of \$8,000, incurred prior to the issue of the preferred stock, was only \$28,000; that at the time of the institution of the suit by Wiedemann the indebtedness of the company aggregated \$104,882.62, exclusive of the \$8,000 mortgage claim, and exclusive of mortgage claims aggregating \$22,000 against the property known as "The Shelly Arms," that, of said aggregate indebtedness, the sum of \$56,909.03 was the indebtedness to Wiedemann, and \$20,540 the indebtedness to Crawford, leaving a balance of \$27,335.50 as indebtedness to other unsecured creditors; that, of this balance, \$15,000 was to a bank, and for which Wiedemann and Crawford were sureties. It is further alleged in the petition that, of the money advanced by Wiedemann and Crawford, \$30,000 was used in making changes and additions to the Altamont Hotel, and the remainder was used in paying the operating expenses of the hotel; that all the property of the Highland Hotel Company was appraised at \$107,814; that the proceeds of the sale aggregated \$77,450; that one L. C. Widreg, as representative of Wiedemann and Crawford, became the purchaser at that price. It is also alleged that, at the time Wiedemann and Crawford purchased control of the property, the company could obtain no further credit, and was about to be forced into dissolution; that, if it had been dissolved at that time, the property could have been sold for a sum sufficient to pay the preferred stockholders in full; that for some time thereafter the assets of the corporation would have paid its current indebtedness and the preferred stockholders in full; that Wiedemann and Crawford had advanced the money when no credit could be obtained from anyone else; that, if the claims of Wiedemann and Crawford are permitted to have priority over the claims of the preferred stockholders, it would be a payment to them to the extent of \$30,000 out of the property of the preferred stockholders; that the advancements made by Wiedemann

and Crawford were made when the company was operating at a loss of \$1,000 a month; that the company operated at a loss during all of said time, except during the months of June, July, August, and September, 1908, when there was a profit; that, if Wiedemann and Crawford are permitted to have priority over the preferred stockholders, this would be in violation of the contract under which the preferred stock was issued, and would be in violation of the relation of trust which Wiedemann occupied towards the preferred stockholders as the president and director of the company, and which Crawford occupied towards them as a stockholder and a virtual director, acting through Robert Nagel. The amended petition then concludes with a prayer to the effect that the preferred stock be given priority over the claims of Wiedemann and Crawford, and asks for a personal judgment against them for any balance of the amount of the preferred stock which the assets of the company might fail to satisfy. To the intervening petition, as finally amended, a general demurrer was sustained, and, the petitioner refusing to plead further, the petition was dismissed. From that judgment he appeals.

Appellant states the main question raised by his petition as amended, as follows: "Does the preferred stock of the described character, on distribution of the assets of the corporation, have priority over the corporation's unsecured indebtedness to a director and a common stockholder acting as director, incurred without the consent of the preferred stockholders?" In this connection it is proper to say that, while under a statute providing that preferred stock may, by recorded agreement, be made a lien on the franchise and property of the corporation, which shall "have priority over any subsequently created mortgage or other encumbrance," stockholders who have been given a preference in such manner prescribed in the statute have been held to be entitled to be preferred to the extent specified therein (*Md. Laws 1880, chap. 474*; *Heller v. National Marine Bank*, 89 *Md.* 602, 45 *L.R.A.* 438, 73 *Am. St. Rep.* 212, 43 *Atl.* 800), such is not the rule in the absence of statutory authority (*Hamlin v. Toledo, St. L. & K. C. R. Co.* 36 *L.R.A.* 826, 24 *C. C. A.* 271, 47 *U. S. App.* 422, 78 *Fed.* 664; *Guarantee Trust Co. v. Galveston City R. Co.* 46 *C. C. A.* 305, 107 *Fed.* 311). On the contrary, preferred stock makes the holders thereof stockholders, and not creditors, and, except as to the preference in the payment of dividends, gives them the same rights, and no greater, and subjects them to the same liabilities, as the holders of common stock, except in

so far as they may be given other rights, or relieved from liabilities, by the charter or by statute. As against creditors, they have no greater rights than common stockholders, and the corporation cannot give them greater rights in the assets of the corporation as against creditors, unless by virtue of an express statutory provision. 2 Clark & M. Corp. § 413. As preferred stock is a part of the capital stock of the corporation, holders of such stock are not preferred to the creditors of the corporation in the distribution of its assets. Consequently the preferred stockholders cannot be reimbursed before the corporate debts are paid. *Warren v. King*, 108 U. S. 389, 27 L. ed. 769, 2 Sup. Ct. Rep. 789; *Hamlin v. Toledo, St. L. & K. C. R. Co.* 36 L.R.A. 829, 24 C. C. A. 271, 47 U. S. App. 422, 78 Fed. 664; *Lloyd v. Pennsylvania Electric Vehicle Co.* 75 N. J. Eq. 263, 21 L.R.A.(N.S.) 228, 138 Am. St. Rep. 557, 72 Atl. 16, 20 Ann. Cas. 119.

Even if it be conceded that the contract in the certificates of preferred stock to the effect that "no mortgage or lien of any nature shall be placed upon the property of the company without the unanimous consent of the preferred stockholders" is a valid contract between the preferred stockholders and the common stockholders, who are also creditors, we conclude that, inasmuch as a lien is something distinct from a claim and is in the nature of a security, the words "lien of any nature" do not include the claims of general creditors. *Rochester Distilling Co. v. O'Brien*, 72 Hun, 462, 25 N. Y. Supp. 281. As no liens of any kind were placed upon the property after the issue of the preferred stock, and as the claims of appellees, Wiedemann and Crawford, are unsecured, it follows that the provision of the contract referred to is eliminated from the case.

But it is claimed that appellees violated the spirit of the contract between the common stockholders and the preferred stockholders by going ahead and incurring an indebtedness after the issue of the preferred stock, large enough to wipe out the preferred stock. It is contended that this was wrong, because Wiedemann as a director, and Crawford as a common stockholder, occupied a position of trust towards the preferred stockholders, and should not have incurred an indebtedness that rendered the preferred stock worthless. It appears from the petition and the amendments thereto that appellees, Wiedemann and Crawford, simply loaned the corporation money to improve its property and to conduct a hotel. They loaned this money at a time when it could not borrow from others. There is no allegation of fraud or

bad faith on the part of appellees. There is an allegation to the effect that two of the directors represented them, but it does not appear that they represented them in any wise differently from the way they represented the other stockholders. Nor are the two directors accused of representing Wiedemann and Crawford improperly, or of acting in bad faith towards the corporation or the stockholders. Not only is there an absence of any charge of fraud or bad faith on the part of appellees, or any one representing them, but the petition shows that appellees, Wiedemann and Crawford, owned a majority of the common stock, and were therefore most interested in the success of the company, and made the loans to the corporation for the purpose of keeping it going. Conceding that both Wiedemann and Crawford occupied the position of trust toward the preferred stockholders and the corporation, it does not appear wherein they in any manner abused the trust. So far as the record shows, they made an honest effort to continue the business, and showed their faith in its ultimate success by putting up large sums of money, which they can never recover. While it may be true that a director, in becoming a creditor of a corporation, may not take advantage of his position and obtain any preference over other creditors, it is well settled that he may, in good faith, make a loan to the corporation. *Osborne v. Monks*, 14 Ky. L. Rep. 606, 21 S. W. 101; 3 Clark & M. Corp. 786. This is all that appellees did in this case. Having in good faith advanced the money to the corporation, they are entitled to share in the distribution of the assets upon the same terms as the other unsecured creditors. *Hooven Mercantile Co. v. Evans Min. Co.* 193 Pa. 28, 44 Atl. 277; *Standard Cotton Seed Oil Co. v. Excelsior Ref. Co.* 108 La. 74, 32 So. 221.

But it is insisted that the corporation had, at the time appellees took charge of it, and for some time thereafter, sufficient assets to pay the preferred stockholders, and that appellees should have then wound up the corporation, and not attempted to continue the business to the detriment of the preferred stockholders. It must be remembered, however, that the stock of every corporation is much more valuable when it is a going concern. It is the duty of the directors, therefore, to make an honest effort to continue the business of the corporation. This is all that appellees did. Appellees were holders, not only of common stock, but of preferred stock. Having more stock than the other stockholders, they were more interested in the success of the corporation than anyone else. Had they suc-

ceeded in the undertaking, they would have been commended. Having failed, and there being no evidence of fraud, bad faith, or negligent management of the company's affairs, they should be treated as any other creditors, and their claims will not be postponed until after preferred stockholders have been paid.

Other questions are discussed by counsel for appellant, but we deem it unnecessary to consider them. We conclude that the petition as amended failed to show appellant entitled to the relief prayed for, and that the demurrer thereto was properly sustained.

Judgment affirmed.

OHIO SUPREME COURT.

STATE OF OHIO, Plff. in Err.,
v.
BOONE.

(84 Ohio St. 346, 95 N. E. 924.)

Health — vital statistics — compulsory service — constitutionality.

1. Sections 14, 17, and 21 of "An Act to Establish a Bureau of Vital Statistics and to Provide for the Prompt and Permanent Registration of All Births and Deaths Oc-

Headnotes by the COURT.

Note. — Constitutionality of statutes in relation to vital statistics.

No case has been found which sustains the position taken in *STATE v. BOONE*. On the contrary, there are two decisions which hold that the failure to provide compensation for attending physicians who are required to report births and deaths or the presence of an infectious disease does not render the law unconstitutional.

Thus, in *Com. v. McConnell*, 116 Ky. 358, 76 S. W. 41, it was held that a statute requiring physicians and midwives without compensation to keep a registry of all births and deaths at which they have professionally attended, showing name, sex, and color, and names, ages, and residence of the parents, and to deposit a copy in the office of the county clerk, is not unconstitutional, but is a valid police regulation.

Likewise, in *State v. Wordin*, 56 Conn. 216, 14 Atl. 801, it was held that an ordinance requiring physicians having a patient within the limits of the city suffering from an infectious disease, to report, under a penalty, that fact to the mayor or clerk of the board of health, together with the name of the patient and the street and number of the house where treated, was not unconstitutional because of its failure to provide compensation for the service required.

In *Robinson v. Hamilton*, 60 Iowa, 134, 46 Am. Rep. 63, 14 N. W. 202, it was held 39 L.R.A. (N.S.)

curing within the State of Ohio" (99 Ohio Laws 296), so far as they relate to a physician or midwife in attendance upon a case of confinement, are unconstitutional and void, because they were enacted by an unnecessary, unreasonable, and arbitrary exercise of the police power.

On rehearing.

Statute — partial invalidity — effect on whole.

2. The requirement that physicians and midwives shall certify items numbered 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, and 18, in § 14, of "An Act to Establish a Bureau of Vital Statistics and to Provide for the Prompt and Permanent Registration of All Births and Deaths within the State of Ohio" (99 Ohio Laws, 296), is an unwarranted and unreasonable exercise of police power; and for the reason that §§ 13, 14, 17, and 21 of said act require a certificate of all items mentioned in said § 14, and recognize no other certificate as complete and proper, each and all of said sections, so far as they apply to physicians and midwives, are unconstitutional and void.

(Spear, J., dissents in part.)

(June 13, 1911.)

ERROR to the Circuit Court for Hardin County to review a judgment reversing a judgment of the Court of Common Pleas convicting defendant of violating the act re-

that a statute requiring physicians and midwives to report births and deaths to the clerk of the courts was not unconstitutional or unjust and oppressive. The court said however: "We have not been favored with an argument on behalf of the defendant, and are therefore not informed of the grounds upon which the statute in question was assailed in the court below, and is claimed to be unconstitutional. It cannot be expected that we shall consider arguments of which we have not heard, or that we will imagine objections and discuss them. . . . The statute requires the collection of statistics pertaining to the population of the state and the health of the people, which may import information useful in the enactment of laws, and valuable to science and the medical profession, to whom the people look for remedies for disease and for means tending to preserve health. The objects of the statute are within the authority of the state, and may be attained in the exercise of its police power."

The title of a statute "An Act to Provide for the Registration of Marriages, Births, and Deaths" is sufficiently specific constitutionally to authorize the incorporation into the statute of a provision requiring physicians and midwives to keep a registry of all births and deaths at which they have professionally attended, and to deposit a copy in the office of the county clerk. *Com. v. McConnell*, supra. A. L. R.

lating to the registration of births. Affirmed.

The facts are stated in the opinion.

Messrs. Timothy S. Hogan, Attorney General, Fred H. Kirtley, and James R. Stillings, for the State:

An act to establish a bureau of vital statistics, and to provide for the prompt and permanent registration of all births, etc., is a police regulation imposing a penalty irrespective of criminal intent, and it contains no exception in favor of any person.

State v. Rippeth, 71 Ohio St. 85, 72 N. E. 298; Farrell v. State, 32 Ohio St. 456, 30 Am. Rep. 614.

The filing of a birth certificate is required of all physicians. The law operates upon all physicians in the state of Ohio alike, and equal protection is not denied where a law operates upon all persons and upon all property similarly located.

Harmon v. State, 66 Ohio St. 249, 58 L.R.A. 618, 64 N. E. 117; State v. Gravett, 65 Ohio St. 289, 55 L.R.A. 791, 87 Am. St. Rep. 605, 62 N. E. 325; State v. Gardner, 58 Ohio St. 599, 41 L.R.A. 689, 65 Am. St. Rep. 785, 51 N. E. 136; Sipe v. Murphy, 49 Ohio St. 536, 17 L.R.A. 184, 31 N. E. 884.

Mr. George E. Crane, for defendant in error:

Under pretense of police regulation, the state cannot be permitted to encroach upon any of the just rights of the citizen which the Constitution intended to secure against abridgment.

Slaughter-House Cases, 16 Wall. 87, 21 L. ed. 412; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

Wide as is this power, everything and anything done under state authority cannot be justified under it. The act done must fall within the legal bounds of the police power. If it exceeds those bounds, and prejudices life, liberty, property, equality before the law, or privilege or immunity, it justifies Federal intervention, under the 14th Amendment, because it violates that amendment.

State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; Ruhstrat v. People, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41, 12 Am. Crim. Rep. 453; Frost v. Chicago, 178 Ill. 250, 49 L.R.A. 657, 69 Am. St. Rep. 301, 52 N. E. 869; State ex rel. Godard v. Johnson, 61 Kan. 803, 49 L.R.A. 662, 60 Pac. 1068.

Davis, J., delivered the opinion of the court:

The defendant in error was indicted for an alleged violation of an act entitled "An Act to Establish a Bureau of Vital Sta-

tistics and to Provide for the Prompt and Permanent Registration of All Births and Deaths Occurring within the State of Ohio" (99 Ohio Laws, 296). A demurrer to the indictment was overruled by the common pleas court, and the defendant was put upon trial, found guilty, and sentenced. The circuit court reversed the judgment for error in rejecting certain testimony offered by the defendant, and the state prosecutes error to reverse the judgment of the circuit court and to affirm the judgment of the court of common pleas.

The attorney general and his associates insist that the act referred to is a constitutional exercise of legislative power, and that the evidence which was rejected in the trial court was properly held to be inadmissible; while the defendant still maintains that the proffered evidence was admissible, and that the act under which the indictment was framed is unconstitutional. We shall review the latter contention only.

That the general grant in the Constitution of the legislative power includes police power is conceded; and that the registration of births, deaths, marriages, and the like, may be included in a proper exercise of the police power is also conceded. But it is disputed that, while requiring the registration of such facts as may naturally and readily come to the knowledge of persons present at a birth, death, or marriage, the state may compel such persons to inquire for, investigate, and report upon, certain collateral matters which may be interesting and of possible value to a bureau of statistics, and that, too, without substantial compensation. We understand the counsel for the state to maintain the affirmative all along the line of this contention.

The police power is inherent in sovereignty; and its exercise is justified by the necessity of the occasion. Its foundation is the right and duty of the government to provide for the common welfare of the governed. It is tersely expressed in the maxim, *Salus populi suprema lex*. While, therefore, a broad discretion is given to the legislature to provide for the general welfare, it necessarily is not an arbitrary or unlimited discretion; for, if it were beyond judicial control or review, it would amount to a practical abrogation of all constitutional guaranties of personal rights, and the undefined boundaries of legislative power could be extended so as to authorize the worst and most irresponsible form of despotism,—a legislative despotism conducted in the name of the people.

Hence it has been held, not only in this state, but in a great number of cases both in the Federal and state courts, that it is

within the judicial power to declare void an unnecessary or unreasonable exercise of police power. This rule was approved and applied in *Phillips v. State*, 77 Ohio St. 214, 82 N. E. 1064: "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting, . . . arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts." *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499. See also numerous cases cited in 22 Am. & Eng. Enc. Law, 2d ed. 939.

We need not inquire whether the state may not require a physician or midwife to report to the proper authority, for registration, the fact of a birth which has come under his or her observation, first, because it is conceded that it may do so, and, second, because it obviously has some relation to the public welfare, and it cannot be very burdensome to comply with such regulation. But this statute goes much further. It imposes upon the physician or midwife the duty of investigating and certifying as to certain facts which would not necessarily or naturally come within the knowledge of the attending physician or midwife, *viz.*, whether the birth was legitimate or illegitimate, and, except in case of illegitimacy, the full name, residence, color or race, birthplace, age, and occupation of the father; also the maiden name in full, residence, color or race, birthplace, age, and occupation of the mother; likewise the number of this child of the mother, and the number of living children of the mother. It is further provided that no certificate shall be held to be complete and correct which does not supply all of the items of information called for therein, or satisfactorily account for their omission; and that the physician or midwife who shall neglect or refuse to file a proper certificate of birth with the local registrar, within the time required by the act, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined, etc. In short, a professional attendant at a birth is required to enter upon an inquiry as to nonprofessional questions, to supply information to, it may be, a nonprofessional official, "clothed with a

little brief authority," in relation to matters which perhaps are interesting as vital statistics, but as to which it requires more than appears in this statute, or in the arguments in this case, to show that they are necessary or even closely related to the public safety, the public morals, or the public welfare; an inquiry, too, which could be just as well and more appropriately conducted, reported upon, and certified to, by the local registrar or a township assessor or a census taker.

The physician or midwife is compelled, under the penalties of the statute, to institute and carry out the necessary investigation and to "supply all of the information called for" without compensation. The contention is made on the part of the state that statutes which impose the duty of making such report or certificate are not unconstitutional, because they do not provide for compensation to physicians. While we do not regard this point as decisive of the present case, yet we are not prepared to yield unqualified assent to the proposition thus broadly stated. None of the cases cited for the state in that connection appears to have been carefully considered, except *State v. Wordin*, 56 Conn. 216, 14 Atl. 801. In one of them, indeed, *Robinson v. Hamilton*, 60 Iowa, 134, 46 Am. Rep. 63, 14 N. W. 202, it is frankly said: "We have not been favored with an argument on behalf of the defendant, and are therefore not informed of the grounds upon which the statute in question was assailed in the court below and is claimed to be unconstitutional. It cannot be expected that we shall consider arguments of which we have not heard, or that we will imagine objections and discuss them." Besides the case does not seem to go further than the defendant in this case concedes the law to be. The Connecticut case referred to, after a statement of the guaranties of personal liberty contained in the Constitution of the United States, contains the following language: "But these provisions place no limitation upon the power of the legislature of this state to require gratuitous service from one member of the community in the protection of the lives of all, other than that which would have been equally upon it in their absence, namely, that it shall not violate fundamental principles and purposes of the social compact." This language should be read in the light of the facts of that case; but, assuming that it correctly states the law in its general application, there is grave reason to doubt whether it is sound law in this jurisdiction, owing to specific provisions of the ordinance of 1787.

The purview of that famous act of Congress is expressly "for the government of

the territory of the United States north-west of the River Ohio." The first twelve sections of the ordinance obviously provided for the temporary government of the territory, until it should be divided and organized into states. Then follows something of more enduring interest. We quote: "And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws, and Constitutions are erected; to fix and establish those principles as the basis of all laws, Constitutions, and governments, which forever hereafter shall be formed in the said territory; to provide, also, for the establishment of states, and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original states, at as early periods as may be consistent with the general interest: It is hereby ordained and declared by the authority aforesaid, that the following articles shall be considered as articles of compact between the original states and the people and states in the said territory, and forever remain unalterable, unless by common consent, to wit." Then follow the several articles of compact. We quote from only two of them. It is provided in article II. that "no man shall be deprived of his liberty or property but by the judgment of his peers or the law of the land; and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same."

Perhaps it may be said that the adoption of a Constitution by the people of Ohio superseded the ordinance of 1787, and that the Constitution of Ohio contains no such provision as that which we have quoted from article II. of the ordinance of 1787. We recur again to the "articles of compact," and quote from article V.: "And whenever any of the said states shall have 60,000 free inhabitants therein, such state shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original states in all respects whatever: Provided, the Constitution and government, so to be formed, shall be Republican, and in conformity to the principles contained in these articles." If our Constitution, instead of creating a Republican form of government for the state, had provided a pure Democracy, a government directly by the people, and, so framed, it had been accepted by the President and Congress of the United States, there might have been some reason for the claim that, in that respect, the compact which was to "remain forever unaltered, unless by common consent," had been repealed by impli-

cation; yet, even under such circumstances, a conclusive presumption would not be raised that the compact had been altered, without the common consent of all the parties thereto. But if the convention which prepared our Constitution had omitted from the Bill of Rights the famous interdiction against slavery, contained in article VI. of the ordinance, would that have justified the conclusion that the compact was altered, and that the existence of slavery in Ohio would be constitutional? Or, to put the question in another form, if our Constitution contained nothing whatever in regard to the privilege of the writ of habeas corpus, or to trial by jury, or to proportional representation of the people in the legislature, or to the prohibition of cruel and unusual punishments, it could not be justly inferred that the great compact had been altered, and that these privileges and guaranties had been subtracted from the rights of the citizens, and were not included among the rights reserved by the people (Const. of Ohio, art. 1, § 20), because there would have been nothing in the Constitution which was inconsistent with the ordinance, and the declared purpose thereof, "to fix and establish those principles as the basis of all laws, Constitutions, and governments, which forever hereafter shall be formed in the said territory," and that these "articles shall be considered as articles of compact between the original states and the people and states in the said territory, and forever remain unalterable, unless by common consent."

In *Hogg v. Zanesville Canal & Mfg. Co.* 5 Ohio, 410, at page 416, Hitchcock, J., speaking of a clause in article IV. of the ordinance, said: "This portion of the ordinance of 1787 is as much obligatory upon the state of Ohio as our own Constitution. In truth it is more; for the Constitution may be altered by the people of the state, while this cannot be altered without the assent both of the people of this state and of the United States, through their representatives. It is an article of compact, and, until we assume the principle that the sovereign power of the state is not bound by compact, this clause must be considered obligatory." And in *Hutchinson v. Thompson*, 9 Ohio, 52, at page 62, Grimke, J., remarked: "But when application for admission into the Union was made by the people inhabiting the eastern part of the territory, modifications in several parts of the ordinance were asked for, and they were granted by the United States as one party, to the state as the other. This seems to show that the people of Ohio have so far treated the articles of compact as of perpetual obligation. The alterations pro-

posed were with a view to the immediate formation of a state Constitution, and were of no importance if the state should have a right to annul the ordinance the moment it assumed that condition."

Similar language is found in the opinion in *Cochran v. Loring*, 17 Ohio, 409, 424, 425, and the foregoing quotations remain as the unmodified expressions of this court upon this subject.

We are not unaware of various *dicta* which have appeared from time to time in opinions by learned justices of the Supreme Court of the United States, beginning with *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565; *Permol v. New Orleans*, 3 How. 589, 11 L. ed. 739, and *Strader v. Graham*, 10 How. 82, 13 L. ed. 337. But it requires no acute analysis to differentiate those cases and to show that they do not go very thoroughly into the question whether the ordinance of 1787 can be superseded, otherwise than by the "common consent" of the parties to the compact, as required by the terms of the ordinance, or whether such "common consent" ever has been given; and, giving the fullest effect that can be claimed from those remarks by the distinguished judges, it is obvious that they ignore the distinction between a mere act of Congress, which may be repealed or superseded by subsequent acts, and a solemn and formal "compact," in the nature of a treaty as it were, between the proprietary states and the people and states of the territory which was subsequently to be erected into several states of this Union. They ignore, moreover, the fact that the compact, on the good faith of which the original proprietors ceded this territory to the United States, expressly declared that the principles declared therein shall be the basis of "all laws, Constitutions and governments which forever hereafter shall be formed in the said territory;" and at best these declarations rest on no stronger foundation than the provision of the compact itself, namely, that a state, with constitutional limitations as provided, "shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original states, in all respects whatever." See cases above cited and *Escanaba & L. Transp. Co. v. Chicago*, 107 U. S. 678, 688, 689, 27 L. ed. 442, 446, 447, 2 Sup. Ct. Rep. 185, 194; *Van Brocklin v. Tennessee* (*Van Brocklin v. Anderson*) 117 U. S. 151, 159, 29 L. ed. 845, 847, 6 Sup. Ct. Rep. 670; *Sands v. Manistee River Improv. Co.* 123 U. S. 288, 295, 296, 31 L. ed. 149, 151, 152, 8 Sup. Ct. Rep. 113; *Willimette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 9, 10, 31 L. ed. 629, 632, 633, 8 Sup. Ct. Rep. 811. Whatever that clause may

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mean, it certainly does not mean that all state Constitutions shall be or are alike, nor that a new state erected in the Northwest territory, shall be understood to surrender all the guaranties of the compact as a condition of admission as a state.

We have thus briefly indicated the reasons for our belief, that the Great Charter of the Northwest territory is still under, and above, and before, all laws or Constitutions which have yet been made in the states which are parts of that territory; and that under its guaranties the state has not the right to draft a citizen into particular service without substantial compensation. At least, it is clear to us that the provisions of this statute which require a professional man to search out nonprofessional information, and certify it to state authorities, are unnecessary, unreasonable, and arbitrary, and are not, therefore, a valid exercise of police power. The demurrer to the indictment should have been sustained, and therefore the judgment of the Circuit Court reversing the judgment of the Court of Common Pleas is affirmed, and defendant discharged:

Spear, Ch. J., and Shauck, Price, Johnson, and Donahue, JJ., concur.

A rehearing having been granted, **Davis, Ch. J.**, on January 16, 1912, handed down the following additional opinion (85 Ohio St. 313, 97 N. E. 975):

This case is fully reported with opinion in 84 Ohio St. 346, ante, 1013, 95 N. E. 924. A motion for rehearing was entertained because of an uncertainty which seemed to exist to some extent, as to the scope of the syllabus in the former report. There is no ambiguity in the opinion; but since, by a rule of this court, the syllabus must be confined to the points of law arising from the facts of the case, and which have been determined by the court, and since the syllabus is the expression of all the concurring judges, doubt seems to have arisen whether the syllabus and the opinion were in harmony.

Whether a physician or midwife might or might not be required, by a proper statute, to report a birth at which he or she had attended, was not a point considered or decided, because it was not disputed, and was expressly conceded by the defendant in error, as expressly stated in the opinion. But, although this much was conceded to be true, it was argued, and so held by the court, that paragraphs or items numbered 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, and 18, in § 14 of "An Act to Establish a Bureau of Vital Statistics and to Provide for the Prompt and Permanent Registration of All

Births and Deaths Occurring within the State of Ohio" (99 O. L. 296), were an unwarranted and unreasonable exercise of police power; and that these items are so interlaced and interwoven into the texture of §§ 13, 14, 17, and 21 of said act as to render each entire section unconstitutional and void, so far as they relate to physicians and midwives; § 13 making it the duty of the attending physician or midwife to file a certificate of birth giving all of the particulars required by the act; § 14 for the same reason; § 17 making it the duty of the state registrar to prepare blanks and issue detailed instructions to carry out the purposes of the act, and providing that no other blanks shall be used; and § 21 making it a penal offense for neglect or refusal to file "a proper certificate," the definition of a proper certificate being fixed by §§ 13, 14, and 17.

For the reason, therefore, that the objectionable items of § 14 are expressly required by all of the sections mentioned above to be joined with those conceded to be sound, the court could not separate the former from the latter and declare part of the sections valid. The legislature may rectify its error by future enactment.

The judgment of the Circuit Court, reversing the judgment of the Court of Common Pleas, is affirmed, on the ground that the demurrer to the indictment ought to have been sustained, and defendant discharged.

Shauck, Price, Johnson, and Donahue, JJ., concur.

Spear, J., dissenting:

I am in accord with that part of the majority opinion given upon the rehearing, wherein it is held with emphasis, as was foreshadowed in the opinion given when the case was first reported, to the effect that the general assembly has power to require physicians to certify to the proper board such information respecting births and deaths as, speaking in general terms, will naturally come within the knowledge or observation of an attending physician. This upon the ground that the physician is licensed by the state. Sections 1289 to 1295, General Code. This requirement is therefore not unreasonable, and it is horn-book knowledge that, where special privileges are accorded by the state, special duties in connection therewith may be exacted, without awarding money compensation therefor.

But I dissent from the holding on the rehearing which will have the effect to destroy the act utterly. This judgment is put upon the ground that the provisions of the 39 L.R.A. (N.S.)

act which were within the power of the general assembly to enact are so interwoven with those admittedly invalid as to make the whole invalid. This is a holding that the general assembly would not have passed the portions of the act which it is now admitted that body had power to pass, without including the provisions which are condemned. In other words, a hungry man presumably would reject a half a loaf, unless he was offered a whole loaf. I can find no such legislative purpose in the words or object of the act. The universal rule is that a part of a law may be unconstitutional while there is no such objection to the remaining parts, and in such case all of the law stands, except the part which is unconstitutional. The use of the word "all" in § 13, and, perhaps, elsewhere in the act, purporting to require the physician to certify all the matters purporting to be required by the act generally, is not controlling; nor should it create doubt as to other portions of the act. Necessarily and reasonably the "all" should be held to mean all those matters which the general assembly has the power to require to be certified; and the "proper certificate" required to be filed by the provisions of § 21 would naturally mean such certificate as the board has legal power to require; its power in that respect being now defined by the judgment of the court.

This view of the act does not affect the defendant in the case. He was properly ordered discharged by this court. The discharge may well rest upon the ground that the evidence adduced at the trial was insufficient to justify a verdict and judgment against him.

VIRGINIA SUPREME COURT OF APPEALS.

NORFOLK FIRE INSURANCE CORPORATION, Plff. in Err.,

v.

T. GILBERT WOOD.

(— Va. —, 74 S. E. 186.)

Insurance — limitation of additional policies — fraudulent insertion — effect.

The insertion by an insurance agent who has failed to secure all the insurance to be placed on a building, of a clause in the policy issued by him making it void if additional insurance is taken, will not prevent recovery on the policy in case of loss,

Note.—The parol-evidence rule as to varying or contradicting written contracts, as affected by the doctrine of waiver or estoppel as applied to policies of insurance,

although the intended amount was placed with other companies.

(March 14, 1912.)

ERROR to the Circuit Court for Nottingham County to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due on a fire insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. Peatross & Savage for plaintiff in error.

Messrs. Caskie & Caskie, for defendant in error:

The company is estopped from denying liability on the ground that its policies forbade additional insurance without its consent.

Independent School Dist. v. Fidelity Ins. Co. 113 Iowa, 65, 84 N. W. 956; Kitchen v. Hartford F. Ins. Co. 57 Mich. 135, 58 Am. Rep. 344, 23 N. W. 616; Brumfield v. Union Ins. Co. 87 Ky. 122, 7 S. W. 893; Steers v. Home Ins. Co. 38 La. Ann. 952; Smith v. Phoenix Ins. Co. 91 Cal. 323, 13 L.R.A. 475, 25 Am. St. Rep. 191, 27 Pac. 738; Smith v. Pennsylvania F. Ins. Co. — Cal. —, 27 Pac. 742; St. Paul F. & M. Ins. Co. v. Wells, 89 Ill. 82; Commercial Union Assur. Co. v. Urbansky, 113 Ky. 624, 68 S. W. 653; Dalton v. Milwaukee Mechanics' Ins. Co. 126 Iowa, 377, 102 N. W. 120; Fireman's Fund Ins. Co. v. Norwood, 16 C. C. A. 136, 32 U. S., App. 490, 69 Fed. 71; McElroy v. British American Assur. Co. 36 C. C. A. 615, 94 Fed. 990; Palatine Ins. Co. v. McElroy, 40 C. C. A. 441, 100 Fed. 391; Queen Ins. Co. v. Union Bank & T. Co. 49 C. C. A. 555, 111 Fed. 697.

Keith, P., delivered the opinion of the court:

Wood, the defendant in error, who was the owner of a building at Burkeville, then in course of construction, was approached by Jones, the Burkeville agent of the Norfolk Fire Insurance Corporation, who asked to be allowed to write a policy of insurance on the property for \$7,500. This Wood refused to do, saying that he had promised other agents insurance on the building, but, after the other agents were satisfied, he would give the agent of plaintiff in error a policy. Jones insisted on \$7,500, say-

ing that he was a local agent and entitled to more insurance than outsiders, but Wood said that he could not fulfil his promise to other agents if he did this, but that he would give Jones \$5,000; and a policy was written for that sum. Wood then called the attention of the agent to the fact that the premium was too large, and that the policy should be what is known as a "builder's risk," and this error was corrected.

The policy thus taken expired on November 12th at 12 o'clock, and on November 11th a Mr. Legg, the managing underwriter for the plaintiff in error, came to Burkeville for the purpose of inspecting the property, and he in company with Wood and Jones, the agent, inspected the building. Legg stated that his company would like to carry \$15,000 upon it, and later Jones saw Wood and tried to induce him to permit him to write \$15,000 on the building, to which Wood replied that he would not give it all to one company, as he had promised other agents. Jones, the agent, then asked to be allowed to write \$7,500, but Wood told him he could write \$5,000 or nothing. On the next day, November 12th, just about one hour before the first policy expired, Jones again saw Wood, and asked, "Have you agreed to let me control the full amount of insurance on that hotel building?" Wood replied, "No," whereupon Jones produced and delivered the policy now sued on. Wood put the policy in his pocket, and went into the schoolhouse where he was teaching. The delivery and conversation took place during the recess of school. Wood did not unfold the policy, but looked at the face of it, and did not read or open it until after the fire.

The policy contained the following clause: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

At sundry times subsequent to November 12th, and before the fire occurred, Wood took out other policies on the building aggregating \$6,500, making a total insurance with the policy in this suit of \$11,500.

The property was destroyed by fire on

is treated in the note to *Haapa v. Metropolitan L. Ins. Co.* 16 L.R.A.(N.S.) 1165.

As to effect of nonwaiver agreement on conditions existing at inception of insurance policy, see note to *Gish v. Insurance Co. of N. A.* 13 L.R.A.(N.S.) 826. And as to power of agents to bind insurer by oral waiver or estoppel *in pais* as to forfeitures occurring after issuance of policy and before loss, under policies of insurance requiring

consent or waiver to be in writing, see note to *Industrial Mut. Indemnity Co. v. Thompson.* 10 L.R.A.(N.S.) 1064. As to effect of agent's insertion in application, of false answers to questions correctly answered by insured, see note to *Deming Invest. Co. v. Shawnee F. Ins. Co.* 4 L.R.A.(N.S.) 607. The digest of this series should be consulted for later cases on these various points.

February 2, 1910, with a total loss, and proof of loss was duly given, but the company refused to pay upon the sole ground that the clause above quoted had been violated. Thereupon Wood brought suit, and, when all of his evidence had been produced before the jury, the defendant, without introducing any testimony, demurred, whereupon the jury returned a verdict in favor of the plaintiff for \$5,000, with interest from May 25, 1910, subject to the opinion of the court upon the demurrer. The court overruled the demurrer and entered judgment for the plaintiff, and the defendant company applied for and obtained a writ of error, which brings before us for consideration the rulings of the court upon the trial.

The plaintiff in error took several exceptions to the admissibility of evidence, to permitting the plaintiff to show that prior to the issuance of the policy in suit he had told the agent of the defendant that he intended to take additional insurance in other companies, that the agent had solicited as much insurance as \$15,000 on the insured premises, and other evidence of like character, which the plaintiff in error objected to 'because it tended to vary the terms of a written instrument, but which the court admitted upon the ground that it tended to establish a state of facts which estopped the defendant from claiming a forfeiture for breach of the condition of the policy against additional insurance. We shall consider the assignments of error as to the admissibility of testimony along with that with respect to the judgment upon the demurrer to the evidence, for they all involved the same general principle.

In *Southern Mut. Ins. Co. v. Yates*, 29 Gratt. 585, Judge Staples, after stating the familiar rule of evidence that all previous verbal agreements must be taken to be merged in the written agreement of the parties made for the purpose of embodying the terms of the contract, and designed to be the depository and proof of their final intention, says: "The exceptions to this rule that are sanctioned by the courts are found in those cases in which the insured is misled by the assurances or declarations of the agent of the insurer, or where the latter seeks to take advantage of a forfeiture of his own creation, or where the insured has given a correct description of the property, which has not been followed by the insurers or their agents in preparing the policy, or where the parties stand on unequal ground, and one of them uses his superior knowledge or influence to mislead the other as to the true import of the contract. . . . It must be conceded that many of these exceptions, if they can be

so termed, are utterly irreconcilable with the rule itself, or any just principle upon which it is founded. In such cases it is said, however, the oral evidence is not offered to contradict the writing, but to show that the representation as it is written ought not to be used against the party, upon the ground of an equitable estoppel,"—citing *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88, and *Manhattan F. Ins. Co. v. Weill*, 28 Gratt. 389, 26 Am. Rep. 364. *Lynchburg F. Ins. Co. v. West*, 76 Va. 575, 44 Am. Rep. 177, fully supports *Southern Mut. Ins. Co. v. Yates*, and reinforces the doctrine there maintained by additional authorities.

In *Mutual F. Ins. Co. v. Ward*, 95 Va. 231, 28 S. E. 209, it is said that "facts relating to the risk, communicated to such an agent of an insurance company . . . before or at the time of issuing the policy in suit, bind the company, whether communicated to it by such agent or not;" and that, "notwithstanding the provision in an insurance policy which avoids the policy if there be 'other insurance' on the property, unless it be made known to the company and indorsed on the policy or otherwise acknowledged in writing, if the existence of such 'other insurance' was communicated to such an agent of the company, . . . the company is estopped to enforce the forfeiture, although the agent may have neglected to communicate his knowledge to the company, and the company was in ignorance of the fact at the time the policy was issued, unless the limitation upon the agent's powers was in some way brought home to the assured."

And in *Farmers' & M. Benev. F. Ins. Asso. v. Williams*, 95 Va. 248, 28 S. E. 214, it is held that "knowledge of facts material to the risk, communicated to the agent of an insurance company who fills out the application for the policy, which is subsequently delivered, is imputed to the company, whether communicated to it by its agent or not, unless it is shown that special limitations on the powers of the agent were known to the assured."

By these authorities, we think it is abundantly established that if insurance in other companies had existed at the time of the negotiations which led to the execution and delivery of the policy in suit, and the fact that there was such other insurance upon the property had been, before the issuing of this policy, communicated to Jones, the agent, and with that knowledge he had received the premium and issued the policy, the company would have been affected by his knowledge of that fact and been estopped to insist upon the forfeiture.

In the case under consideration, there

was no other policy in actual existence, but it appears that the plaintiff in error was willing to write a policy for \$15,000 upon the property. There was, then, no excessive insurance. It further appears that it applied for and insisted upon being permitted to write a policy larger than the one in suit; that it was informed through its agent that Wood declined to give them more than \$5,000 of insurance, upon the ground that he had entered into agreements with other insurance companies to permit them to write policies upon his building. Almost at the instant when the policy in suit was delivered, the agent renewed the request and was again informed that he could write \$5,000 or nothing, because of the agreement which Wood had entered into with other companies, though other policies had not in point of fact been issued. Thereupon, with this knowledge the premium was received and the policy was issued, and without being read, as was also known to the agent, was put by Wood into his pocket, and he went about his duties as schoolmaster.

It would be a somewhat singular result if the policy should be held good, notwithstanding the clause of forfeiture, in case of concurrent insurance, if the concurrent policies had actually been issued with the knowledge of the insurance company through its agent; but that the forfeiture should prevail if, in reliance upon the act of the company through its agent in receiving the premium and issuing the policy with full knowledge of his purpose, Wood should take out other insurance in pursuance of what he conceived to be binding agreements with other companies to that effect.

We have reached, then, this point, that the authorities establish that the policy under consideration would not have been defeated by the actual existence of other policies, because the insurance company would have been estopped by its knowledge of the facts to insist upon the forfeiture; but it is insisted by the plaintiff in error that the estoppel did not arise, although the premium was received and the policy issued with full knowledge that the insured intended to do, and had actually agreed to do, that which, if executed, would have tied the hands of the company. In both instances the result is the same; as a moral question, both seem to involve identical propositions, and there is abundance of authority in support of both.

In *Kitchen v. Hartford F. Ins. Co.* 57 Mich. 135, 58 Am. Rep. 344, 23 N. W. 616, where an applicant for fire insurance told the agent that he meant to obtain further insurance in other companies, and asked

him so to notify the company he represented, the agent replied that it would be needless to do so until such insurance was obtained. The applicant had no notice of any limitations upon the agent's authority. Held, that the company was estopped from denying liability on the ground that its policies forbade additional insurance without its consent.

In *Erb v. Fidelity Ins. Co.* 99 Iowa, 727, 69 N. W. 261, it was held that a provision of a policy of insurance against additional insurance was waived where the agent of the insurer, whose knowledge is imputable to it, knows at the time the policy is issued that an existing policy issued by another company is about to be renewed.

In *Fitchner v. Fidelity Mut. Fire Asso.* 103 Iowa, 277, 72 N. W. 530, it was held that the insurance company is charged with the knowledge of its soliciting agent that the insured desired, and was placing \$12,000 of concurrent insurance on the merchandise.

In *Independent School Dist. v. Fidelity Ins. Co.* 113 Iowa, 65, 84 N. W. 956, where an insurance company issued a policy on certain property, while its agent who procured the risk knew of a certain other policy to be obtained on the same property, it consented to the additional insurance, and its policy was not void in consequence thereof since its agent's knowledge was the knowledge of the company.

See *St. Paul F. & M. Ins. Co. v. Wells*, 89 Ill. 82.

In *Fireman's Fund Ins. Co. v. Norwood*, 16 C. C. A. 136, 32 U. S. App. 490, 69 Fed. 71, the general agent of certain insurance companies called upon the plaintiff and asked to be allowed to place some of the insurance on plaintiff's stock. He inquired how much insurance plaintiff intended to carry, and plaintiff told him \$40,000, and subsequently authorized him to place \$10,000 of such insurance. The general agent afterwards delivered to plaintiff policies, including two of \$2,500 each, to which were attached riders allowing other insurance to the amount of \$27,500, and both contained the condition that if the assured should have or afterwards effect other insurance, without the written consent of the company, the policy should be void, and also provided that only certain specified officials should have authority to waive or modify the conditions of the policy. When plaintiff received the policies, he examined them to see that the amounts were correct, but, relying on his conversation with the agent, did not examine them further, and placed them in his safe. It was held "that by delivering the policies with knowledge, through their agent, of the amount of

insurance intended to be taken, the companies waived the condition as to other insurance, and were estopped to set the same up, after a loss; plaintiff having a right to rely on such knowledge of the agent."

See *McElroy v. British America Assur. Co.* 36 C. C. A. 615, 94 Fed. 990; *Palatine Ins. Co. v. McElroy*, 40 C. C. A. 441, 100 Fed. 391; *Queen Ins. Co. v. Union Bank, & T. Co.* 49 C. C. A. 555, 111 Fed. 697.

What we have said and the authorities we have discussed in no way conflict with the opinion of this court in *Metropolitan L. Ins. Co. v. Hall*, 104 Va. 572, 52 S. E. 345, where it was held, in an action to recover on a life insurance policy, that "a contemporaneous parol agreement or understanding between the agent of an insurance company who solicits the insurance and the insured as to the time and place of paying the premiums, different from that stated in the policy, cannot be given in evidence, as it varies or contradicts the terms of the written contract of the parties." The effort of the insured there was virtually to introduce into the policy of insurance a new term with respect to the authority of the agent, doing away with the limitation which the company had imposed upon the agent's authority, which it was held could not be done, unless the company, by a course of business or otherwise, had waived the limitation on the agent's power. In other words, that case in substance reaffirms the law as stated by Judge Staples in *Southern Mut. Ins. Co. v. Yates*, supra, which already appears in this opinion, and need not be repeated.

This case is considered as upon a demurrer to the evidence, and, without again discussing rule governing courts in such cases, we are of opinion that there is no error in the judgment complained of, which is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

JAMES M. SWIFT, ATTORNEY GENERAL, EX REL. STATE TREASURER

v.

CHARLES N. BARNEY, Admr., etc., of Frank Sweetser, Deceased.

(211 Mass. 134, 97 N. E. 750.)

Inheritance tax — property within state — limit.

1. Under a statute imposing an inheritance tax upon all property within the jurisdiction of the commonwealth, and providing that no bequest, devise, or distributive share shall be subject to the provisions of the act unless its value exceeds a certain amount, only property within the commonwealth is to be considered in determining whether or not the specified amount is exceeded, and if such property does not exceed the amount no tax can be imposed, although the sum received by the beneficiary from portions of the estate located in other jurisdiction exceeds the specified limit.

Statute — construction — official custom.

2. In the absence of ambiguity in a statute, the practice of the taxing officers with respect to the levying of inheritance taxes cannot be taken into consideration in ascertaining the meaning of the statute.

(February 28, 1912.)

RESERVATION by the Supreme Judicial Court for Suffolk County for the determination by the full court of a bill filed for the collection of a legacy and succession tax upon property passing by the will of deceased to the residuary legatees named therein. Bill dismissed.

The facts are stated in the opinion.

Messrs. James M. Swift, Attorney General, and Fred T. Field, Assistant Attorney General, for plaintiff:

There is no exemption from tax, since the value of each bequest exceeds \$1,000; but the tax is computed only upon property within the jurisdiction of the commonwealth.

McCurdy v. McCurdy, 197 Mass. 248, 16 L.R.A.(N.S.) 329, 83 N. E. 881, 14 Ann. Cas. 859; *Kingsbury v. Chapin*, 196 Mass. 533, 82 N. E. 700, 13 Ann. Cas. 738; *Minot v. Winthrop*, 162 Mass. 113, 26 L.R.A. 259, 38 N. E. 512.

In determining whether property was within the exemption provided for by the statutes, "it has been the uniform practice of administrative officers of the commonwealth . . . to consider both property within the jurisdiction of the commonwealth and property without such jurisdiction."

United States v. Cerecedo Hermanos y

Note. — Must property out of state be included in fixing exemptions under inheritance tax.

The question presented in *SWIFT v. BARNEY*, whether, granting that property of a nonresident located out of the taxing state is not itself subject to the inheritance tax of such state, it may be considered in determining whether property within the state is or is not subject to exemptions under the inheritance tax, seems to be one of novelty in the courts. The question is, of course, distinct from the question whether or not property outside of the state may be taxed, and, except where the statutes render the answer clear, is one of considerable nicety. The rule that "where both the domicile of the decedent and the situs of the property

Compañia, 209 U. S. 338, 52 L. ed. 821, 28 Sup. Ct. Rep. 532; Rogers v. Goodwin, 2 Mass. 475; Boston v. Boston Elev. R. Co. 186 Mass. 274, 71 N. E. 295; Smith v. Wenz, 187 Mass. 421, 73 N. E. 651.

Messrs. C. N. Barney and H. T. Lummus for respondent.

Morton, J., delivered the opinion of the court:

The defendant is the administrator with the will annexed of one Frank D. Sweetser, who at the time of his death was domiciled in Martinez, in the state of California. The will was duly proved in California. By the will the testator gave to a niece a legacy of \$500, and bequeathed the rest and residue to two sisters and a brother in equal shares. The estate amounted to \$16,144.20, of which \$1,116.07 was in this commonwealth. This was all that was actually or constructively here, or that came into the hands of the defendant. The legacy of \$500 was paid by the executor in California, and he distributed the rest and residue, amounting to nearly \$5,000 each, between the sisters and the brother. The defendant paid from the estate in his hands the debts due to Massachusetts creditors, the expenses of administration here, and the funeral charges incurred here, and at the request of the executor in California divided what remained, which amounted to \$631.08, equally between the residuary legatees, each receiving in full \$210.36. The treasurer and receiver general has assessed a legacy and succession tax upon the estate thus paid over to and distributed by the defendant amongst the residuary legatees, and brings this bill to enforce its payment, contending that the amounts severally received by the residuary legatees from the estate in California should be taken into account in determining whether the be-

quests to them exceeded \$1,000 in value, and if they do, as it is plain that they do if that rule is to be applied, that when the estate in the hands of the defendant is liable to a legacy and succession tax. We do not understand the defendant to controvert this if the rule contended for by the treasurer and receiver general is the correct rule. The defendant on the other hand contends that the amounts received by the residuary legatees from the California estate should not be taken into account in determining whether the bequests to them exceed \$1,000 in value, and if it should not, then he contends, and the attorney general, as we understand him, concedes, that the tax was unlawfully and improperly assessed.

The testator died in November, 1908. The statute then in force was Stat. 1907, chap. 563, § 1, now Stat. 1909, chap. 490, part 4, § 1. That statute, so far as applicable to the case before us, provides that "all property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the commonwealth or not; which shall pass by will, or by the laws regulating intestate succession, or by deed, grant, or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person, absolutely or in trust, except," etc. Then follow the exceptions, which include husband and wife and children and certain other near relatives and connections of the decedent. These are divided into two classes, A and B. The statute then goes on: "And such property which shall so pass to or for the use of a member of class A shall be subject to a tax on 1 per cent of its value for the use of the common-

are in a foreign state or county, no tax is payable, although the succession devolves upon a resident citizen" (37 Cyc. 1561), would seem to afford no inherent obstacle to holding that, for the purpose of reaching the whole estate of a decedent, foreign property descending to a resident could be considered in connection with local property descending to such resident, in order to bring the total above the exempted amount, so that the local property might be subject to tax. Such a rule would, at least, prevent the scattering of an estate in such manner as to escape all inheritance taxes. whereas, if locally situated, it would have been subject to the tax. However, in jurisdictions such as Massachusetts, where the statutes render it clear that only property within the taxing state may be taken into account in determining exemptions, a rule such as is above suggested could not be applied.

39 L.R.A. (N.S.)

As to effect on transfer tax of apportioning property of nonresident decedent within the state, to payment of debts or legacies which are exempt or subject to a reduced rate, see note to Re Ramsdill, 18 L.R.A. (N.S.) 946.

As to liability to pay transfer or inheritance tax in respect to stock in domestic corporation belonging to the estate of a nonresident, see notes to Neilson v. Russell, 19 L.R.A. (N.S.) 887, and Re Culver, 25 L.R.A. (N.S.) 384.

As to liability of insurance policy issued by a domestic corporation upon the life of a nonresident, to a local transfer tax, see note to Re Gordon, 10 L.R.A. (N.S.) 1089.

The question of the subjection to inheritance tax of debts due to nonresident, secured by mortgage upon land within the state, is treated in the note to Bradley v. Merriam, 9 L.R.A. (N.S.) 1104.

G. J. C.

wealth, if such value does not exceed," etc. The same language is used in regard to class B, except that the tax is 3 per cent instead of 1 per cent. It is manifest that the words "such property" refer to the words with which the section begins, namely: "All property within the jurisdiction of the commonwealth . . . which shall pass by will" or in the manner there specified. In other words, it is on property within the commonwealth, and on that alone that the tax is imposed. The attorney general not only does not controvert this, but agrees that the statute must be so construed. After providing that administrators and executors shall be liable for the taxes, the statute continues: "But no bequest, devise, or distributive share of an estate which shall so pass to or for the use of a husband, wife, father, mother, child, or adopted child of the deceased, unless its value exceeds \$10,000, and no other bequest, devise, or distributive share of an estate, unless its value exceeds \$1,000, shall be subject to the provisions of this part." It is plain, we think, that the "bequests, devise, or distributive share" referred to is of property within the jurisdiction of this commonwealth. The section deals with property in this commonwealth and nowhere else. The word "estate" in the connection in which it is used means, and can only mean, property in this commonwealth. It necessarily follows that, in determining whether "a bequest, devise, or distributive share" is or is not exempt, the treasurer and receiver general has no right to take into account the amount received by the devisees or distributees from property situated in another state or country. To do so would be to tax the devisee or distributee indirectly for such property to an amount equal to the amount of the exemption here, and would be contrary to the principle on which the legacy and succession tax is based, which is that it is "an excise tax upon the privilege of passing the title to property on the death of its owner." *Kingsbury v. Chapin*, 196 Mass. 533, 537, 82 N. E. 700, 702, 13 Ann. Cas. 738. In order to be valid, the tax must be levied by the authority that confers the privilege upon property which passes by virtue of the privilege.

It is immaterial what the practice of the administrative officers of the commonwealth, charged with the duty of collecting legacy and succession taxes, may have been in regard to considering property within and without the commonwealth. It is only when a statute is of doubtful import, and the practice has been long continued and acquiesced in by all parties interested, that it can be resorted to to aid in the construc-

tion of the statute. In the present case we discover no such ambiguity in the meaning of the statute as to justify, as an aid to construction, a resort to the practice of the officers charged with its execution, even if we assume that the practice had been sufficiently long continued to render it otherwise admissible.

There is nothing in the previous history of the statute which tends to show that it should be construed differently from what we have construed it.

Bill dismissed with costs.

WEST VIRGINIA SUPREME COURT OF APPEALS.

L. A. WHITTEN, Appt.,

v.

THOMAS G. WHITTEN et al.

(— W. Va. —, 74 S. E. 237.)

Husband and wife — investments — other's name — gift — trust.

Money of a wife invested in land in the husband's name is presumptively a gift, and, in the absence of facts and circumstances rebutting the presumption, such as violation of a prior or contemporaneous agreement to take the title in the wife's name, ignorance of its having been taken in the husband's name, subsequent expenditure of the wife's money in improvements thereon, an effort on her part to obtain the title after discovery of its condition, control of the property as her own against the husband, or the like, there is no resulting trust in her favor.

(February 27, 1912.)

A PPEAL by plaintiff from a decree of the Circuit Court for Monroe County in defendants' favor in a suit for the partition of certain land. Reversed.

The facts are stated in the opinion.

Messrs. J. H. Crosier and R. L. Clark for appellant.

Messrs. Rowan & Meadows, for appellees. Sull:

If John G. Whitten purchased the land in question, with the separate estate of his

Headnote by POFFENBARGER, J.

Note. — As to the effect of investment by husband in his own name of wife's separate property in real estate to create a trust in her favor, see notes to *Sparks v. Taylor*, 6 L.R.A.(N.S.) 381, and *Wright v. Wright*, 26 L.R.A.(N.S.) 161. For presumption as to common hoard when earnings of both spouses or family are invested in the name of one spouse, see note to *Beck v. Beck*, 35 L.R.A.(N.S.) 713.

wife, and without her knowledge or consent took the title in his own name, a resulting trust arose in favor of his wife, which will be enforced by a court of equity; and if the money so invested was intended as a loan or gift the establishment of this fact devolved on the husband or on those claiming under him.

Standard Mercantile Co. v. Ellis, 48 W. Va. 309, 37 S. E. 593; *Smith v. Turley*, 32 W. Va. 14, 9 S. E. 46; *Berry v. Wiedman*, 40 W. Va. 36, 52 Am. St. Rep. 866, 20 S. E. 817; *Skaggs v. Mann*, 46 W. Va. 209, 32 S. E. 110; *Cresap v. Cresap*, 54 W. Va. 581, 46 S. E. 582; 1 *Beach*, Eq. Pr. § 183; *Perry, Tr.* § 127; *Almond v. Wilson*, 75 Va. 626.

Poffenbarger, J., delivered the opinion of the court:

Sufficiency of the evidence to establish a resulting trust in favor of the devisees of a deceased widow against the heirs of the deceased husband is challenged by this appeal from a decree in a partition suit in favor of the former.

At the time of his death, in 1890, John G. Whitten held the legal title to a tract of land, containing 57 acres, on which he resided, and a small adjacent tract. In 1882, a commissioner of the circuit court of Monroe county conveyed to him and Thos. G. Whitten, his brother, as assignees of H. M. Lockridge, a purchaser at a judicial sale, a tract of 159 acres and 32 poles, out of which the latter, under a voluntary partition, conveyed to the former the 57-acre tract. In 1886, the other small tract was conveyed to John G. He died, in 1890, leaving his wife, Sally A., surviving, who resided on the 57-acre tract until her death, in 1907, leaving a will, bequeathing and devising all of her property, "both personal and real," to Geo. Stull and Cora M. Stull, his wife, subject to the payment of her debts. This suit was brought by a collateral heir of John G. Whitten, his brother, L. A. Whitten, against numerous other heirs, for partition of the land, and the Stulls were made parties to it on their petition, claiming title to all of it by virtue of the will, upon the theory of equitable title in the testatrix by reason of alleged payment of all the purchase money out of money belonging to her, and the court upheld and enforced their claim as to the 57 acres by the decree appealed from.

Three witnesses swear the deceased husband had admitted payment for the land with his wife's money, and her title to it, and his duty to convey it to her. Two of them say \$250 of the purchase money came from her father's estate, one of whom fur-

ther says he was present when Shannon Baker, her brother, paid it either to John G. Whitten or Lockridge. Another says he married into the family, and knows the purchase money came from her father's estate, but details no dates, amounts, or circumstances. Two of them mention an additional sum of \$35, put in on the original transaction with the \$250, which she had saved from the proceeds of sales of farm products. By way of rebuttal, two witnesses say John Baker, the wife's father, died only ten years before the date of their testimony, fifteen years or more after the date of the first purchase. Four witnesses testify to the wife's admissions of title in the husband's heirs, and her inability to sell or dispose of the land, or obtain more than the use of it during her life, but not to any denial of payment of purchase money out of her funds, or admission of payment otherwise. As to the total amount of purchase money, there is no evidence; but the petition, treated as a cross bill, contains an undenied allegation that it was \$400, which, under the rule, is taken as true.

Failing to observe the effect of the relation of husband and wife upon the transaction, relied upon as having vested equitable title in Mrs. Whitten, the decree seems to treat it as one between strangers, in which proof of payment of money alone establishes a resulting trust in favor of him who paid the money; the legal title having been conveyed to another. The marital relation of the parties introduces an exception, not always mentioned, however, in dealing with cases in which it is a factor. The rule as stated in *Skaggs v. Mann*, 46 W. Va. 209, 33 S. E. 110, is somewhat broader than the authority cited for it (*Berry v. Wiedman*, 40 W. Va. 36, 52 Am. St. Rep. 866, 20 S. E. 817), which, though placing the burden upon the husband to prove the money invested was a gift, says the fact is "prima facie established by proof of her knowledge and consent." This qualification is unnoticed in the quotation of the rule in *Skaggs v. Mann*. *Cresap v. Cresap*, 54 W. Va. 581, 46 S. E. 582, observes it. *Deck v. Tabler*, 41 W. Va. 332, 56 Am. St. Rep. 837, 23 S. E. 721; *McClintock v. Loiseau*, 31 W. Va. 865, 2 L.R.A. 816, 8 S. E. 612, and *Lockhard v. Beckley*, 10 W. Va. 87, go further, declaring a presumption of gift without proof of knowledge and consent on the part of the wife whose money has been so invested in the name of the husband, which must be rebutted by proof of her ignorance of the fact, or her objection to the form of the conveyance, or some other fact inconsistent with the presumption.

This subject is more thoroughly considered in *McGinnis v. Curry*, 13 W. Va. 29, than in any other of our decisions. There the deed was taken in the husband's name with the approbation of the wife, but Judge Green clearly expresses the opinion that the result ought to have been the same in the absence of proof of that fact. In other words, he thought the burden was upon the wife to negative the presumption of a gift. We read: "It is equally well settled that such a resulting trust will not arise, where the party who advanced the purchase money bears certain close relations to the party in whose name the deed is taken. If a father advances the purchase money, for instance, and the deed is taken in the name of a wife or child. *Shaw v. Read*, 47 Pa. 96. So, too, if a grandparent advances the purchase money, and the deed be taken in the name of a grandchild, even though the father be not dead, the presumption would be that it was intended as a gift, and no remitting trust would arise. This is a legitimate inference from the English cases. See *Ebrand v. Dancer*, 2 Ch. Cas. 26; *Lloyd v. Read*, 1 P. Wms. 607; *Kilpin v. Kilpin*, 1 Myl. & K. 520. In these and other instances, in which the law presumes that the person advancing the money intended it as a gift to the person in whose name the deed is made, this presumption is one of fact, and not of law, and may be rebutted by evidence or circumstances. The presumption, that the advancement of the purchase money was intended as a gift is not confined to the case where the person making the advancement was under legal obligations to support the other party. A grandparent is under no such obligation to support a grandchild, especially when its father is living; and yet the more recent English cases, above cited, assume that a gift would be presumed in such a case, where a deed is taken in the name of the grandchild, and the purchase money advanced by the grandparent."

The following from Schouler's *Dom. Rel.* § 119, agrees with this view: "So, too, land or other property bought by the husband with his wife's money, but in his own name, and without any agreement that the purchase shall be to her separate use, or the title taken in her name, will not, as a rule, as presumptions have ruled hitherto, be treated as her separate property." Wells, *Separate Property of Married Women*, § 212, conforms, saying: "Something depends on the form of the conveyance, and more still probably on the intent of the transaction. Where her money pays for the land, and the deed is taken in the name of the husband and wife

jointly, and their heirs and assigns, and there is no evidence of an intention on her part to create a trust, the legal inference is that she thereby conferred an interest on her husband, such as the deed expresses; and no trust by operation of law will arise for herself or her heirs." So does Bishop *Law of Married Women*, vol. 2, § 118, quoting the following with approval: "The authorities simply show that the same facts which would raise a resulting trust as between strangers do not necessarily do so as between parent and child, or husband and wife; the presumption in such cases being, until rebutted, that an advancement or provision was intended, but this presumption being liable to rebuttal. There is, therefore, no uniform and unbending rule. The question resolves itself into one of intent; and each case, subject to those general prima facie presumptions, must depend upon its individual facts."

However the rule may have been stated from time to time, the fact is that, in every case in which this court has upheld and enforced a claim to a resulting trust in favor of a wife as against the heirs of her husband, she has clearly rebutted the presumption of a gift. In *Skaggs v. Mann* a prior or contemporaneous agreement to take the deed in the wife's name, and her ignorance of the breach of that agreement, were shown. In *Berry v. Wiedman* the chief value of the property was in the improvements made by the wife, at her own cost, subsequent to the purchase of the land. Her uniform claim of ownership and recognized control of the property, during her husband's life, were also shown. In *Cresap v. Cresap* the allegations treated as sufficient on demurrer were substantially that the property had been conveyed to the husband without the knowledge or consent of the wife, and that, on discovery of the fact, she had repeatedly demanded a conveyance to her, which was promised, but never executed. An equally strong case on the facts was shown in *Standard Mercantile Co. v. Ellis*, 48 W. Va. 309, 37 S. E. 593. We quote: "The proof appears to plainly establish that the property was paid for with the wife's money, and was to be deeded to her, but that the title bond, without her knowledge or consent, and apparently without his knowledge, was taken in his name. When she discovered this, she sent the title bond by her son to have a deed for the property made to herself." This conduct of the wife clearly negated the presumption.

The presumption of a gift under such circumstances accords with general legal principles. Ordinarily services rendered by one of two persons standing in close re-

lationship, by blood or marriage, to the other, is in law gratuitous, unless an express agreement to compensate, or facts from which it arises by inference, is shown. In the absence of a contrary agreement, express or shown by circumstances importing it, property passing from one of such persons to the other is ordinarily deemed a gift. Money of the husband invested in the name of the wife is always *prima facie* a gift. Why should not the money of a wife invested in the name of the husband be so regarded? By the weight of authority, here as elsewhere, it is, as we have shown.

Proof of Mrs. Whitten's ignorance of the character of the conveyance and of violation of any prior or contemporaneous agreement is wholly lacking. She furnished only a part of the money. Knowing the title was in her husband's name before his death, she made no demand for it, and died, leaving it in his heirs; and her will makes no specific reference to it. Moreover, she died believing she had no title to it. There is no proof of any improvements of the property at her expense. So the facts and circumstances, considered as a whole, confirm rather than repel the natural presumption of a gift.

Record title in the heirs ought to be overcome by clear and explicit evidence, if at all. *Prima facie*, they are the owners of the property. Ordinarily written evidence of title to land is required. Title resting on oral evidence is recognized in a few instances, but in all such cases clear and full proof is required. *Smith v. Turley*, 32 W. Va. 14, 9 S. E. 46. In neither character nor quantity does the evidence here measure up to this requirement.

Our conclusion is to reverse the decree, dismiss the petition of George Stull and Cora M. Stull, treated as a cross bill, and remand the cause for further proceedings.

OHIO SUPREME COURT.

GEORGE W. KISER, Plff. in Err.,
v.

BOARD OF COUNTY COMMISSIONERS
OF LOGAN COUNTY et al.

(85 Ohio St. 129, 97 N. E. 52.)

Constitutional law — removal of milldams — compensation.

The amendment, in parentheses, to Revised Statutes 1880, § 4567c, passed March 23, 1893 (90 O. L. 123), authorizes the taking of private property in the improvement of, and removal of an obstruction from, a

living stream for the public benefit, without compensation to the owner, in violation of article 1, § 19, of the Constitution, and is therefore null and void.

(November 21, 1911.)

ERROR to the Circuit Court for Logan County to review a judgment affirming a judgment of the Court of Common Pleas in defendants' favor in an action brought to restrain defendants from removing plaintiff's milldam and destroying the water power and water rights enjoyed by him. Reversed.

Statement by Davis, J.:

On the 5th day of August, 1909, George W. Kiser, the plaintiff in error, commenced his action in the court of common pleas of Logan county, Ohio, to restrain the above-named defendant in error from removing his milldam and destroying the water power afforded thereby and the water rights theretofore enjoyed by him, which they were threatening to do in pursuance of the findings and orders of the board of county commissioners of Logan county, Ohio, in a proceeding on the petition of Mary Connolly, C. K. Hartzler, and others, under §§ 4567a, 4567b, and 4567c of the Revised Statutes of Ohio, all without allowing or paying to him any compensation. Among other grounds for injunction, the plaintiff in error, in his said petition below, complained that all the said proceedings and

Note. — Right to take private property for public use without compensation on the theory that it has been abandoned.

No other decision has been disclosed on this question.

Acts providing for the taking of water rights in case of abandonment have been given effect where provision for compensation was made.

In *Curtiss v. Smith*, 35 Conn. 156, a statute of this kind was construed, and the report of the committee assessing damages was accepted and judgment rendered for the amount assessed. The act in this case provided that "no such dam shall be erected to the injury of any mill lawfully existing either above or below it on the same stream, or to the injury of any mill site on the same stream on which a mill or milldam shall have been lawfully erected and used, unless the right to maintain a mill on such last-mentioned site shall have been lost or defeated by abandonment or otherwise." It was held that this act did not contemplate a literal loss of the right to use such mill site, but only such a neglect on the part of the owner as showed that he did not again intend improving it for milling purposes. The court said: "The difficulty in the case seems to be in ascertaining in what sense

orders of said board are void, for the reason that the provisions of said sections of the statute are in conflict with § 19, art. 1, of the Constitution of Ohio. On the 5th day of August, 1909, a temporary injunction was allowed, and an undertaking was filed and approved. On the 30th day of September, 1909, the answer of all the defendants below was filed. On the 18th day of October, 1909, plaintiff below filed his motion to reform said answer, which motion was overruled by the court of common pleas, on the 22d of November, 1909. On the 30th day of April, 1910, the cause was heard on the petition, answer, and evidence, and that court thereupon found and decreed for the defendants. The plaintiff, having filed his appeal bond on the 6th day of May, 1910, perfected his appeal to the circuit court of Logan county. The plaintiff, at the October term of the circuit court, 1910, on leave, withdrew his said motion to reform the answer, and filed his motion for judgment on the pleadings; that the proceedings and orders alleged in the plaintiff's petition are void, and that the temporary injunction theretofore allowed be made perpetual, and for costs; on consideration whereof the circuit court overruled the same, and, the plaintiff not desiring to offer any evidence, said cause was submitted to the court on said petition and answer, and on consideration the circuit court found and decreed for the defendants, dissolved said injunction, and dismissed said petition, and gave judg-

the legislature intended to be understood by the language used. If we construe it literally, it is difficult to see how a person who owns a mill site could in any case lose the right to maintain a mill on it by abandonment or otherwise. A mill site comprehends not only the site of the mill building, but also the water power connected therewith for milling purposes. Now, inasmuch as a party has absolute dominion over his own property, subject only to the right of eminent domain on the part of the government, in what sense can it be said that, by abandonment or otherwise, he can lose the right to maintain a mill upon a mill site that he owns? If the right is lost, where has it gone? If another has acquired it, by prescription or otherwise, that person is now the owner, and these proceedings should be brought against him, when the same question would arise. . . . This statute unmistakably shows a desire and intention on the part of the legislature, that all the water power of the state shall be improved by somebody for milling purposes. A preference is shown for the owner, and if it appears in a given case that a mill or mill dam has been erected and used upon a mill site, it shall be deemed to be sufficient assurance that it will be improved again by the owner for milling purposes, and the mill site shall be exempt 39 L.R.A. (N.S.)

ment against the plaintiff for costs. The plaintiff in error has filed his petition in error in this court to reverse the judgments of the circuit court and court of common pleas.

Mr. James Kernan, for plaintiff in error:

The provision of the statutes authorizing the board to appropriate, take, and destroy this private property, "without bargain or compensation," is void.

Smith v. Atlantic & G. W. R. Co. 25 Ohio St. 91; *Norton v. McLeary*, 8 Ohio St. 209; *Reckner v. Warner*, 22 Ohio St. 275.

Mr. Ernest Thompson, for defendants in error:

The private rights in easements which no longer serve the purpose for which said easement was originally created, are not paramount, but are subservient to the "public health, convenience, and welfare."

Sessions v. Crunkilton, 20 Ohio St. 349; 22 Am. & Eng. Enc. Law, 916, 919; *People ex rel. New York Electric Lines Co. v. Squire*, 107 N. Y. 503, 14 N. E. 820, affirmed in 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. Rep. 880; *Com. v. Alger*, 7 Cush. 53; *Bowditch v. Boston*, 101 U. S. 16, 25 L. ed. 980; *Carthage v. Frederick*, 122 N. Y. 268, 10 L.R.A. 178, 19 Am. St. Rep. 490, 25 N. E. 480; *Arnold v. Yanders*, 56 Ohio St. 417, 60 Am. St. Rep. 753, 47 N. E. 50; *Marmet v. State*, 45 Ohio St. 63, 12 N. E. 463; *Lawton v. Steele*, 152 U. S. 133, 38

from the operation of the statute, unless it appears that, by long-continued nonuser, all intention so to improve it at any time has been abandoned, when all right on the part of the owner so to improve it, in preference to other proprietors on the stream, shall be deemed to be lost or defeated by abandonment or otherwise. It shall be preserved to him, and he shall have the right to maintain a mill on the site in preference to others, so long as there is any reasonable expectation that the object that the statute has in view will be carried out by the owner; but when that ceases to exist, his preferred right to maintain a mill on the site becomes lost or defeated by abandonment or otherwise. It may be said that, in the exercise of the right of eminent domain, the law appropriates all mill sites to public use, but leaves the privilege of carrying out the object of the statute in each particular case to the owner and other proprietors on the stream. To the owner it gives a superior right, and to the other proprietors an inchoate right, to the same mill site. If the owner abandons his privilege, then his superior right is gone, and the case is the same as it would have been if no mill or milldam had ever been erected on the site, and the maxim applies, *prior tempore prior jure*. No other sensible construction can be given to the statute." J. T. W.

L. ed. 385, 14 Sup. Ct. Rep. 499; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *New Orleans Waterworks Co. v. St. Tammany Waterworks Co.* 4 Woods, 134, 14 Fed. 194.

Davis, J., delivered the opinion of the court:

Whether or not a proprietor has abandoned his rights or his property is usually a question of fact for the jury to answer, and the answer must depend primarily upon an intention by the proprietor to abandon. This must be found from all the facts and circumstances of the case. But mere non-user is not ordinarily sufficient to establish the fact of abandonment; and both reason and authority suggest a doubt whether non-user for a period of statutory limitation, as in this case five years, would be proof of abandonment, unless accompanied by a possession adverse to the proprietor. In this case, however, we may put aside consideration of the sufficiency of the findings by the county commissioners, and we may even waive all questions concerning the authority of the general assembly to declare property or rights to be abandoned upon such findings, because the case may be readily resolved upon another objection to the statute under which these proceedings were had.

The parenthetic provision of the statute which controls this case was inserted by amendment, in an act passed April 11, 1884 (81 O. L. 135), and is as follows: "(But in any case where a mill has become useless or has been destroyed, and has so remained for more than ten years, without any attempt to repair or rebuild the same, the milldam and water rights and privileges belonging to the same shall be deemed abandoned, and the right thereto, as against the public health, convenience, and welfare, under this act, shall cease and be barred; and the commissioners may, under this act, without bargain or compensation, cause such milldam to be removed, and the water course upon which it is located cleaned out and improved, when an apportionment has been made, as hereinbefore stated.)"

By an act passed March 23, 1893 (90 O. L. 123), the period of limitation in the provision above quoted was changed from ten to five years; and so it has remained.

If it be conceded that "such milldam"—that is, a milldam existing under the conditions stated in this amendment—may be seized and destroyed by the county commissioners for the public welfare, yet it is apparent that, so long as any value, however small, remains in the milldam and water rights, the taking of it, "without bar-

gain or compensation," is a violation of article 1, § 19, of the Constitution of Ohio.

The argument is made that the Constitution emanated from the people, and that the welfare of the people is paramount to any private interest. Very true, but written Constitutions have heretofore been framed chiefly to protect the weak from the strong, and to secure to all the people "equal protection and benefit." They have been constructed upon the theory that majorities can and will take care of themselves; but that the safety and happiness of individuals and minorities need to be secured by guaranties and limitations in the social compact, called a "Constitution." Hence, while it is declared in article 1, § 19, of our Constitution, that private property shall be held "subservient to the public welfare," it is also declared that it shall ever be held inviolate, and shall not be taken for the public use without compensation, in most cases compensation first to be made in money.

It is regrettable that there should be an apparent necessity for restating such familiar principles; but there seems to be a growing disposition to legislate, by ordinance and by general statute, regardless of constitutional limitations, thus imposing upon the courts the odium of declaring them to be unconstitutional.

A further contention is made that the plaintiff in error has lost all of his property rights, "as against the public health, convenience, and welfare," because of nonuser and failure to repair for more than five years, when the amendment to Revised Statutes, § 4567c, declares that in such case "the milldam and water rights and privileges belonging to the same shall be deemed abandoned, and the right thereto as against the public health, convenience, and welfare, under this act, shall cease and be barred." Waiving, as we did at the outset, any question as to the legislative power to so declare, and granting the contention to be true as a general proposition, it seems to us that there are at least two answers to it in the present case.

This is not a prosecution for nuisance, nor a proceeding to abate a nuisance. It is a proceeding under §§ 4567a, 4567b, and 4567c of the Revised Statutes for the improvement of a living stream by the removal of a milldam alleged to hinder the free passage of water in the natural channel of such stream. In § 4567c, excepting, of course, the amendment in parentheses, which is now under review, the legislature recognized the constitutional right of the owner to compensation and damages. The removal of a dam under this act is called an improvement for the public welfare. It is declared that "if they [the commissioners]

find that such improvement and removal . . . will be conducive to the public health, convenience, or welfare, they shall report their findings in writing and order the auditor to enter the same on the journal, and they shall at once proceed to negotiate with the owner or owners for the purchase of such milldam or milldams, of all rights, title, and interest they may have to or in the same," etc. Elsewhere in the same section provision is made for ascertaining and apportioning compensation and damages upon failure to agree with the owner or owners, or upon objections by the petitioners.

Then follows this amendment, which attempts to foreclose inquiry into the fact of abandonment, and declares that upon the mere nonuser and failure to repair for more than five years, "the same shall be deemed abandoned," and the commissioners are authorized to proceed, "without bargain or compensation," to remove the dam and to clean out and improve the water course.

There can be no doubt that the dam and water rights belonging to the plaintiff in error could have been removed in the improvement of the living stream for the public welfare, just as in the other cases provided for in these sections, because all private property in held "subservient to the public welfare," whether it has been abandoned or not; but "private property shall ever be held inviolate" (Const. art. 1, § 19), and when the owner is compelled to yield his rights to public use, he is guaranteed compensation. Therefore, when the legislature undertook to authorize the commissioners to seize the property of the plaintiff in error, "without bargain or compensation," it went entirely beyond the limitations of the Constitution.

Again, the defendants in error are estopped by their own answer in this case from making this contention. 31 Cyc. 87-90. Answering the plaintiff's petition, they expressly admit the first allegation therein, namely, "that the plaintiff is the owner of the milldam and water rights sought by the proceedings and orders mentioned and referred to in his petition to be destroyed," etc. If he is still the owner of the dam and water rights, he has not lost them. If the property is of any value whatever, whether a mill or a million, he is entitled to compensation under the Constitution. Therefore the amendment of Revised Statutes, § 4567c, in parentheses, passed April 11, 1884 (81 O. L. 135), and itself amended March 23, 1893 (90 O. L. 123), is null and void, because it is in conflict with article 1, § 19, of the Constitution.

The judgment of the Circuit Court and the judgment of the Court of Common Pleas 39 L.R.A. (N.S.)

are reversed, and injunction made perpetual, as prayed in plaintiff's petition.

Spear, Ch. J., and Shauck, Price, Johnson, and Donahue, JJ., concur.

OKLAHOMA SUPREME COURT.

EXCHANGE BANK OF WEWOKA et al,
Plffs. in Err.,
v.
SAMUEL BAILEY.

(29 Okla. 246, 116 Pac. 812.)

Receiver — mismanaged corporation — rights of minority.

1. Where the property of a corporation is being mismanaged, or is in danger of being lost to the stockholders and creditors through mismanagement, collusion, or fraud of its officers and directors, a court of

Headnotes by HAYES, J.

Note. — Inherent jurisdiction of equity, independently of statute, at the instance of stockholder, to appoint a receiver or wind up a corporation because of mismanagement or fraud of its officers.

I. General rule, 1032.

II. Where fraud or mismanagement is charged.

a. Dissolution of corporation, 1034.

b. Appointment of receiver.

1. In general, 1038.

2. Receiver *pendente lite*, 1041.

III. Where corporation is no longer a going concern, 1043.

IV. Where purpose of organization is impossible of attainment, 1044.

I. General rule.

The general rule has been asserted that corporations are the creatures of the state, hence, in general, their life depends upon the action of the state or the stockholders as a whole; and especially if a going concern whose charter or franchise has not yet expired, they cannot, in the absence of statute, be dissolved at the instance of a stockholder by an action in equity for that purpose, and therefore equity is without jurisdiction of a suit by a stockholder, the principal purpose of which is to wind up the affairs of the corporation or to have a receiver appointed with that end in view. (As appears in the next subdivision some of the jurisdictions make an exception in case of fraud or mismanagement, and other exceptions also are subsequently noted.)

Fed.—Republican Mountain Silver Mines v. Brown, 24 L.R.A. 776, 7 C. C. A. 412; 19 U. S. App. 203, 58 Fed. 644; Taylor v. Decatur Mineral & Land Co. 112 Fed. 449, Affirmed in 52 C. C. A. 686, 115 Fed. 1022;

equity has inherent power to appoint a receiver for the property of such corporation, and to require the officers to make an accounting, upon petition of a minority stockholder therefor.

Corporation — suit by stockholder — request for action.

2. Where the officers, of whose mismanagement and misconduct of plaintiff stockholder complains, are in control of the corporation, both by being the officers thereof and the holders of a majority of the stock, it is not necessary for a complaining stockholder to show as a condition necessary to maintain his suit, that he first made demand on said officers to proceed on behalf of the corporation to remedy the wrongs complained of.

(July 11, 1911.)

Conklin v. United States Shipbuilding Co. 140 Fed. 219; Pearce v. Sutherland, 90 C. C. A. 519, 164 Fed. 609; Re Electric Supply Co. 175 Fed. 612; Lyon v. McKeefrey, 96 C. C. A. 340, 171 Fed. 384; Hardon v. Newton, 14 Blatchf. 376, Fed. Cas. No. 6, 054.

Cal.—Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508, 1 Mor. Min. Rep. 80; State Invest. & Ins. Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549; Davis v. Randall, 117 Cal. 12, 48 Pac. 906.

Colo.—People ex rel. Daniels v. District Ct. 33 Colo. 293, 80 Pac. 908.

Ga.—Croft v. Lumpkin Chestattee Min. Co. 61 Ga. 465.

Ill.—Wheeler v. Pullman Iron & Steel Co. 143 Ill. 197, 17 L.R.A. 818, 32 N. E. 420; People v. Weigley, 155 Ill. 491, 40 N. E. 300; Coquard v. National Linseed Oil Co. 171 Ill. 480, 49 N. E. 563; Bixler v. Sumnerfield, 195 Ill. 147, 62 N. E. 849.

Ind.—Wayne Pike Co. v. Hammons, 129 Ind. 368, 27 N. E. 487; Supreme Sitting, O. I. H. v. Baker, 134 Ind. 293, 20 L.R.A. 210, 33 N. E. 1128.

Iowa.—French v. Gifford, 30 Iowa, 148; Wallace v. Pierce-Wallace Pub. Co. 101 Iowa, 313, 38 L.R.A. 122, 63 Am. St. Rep. 389, 70 N. W. 216; Stewart v. Pierce, 116 Iowa, 751, 89 N. W. 234.

Kan.—Feesas v. Mechanics' State Bank, 84 Kan. 828, —L.R.A. (N.S.) —, 115 Pac. 563.

Ky.—Oldham v. Mt. Sterling Improv. Co. 103 Ky. 529, 45 S. W. 779; Com. v. Richardson, 29 Ky. L. Rep. 622, 94 S. W. 639.

La.—Baker v. Louisiana Portable R. Co. 34 La. Ann. 754.

Me.—Ulmer v. Maine Real Estate Co. 93 Me. 324, 45 Atl. 40.

Md.—Mason v. Supreme Court, E. L. 77 Md. 483, 39 Am. St. Rep. 433, 27 Atl. 171; Barton v. International Fraternal Alliance, 85 Md. 14, 36 Atl. 658.

Mo.—State ex rel. Donnell v. Foster, 225 Mo. 171, 125 S. W. 184.

Mont.—State ex rel. Independent Dist. Teleg. Co. v. Second Judicial Dist. Ct. 15 Mont. 324, 27 L.R.A. 392, 48 Am. St. Rep. 682, 39 Pac. 316.

Neb.—Vila v. Grand Island Electric 39 L.R.A. (N.S.)

ERROR to the District Court for Semi-nole County to review a judgment in plaintiff's favor, and an order granting a new trial and refusing to vacate and set aside the same, in a suit for the dissolution of a corporation and for the appointment of a receiver. Affirmed.

The facts are stated in the opinion.

Mr. Aubrey M. Fowler, for plaintiffs in error:

Unless power has been expressly conferred by statute upon courts of equity, such courts have no jurisdiction to dissolve a corporation and decree the winding up of its affairs at the suit of a stockholder.

O'Connor v. Knoxville Hotel Co. 93 Tenn. 708, 28 S. W. 308; People ex rel. Daniels

Light Ice & Cold Storage Co. 68 Neb. 222, 63 L.R.A. 791, 110 Am. St. Rep. 400, 94 N. W. 136, 97 N. W. 613, 4 Ann. Cas. 59.

N. J.—Benedict v. Columbus Constr. Co. 49 N. J. Eq. 23, 23 Atl. 485.

N. Y.—Denike v. New York & R. Lime & Cement Co. 80 N. Y. 590; Abbott v. American Hard Rubber Co. 33 Barb. 578; Latimer v. Eddy, 46 Barb. 61; Gilman v. Green Point Sugar Co. 61 Barb. 9; Magee v. Genesee Academy, 17 N. Y. S. R. 221, 1 N. Y. Supp. 709; Ramsey v. Erie R. Co. 7 Abb. Pr. N. S. 156; Bliven v. Peru Steel & I. Co. 60 How. Pr. 280; Verplanck v. Mercantile Ins. Co. 1 Edw. Ch. 84.

Ohio.—Cincinnati, H. & D. R. Co. v. Duckworth, 2 Ohio C. C. 518, 1 Ohio C. D. 618; Robison v. Cleveland City R. Co. 7 Ohio S. & C. P. Dec. 312; Cronin v. Potters' Co-op. Co. 11 Ohio Dec. Reprint. 748, 29 Ohio L. J. 52; North Fairmount Bldg. & Sav. Co. v. Rehn, 8 Ohio S. & C. P. Dec. 594.

Or.—Wills v. Nehalem Coal Co. 52 Or. 70, 96 Pac. 528.

Tenn.—State v. Merchants' Ins. & T. Co. 8 Humph. 235.

Tex.—People's Invest. Co. v. Crawford, — Tex. Civ. App. —, 45 S. W. 738.

Wis.—Strong v. McCagg, 55 Wis. 624, 13 N. W. 895; Hinckley v. Pfister, 83 Wis. 64, 53 N. W. 21.

A court of chancery by virtue of its general equity powers, in the absence of express statutory authority, is not authorized to dissolve a corporation, or distribute the assets of a corporation pursuing its ordinary business, so as to effect a practical dissolution of the corporation. Hardon v. Newton, 14 Blatchf. 376, Fed. Cas. No. 6,054.

The reason for denying equity jurisdiction to wind up the affairs of a corporation has been stated thus: "A corporation owes its life to the sovereign power, and under what circumstances it shall forfeit or be deprived of that life depends upon the same power. A corporation may be dissolved by forfeiture through abuse or neglect of its franchises; but such forfeiture, unless there be special provisions by statute, can only be enforced by the sovereign in some proceeding instituted in its

v. District Ct. 33 Colo. 293, 80 Pac. 908; People's Invest. Co. v. Crawford, — Tex. Civ. App. —, 45 S. W. 738; Smith, Receiverships § 342; Baker v. Backus, 32 Ill. 79; Oldham v. Mt. Sterling Improv. Co. 103 Ky. 529, 45 S. W. 779; Philadelphia & M. R. Co.'s Petition, 187 Pa. 123, 40 Atl. 967; State v. Merchants' Ins. & Trust Co. 8 Humph. 235; Hinckley v. Pfister, 83 Wis. 64, 53 N. W. 21; Strong v. McCagg, 55 Wis. 624, 13 N. W. 895; Galveston, H. & S. A. R. Co. v. State, 81 Tex. 573, 17 S. W. 67; Denike v. New York & R. Lime & Cement Co. 80 N. Y. 599; Utah, N. & C. R. Co. v. Utah & C. R. Co. 110 Fed. 879; Worth Mfg. Co. v. Bingham, 54 C. C. A. 119, 116 Fed. 785; 2 Cook, Corp. 1768, § 629; Com. v. Richardson, 29

Ky. L. Rep. 622, 94 S. W. 639; Heap v. Heap Mfg. Co. 97 Mich. 147, 56 N. W. 349; Ulmer v. Maine Real Estate Co. 93 Me. 324, 45 Atl. 40; Decker v. Gardner, 124 N. Y. 334, 11 L.R.A. 480, 26 N. E. 814; Wheeler v. Pullman Iron & Steel Co. 143 Ill. 197, 17 L.R.A. 818, 32 N. E. 420; Coquard v. National Linseed Oil Co. 171 Ill. 480, 49 N. E. 563; People ex rel. Port Huron & G. R. Co. v. Circuit Judge, 31 Mich. 456; Baker v. Louisiana Portable R. Co. 34 La. Ann. 754; French v. Gifford, 30 Iowa, 148; Supreme Sitting, O. I. H. v. Baker, 134 Ind. 293, 20 L.R.A. 210, 33 N. E. 1122.

Equity has no jurisdiction in accounting, because the demands as alleged in the bill were not disputed, being evidenced by

behalf." Denike v. New York & R. Lime & Cement Co. 80 N. Y. 599.

On this point, in Robertson v. Bullions, 11 N. Y. 243, the court reasoned; "If it be admitted that a court of equity has power, by virtue of its general jurisdiction over every species of trust, to interfere at the instance of a corporator, in cases of gross violation of duty by the managing officers of a civil corporation, which is at least doubtful, the question still remains, How may this jurisdiction be exercised? Does it extend to the removal of the officers of the corporation? It is difficult to conceive from what source the court, independent of legislative enactment, could derive such a power. This class of officers receive their authority directly from the sovereignty of the state. The statute prescribes their qualifications, the mode of their election, and the tenure of their officers. What power has the court of chancery, or any other court, to set aside the statute, to impose conditions to the holding of the office which the statute does not impose? There is a wide difference between this description of officers and mere private trustees, whose powers rest solely upon individual contract. There, if the conditions of the contract be violated, the office is rightfully forfeited; and the court may enforce this forfeiture at the instance of the party aggrieved. But the powers of corporate officers have a source above that of mere private contract, over which the court of chancery has no paramount authority. No such power was ever asserted or claimed by the English court of chancery."

II. Where fraud or mismanagement is charged.

a. Dissolution of corporation.

In some of the foregoing cases, equity jurisdiction to dissolve a corporation at the instance of the stockholder was denied, although fraud or mismanagement of the affairs of the corporation by its officers was charged. The question whether such charge constituted an exception to the general rule 39 L.R.A. (N.S.)

was not, however, specifically considered, the general rule being asserted and applied without discussing this point. But even where the question has been squarely raised, in many jurisdictions it has been denied that fraud or mismanagement of the corporate property by its officers affords any ground for equity jurisdiction to dissolve the corporation in a suit by a stockholder. Chandler Mortg. Co. v. Loring, 113 Ill. App. 423; French v. Gifford, 30 Iowa, 148; Wallace v. Pierce-Wallace Pub. Co. 101 Iowa, 313, 38 L.R.A. 122, 63 Am. St. Rep. 389, 70 N. W. 216; Mason v. Supreme Court, E. L. 77 Md. 485, 39 Am. St. Rep. 433, 27 Atl. 171; Barton v. International Fraternal Alliance, 85 Md. 14, 36 Atl. 658; State ex rel. Donnell v. Foster, 225 Mo. 171, 125 S. W. 184; Vila v. Grand Island Electric Light, Ice & Cold Storage Co. 68 Neb. 232, 63 L.R.A. 791, 110 Am. St. Rep. 400, 94 N. W. 136, 97 N. W. 613, 4 Ann. Cas. 59; People's Invest. Co. v. Crawford, — Tex. Civ. App. —, 45 S. W. 738.

Thus, it has been asserted that the infidelity or misconduct of some or even of all of the trustees or managers of a corporation affords no ground for taking away the rights of shareholders who constitute the company, either by dissolving it or taking away its management and placing it in the hands of an officer of the court. In such a case, the principles of remedial or preventive justice go no farther than to enjoin or forbid the misconduct, or remove the unfaithful officer. A court may enjoin the trustee or suspend or remove him, and if necessary may order a new election, but cannot substitute its own officer. Waterbury v. Merchants' Union Exp. Co. 50 Barb. 157; Belmont v. Erie R. Co. 52 Barb. 637.

And the rule has been stated that, in the absence of statutes enlarging the powers, the general rule is that a court possessed with chancery powers merely has no jurisdiction, at the suit of a stockholder, to dissolve a corporation and decree its winding up for the misuser or nonuser of its franchise, or for any other cause. Wills v. Nehalem Coal Co. 52 Or. 70, 96 Pac. 528.

note and overdraft, definite and certain; and the only thing the corporation could recover in this action, or anyone for it, was a money judgment.

Gaines v. Miller, 111 U. S. 305, 28 L. ed. 466, 4 Sup. Ct. Rep. 426; Bolt v. Gray, 54 S. C. 95, 32 S. E. 148; Boyce v. Allen, 105 Iowa, 249, 74 N. W. 948; 1 Pom. Eq. Jur. 3d ed. § 178; Shields v. Barrow, 17 How. 130, 15 L. ed. 158; Schwalber v. Ehlman, 62 N. J. Eq. 314, 49 Atl. 1085; Norden v. Buck, 79 Minn. 352, 82 N. W. 644; Galusha v. Wendt, 114 Iowa, 597, 87 N. W. 512; Kuhl v. Pierce County, 44 Neb. 584, 62 N. W. 1066; Whitney v. Fairbanks, 54 Fed. 985; Paton v. Majors, 46 Fed. 210; Buzard v. Houston, 119 U. S. 347, 30 L. ed. 451, 7 Sup. Ct. Rep. 249; Security Sav.

& L. Asso. v. Buchanan, 14 C. C. A. 97, 31 U. S. App. 244, 66 Fed. 799; Merrill v. Lake, 16 Ohio, 377, 47 Am. Dec. 377; Jewett v. Bowman, 29 N. J. Eq. 174; Badger v. McNamara, 123 Mass. 117; Passyunk Bldg. Asso's Appeal, 83 Pa. 441; Norwich & W. R. Co. v. Storey, 17 Conn. 370; Long v. Cochran, 9 Phila. 287; Santacruz v. Santacruz, 44 Miss. 720; Youngblood v. Youngblood, 54 Ala. 486; Huff v. Ripley, 58 Ga. 11; Suter v. Matthews, 115 Mass. 253.

The evidence of complainant upon the hearing is much weaker than the averments in his bill, and the evidence nowhere, and in no manner, supports, or even hints at, the intimation alleged in the bill; and in no manner empowers the court to grant the

And that, in the absence of a permissive statute, courts of equity have no power to dissolve a going business corporation, and to that end appoint a receiver for the sequestration of the corporate property, even though fraud on the part of the officers of the corporation is alleged. People ex rel. Daniels v. District Court, 33 Colo. 293, 80 Pac. 908.

Compare with Jones v. Pearl Min. Co. 20 Colo. 417, 38 Pac. 700, sustaining a bill in equity on demurrer, although the relief sought was the appointment of a receiver and the dissolution of a corporation on the ground that the directors were guilty of negligence, fraud and mismanagement of the corporate business, as well as *ultra vires* acts. The court said that the relief sought was general, and any relief might be awarded to which, upon the hearing, the facts showed that the stockholders were entitled, and hence it was unnecessary to consider the particular relief which should be granted.

In the absence of statutes to that effect, a court of equity has no jurisdiction over a corporation for the purpose of restraining their operations or winding up their concerns, and the court, by the appointment of a receiver and the sale of corporate property and a settlement of the affairs of the corporation, cannot accomplish in an indirect way that which it has no power to accomplish directly. Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508, 1 Mor. Min. Rep. 80.

The general rule has been asserted in Ohio that, unless expressly authorized by statute, equity has no jurisdiction to decree the dissolution of a corporation at the instance of a stockholder thereof. Cincinnati, H. & D. R. Co. v. Duckworth, 2 Ohio C. C. 518, 1 Ohio C. D. 618.

And it has been said that this rule applies although the officers of the corporation have wasted and misapplied its funds. Robison v. Cleveland City R. Co. 7 Ohio S. & C. P. Dec. 312.

Or are managing the affairs of the corporation in their own interests, and especially in the interests of one of them. 39 L.R.A. (N.S.)

Cronin v. Potters' Co-op. Co. 11 Ohio Dec. Reprint, 748, 29 Ohio L. J. 52.

And it has been said that this rule applies although it is alleged that the corporation is insolvent, and the directors have been guilty of mismanagement and fraudulent acts in the performance of their duties as directors. North Fairmount Bldg. & Sav. Co. 8 Ohio S. & C. P. Dec. 594, 6 Ohio N. P. 185.

And, while conceding that a stockholder is entitled to injunctive relief where he shows that a person holding a majority of the stock of a corporation is director, president, and treasurer of the company, and is wrongfully using its property to the injury of the minority of the stockholders, and to his own advantage, it has been held that such facts do not entitle him to a dissolution of the corporation, in the absence of a statute authorizing equity to grant such relief. Bixler v. Summerfield, 195 Ill. 147, 62 N. E. 849.

On the other hand, in *Thoroughgood v. Georgetown Water Co.* — Del. Ch. —, 77 Atl. 720, while the general doctrine is recognized that there is no inherent power in a court of equity to appoint receivers of corporations on the ground of insolvency, yet it is asserted that where, as a basis for such interference, gross mismanagement, positive misconduct, or other grounds showing a breach of trust on the part of the officers of the corporation, are alleged or established, courts of equity do, independently of statute, appoint receivers of corporations, and through them take possession of the property of the corporation to administer their affairs, enjoin interference by their officers, collect their assets, convert their property into money, wind up their affairs, and distribute the assets among the creditors and stockholders.

A case passing upon this question, which has caused considerable comment in that it fully sustains the power of a court of equity to appoint a receiver of the corporation at the instance of the stockholder, and even to dissolve the corporation, is *Miner v. Belle Isle Ice Co.* 93 Mich. 97, 17 L.R.A. 412,

relief prayed at the request of complainant, even if he is a shareholder in the corporation.

Moses v. Tompkins, 84 Ala. 613, 4 So. 763; Miller v. Murray, 17 Colo. 408, 30 Pac. 46; Taylor v. Holmes, 127 U. S. 480, 32 L. ed. 179, 8 Sup. Ct. Rep. 1192; Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401; Dunphy v. Traveller Newspaper Asso. 140 Mass. 495, 16 N. E. 426; Allen v. Wilson, 28 Fed. 677; Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 26 L. ed. 827; Quincy v. Steel, 120 U. S. 241, 30 L. ed. 624, 7 Sup. Ct. Rep. 520; Mellenry v. New York, P. & O. R. Co. 22 Fed. 130; Dimpfell v. Ohio & M. R. Co. 110 U. S. 209, 28 L. ed. 121, 3 Sup. Ct. Rep. 573; Foote v. Cunard Min. Co. 5 Mc-

Crary, 251, 17 Fed. 46; Bill v. Western U. Teleg. Co. 16 Fed. 14; Zieghler v. Lake Street Elev. R. Co. 22 C. C. A. 465, 46 U. S. App. 242, 76 Fed. 662; Watson v. United States Sugar Refinery, 15 C. C. A. 662, 34 U. S. App. 81, 68 Fed. 769; Brewer v. Boston Theatre, 104 Mass. 378; Dillon v. Lee, 110 Iowa, 156, 81 N. W. 245; Robinson v. West Virginia Loan Co. 90 Fed. 770; Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 362; Joy v. Ft. Worth Compress Co. 24 Tex. Civ. App. 94, 58 S. W. 173.

Messrs. Crump, Rogers, & Harris for defendant in error.

Hayes, J., delivered the opinion of the court:

This action was originally brought by

53 N. W. 218. This case involved flagrantly fraudulent acts on the part of the officers of the corporation, who were the owners of the majority of the stock of the corporation, and who were using the stock of the corporation for their own benefit and to the injury of the minority stockholders. The court admitted the general rule that courts of equity have no power to wind up a corporation in the absence of statutory authority, but said that to this rule there were exceptions, that "when it turns out that the purposes for which a corporation was formed cannot be attained, it is the duty of the company to wind up its affairs; that the ultimate object of every ordinary trading corporation is the pecuniary gain of its stockholders; that it is for this purpose, and no other; that the capital has been advanced; and if circumstances have rendered it impossible to continue to carry out the purpose for which it was formed with profit to its stockholders, it is the duty of its managing agents to wind up its affairs. To continue the business of the company under such circumstances would involve both an unauthorized exercise of the corporate franchises and a breach of the charter contract."

Another case sustaining this doctrine to a limited extent is *Fougeray v. Cord*, 50 N. J. Eq. 185, 24 Atl. 499, where the facts presented a case of fraud fully as flagrant as that presented in the Michigan case. In this case a receiver was appointed, and an order made distributing among the stockholders that portion of the property of the corporation consisting of real estate sold on land contract. This distribution was treated by the court as a dividend, and it was pointed out that the distribution did not dissolve the corporation, or prevent the officers from continuing with its management aside from this property. The doctrine is here asserted that it is "the peculiar province of this court not only to right wrongs already committed, but to protect property from future injury and waste by withdrawing it from the reach of danger. In the case of a wilful breach of trust, it not only compels the guilty trustee to restore the trust property, but removes it

from the possession and control of the custodian who has proved untrustworthy. There is nothing in the character of a trading corporation to prevent the application of this remedy." It is impossible to leave the complainant shareholders property interests in the control of the corporation without leaving it in the control of the defendants, found guilty of fraud. "They have proved themselves wholly untrustworthy, so that, if this were a case of partnership, the court would dissolve it at once and divide the property. The exigency of the case demands the same remedy here, as far as it is necessary to ascertain and give complainant his share. This, as I have already shown, can be done without dissolving the corporation, or seriously interfering with the conduct of its business."

Apparently in recognition of this rule, it has been asserted that unless a corporation is insolvent, or its affairs are being fraudulently mismanaged by its officers in authority, a court of equity ought not, at the instance of a stockholder and in the absence of statutory authority, interfere to appoint a receiver with a view of winding up the affairs of the corporation (*Texas Consol. Compress & Mfg. Asso. v. Storrow*, 34 C. C. A. 182, 92 Fed. 5).

And that insolvency without fraud, waste, or extravagance is no ground for appointing a receiver for winding up the affairs of a corporation. *Worth Mfg. Co. v. Bingham*, 54 C. C. A. 119, 116 Fed. 785

The power of equity to wind up the affairs of a corporation is also apparently recognized in *Klugh v. Coronaca Mill Co.* 60 S. C. 100, 44 S. E. 566, holding that a complaint by a stockholder seeking this relief is defective unless it charges the officers either with fraudulent or *ultra vires* acts relative to the corporate property, or with negligence in the management of the affairs of the corporation. Approved in *Brookshire v. Farmers' Alliance Exch.* 73 S. C. 131, 52 S. E. 867.

In *Cantwell v. Columbia Lead Co.* 199 Mo. 1, 97 S. W. 167, sustaining the power of equity to appoint a receiver for a corporation at the instance of a stockholder, on

defendant in error, suing on behalf of himself and for the benefit of the Exchange Bank of Wewoka, Indiana Territory, a corporation, against plaintiffs in error as defendants. After answer was filed by defendants, the cause was referred to the master in chancery to take evidence and report his findings of fact and conclusions of law thereon. The evidence was taken before the master on June 26, 1906; but it does not appear that any report on the facts or conclusions of law was made before the admission of the state into the Union. After admission of the state into the Union, the cause was transferred to the district court of Seminole county, under the provisions of the enabling act and the Schedule to the Constitution. Thereafter, on the

5th day of March, 1908, it stipulated by the parties to the action that the evidence taken in the cause before the master in chancery should be submitted to the court in which the cause was then pending, the same as if taken before that court; and that the court should hear and dispose of said cause upon said evidence. Thereupon plaintiffs in error filed their demurrer to the evidence, and the court, upon hearing the same, sustained it and dismissed the cause, upon the ground that the court was without jurisdiction. Thereafter, upon plaintiff's motion, a new trial was granted. Subsequently a motion was made by defendants to vacate and set aside the order granting a new trial. It is from these orders granting a new trial and refusing

the ground of fraud in the management of the affairs of the corporation, it is admitted that courts have hesitated to lift the affairs and assets of the corporation out of the hands of its board of directors, and administer them through receivers, but it is said that "this court has never denied power in a chancellor to prevent a scheme of irreparable injury and wrong, merely because the movers in that scheme speak and act in a corporate capacity rather than in an individual capacity. That solvent corporations are wrecked for purely selfish and illegal purposes, that minority interests are 'frozen out,' that business immorality has run amuck under the assumption that courts are powerless, is too true. But the assumption is wrong. Judicial hesitancy does not mean judicial atrophy or paralysis. The board of directors of a corporation are but trustees of an estate for all the stockholders, and may not only be amenable to the law, personally, for a breach of trust, but their corporate power, under color of office, to effectuate a contemplated wrong, may be taken from them when, by fraud, conspiracy, or covinous conduct, or extreme mismanagement, the rights of minority stockholders are put in imminent peril, and the underlying, original, corporate *entente cordiale* is unfairly destroyed. It would be a sad commentary on the law, if, when the trustee of a corporate estate is making an improper disposition of it, or has shown improper partiality towards one of its conflicting parties, or has put the estate in a fix it is liable and likely to be either wasted or destroyed, or mercilessly taken from all and given to a part, a court could not reach out its arm and preserve and administer the estate."

While the preceding case is not overruled in *State ex rel. Donnell v. Foster*, 225 Mo. 171, 125 S. W. 184, it is pointed out that, while the petitioner therein did pray for the dissolution of the corporation, nevertheless the only question presented on appeal was the validity of an order refusing to revoke the appointment of a receiver, and it is said that no conclusion was announced in the case except that the court had jurisdiction.

to appoint a receiver, and the case did not involve the power of the court of equity to dissolve a corporation. In the *Foster* Case the court adheres to the general rule that equity has no power at the suit of a stockholder to dissolve a corporation, unless expressly authorized in that regard, although fraud and mismanagement by the officers of the corporation are alleged. It is not entirely clear whether the receiver, appointed in *Cantwell v. Columbia Lead Co.* was merely for the purpose of preserving the property of the corporation pending a trial of the charges of fraudulent management, or whether the receiver was appointed with a view to dissolution of the corporation, since relief of the latter character was specifically asked.

In *Ponca Mill Co. v. Mikesell*, 55 Neb. 98, 75 N. W. 46, being a proceeding to establish and foreclose a lien upon corporate property at the instance of a stockholder, and to appoint a receiver of the corporation on the ground of fraudulent management by the officers, the doctrine is asserted that where the property of a corporation is being mismanaged, and is in danger of being lost through the collusion and fraud of the officers, especially where they are using it for their individual ends to the detriment of the stockholders, a receiver will be appointed; and it is said that when it clearly appears that the officers or a majority of the stockholders of a corporation are abusing their power by misappropriating the corporate property, by using the corporate means for their individual profit, or by so acting as wilfully and wrongfully to jeopardize the corporate business, then the court should not hesitate to afford relief, since "no one is more helpless unless aided by the arm of the law, than the holder of a small portion of the stock of a corporation, when the large stockholders combine to advance their private interests at the expense of the corporation."

In *Vila v. Grand Island Electric Light, Ice & Cold Storage Co.* 68 Neb. 232, 63 L.R.A. 791, 110 Am. St. Rep. 400, 94 N. W. 136, 97 N. W. 613, 4 Ann. Cas. 59, it is pointed out that *Ponca Mill Co. v. Mike-*

bank whether the same has been paid or not; that the bank is insolvent; and plaintiff thereupon closes his petition with the following prayer: "Wherefore plaintiff demands judgment, and that it be decreed herein: (1) That a receiver be appointed to take charge of said bank and its entire property, both real and personal, and all other assets, and convert them into money and pay off the depositors. (2) That after the depositors are paid in full, that the just debts owing by the said bank be paid, and that the residue be ratably distributed among the stockholders in accordance with their several rights. (3) That the president and the cashier and the board of directors of said bank be required to make disclosal by production of the books and

papers belonging to said bank, and that an accounting of the transactions, profits, and expenses of the operation of the said bank since its organization be taken, and that the profits of said bank, if any, be distributed as justice requires, and that all sums improperly drawn from said bank by the defendant T. G. Cutlip or members of his family be returned to said bank, or charged in the final distribution to the guilty parties. (4) That said moneys due from the president or directors of said bank be paid to the receiver for the benefit of said corporation. (5) That the said corporation be dissolved and its charter revoked, and for such other and further relief as may be just, necessary, and equitable."

The principal contention of defendants

a receiver for a corporation at the instance of the stockholders thereof, where the officers of the corporation have been guilty of illegal, fraudulent, and *ultra vires* acts, is also sustained in *DuPuy v. Transportation & Terminal Co.* 82 Md. 408, 33 Atl. 889. In reaching this conclusion the court said that if it were powerless to appoint a receiver under such circumstances, not only would the law be open to grave reproach for inefficiency, but serious wrongs would go unredressed, and fraud of a stupendous character would escape and go unrebuked. The purpose of a receiver in this case was to compel an accounting and restoration on the part of the officers of the company. On the general question of equity jurisdiction in such cases, the doctrine is asserted that "a stockholder, though owning but a single share, may invoke and set in motion the plenary and far-reaching powers of a court of equity, to investigate, strike down, and strip of its covering any act of the corporation to which he belongs, when that act is tainted with fraud, or is *ultra vires* or illegal. This jurisdiction is one of the most salutary and conservative possessed by a court of equity, and neither the adroitness of the imputed fraud, nor the skill that seeks to hide the illegality of the impeached transaction, will thwart the exercise of the court's coercive and remedial authority. Mere internal dissensions among stockholders, or mere differences or disputes as to corporate management, so long as the officers or stockholders do no act that is fraudulent, illegal, or *ultra vires*, will not warrant the intervention of a court of chancery; because, in the absence of fraud, illegality, or conduct that is *ultra vires*, the will of the majority is entitled to control the policy and the business of the body corporate."

Even though a corporation is solvent, the appointment of a receiver to take charge and control of the affairs and concerns of the corporation until a recognized board of directors is obtained, faithfully and efficiently to conserve the interests of all the stockholders, is within the proper exercise of the jurisdiction of the chancery court, 39 L.R.A.(N.S.)

where such course is rendered necessary by the action of contesting boards of directors. *Jasper Land Co. v. Wallis*, 123 Ala. 652, 26 So. 659.

In *Abbot v. American Hard Rubber Co.* 33 Barb. 578, without discussing this question, at the suit of a stockholder a receiver *pendente lite* was appointed to take charge of the property of the corporation, which had been conveyed by the directors in violation of their duties to the stockholders.

It has been said that while the right to wind up a corporation and to decree its dissolution may exist only in the state, nevertheless a court of equity may compel a fraudulent trustee to account, and if, in so doing, it is necessary to the preservation of the property of the corporation for the benefit of the parties lawfully entitled thereto, a receiver may also be appointed. *Chandler Mortg. Co. v. Loring*, 113 Ill. App. 423.

Courts of equity, if not so authorized by statute, do not exercise jurisdiction to dissolve corporations or distribute their assets, although they may afford a stockholder relief from the malfeasance of those intrusted with the management of the corporate business, and to this end, if such a course is necessary, may appoint a receiver for the corporation. *French v. Gifford*, 30 Iowa, 148. A receiver was not, however, appointed in this case, the court holding that such a severe remedy was not necessary.

And in *Wallace v. Pierce-Wallace Pub. Co.* 101 Iowa, 313, 38 L.R.A. 122, 63 Am. St. Rep. 389, 70 N. W. 216, although the general doctrine is conceded to be that, in the absence of express statutory authority, a court of equity is without jurisdiction to dissolve a corporation, wind up its affairs, or sequester its property, it is asserted, however, that there are cases where a receiver will be appointed for the property of a corporation, as where its officers are guilty of the misappropriation of the funds of the corporation.

While the rule prevails in Wisconsin that a stockholder cannot maintain a suit in equity to wind up the affairs of a corporation (*Strong v. McCagg*, 55 Wis. 624, 13 N.

is that a court of equity, in the absence of statutory authority, has no jurisdiction over corporations for the purpose of decreeing their dissolution and the distribution of the assets of the corporation among the stockholders at the suit of one or more of the stockholders; and that, since one of the reliefs for which plaintiff in this proceeding asks in his prayer is that the corporation be dissolved and its assets distributed among its stockholders, after paying all debts of the corporation, the trial court is without jurisdiction. This contention, in so far as it applies solely to proceedings to dissolve corporations and to wind up their affairs, finds support in § 119, Pomeroy's Eq. Jur., in the following language: "It is well settled, with scarcely a

dissenting voice, that in the absence of express statutory authority, a court of equity has no power to dissolve a corporation, or to wind up its affairs and sequester its property." This statement from the text is supported as a general rule of law by almost all the decided cases; but the eminent author states in the same section that "a few exceptions have, however, been admitted to this rule; as, where the corporation had utterly failed of its purpose because of fraudulent mismanagement and misappropriation of its funds by the president and manager, who owned a majority of its stock, a receiver was appointed to wind up its affairs at the suit of a minority stockholder."

Some cases hold that a court of equity

W. 895; *Hinckley v. Pfister*, 83 Wis. 64, 53 N. W. 21), it is, however, held that where the property of a corporation is being mismanaged, and is in danger of being lost to the stockholders and creditors through the collusion and fraud of its officers and directors, the only place of safety for the business and property of the company is in the hands of the court, through a receiver *pendente lite*. *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639, 26 N. W. 184.

And in *Davis v. United States Electric Power & Light Co.* 77 Md. 35, 25 Atl. 982, the power of a court to appoint a receiver for a corporation at the instance of a stockholder is asserted, although it is admitted that the court would have no jurisdiction to dissolve the corporation except as authorized by statute. As to the right to appoint a receiver, it is said that the power is a discretionary one, to be exercised with great circumspection and only in cases where there is fraud, spoliation, or imminent danger of loss of the property if immediate possession is not taken by the court; and these facts must be clearly proved. But where these conditions have been fully met, courts do not hesitate to appoint receivers over the property of corporations, for the benefit of all concerned, during the controversy.

A stockholder of a corporation may have a receiver appointed of a particular fund the proceeds of an unlawful act, although the court will not appoint a receiver to take entire charge of the corporate property, even though fraud on the part of some of the officers of the corporation is alleged. *Belmont v. Erie R. Co.* 52 Barb. 637; *Fisk v. Chicago, R. I. & P. R. Co.* 36 How. Pr. 20.

III. Where corporation is no longer a going concern.

It is within the inherent power of a court of equity to give relief to stockholders of an insolvent corporation, by compelling an equitable distribution of its assets, for any infringement of their equitable rights as members and beneficiaries of the corporation, if the corporation is unable, by rea-

son of the default of its agents, to obtain any adequate remedy within a reasonable time. *Porter v. Industrial Information Co.* 5 Misc. 262, 26 N. Y. Supp. 328.

Thus, where the officers of a corporation have sold all of its property except book accounts owing to it, and it has transacted no business for some period of time, but they refuse to wind up the affairs of the corporation, and by such conduct they are depriving the complaining stockholder of his share of the corporate estates and correspondingly enriching themselves, a court of equity has power, at the suit of the stockholder, to take jurisdiction to appoint a receiver to perform the functions which such officers have wrongfully and fraudulently refused to perform. *Seering v. Black*, 140 Wis. 413, 122 N. W. 1055.

So, where, by sale of the property of a corporation, the functions of the corporation have ceased, its managers are bound to account for the money belonging to the corporation, and when they improperly retain the same, equity, at the instance of any stockholder, will decree distribution of same among the various stockholders. *Cramer v. Bird*, L. R. 6 Eq. 143.

This rule also applies where the corporate property is abandoned, or where there are no persons authorized to take charge of or conduct its affairs, although power to appoint a receiver does not exist in case of an existing corporation equipped with competent officers. *Baker v. Louisiana Portable R. Co.* 34 La. Ann. 754.

In *Noble v. Gadsden Land & Improv. Co.* 133 Ala. 250, 91 Am. St. Rep. 27, 31 So. 856, it is conceded that where the corporation is a going concern, minority stockholders cannot maintain a bill to have it dissolved, or to have its assets distributed. It is, however, asserted that where a corporation has been abandoned by stockholders and officers, and is therefore powerless to protect its assets and to discharge its duty to the stockholders, minority stockholders may invoke the jurisdiction of equity to rescue the trust fund from the perils endangering the same, and also to distribute the assets.

may dissolve a corporation, but only under extreme circumstances. It is unnecessary, however, to decide in this case under what circumstances, if any, a court of equity may decree a dissolution of a corporation and wind up its affairs, for, while this is one of the reliefs prayed for by plaintiff's petition, it is not the only relief asked, and the facts alleged clearly, we think, entitle plaintiff to other relief which a court of equity may administer; and if we assume, without deciding, that the trial court was without jurisdiction to dissolve this corporation and to wind up its affairs, there being other relief which it can afford to plaintiff upon the petition, the cause should not be dismissed. It is apparent from plaintiff's prayer that the principal relief he seeks is a dissolution of the corporation and a final settlement of its affairs with its creditors and its stockholders; but his prayer also asks for general relief, in that, in addition to the specific relief prayed for, he prays, in the fifth paragraph of his prayer, for such other and further relief as may seem just, necessary, or equitable; and in addition to the general relief asked, plaintiff prays that defendants Cutlips, the officers of the bank, shall be required to make an accounting

and return to the bank all amounts of money that have been improperly drawn from the bank by them; and that the depositors and debts of the corporation be paid; and that a receiver be appointed to take charge of the bank and its entire property for these purposes.

"The inherent jurisdiction of a court of equity to appoint receivers of corporations, in proper cases, independently of statutory authorization, has been frequently recognized. The cases in which the power is most frequently invoked are as follows: (1) In suits by stockholders seeking a remedy for breaches of their fiduciary duty by the directors or officers of the corporation. (2) After dissolution, where no means are provided by statute or otherwise for winding up the affairs of the corporation. (3) When the corporation has no properly constituted governing body, or there are such dissensions in its governing body as to make it impossible for the corporation to carry on its business with advantage. (4) In suits by judgment creditors of the corporation. (5) In suits for the foreclosure of mortgages or other liens upon the corporate property." 5 Pom. Eq. Jur. § 116.

Section 3482, Ind. Terr. Statutes, in force in the jurisdiction where this action arose

Although a corporation has not been dissolved in accordance with the provisions of a statute relative thereto, equity will nevertheless take jurisdiction at the instance of a stockholder, to distribute the estates, giving the same relief as though the provisions of the statute had been followed, it appearing that there are no officers of the corporation in existence and no organization maintained. *Greenleaf v. Land & Lumber Co.* 146 N. C. 505, 60 S. E. 424.

When a corporation has ceased to do business for a long term of years, and has no board of directors that can be approached, or its board of directors are unknown, and all the incorporators are brought before the court, and a third person is trying to make way with all the property of the corporation, equity will assume jurisdiction and grant a recovery of the property in the name of the stockholder bringing the suit, for the use and benefit of the corporation and the shareholders. *Tennessee Mountain Petroleum & Min. Co. v. Ayers*, — Tenn. —, 43 S. W. 744.

Where there is no person then in being authorized to take charge of and conduct the affairs of the corporation, if those who own a majority of the stock neglect to elect directors to take charge of the property of the corporation, the minority are not to be the sufferers in consequence of such neglect, but the court will appoint a receiver to take charge of the effects of the company and preserve them for the stockholders. *Lawrence v. Greenwich F. Ins. Co.* 1 Paige, 587.

So, where through the death of the principal manager and the majority owner of the stock of the corporation, the corporation is left without any corporate agency, and the personal representative of such deceased refuses to join in the appointment of some person to act in that regard, the court, at the instance of one of the stockholders, will appoint a receiver. *Re Belton*, 47 La. Ann. 1614, 30 L.R.A. 648, 18 So. 642.

A court of equity has jurisdiction to appoint a receiver for, and remove the assignee of, a bank, holding under an assignment of the assets of the bank by its president and cashier without the knowledge of the shareholders, the purpose of the assignment being to divert the assets of the bank. *Mitchell v. Bank of St. Paul*, 7 Minn. 252, Gil. 192.

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Equity has jurisdiction of a proceeding for the dissolution of a nongoing corporation which has utterly failed of the object for which it was formed. *Minona Portland Cement Co. v. Reese*, 167 Ala. 485, 52 So. 523. And a stockholder may maintain a bill to wind up a corporation where the purpose for which it was organized has become impossible of performance. *O'Connor v. Knoxville Hotel Co.* 93 Tenn. 708, 28 S. W. 308. Or where it has become impossible to accomplish the charter purposes of the corporation, or when its affairs have been so managed that failure or ruin is inevitable. *Ulmer v. Maine Real Estate Co.* 93 Me. 324, 45 Atl. 40.

and was begun, provides that "whenever it shall not be forbidden by law, and shall be deemed fair and proper in any case in equity, the court, judge, or chancellor shall appoint some prudent and discreet person as receiver, who shall. . . ."

The foregoing statute constitutes in no way a limitation upon the general powers of a court of equity to appoint receivers. "The power to appoint a receiver is necessarily inherent in a court which possesses equitable jurisdiction. It is exercised when an estate or fund is in existence and there is no competent person entitled to hold it; or the person so entitled is in the nature of a trustee, and is misusing or misapplying the trust; or the property is about to be removed beyond the reach of the court; and generally when it is necessary to secure rights and prevent a failure of justice. The property is thus placed in the hands of an officer of the law in order that it may be under the protecting care and control of the court and be delivered unimpaired to the persons to whom it is legally ascertained to belong." 2 Waterman, Corp. § 356. See also Morawetz, Priv. Corp. § 642.

The officers of a corporation in the management and control of its assets are the

trustees of the stockholders, and are charged with the faithful management of the corporate property for the accomplishment of the purposes for which the corporation is chartered; and where the corporation is insolvent, as the bank is alleged to be in this case, they are also the trustees of the creditors. It would certainly be a confession of extreme weakness in the power of a court of equity, which is presumed to afford a remedy where no adequate remedy at law can be had, to hold that plaintiff in this case, under the facts, can be afforded no relief in equity; that he must resort to a court of law and have the corporation bring its action against these delinquent officers, who, for the purpose of such suit, are themselves the corporation, and would control every act of the corporation in the prosecution of that suit. How are these officers to be made to repay to the corporation the assets they have withdrawn from it by an action at law, when they must themselves bring that action, and would be practically, so far as the prosecution of such action is concerned, both plaintiffs and defendants? Again, how is plaintiff to know what kind of an action and what relief he is to ask for in a court of law, when he is without access to the books of the corporation, and

Since a private corporation entered into solely for the benefit of the shareholders, and involving no public duty, may be dissolved by the stockholders, on the same principle, when the purpose of such association has failed, there is in the chancery court an inherent power to administer the property so as to restore to the stockholders their ultimate interest. *Merchants' & Planters' Line v. Waganer*, 71 Ala. 581, approved in *Noble v. Gadsden Land & Improv. Co.* 133 Ala. 250, 91 Am. St. Rep. 27, 31 So. 856.

So, where a private business corporation has failed of the purposes and objects of its creation, a single stockholder may maintain a bill in equity for its dissolution and the distribution of its assets among those entitled thereto. And this without reference to the solvency of the corporation. *Ross v. American Banana Co.* 150 Ala. 268, 43 So. 817.

So, where a private corporation, although solvent in that it owes no debts, is a failure, and the purposes for which it was organized are impossible of attainment, and it has been abandoned by its officers and its assets are being sacrificed in the payment of taxes and expenses, the minority stockholders may maintain a bill in equity to have the corporate assets sold and the proceeds distributed among the stockholders. *Central Land Co. v. Sullivan*, 152 Ala. 360, 44 So. 644, 15 Ann. Cas. 420.

The reason for this rule is thus stated in *Benedict v. Columbus Constr. Co.* 49 N. J. Eq. 23, 23 Atl. 485: "Where it plainly appears that the object for which the company

was formed is impossible of attainment, it becomes the duty of the company's agents to put an end to its operations and wind up its affairs, and should they, even though supported by a majority of the shareholders, pursue operations which must eventually be ruinous, any shareholder feeling aggrieved would, upon plain equitable principle, be entitled to the assistance of this court, and a decree should be made compelling the directors to wind up the company's business and distribute the assets among those who are entitled to them, unless they can lawfully be used for other business purposes allowed by the charter. This course is pursued in case of partnerships in similar situation, and, for the reasons there controlling, I perceive no reason why it should not also be pursued in the case of corporations."

The same reason is advanced in *Porter v. Industrial Information Co.* 5 Misc. 262, 25 N. Y. Supp. 328, holding that whenever it proves impossible to attain the real objects for which a corporation is formed, or when the failure of the company has become inevitable, it is the duty of the company's agents to put an end to its operations and to wind up its affairs; and if the majority should attempt to continue the company's operations in violation of its charter, or should refuse to make a distribution of the assets, any shareholder is entitled to the assistance of the court to compel the distribution of the corporate assets.

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defendant officers conceal from him the facts relative to its management and the condition of its business? To compel the performance of a trust and prevent its abuse is one of the peculiar and valuable powers of a court of equity; and, where the officers of a bank, as in this case, have converted the money and property of the corporation to their own use, until the amount they owe the bank exceeds the total deposits, and when the bank has only approximately \$1,000 with which to meet a liability of more than \$9,000 to its depositors, if such acts do not constitute fraud, they at least constitute such gross mismanagement, the bank being insolvent, as to justify a court of equity in reaching out its arm and protecting the minority stockholders and the creditors of the bank, by placing the assets of the bank in the hands of a receiver, and requiring an accounting of its officers and restoration of those assets they have withdrawn and appropriated to their own use. This power of a court of equity finds support in numerous cases. *Cameron v. Groveland Improv. Co.* 20 Wash. 169, 72 Am. St. Rep. 26, 54 Pac. 1128; *Davis v. United States Electric Power & Light Co.* 77 Md. 35, 25 Atl. 982; *Haywood v. Lincoln Lumber Co.* 64 Wis. 639, 26 N. W. 184; *Ponca Mill Co. v. Mikesell*, 55 Neb. 98, 75 N. W. 46; *Edison v. Edison United Phonograph Co.* 52 N. J. Eq. 620, 29 Atl. 195; *Neall v. Hill*, 16 Cal. 146, 76 Am. Dec. 508, 1 Mor. Min. Rep. 80; *Wayne Pike Co. v. Hammons*, 129 Ind. 368, 27 N. E. 487; *Merchants' & Planters' Line v. Waganer*, 71 Ala. 581.

Nor was it necessary, in order to entitle plaintiff to maintain this action, that he request the defendant officers and directors to prosecute an action to obtain the relief desired, for when the defendant officers are directors of the corporation and own the controlling stock, and are in complete control of the corporation, and are shown to occupy such a relation to the transaction complained of that they would be antagonistic to the prosecution of an action which a complaining shareholder would request, a demand that such officers bring and prosecute the action in the name of the corporation would be useless and is not necessary. *Ponca Mill Co. v. Mikesell*, 55 Neb. 98, 75 N. W. 46; 10 Cyc. 978.

We do not undertake to anticipate the final judgment in this case by suggesting any provisions that such judgment should contain, in the event judgment is ultimately rendered in favor of the plaintiff. Those are matters to be determined by the trial court after a hearing and examination of the evidence and findings of fact. It is sufficient for the purpose of this proceeding, 39 L.R.A.(N.S.)

that under the facts alleged in the petition, the court has jurisdiction under plaintiff's petition to grant him some relief.

Several propositions are urged by defendants in their brief relative to the facts as established by the evidence in the trial court, in which there is conflict, which they contend show that plaintiff is entitled to no relief in this action. Questions of fact are primarily for the trial court; and the propositions involving the evidence can be presented to the trial court at the new trial. The order of the trial court is affirmed.

All the Justices concur.

TEXAS SUPREME COURT.

SAN ANTONIO GAS & ELECTRIC COMPANY, Appt.,

v.

MRS. SENOVIA OCON et al.

(— Tex. —, 146 S. W. 162.)

Electricity — defective wiring — liability for injury — gratuitous service.

An electrical company is not liable for the death of one driving in a highway, by his vehicle coming in contact with a wire negligently permitted to sag after being strung across the street by one to whom it has agreed, if such person will place the wires for reception of the current, and connect them with the poles of the electrical company, to furnish current free of charge for a celebration in a park, and the overturning of the seats thereby, if the company has no notice of the defective condition of the wire.

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A PPEAL by defendant San Antonio Gas & Electric Company from a judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District, affirming a judgment of the District Court for Bexar Coun-

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Generally, as to liability for injuries by electric wires in highway, see note in 37 L.R.A. 566, and note supplemental thereto in 22 L.R.A.(N.S.) 1169.

As to duty of electric light company with respect to wires or fixtures in private property, see note in 13 L.R.A.(N.S.) 226, and note supplemental thereto in 20 L.R.A.(N.S.) 816.

The question under annotation, so far as it applies to the liability of one furnishing an electrical current to be distributed by another, is treated in the note to *Fickeisen v. Wheeling Electrical Co.* 27 L.R.A.(N.S.)

ty in plaintiffs' favor in an action brought to recover damages for the death of plaintiffs' intestate, alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Ogden, Brooks, & Napier for appellant.

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Dibrell, J., delivered the opinion of the court:

This was a suit by the widow and children of Jacinto Ocon, against the San Antonio Gas & Electric Company, Martin Wright, and the city of San Antonio to recover damages for his death, alleged to have occurred by the joint negligence of said defendants.

It was alleged by plaintiffs that, while Jacinto Ocon was driving a delivery wagon along a public street in the city of San Antonio, the umbrella, attached to the seat of the wagon came in contact with a wire stretched across the street, and thereby the seat on which he was riding was pulled off, and he was thrown to the ground and received injuries from which he died. It was also alleged that the wire was stretched across the street by the defendant Martin Wright, an electrical contractor, for the defendant San Antonio Gas & Electric Company, and when completed was turned over to the Gas & Electric Company.

The grounds of negligence set out and relied upon as relating to the wire were that it was improperly insulated, improperly strung on the poles in such a way as to make it a constant danger to the traveling

public, and its manner of stringing was, in violation of the ordinances of the city, less than 25 feet above the curbing. Greater particularity in stating plaintiffs' pleadings is not essential to a full understanding of the material issues involved.

The city of San Antonio was dismissed from the suit, upon the ground that a municipal corporation could not be liable for an injury resulting in death. Martin Wright, among other things, pleaded specially the statute of limitations upon which the jury were instructed by the court to find in his favor.

The San Antonio Gas & Electric Company, among other pleas not necessary to mention, pleaded that it was not responsible for the death of Ocon, because the wire mentioned in plaintiffs' petition was neither constructed, owned, nor controlled by it.

The cause having been tried with the assistance of a jury, verdict was rendered for plaintiffs for \$5,000, and duly apportioned among those entitled to receive it.

The material facts developed in the case are practically without dispute, and show that in September, 1907, the Mexican people of San Antonio, wishing to celebrate some event of interest to them, appointed a committee to confer with the defendant San Antonio Gas & Electric Company and arrange for lighting San Pedro park, where the celebration was to take place. The committee conferred with the general manager of the Gas & Electric Company, and it was agreed that this company would furnish, free of charge, the electric current for lighting the park, if the committee for the Mexi-

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may dissolve a corporation, but only under extreme circumstances. It is unnecessary, however, to decide in this case under what circumstances, if any, a court of equity may decree a dissolution of a corporation and wind up its affairs, for, while this is one of the reliefs prayed for by plaintiff's petition, it is not the only relief asked, and the facts alleged clearly, we think, entitle plaintiff to other relief which a court of equity may administer; and if we assume, without deciding, that the trial court was without jurisdiction to dissolve this corporation and to wind up its affairs, there being other relief which it can afford to plaintiff upon the petition, the cause should not be dismissed. It is apparent from plaintiff's prayer that the principal relief he seeks is a dissolution of the corporation and a final settlement of its affairs with its creditors and its stockholders; but his prayer also asks for general relief, in that, in addition to the specific relief prayed for, he prays, in the fifth paragraph of his prayer, for 'such other and further relief as may seem just, necessary, or equitable; and in addition to the general relief asked, plaintiff prays that defendants Cutlips, the officers of the bank, shall be required to make an accounting

and return to the bank all amounts of money that have been improperly drawn from the bank by them; and that the depositors and debts of the corporation be paid; and that a receiver be appointed to take charge of the bank and its entire property for these purposes.

"The inherent jurisdiction of a court of equity to appoint receivers of corporations, in proper cases, independently of statutory authorization, has been frequently recognized. The cases in which the power is most frequently invoked are as follows: (1) In suits by stockholders seeking a remedy for breaches of their fiduciary duty by the directors or officers of the corporation. (2) After dissolution, where no means are provided by statute or otherwise for winding up the affairs of the corporation. (3) When the corporation has no properly constituted governing body, or there are such dissensions in its governing body as to make it impossible for the corporation to carry on its business with advantage. (4) In suits by judgment creditors of the corporation. (5) In suits for the foreclosure of mortgages or other liens upon the corporate property." 5 Pom. Eq. Jur. § 116.

Section 3482, Ind. Terr. Statutes, in force in the jurisdiction where this action arose

Although a corporation has not been dissolved in accordance with the provisions of a statute relative thereto, equity will nevertheless take jurisdiction at the instance of a stockholder, to distribute the estates, giving the same relief as though the provisions of the statute had been followed, it appearing that there are no officers of the corporation in existence and no organization maintained. *Greenleaf v. Land & Lumber Co.* 146 N. C. 505, 60 S. E. 424.

When a corporation has ceased to do business for a long term of years, and has no board of directors that can be approached, or its board of directors are unknown, and all the incorporators are brought before the court, and a third person is trying to make way with all the property of the corporation, equity will assume jurisdiction and grant a recovery of the property in the name of the stockholder bringing the suit, for the use and benefit of the corporation and the shareholders. *Tennessee Mountain Petroleum & Min. Co. v. Ayers*, — Tenn. —, 43 S. W. 744.

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The grounds of negligence set out and relied upon as relating to the wire were that it was improperly insulated, improperly strung on the poles in such a way as to make it a constant danger to the traveling

public, and its manner of stringing was, in violation of the ordinances of the city, less than 25 feet above the curbing. Greater particularity in stating plaintiffs' pleadings is not essential to a full understanding of the material issues involved.

The city of San Antonio was dismissed from the suit, upon the ground that a municipal corporation could not be liable for an injury resulting in death. Martin Wright, among other things, pleaded specially the statute of limitations upon which the jury were instructed by the court to find in his favor.

The San Antonio Gas & Electric Company, among other pleas not necessary to mention, pleaded that it was not responsible for the death of Ocon, because the wire mentioned in plaintiffs' petition was neither constructed, owned, nor controlled by it.

The cause having been tried with the assistance of a jury, verdict was rendered for plaintiffs for \$5,000, and duly apportioned among those entitled to receive it.

The material facts developed in the case are practically without dispute, and show that in September, 1907, the Mexican people of San Antonio, wishing to celebrate some event of interest to them, appointed a committee to confer with the defendant San Antonio Gas & Electric Company and arrange for lighting San Pedro park, where the celebration was to take place. The committee conferred with the general manager of the Gas & Electric Company, and it was agreed that this company would furnish, free of charge, the electric current for lighting the park, if the committee for the Mexi-

893. A later case on that point, however, is here presented.

In *Perry v. Ohio Valley Electric R. Co.* — W. Va. —, 74 S. E. 893, it was held that the generating company that sells and delivers electricity to a distributing company is under no obligation to see that the distributing company's lines over which the current is carried to consumers are in safe condition; and so a generating company was not liable for death of a boy who took hold of a piece of telephone wire which one of his companions had thrown over a guy wire which was fastened around the electric light pole about 2 inches above span wire supporting an arc light, and which come in contact with it, and which, because of lack of insulation between the span wire and the electric light wire, had become charged with electricity and so charged the piece of telephone wire. This case cites and follows as authority, *Fickeisen v. Wheeling Electrical Co.* 67 W. Va. 335, 27 L.R.A.(N.S.) 893, 67 S. E. 788.

ANTONIO GAS & ELECTRIC CO. v. OCON is in accord with the view taken in *Perry v. Ohio Valley Electric R. Co.*, that the vendor company has not the duty of inspecting the wires of the purchasing company. But it 39 L.R.A.(N.S.)

will be noted that it was said in the first case that it was not decided that the Gas & Electric Company would not have had the duty to see that the dangerous condition was removed if it had had actual knowledge of the defective condition of the wire.

And in *Lewis v. Bowling Green Gaslight Co.* 135 Ky. 611, 22 L.R.A.(N.S.) 1169, 197 S. W. 278, in reversing a judgment in defendant's favor, it was held that the vendor of electricity which turns a powerful current onto private wires strung along the highway is bound to inspect them from time to time to see that they are securely fastened and properly insulated, although they do not belong to it. In this case the vendor, of a corporation furnishing electricity in a certain city, furnished the electric power for a private electric light line extending beyond the limits of such city to supply some suburban residents with lights for their dwellings, and one of the wires had parted and sagged to within 6 or 7 feet of the sidewalk, and a pedestrian taking hold of the same was killed.

Other cases in point upon the question under annotation will be found in the note to *Fickeisen v. Wheeling Electrical Co.* 27 L.R.A.(N.S.) 893. J. H. B.

can people would put up the wiring and provide everything for the reception of the current. In pursuance of this understanding, the wire with which the umbrella on deceased's wagon came in contact was erected by the defendant Martin Wright, through one of his employees, at the request of and for the committee for the Mexican celebration; and he was paid for the work by this committee. The committee directed the electrical contractor where to place the wires, and all poles and other material were supplied either by the committee or the electrical contractor; and the San Antonio Gas & Electric Company gave no instructions as to where or how to place the wires, and had nothing to do with placing the wire across the street. In preparing the wires for receiving the electric current, the contractor for the Mexican society attached one to the pole of the Gas & Electric Company, extending across one of the public streets of the city. This was the wire upon which the umbrella attached to the deceased's wagon was caught, and by which he was thrown from the wagon, receiving injuries from which he died. Where this wire was attached to the Gas & Electric Company's pole, a switch was there placed by the contractor for the committee; and the point where the wire in question left the pole was 25 or 30 feet above the street curbing. After this wire was attached to the pole and a switch placed there by the committee's contractor, the Gas & Electric Company did nothing more than to run a connection from the transformer on its pole down to the side of the pole to the point where the committee had directed a switch placed, and by the means of a short wire connect with the top of such switch. When the wire was thrown down, it was repaired by Martin Wright, the electrical contractor, and after the celebration was over, having lasted for three days, the electrical contractor had his employees take the wires down and return them to his shop. The current furnished by the Gas & Electric Company was connected with the wire in question by means of throwing the switch which was placed on the pole by the defendant Martin Wright; and this switch was thrown each night by the park policeman, at the instance of the celebration committee, in order to secure the current. At the time of the accident, the current was not on the wire complained of. The Gas & Electric Company received no compensation for furnishing the current. The facts do not disclose how long the wire across the street from which contact with the wagon caused the death of Ocon, was in a sagging condition; but it was shown that on the night 39 L.R.A. (N.S.)

previous the wire was up and properly constructed.

The question involved in this case does not embrace the liability of defendant Gas & Electric Company for damages resulting from contact with the dangerous and potent force of an electric current. The uncontradicted facts exclude that issue, and we are circumscribed to the sole question of its liability for damages resulting from contact with a plain wire, strung, owned, and controlled by others than the Gas & Electric Company. The only connection with the wire in question attributed to this company is its tacit or implied consent that the wire might be attached to its pole, for the purpose of furnishing the owners or lessees of the wire the electric current for temporarily lighting the park for a celebration conducted by such owner or lessees.

The evidence discloses, without dispute, that the wire in question was, in the beginning, properly strung, and that its sagging condition occurred afterwards. It was not shown by the evidence at what time the defective condition of the wire occurred, or how long it had remained in such condition, or that the condition the wire was in at the time Ocon's umbrella came in contact with it was known to this defendant. We think that at the time the implied consent of this defendant to its codefendant, Martin Wright, or the committee for the Mexican celebration, was given, to attach the wire to its pole, in so far as any injury might result from such wire independent of the electric current, by reason of its improper construction, this defendant was not legally bound to see that the wire was properly strung; and, in the absence of actual knowledge that it was improperly or defectively strung, the Gas & Electric Company could presume that those who were in charge of stringing the wire, and for whose benefit it was strung, would perform the work in a proper manner and in compliance with the city ordinance. We do not wish to be understood as holding that this rule is applicable in so far as it relates to the electric current and as to injuries received by third parties from such current, for we think a different rule applicable in such case, but solely upon the ground that "electricity is a silent, deadly, and instantaneous force; and one who uses it for profit is bound to exercise care corresponding to the dangers incident to its use." *Rowe v. Taylorville Electric Co.* 213 Ill. 318, 72 N. E. 711; *McLaughlin v. Louisville Electric Light Co.* 100 Ky. 173, 34 L.R.A. 812, 37 S. W. 851; *Cooley, Torts*, 1492.

Nor do we wish to be understood as holding that, if the defective condition of the wire was known to the Gas & Electric

Company, the duty did not devolve upon it to see that the wire was repaired or detached from its pole. However, the doctrine of knowledge or notice from the exercise of ordinary care cannot, we think, be invoked in such case as to the defective condition of the wire, independent of the deadly current; but actual notice to the Gas & Electric Company of the wire's defective condition must have been shown. This arises from the fact that the Gas & Electric Company was under no obligation to repair the wire of its codefendant, or to see that the wire was properly strung, except when the electric current was on, and where the injury resulted from such current. Again, we do not wish to be understood in this connection, as holding that actual knowledge of the wire's sagging condition on the part of the Gas & Electric Company would, as a general rule and under ordinary circumstances, where others were permitted simply to attach their wire to its pole, as in this instance, create a liability against such company; but we think liability in case of actual notice of the defective condition of the wire would arise only in a case like the one under consideration, where the injury was inflicted upon one using a public thoroughfare. Safety to one in the use of a public street or thoroughfare demands the application of a different rule than should be applied to places of a private or less public character. This would seem to be just, since, under such circumstances, the company is authorized to detach such wire from its premises; and we think that, even though there was not primarily any obligation imposed upon this company to use any care to see that the wire was properly strung without respect to the electric current, and therefore, strictly speaking, the doctrine of negligence is not applicable, yet such obligation would arise from its continued consent to the use of its pole after knowledge of a condition of the wire as a constant menace of danger to the safety of public travel.

We venture to assert that no text-book or case can be found that carries the doctrine of negligence further than we have here announced it; but we do not think we have gone further than justice and expediency demand. It is clearly the right of a public service corporation, obliged to exercise its functions for the convenience and benefit of the public, to demand the detachment of a wire negligently or defectively strung to its pole, when notice of such defective condition of the wire has been received; and the failure to act with reasonable promptness under such circumstances will make its negligence concurrent with that of the owner of the defective wire attached to its

pole, when the safety of public travel is endangered. This rule, however, does not affect the present case, since it was not shown that the Gas & Electric Company had notice of the sagging of the wire.

There is no difference of opinion as to a number of legal propositions presented in support of the cause of action here sought to be maintained against the Gas & Electric Company; but we do not think they are in the remotest degree applicable to the facts of the case. For instance, it is not denied that, where a party sustains an injury from the concurring negligence of several, he may recover therefor against all or either of them. But what fact is there in this case that tends to show that there was any negligence or concurring negligence on the part of the Gas & Electric Company tending to cause the injuries of Ocon from which he died? It cannot be said the negligence arising from the sagging wire across the public street, in violation of the city ordinances, was its neglect, for the most potent reason that the wire was not so strung or so allowed to sag and remain in that condition across the street by the Gas & Electric Company, since the undisputed facts show that the company had nothing to do with the stringing of the wire, nothing to do with placing it across the street, no control over the wire, no ownership of or interest in the wire, nothing to do with securing the permit from the city to string the wire, and no notice of its condition. In short, the evidence fails wholly to show there was any duty on the part of this company that it owed to the deceased or the public, the violation of which was shown in order to constitute negligence. It was not the duty of this defendant to repair the defective wire, or to in any manner interfere with its position, in the absence of knowledge of its condition.

In order to impute negligence to this defendant, it was necessary to show that it violated some duty it owed to the public, and to the deceased as a component of the public, or to him personally by reason of some other connected relationship. Unless the death of Ocon was due to the breach of some duty this company owed him, there could be no recovery against it in this action. Negligence is imputable only for a breach of an existing duty due by the person sought to be held responsible. *San Antonio Edison Co. v. Dixon*, 17 Tex. Civ. App. 320, 42 S. W. 1009; 15 Cyc. 475; 1 *Thomp. Neg.* § 3.

To hold that the care devolved upon such public service corporation as the Gas & Electric Company to look after the construction and maintenance of wires in-

stalled by or under the direction of private persons or concerns, without reference to their adaptability to safely carry the electric current, would impose upon such companies burdens so great as to clearly render their existence, and hence their service to the public, impracticable, if not impossible. It is not necessary to enlarge upon the disagreeable consequences of such a ruling; but it should be enough to say that such a doctrine is repugnant to reason and justice. It would not only make Cain the keeper of his brother Abel, but would impose upon him a vicarious atonement for the sins of his brother, whether of omission or commission.

We have been cited by learned counsel for defendants in error to a number of cases thought to bear upon the question presented by the facts of this case; but we are not able to appreciate their analogy to the case at bar. The case of *Wehner v. Lagerfelt*, 27 Tex. Civ. App. 520, 68 S. W. 221, was for damages received from an electrical shock under the following circumstances: "One of the electric wires so maintained and operated by appellants was suspended from poles along the north side of San Antonio street, one of the principal thoroughfares of . . . [the city of El Paso] and charged with a strong and dangerous current of electricity. Below and near this wire was suspended from the same poles one that was uninsulated, the end of which was broken and hanging within a foot or two of and above the sidewalk on the north side of said street. The insulation of the upper wire, through which the strong electric current, was conveyed, was worn and abraded. In contact with one of its abrasions was a small bare wire, which extended therefrom, and rested upon the uninsulated and broken wire beneath, thereby conveying to and charging it with a strong and dangerous current of electricity from the defectively insulated wire above, thus rendering the uninsulated hanging wire very dangerous to persons passing along said street and sidewalk. This dangerous condition of the wire existed on the day . . . [of the injury], and had been maintained continuously for about two weeks prior to and up to that time, and, by the exercise of ordinary care, could and should have been known by the appellants. . . . The appellee, Dagmer Lagerfelt, a little ten-year-old girl, . . . while walking along said sidewalk in ignorance of the danger, came in contact with the uninsulated hanging wire, charged with a strong and dangerous current of electricity in the manner and by the means aforesaid," and was seriously and painfully injured. The mere statement of the case makes ap- 39 L.R.A. (N.S.)

parent its lack of similarity to the case under consideration. The wire permitted to hang from the defendant's poles in that case was heavily charged with an electric current, and was with 1 or 2 feet of the sidewalk and from the ground. This was clearly negligence, notwithstanding the piece of wire belonged to another. The wire itself was uninsulated, and so was the wire of the defendant in that case connected with the hanging wire defectively insulated and heavily charged with a dangerous current. The court of civil appeals correctly held the defendant chargeable with the knowledge of the condition of the wire; but such holding throws no light upon the case at bar.

The case of *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564, was a suit by the District of Columbia to recover judgment for an amount it had been required to pay Marietta M. Parker for injury she received by stepping into an open gas box constructed in the sidewalk. Mr. Justice White, who wrote the opinion in that case, states the evidence to have been that the gas box in question was placed by the gas company in the center of the sidewalk in the city of Washington in 1873, it being one of the customary appliances used by the company when connecting its main with a house where gas was to be used; that this box consisted of an iron cylinder, 4 inches wide and 2½ feet deep, with an iron cover. The box served the purpose of affording access to a cock in the service pipe which later conducted the gas from the main of the company to the gas meter in the house; whence it was carried to the burner. By means of this box or cylinder, on removing the cover therefrom with a key made for the purpose, the cock in the service pipe could be reached, and the gas be thus turned on or off from the house. This box was placed in the sidewalk so as to be level with its surface, and the cover thereon was held in place by lugs which slipped into slots made for the purpose. The box was put in by the company in accordance with its general method used for introducing gas, and in compliance with the form of structure pointed out by an ordinance of the board of common council of the city of Washington. The gas box was put in at the request of the owner of the premises in front of which it was situated. It was constructed by the gas company, which furnished the materials, and worked as any other plumber would have done, being paid therefor by the owner of the premises. In order to do this work, the gas company had first to obtain from the city permission to open the street to

make the requisite connection, and paid to the district a permit fee of \$ 1. When the gas box was first constructed, it was done in a proper manner; but at the time of the injury, and for some time before, was out of repair and in a defective condition. It was shown that in case the owner of the premises ceased to take gas, the box became the property of the gas company, and that company never permitted the owner of the premises to have a key to the box, and the company exercised exclusive control, maintenance, and supervision of the gas box. It will be observed from the statement of the case that the duty of the gas company was to maintain the gas box, over which it had exclusive control, from which fact it logically follows that a failure to do this in a proper manner would constitute negligence from which liability would ensue. The case is in no essential particular analogous to the one under consideration, and cannot serve as a guide in its disposition.

The two cases thus analyzed are the ones upon which counsel placed the greatest stress, and it is not essential to review the others. In fact, we have been unable to find any case in the books, and we have been cited to none, that are similar in the facts upon which the recovery in this case is sought. Likewise the text-books we have consulted are barren of authority relevant to the subject. The case has been given careful consideration and we are unable to find substantial legal grounds upon which to approve the judgment of the honorable court of civil appeals in affirming the judgment of the lower court.

The cause will therefore be reversed and here rendered for the plaintiff in error, San Antonio Gas & Electric Company; and it is so ordered.

WASHINGTON SUPREME COURT.

STATE OF WASHINGTON, Resp't.,

v.

AUGUST MAIRE, Appt.

(66 Wash. 591, 120 Pac. 87.)

Intoxicating liquor — unbroken packages — character.

A package, to be unbroken within the meaning of a law permitting liquor to be de-

Note. — What constitutes an original or unbroken package.

It may be stated that in general an original package is that package which, according to custom respecting the particular article shipped, is usually delivered by the vendor to the carrier for transportation, 39 L.R.A. (N.S.)

livered in unbroken packages in dry territory, need not necessarily be the one received by the wholesaler, but he may fill a smaller receptacle, as a demijohn, from a larger one, and deliver it in the unbroken form in which he prepares it.

(January 15, 1912.)

A PPEAL by defendant from a judgment of the Superior Court for Snohomish County, convicting him of violating the local-option law. Reversed.

The facts are stated in the opinion.

Messrs. Hathaway & Alston, with Mr. E. C. Dailey, for appellant:

Defendant is entitled to have the statute construed according to its plain reading. United States v. Wiltberger, 5 Wheat. 92, 5 L. ed. 42; Cook v. State, 26 Ind. App. 278, 59 N. E. 489.

Mr. Ralph C. Bell, for respondent:

The section under which this prosecution is instituted, and the term "unbroken package" in the exception thereto, should be interpreted liberally, in the light of the evil sought to be remedied and the object to be attained.

36 Cyc. 1162; Re Schneck, 78 Kan. 207, 96 Pac. 43; State v. Twin City Teleph. Co. 104 Minn. 270, 116 N. W. 835.

Morris, J., delivered the opinion of the court:

Appellant was convicted of a violation of the local-option law, of 1909, in bringing liquor into a dry unit in quantities less than an unbroken package. The admitted facts are these: Appellant is an employee of a wholesale liquor dealer at Snohomish, a wet unit, of whom a resident of Everett, a dry unit, had ordered a demijohn of intoxicating liquor. This demijohn was filled by the dealer at Snohomish from a larger receptacle in his store, and when so filled was brought to Everett, and delivered to the customer in the same condition in which it left Snohomish. Upon these facts arises the only question in the case: What is an "unbroken package," within the meaning of § 18 of that act, Rem. & Bal. Code, § 6309, which provides that the act shall not apply to deliveries of unbroken packages at residences, which are not places of business or of public resort, by wholesalers, in their own conveyances, or by any common carrier?

The court below held that the words "un-

and delivered as a unit to the consignee. This definition, in substance, has been stated in numerous cases, as illustrated by the following definitions: An original package is a bundle put up for transportation or commercial handling, and usually consists of a number of things bound together, convenient for handling and conveyance. The

broken package" should be so construed as to mean the original package as put up by the manufacturer, and in which the wholesaler received the liquor, and only a delivery of such original package, within a dry unit, came within the exemption of the law. We do not so interpret the law. Without special reference to the cases, it has been generally held that by the words "original package," in cases involving the right to ship intoxicating liquor into a state prohibiting its sale, was meant any form of receptacle that would hold a fixed quantity with reference to safe and convenient transportation; and when so shipped it was immaterial what the form or size of the package was, as the importer had a right to determine the quantity desired, and so long as

this quantity came to him in the unbroken or original package in which it was shipped, however small the package was, it was protected as an original package. In *State ex rel. Cochran v. Winters*, 44 Kan. 728, 10 L.R.A. 616, 25 Pac. 237, it is said: "The 'original package' . . . was and is the package of the importer as it existed at the time of its transportation from one state into the other." In *Cook v. Marshall County*, 119 Iowa, 384, 104 Am. St. Rep. 283, 93 N. W. 372, the court says: "It relates wholly to goods as prepared for transportation, and has no necessary reference whatever to the package originally prepared or put up by the manufacturer." A package put up in the usual way employed for transportation by honest dealers, and in a bona fide receptacle

words "original package" have reference to the unit which the carrier receives, transports, and delivers as an article of commerce. *McGregor v. Cone*, 104 Iowa, 405, 39 L.R.A. 484, 65 Am. St. Rep. 522, 73 N. W. 1041. "An original package, as governed by interstate commerce law, is that which is delivered by the importer to the carrier at the initial point of shipment, and retains its form and contents until received by the consignee in the same condition as when shipped," but which ceases to be such when broken for sale of smaller units contained in the larger package. *Re Agnew*, 89 Neb. 306, 35 L.R.A. (N.S.) 836, 131 N. W. 817. "Speaking generally . . . an original package, as applied to interstate and international commerce, is a package, bundle, or aggregation of goods put up in whatever form, covering, or receptacle for transportation, and as a unit transported from one state or nation to another." *Austin v. State*, 101 Tenn. 563, 50 L.R.A. 478, 70 Am. St. Rep. 703, 48 S. W. 305, affirmed in 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132. "An 'original package' is such form and size of package as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce." *Com. use of Philadelphia County v. Schollenberger*, 156 Pa. 201, 22 L.R.A. 155, 4 Inters. Com. Rep. 488, 36 Am. St. Rep. 32, 27 Atl. 30. "The package consists of a number of things bound together, convenient for handling and conveyance. A package means a bundle put up for transportation or commercial handling. It is a thing in form to become as such an article of merchandise or transportation or delivery from hand to hand." *State ex rel. Gelpi v. Board of Assessors*, 46 La. Ann. 145, 49 Am. St. Rep. 318, 15 So. 10, cited with approval in *Henderson v. Ortte*, 114 La. 523, 38 So. 440. "The original package is the package delivered by the importer to the carrier at the initial place of shipment, in the exact condition in which it was shipped. If in single bottles, shipped singly, or if in packages or three or more, securely fast-

ened together and marked, or if in a box, barrel, crate, or other receptacle, the single bottle, in the one instance, the three or more bottles, in another instance, the barrel, box, crate, or other receptacle, respectively constitute the original package. If sold or delivered, it must be sold or delivered as shipped and received." *Guckenheimer v. Sellers*, 81 Fed. 997. See also the definition given by the Kansas supreme court in *State ex rel. Cochran v. Winters*, 44 Kan. 728, 10 L.R.A. 616, 25 Pac. 237, which is set out in *STATE v. MAIRE*.

Under these rules it would seem that the size and form of the package would be immaterial, and that single articles, no matter how small, would be considered as original packages if they were packed and shipped singly, except, perhaps, where the shipment was made in the form chosen merely to evade local laws. Thus it has been held that the fact that the article is in packages suitable for retail trade to individual customers does not destroy the character of what would otherwise constitute original packages (*Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757, reversing *Com. v. Paul*, 170 Pa. 284, 30 L.R.A. 396, 5 Inters. Com. Rep. 506, 50 Am. St. Rep. 776, 33 Atl. 82; *Com. v. Schollenberger*, 170 Pa. 296, 33 Atl. 85; and *Com. v. Paul*, 170 Pa. 296, 33 Atl. 85 [this case does not, as is indicated by some digesters and annotators, directly overrule *Com. use of Philadelphia County v. Schollenberger*, 156 Pa. 201, 22 L.R.A. 155, 4 Inters. Com. Rep. 488, 36 Am. St. Rep. 32, 27 Atl. 30], holding that a ten-pound package of oleomargarin manufactured, packed, unmarked, and imported as a single package, constituted an original package of commerce; *Henderson v. Ortte*, supra, holding that various parts of a sewing machine, packed in separate parcels, all of which were inclosed in a larger package, rendered the inclosing package an 'original one'), unless the form and size of the package is not that usually adopted in the trade for the purpose of transportation, but was adopted with a view to evade the local laws by bringing the article within the protection of the Feder-

ordinarily used in shipment, and not evidently put up for the purpose of evading the law of a sister state, is regarded as an original package; so long as it remains in the unbroken condition in which it existed during its transportation. 17 Am. & Eng. Enc. Law (2d ed.) 292, 294; 7 Cyc. 429.

Applying the reasoning and principle of these various decisions to the question submitted, the answer is readily determined, and it must be held that an unbroken package is the package in the original form in which it was made by the shipper for shipment and delivery into a dry unit, providing the receptacle used is one ordinarily used by honest dealers in the same business, and is recognized commercially as such a receptacle. This means that, if four residents of

a dry unit each ordered a quart of whisky from a dealer in a wet unit, such dealer could not send a gallon cask into the dry unit, and deliver a quart to each customer. Neither could a number of residents of a dry unit join together and order the dealer in the wet unit to pack a barrel with bottled beer, for convenience of shipment, send it into the dry unit, and deliver to each customer the number of bottles he desired. In each of these instances, the liquor would be delivered to the customer from a broken package, which, to our mind, is plainly what the law intended to prevent. To adopt the view of the lower court would be to say that the law gives the citizen in the dry unit the right to use liquor in his private home. It forbids him procuring the liquor

al Constitution (Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132, affirming 101 Tenn. 563, 50 L.R.A. 478, 70 Am. St. Rep. 703, 48 S. W. 305; Com. use of Philadelphia County v. Schollenberger, 156 Pa. 201, 22 L.R.A. 155, 4 Inters. Com. Rep. 488, 36 Am. St. Rep. 32, 27 Atl. 30).

And it has been held that the package need not be the one originally put up by the manufacturer, but that a wholesaler may break up the manufacturer's package into "unbroken packages," provided such packages are such as are ordinarily used by honest dealers in the same business. See *STATE v. MAIRE*. A case somewhat analogous to that of *STATE v. MAIRE* is *State v. Southard*. 60 Ark. 247, 29 S. W. 751, wherein a distiller filled a 45-gallon barrel with whisky, and placed a government stamp upon it for that amount, but subsequently surrendered such stamp, and receiving nine 5-gallon stamps in lieu thereof, divided the barrel into nine 5-gallon packages, stamped them, and sold them as original packages, it being held, over the contention that the barrel was the original package, and that there could be but one original package, that the 5-gallon packages sold were original packages within the meaning of a statute permitting manufacturers of liquors to sell in original packages of not less than 5 gallons without license. Although neither of these cases involves interstate commerce, there seems to be no reason why the rule as laid down by them should not be applicable to interstate commerce, assuming, of course, that the breaking up of the manufacturer's package occurred before export.

But the fact that the internal revenue department for purposes of taxation has recognized a package as an "original package" does not necessarily render it such under the commerce clause, where the packages are of such size that they may be repacked in additional coverings, at the option of the consignor. *McGregor v. Cone*, 104 Iowa. 465. 39 L.R.A. 484, 65 Am. St. Rep. 522, 73 N. W. 1041.

A few cases have passed upon the question of shipping single articles in individual 39 L.R.A. (N.S.)

packages. Thus, in *Re Beine*, 42 Fed. 545, single bottles of beer and whisky, packed and sealed or nailed up in boxes made of pasteboard or wood, and not packed in any other box, but shipped singly and separately, as so many distinct and separate packages, were held to constitute original packages of commerce. And in *State ex rel. Cochran v. Winters*, 44 Kan. 728, 10 L.R.A. 616, 25 Pac. 237, in reaching a similar conclusion, the court said: "It is for the importer to determine how large or how small the package should be, and the manner in which the package should be made up, and the materials used in making it up. Certainly an importer has as much right, under the Federal Constitution, to import into a state and sell against its laws a single gill of intoxicating liquor as he has to import into such state and sell against its laws a gallon, or a barrel, or a hogshead of the same interdicted article." So, single pasteboard boxes conforming to the internal revenue laws, and containing ten cigarettes each, when not inclosed in any other packages or wrappings, but loose and separate, were held to constitute an original package, in *Iowa v. McGregor*, 76 Fed. 956, and in *Sawrie v. Tennessee*, 82 Fed. 615. These latter decisions, however, in view of later cases hereinafter set out, seem questionable.

The majority of cases which have defined the term "original package" have involved an aggregation of articles or packages packed and shipped generally for convenience sake in a larger package. The well-settled rule among this class of cases is that the large bundle or receptacle, and not the individual articles or packages comprising the larger unit, constitutes the "original package" of commerce. Thus, in *May v. New Orleans*, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976, affirming 51 La. Ann. 1064, 25 So. 959, it was held that original packages of imported goods consist of the boxes, cases, or bales in which the goods were shipped, and not the smaller packages therein contained, although these are the packages in which the goods are put up by the manufacturer; and that opening the shipping boxes or cases for sale or delivery

in the dry unit, except he may accept a delivery of liquor from a wet unit; provided, if he wishes liquor that is packed by the manufacturer in barrels, or other large forms of shipment, he may order and receive nothing less than a barrel, or such other large receptacle. A quart may be sufficient for his needs, but he must nevertheless buy the barrel or case to obtain the quart. Such an interpretation of the legislative intent does not appeal to us as in the interest of temperance and sobriety, which was the purpose of the law. It sav-

ors rather of the reverse, and fixes the legislative intent as encouraging the sale of liquor in large quantities, rather than, as we read the law, permitting the sale in the smallest quantity desired, provided only the delivery be made in the unbroken package in which it was shipped.

It follows the appeal is well taken, and the judgment is reversed.

Crow, Chadwick, and Ellis, JJ., concur.

of the separate parcels contained therein destroyed their distinctive character as imports.

So, it was held in *Austin v. Tennessee*, supra, that paper packages of cigarettes, each 3 inches in length and $\frac{1}{4}$ inch in width, containing ten cigarettes, without any shipping address on such packages, when they are taken from a loose pile of such packages at the factory by an express company in a basket which it furnishes, in which it carries them, and from which it empties them on the counter of a consignee in another state, do not constitute an original package in interstate commerce; especially where such method is employed for the purpose of evading local laws. And the same conclusion was reached in *Cook v. Marshall County*, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233, affirming 119 Iowa, 384, 104 Am. St. Rep. 283, 93 N. W. 372, which differs from the *Austin* Case only in the fact that it does not appear what means was used in transporting the cigarettes, except the inference that they were shoveled in and out of the car, and that they were shipped loose, the packages not being separately or otherwise addressed, by an express company, which merely issued a receipt in duplicate.

And in *McGregor v. Cone*, supra, wooden boxes in which cigarettes were shipped were held to be the original packages rather than the individual packages of cigarettes, under the rule that an original package is the unit which the carrier receives, transports, and delivers as an article of commerce. And the same was held true of bottles of whisky, each sealed up in a paper wrapper or box, and packed together in uncovered wooden boxes furnished by the carrier, and marked "to be returned," in *Re Harmon*, 43 Fed. 372, it being said that the wooden box, and not the bottles, constitutes an "original package;" and of small bottles of whisky, each wrapped in tissue paper, and labeled "original package," shipped in open wooden boxes, in *Keith v. State*, 91 Ala. 2, 10 L.R.A. 430, 8 So. 353, it being said that the small size of the package, if the bottles be otherwise considered original packages, should have no bearing upon the question, but that merely labeling each bottle "original package" did not make it one, if it was not really an original package; and of sealed bottles of intoxicating bitters shipped in inclosed wooden boxes, in *Harrison v.*

State, 91 Ala. 62, 10 So. 30; and of bottles of whisky inclosed in a wooden box, in *Vernon v. State*, 161 Ala. 83, 50 So. 57; and of bottles of whisky shipped in both open and closed boxes, in *Smith v. State*, 54 Ark. 248, 15 S. W. 882; and of bottles of medicine separately wrapped, but packed in a box for shipping in *State v. Parsons*, 124 Mo. 436, 5 Inters. Com. Rep. 250, 46 Am. St. Rep. 457, 27 S. W. 1102; and of half-pint flasks of whisky, each packed in a sealed paper box and shipped in a larger covered wooden box, in *Haley v. State*, 42 Neb. 556, 47 Am. St. Rep. 718, 60 N. W. 962; and of individual packages of "Uneeda Biscuit," packed and shipped in larger receptacles, in *Re Agnew*, 89 Neb. 306, 35 L.R.A.(N.S.) 836, 131 N. W. 817; and in *Re King*, 89 Neb. 298, 131 N. W. 820, and in *Re Page*, 89 Neb. 299, 131 N. W. 820; and of packages of oleomargarin, each labeled "original package," fastened together and packed in a larger receptacle, in *Com. v. Leslie*, 20 Pa. Super. Ct. 529; and of small bottles of liquors, each sealed and put up in a pasteboard box and shipped in quantities in larger wooden boxes, in *Com. v. Bishman*, 138 Pa. 639, 21 Atl. 12; and of bottles of whisky and beer, each sealed up in paper and packed together in uncovered wooden boxes, in *State v. Chapman*, 1 S. D. 414, 10 L.R.A. 432, 47 N. W. 411; and of canned goods shipped in quantity in larger boxes, in *McDermott v. State*, 143 Wis. 18, — L.R.A.(N.S.) —, 126 N. W. 888, 21 Ann. Cas. 1315.

But where the open boxes are furnished by the carrier without the knowledge or agency of the consignor, it has been held that where small bottles of spirituous liquors are each inclosed in a paper bag and tied with a string about the cork, the bags being labeled with the kind and quantity of the contents, and the consignee's name, each bottle, and not the boxes, constitutes an "original package." *Tinker v. State*, 98 Ala. 115, 11 So. 383.

And where liquid in casks is shipped in carload lots, the casks, and not the car, are the "original packages," within the pure food and drug act of 1906, authorizing the seizure of adulterated articles while remaining in the "original unbroken packages." *United States v. 65 Casks Liquid Extract*, 170 Fed. 449, affirmed in 99 C. C. A. 667, 175 Fed. 1022. And the same conclusion was reached as to sacks of flour shipped in car-

load lots in *Lasater v. Purcell Mill & Elevator Co.* 22 Tex. Civ. App. 33, 54 S. W. 425.

A few decisions have reached a conclusion contrary to that reached in the majority of the cases. Thus, in *Re May*, 82 Fed. 422, and in *State v. Goetze*, 43 W. Va. 495, 64 Am. St. Rep. 871, 27 S. E. 225, the courts went so far as to hold that the individual boxes of cigarettes constituted "original packages," even though they had been placed in a larger box for convenience in shipping. And the same is true of the cases of *Collins v. Hills*, 77 Iowa, 181, 3 L.R.A. 110, 41 N. W. 571, wherein, in holding that bottles of liquor packed in both open and closed boxes and barrels constitute the original packages, the court said: "When defendant purchased one hundred bottles of either beer or whisky, he in effect purchased that number of packages of the article; and when he sold by the bottle the transaction was of the same character. The fact that, as a matter of convenience in handling during the transportation of the property, the bottles were packed in boxes and barrels, can make no difference as to the character, in law, of the transaction. If he had the right to bring the liquor within the state, and to sell it here, he had the right to adopt such means and mode of shipment as best suited his convenience or interest;" of *State v. Coonan*, 82 Iowa, 400, 3 Inters. Com. Rep. 670, 48 N. W. 921, wherein it was held that sealed bottles packed in boxes and barrels constituted original packages; and of *State v. Miller*, 86 Iowa, 638, 53 N. W. 330, wherein it was held that bottles of beer, although packed and shipped in boxes, constituted original packages. But these cases cannot be considered good law, as the decisions of the United States Supreme Court in the *Austin* and *Cook Cases*, supra, oppose *Re May*; and the *Collins*, *Coonan*, and *Miller Cases* were, in effect, overruled by *McGregor v. Cone*, supra.

An exception to the general rule seems to arise where goods are sold through an agent, and are set aside for designated purchasers before shipment. This is upon the ground that the doctrine of "original packages" primarily concerns the right to sell within the prohibiting or taxing state goods coming in from outside. Thus, in *Rearick v. Pennsylvania*, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159, reversing 26 Pa. Super. Ct. 384, it was held that where a foreign corporation, dealing through an agent, sold brooms, which, after being tagged and marked and tied up together in bundles convenient for shipping, were so shipped and then delivered to the respective purchasers, each broom so marked was held to be specifically appropriated to the specific contract, and therefore to constitute the original packages, rather than the whole bundle. And a similar conclusion was reached in *State v. Eckenrode*, 148 Iowa, 173, 127 N. W. 56, which followed the *Rearick Case*. And see *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229, and *Stone v. State*, 117 Ga. 292, 43 S. E. 740. But no such distinction was 39 L.R.A. (N.S.)

made in *Parks Bros. v. Nez Perce County*, 13 Idaho, 298, 121 Am. St. Rep. 261, 89 Pac. 949, 12 Ann. Cas. 1113, where, upon facts and contentions similar, with the exception that the separately labeled packages were inclosed in a box, to those in the *Rearick Case*, a contrary conclusion was reached. And this rule seems inapplicable where the different packages are not set aside for or addressed to particular customers (*Canton v. McDaniel*, 188 Mo. 207, 86 S. W. 1092; *Croy v. Olbion County (Croy v. Epperson)* 104 Tenn. 525, 51 L.R.A. 254, 78 Am. St. Rep. 931, 58 S. W. 235; *Loverin & B. Co. v. Tansil*, 118 Tenn. 717, 102 S. W. 77), or where the goods are consigned and charged to the so-called agent individually (*Kimmell v. State*, 104 Tenn. 184, 56 S. W. 854).

As to what amounts to retail sale of intoxicating liquors, as distinguished from wholesale, see note to *Re Metz Bros. Brewing Co.* 32 L.R.A. (N.S.) 622. G. J. C.

PENNSYLVANIA SUPREME COURT.

ELIZABETH FLYNN

v.

PITTSBURGH RAILWAYS COMPANY,
Appt.

234 Pa. 335, 83 Atl. 207.)

Street railway — collision — stepping in front of car — nearsightedness.

Nearsightedness will not relieve one from the charge of contributory negligence, who steps upon a street car track immediately in front of a moving car, where the view of the track is unobstructed.

(January 2, 1912.)

A PPEAL by defendant from a judgment of the Court of Common Pleas Number 3 of the Allegheny County in plaintiff's fav-

Note. — Care required from one of defective sight, in using streets.

This note is supplemental to the note to *Keith v. Worcester & B. Valley Street R. Co.* 14 L.R.A. (N.S.) 648.

For the general subject of contributory negligence as affecting liability of municipal corporations for defects and obstructions in streets, see the note to *Lerner v. Philadelphia*, 21 L.R.A. (N.S.) 614.

For the duty of carrier to blind passenger, see the note to *Georgia R. & Bkg. Co. v. Rives*, 38 L.R.A. (N.S.) 564.

It is pointed out in the said note first referred to, that the cases which state that a blind person or one with defective eyesight, in using the streets, is required to take greater care than one not similarly afflicted, are not in general to be understood as meaning that a higher degree of care is required of those so afflicted. It will be seen that on its face there is nothing necessarily

or in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. William A. Challenger and Clarence Burleigh for appellant.

Messrs. Thomas M. & Rody P. Marshall, for appellee:

A nearsighted person may recover for an injury negligently inflicted upon him, if he uses the degree of care of which he is capable under all the circumstances.

Thompson v. Baltimore & O. R. Co. 218 Pa. 444, 19 L.R.A. (N.S.) 1162, 120 Am. St. Rep. 897, 67 Atl. 768, 11 Ann. Cas. 894; Shearm. & Redf. Neg. § 481; Beach, Contrib. Neg. § 397; Davenport v. Ruckman, 37 N. Y. 568; Swift v. Staten Island Rapid Transit R. Co. 123 N. Y. 645, 25 N. E. 378; Robbins v. Springfield Street R. Co. 165 Mass. 30, 42 N. E. 334; Baltimore Traction Co. v. Wallace, 77 Md. 435, 26 Atl. 518.

Plaintiff was still a passenger for hire while being transferred, and it was the duty of the defendant company to exercise a high degree of care.

contrary to this in the statement in *FLYNN v. PITTSBURGH R. Co.*, that the nearsightedness of the plaintiff "imposed upon her the duty of greater precaution to avoid injury." But it should be noted that in the earlier Pennsylvania case of *Karl v. Juniata County*, 206 Pa. 633, 56 Atl. 78, cited in the earlier note, "a degree of care . . . beyond the usual and ordinary" was said to be required of one with impaired vision.

In *Apperson v. Lazro*, 44 Ind. App. 186, 87 N. E. 97, 88 N. E. 99, affirming a judgment for the plaintiff, who was run into by an automobile on the highway, he being very nearsighted, the court said: "The plaintiff was infirm and had such defective eyesight that, according to his own testimony, he was unable to distinguish the features of a person within conversational distance. He was walking along the western edge of the beaten roadway, looking downward, it seems, to make sure of his footing. Other than this, there appears to have been nothing unusual or extraordinary in his conduct, until he was startled by the approach of the automobile. Up to this time at least, there was nothing in his actions that would indicate carelessness or negligence on his part. The fact that he was almost blind and was traveling upon the highway unattended does not constitute negligence. . . . A blind man walking upon the highway is bound to use ordinary care only, in determining which the jury should consider the blindness, other infirmities, and all circumstances bearing upon the question as to what care was reasonably necessary to insure his safety."

In *Chesapeake & P. Teleph. Co. v. Lysher*, 107 Md. 237, 126 Am. St. Rep. 389, 68 Atl. 619, the plaintiff, a blind man employed in the school for the blind in Baltimore, for 39 L.R.A. (N.S.)

Sowash v. Consolidated Traction Co. 188 Pa. 618, 41 Atl. 743; *Keator v. Scranton Traction Co.* 191 Pa. 102, 44 L.R.A. 546, 71 Am. St. Rep. 758, 43 Atl. 86; *South Covington & C. Street R. Co. v. Beatty*, 20 Ky. L. Rep. 1845, 50 S. W. 239; *Chicago & A. R. Co. v. Winters*, 175 Ill. 294, 51 N. E. 901; *Colorado Springs & C. C. Dist. R. Co. v. Petit*, 37 Colo. 326, 86 Pac. 121.

Whether or not the plaintiff was guilty of contributory negligence is a question of fact for the jury under the circumstances.

Callahan v. Philadelphia Traction Co. 184 Pa. 425, 39 Atl. 222; *Maher v. Philadelphia Traction Co.* 181 Pa. 391, 37 Atl. 571; *Hamilton v. Consolidated Traction Co.* 201 Pa. 351, 50 Atl. 946; *Taylor v. Delaware & H. Canal Co.* 113 Pa. 162, 57 Am. Rep. 446, 8 Atl. 43; *Henderson v. United Traction Co.* 202 Pa. 527, 51 Atl. 1027; *Thatcher v. Central Traction Co.* 166 Pa. 66, 45 Am. St. Rep. 645, 30 Atl. 1048; *Jackson v. Pittsburgh, A. & M. Traction Co.* 159 Pa. 399, 28 Atl. 257.

In the case at bar, if the car had made the safety stop, or had been running at the

four years had pursued a certain route from his home to the school; he moved along the street by passing his cane over the street in front of him, feeling along with his cane, and following the curbstone as much as he could; he testified that he was proceeding in this way when he fell into a hole in the sidewalk made by the defendant, and left there unguarded. In affirming a judgment for the plaintiff, and holding that the questions of negligence and contributory negligence were properly left to the jury, the court said: "The vital question in the case was whether the plaintiff, a blind man, exercised due care in passing along the sidewalk on the west side of Bradford street on the day of the accident. By the defendant's fifth prayer, the question of due care was directly submitted to the jury, to the effect that, if the jury believed the accident would not have happened if the plaintiff had used proper care on his part, then the verdict of the jury must be for the defendant. By its ninth prayer, the jury were further told that, if they believe that both the plaintiff and defendant were negligent, then their verdict must be for the defendant, as the plaintiff could not recover if his negligence contributed to the accident." The jury was also instructed that the measure of the plaintiff's care was "ordinary care, such as a reasonably prudent man, in his condition as to sight, would be expected to exercise."

In *Wedderburn v. Detroit*, 144 Mich. 684, 108 N. W. 102, where the plaintiff had been injured by stumbling over a flagstone left for a long time upon the sidewalk, it was held that she was entitled to show the defective condition of her eyesight as bearing upon the question of due care on her part.

B. R. B.

usual rate of speed, the plaintiff would have crossed in safety.

Harkins v. Pittsburg, A. & M. Traction Co. 173 Pa. 149, 33 Atl. 1044; *Smith v. Philadelphia Traction Co.* 3 Pa. Super. Ct. 129; *Beard v. Reading City Pass. R. Co.* 3 Pa. Super. Ct. 171; *Haughey v. Pittsburg R. Co.* 210 Pa. 363, 59 Atl. 1110; *Kuntz v. New York, C. & St. L. R. Co.* 206 Pa. 162, 55 Atl. 915; *Conyngham v. Erie Electric Motor Co.* 15 Pa. Super. Ct. 573; *Shaughnessy v. Consolidated Traction Co.* 17 Pa. Super. Ct. 588; *Oehmler v. Pittsburg R. Co.* 25 Pa. Super. Ct. 617; *Malone v. Pittsburgh & L. E. R. Co.* 152 Pa. 390, 25 Atl. 638.

Brown, J., delivered the opinion of the court:

The contributory negligence of the plaintiff below was so clear that the defendant's motion for a nonsuit should have prevailed, or, at the close of the testimony, a verdict ought to have been directed in its favor. After leaving a street car on California avenue, in the city of Allegheny, the appellee, with several others, walked down an alley to Beaver avenue, for the purpose of boarding a car on the south side of that avenue. There were two tracks of the defendant company upon it, and to reach the one on the south side it was necessary to cross over the one on the north. The testimony of the appellee is that, after she had passed out of the alley, she stepped down from the curb of the pavement, and looked and listened for an approaching car, and, having neither seen nor heard one, passed over the space between the curb and first track, less than 8 feet in width, continuing to look and listen for a car. The day was clear and bright, and there was nothing to obstruct a view of the track for more than a mile in the direction from which the car came that struck her, for it was straight and level for that distance. She was struck just as her feet were upon the track, though the coming of the car could have been seen for the distance stated. That she was struck the instant she got upon the track is not to be questioned.

William Hiens, a witness to the accident, who was called by the plaintiff, testified as follows:

Q. Where was the car when she stepped on the track?

A. The car was very near on top of her when she stepped on the track. . . .

Q. And the car was on top of her when she stepped on the first rail, wasn't it?

A. Yes, sir.

Q. And she practically stepped in front of that moving car, didn't she?

A. Yes, sir.

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Her own daughter, Mrs. Lillian Mulroy, who witnessed the collision, stated that as soon as her mother stepped across the first rail the car struck her about the center of the track. In *Crooks v. Pittsburg R. Co.* 216 Pa. 590, 66 Atl. 142, we said: "Where a foot passenger walks or steps directly in front of an approaching car, and is struck at the instant he sets his foot between the rails, there is but one inference which can reasonably be drawn from that fact, and that is the inference of contributory negligence. . . . The testimony is undisputed as to the manner in which this most unfortunate accident occurred. As we have seen, one step, or at the most two, carried the deceased from a point outside the line of the track into collision with the car. It must have occurred in less than a second of time. The facts speak for themselves. The action of the deceased can only be characterized as contributory negligence." And so here the act of the appellee in stepping on the track when the car which struck her was but a few feet from her, and which she must have seen and heard if she had been looking and listening, must be regarded as contributory negligence, barring her right to recover, even if the defendant company was negligent.

But it is urged that the appellee ought not to be adjudged guilty of contributory negligence as a matter of law, for two reasons: First, she was nearsighted; and, second, as there was a safety stop a few feet from the alley, in the direction from which the car came, she had a right to presume it would stop there. These two circumstances were not sufficient to send to the jury the question of her contributory negligence. Though nearsighted, she admitted that she could see, for she says she looked to see whether a car was coming, and, even when protesting her nearsightedness, she again admitted that she could see a moving object across the street from her. If she had looked when she was about to put her foot on the track, she would have seen the car, which was then nearer to her than the width of the street. If she was nearsighted, there was the greater reason for caution on her part in crossing the street. Her nearsightedness, instead of relieving her from the duty of ordinary care, imposed upon her the duty of greater precaution to avoid injury. *Central R. Co. v. Feller*, 84 Pa. 226; *Marks v. Petersburg R. Co.* 88 Va. 1, 13 S. E. 299; *McKinney v. Chicago & N. W. R. Co.* 87 Wis. 282, 58 N. W. 386, 59 N. W. 499. "Those who are deficient in any one of their senses must all the more diligently use the others. Thus a deaf man should look up and down the track even more closely than might be necessary if he could hear well;

and one whose eyesight is defective ought to listen all the more carefully for trains." 2 Shearm. & Redf. Neg. 5th ed. § 481. If the appellee had looked before she stepped upon the track, she would have known that the car had not stopped at the safety stop. The learned trial judge correctly instructed the jury that she could not escape the charge of contributory negligence by reason of being nearsighted, nor relieve herself of that charge under a belief that the car would stop at the safety stop; but he should have gone further, and, in view of her clear contributory negligence, to which we have referred, affirmed defendant's point.

The first assignment is sustained, and the judgment reversed.

NEW HAMPSHIRE SUPREME COURT.

CHARLES A. MADDEN, Admr., etc., of
Helen Yarsansky, Deceased,
v.
BOSTON & MAINE RAILROAD.

(76 N. H. 379, 83 Atl. 129.)

Negligence — fire on premises — duty to trespassing children.

A railroad company which does not know of the presence of children on its track, and

Note. — Duty to guard against injury to trespassing children by fire.

That the general rule that the mere fact that a trespasser is a child will not create nor impose on the owner of property any duty to keep his premises safe finds no exception in the case of one who has set out a fire on his premises is evident from the decisions in *MADDEN v. BOSTON & M. R. Co.* and the few cases collected in this note, all of which deny the liability, whether the jurisdiction is in general committed to the turntable doctrine or not.

In *Erickson v. Great Northern R. Co.* 82 Minn. 60, 51 L.R.A. 645, 83 Am. St. Rep. 410, 84 N. W. 462, where it appears that defendant set fire to stumps and rubbish on its right of way and, a child four years of age went to the fire, and while playing with it was burned so severely that she died, it was held that defendant was not bound to exercise ordinary care so to guard a fire on its right of way that children intruding thereon could not come in dangerous contact with the fire, though induced so to do by its attractiveness. The court said: It set fire to rubbish on its right of way presumably for the purpose of getting rid of it. In so doing it was executing upon its own premises, in a lawful way, necessary work. It exercised no actual force against the child, and the danger of injury from the fire was not concealed. The child was an intruder upon de- 39 L.R.A. (N.S.)

is not charged with knowledge that they are likely to be there because of their habit of using it as a playground, is not, when burning the grass off the right of way, bound to anticipate the presence of children, and warn them away, under penalty of being liable for injury to one who trespasses upon the track and is burned.

(April 2, 1912.)

TRANSFER by the Superior Court of Cheshire County for the opinion of the Supreme Court upon plaintiff's exceptions, after direction of a verdict in favor of defendant, of an action brought to recover damages for personal injuries resulting in death, which were alleged to have been caused by defendant's negligence. Exceptions overruled.

Plaintiff's intestate, a child six years of age, was burned so badly that she died from the injuries, through her clothing igniting from the fire which was burning upon or adjacent to defendant's right of way, upon which its employees were engaged in removing and burning grass and weeds.

Further facts appear in the opinion.

Mr. Joseph Madden, for plaintiff:

Permitting the fire to travel and spread was practically a new setting on the land adjoining the Yarsansky home, and it was active intervention.

defendant's land, and by her own act was injured by meddling with the fire. It is true she knew no better and was an innocent trespasser, but the innocence of the intruder in cases of this kind does not necessarily establish the legal duty of the landowner to protect him from injury. The law does not, as a general rule, impose restraints and conditions upon an owner's lawful and necessary use of his land which is only dangerous to persons who intrude thereon.

And in *Paolino v. McKendall*, 24 R. I. 432, 60 L.R.A. 133, 96 Am. St. Rep. 736, 53 Atl. 268, it was said that one who, for the purpose of burning up waste material, starts a fire on vacant land, need not so guard it as to prevent injury to one who is attracted there by childish instincts, as no satisfactory ground could be found for the distinction sought to be made between infants and adults in the duty of the owner or occupier of land to a mere trespasser to keep his premises safe.

In *Coleman v. Robert Graves Co.* 39 Misc. 85, 78 N. Y. Supp. 893, it was held that one who kindles a pile of shavings on his own premises, in the proper conduct of his business, owes no duty of active vigilance to prevent children from playing with the fire, and so was not liable for injuries received by a nine-year-old girl, who, while poking in the ashes, allowed her dress to catch fire. The court said: "The burning of the chips or shavings thrown out from the defendant's factory, it must be assumed,

Felch v. Concord R. Co. 66 N. H. 320, 29 Atl. 557.

Defendant was guilty of culpable ignorance of the presence of these children.

Mitchell v. Boston & M. R. Co. 68 N. H. 96, 34 Atl. 674; Hobbs v. George W. Blanchard & Sons Co. 75 N. H. 73, 18 L.R.A. (N.S.) 939, 70 Atl. 1082; Nashua Iron & Steel Co. v. Worcester & N. R. Co. 62 N. H. 162.

Mr. John E. Allen for defendant.

Walker, J., delivered the opinion of the court:

One of the facts it was essential for the plaintiff to prove or establish by a preponderance of evidence was that the defendant was guilty of a breach of some duty it owed to the intestate, which naturally resulted in her injury. But its duty to her, if she was a trespasser when her injury occurred, would not be the same as it would if she was not a trespasser.

It was a matter in dispute at the trial whether she was on the defendant's land when she caught fire, or on her father's premises. According to the testimony, no

was done for the purpose of properly conducting its business. While it might be apprehended that children playing upon the vacant lot of the defendant would play around the fire, and even play with the fire, and, as urged on behalf of the plaintiff, be enticed to search in the hot ashes for the pieces of brass, the setting fire to a pile of shavings on the lot was not in the nature of a trap for the unwary. A child of nine years knows that fire will burn. The little girl, as she says, was aware of this. There was fire in the ashes, and she used a stick. She did not think her dress would take fire; neither would the defendant's employee, who threw out the chips and set fire to them. The accident which overtook this child is extraordinary; one which, in the exercise of reasonable forethought, would not have been apprehended. But it is not necessary to place the decision upon that ground. The defendant here, under the circumstances . . . owed no duty to the plaintiff requiring active vigilance to prevent the occurrence of such an accident."

In Kalz v. Winona & St. P. R. Co. 76 Minn. 351, 79 N. W. 310, an action brought to recover damages for fatally burning a child by fire set out by a railroad company on its right of way for purposes of consumption of grass thereon, it was held that, as the evidence strongly supported the contention of defendant that the child was a trespasser, a refusal to direct a verdict for defendant was error. In this case there was apparently no contention by plaintiff that defendant would be liable even though the child was a trespasser, but he based his right to recover on the theory that the child was burned outside the right of way, at a place to which the fire set had spread, 39 L.R.A. (N.S.)

one saw her when her clothing caught fire; and she was first seen on the defendant's land, enveloped in flames. How she caught fire was not disclosed by the evidence; nor did it appear where she was at that particular time. As ruled by the court, there was no evidence that the deceased was not a trespasser when she caught fire. She was first discovered on the defendant's right of way after her clothing was on fire. How long she had been there is not disclosed by the evidence; and it would be the merest conjecture to suppose that the fire came in contact with her while she was upon her father's premises, and that she then escaped over the wall onto the defendant's land. She must be treated as a trespasser.

The only evidence that the defendant's servants actually knew of her presence was that when they were attracted by her screams she was only some 15 feet from them; and from this it is argued that they must have known she was about there before she caught fire. In the absence of any evidence that she had occupied that position for more than an instant of time, or where she caught fire, or that she had done any-

which the appellate court held to be contrary to the evidence.

Generally as to duty to discover peril or disability of trespasser, see note in 69 L.R.A. 543.

Application of turntable doctrine.

In Erickson v. Great Northern R. Co. supra, the court, while approving the so-called turntable doctrine, declined to extend its application to the case at bar, and, in discussing the limits of that doctrine, said: It is not practicable to lay down any absolute rule as to the limitations. The manifest trend, however, of all the decisions of this court, is to limit its application to attractive and dangerous machinery and to other similar cases where the danger is latent. We are not prepared to say that cases may not arise outside of this classification to which the doctrine may be extended, but we do hold that, as a general rule, the doctrine of the turntable cases must be limited to cases of attractive and dangerous machinery and to other similar cases where the danger is latent. This rule may not be strictly logical, but it is a necessary one, unless landowners are to be made insurers of the safety of children when trespassing upon their premises.

But in Paolino v. McKendall and Coleman v. Robert Graves Co. supra, the turntable doctrine was disapproved; the court in the first case stating that it is a doctrine which construes a mere temptation as an allurement sufficient legally to constitute an invitation to enter the premises of another.

As to the extent of application of attractive nuisances, see note in 19 L.R.A. (N.S.) 1124. J. H. B.

thing before screaming to attract the attention of the men engaged in their work on the track, it cannot be reasonably inferred that they knew of her presence in their vicinity before she caught fire. The evidence is not sufficient to authorize a finding that they knew she was in a place of danger until she was in imminent peril.

Nor does the evidence have any legitimate tendency to show that the workmen ought to have known that she or other little children were liable to be there. It does not appear that the defendant's way was frequented by children. It had not been used as a playground; and there was no reason to anticipate that children would trespass upon it when it was being burned over. It is argued that the fire was attractive to children, and that the defendant, knowing this fact, ought to have anticipated that they would trespass upon its way to play with the fire. But this assumption is not universally true; for many children are repelled by the sight of a conflagration. It is impossible, without other evidence, to account for the presence of the deceased on the defendant's way. What induced her to go there is problematical; and it cannot be inferred that she was there because the fire attracted her, in order to draw the further inference that the railroad men ought, in the exercise of reasonable care, to have known of her presence in time to warn her of her danger. When she screamed, nothing could be done to save her. If, therefore, it would have been the defendant's duty to warn her of her danger, or to drive her from its land, if its servants had known or ought to have known of her presence (*Hobbs v. George W. Blanchard & Sons Co.* 75 N. H. 73, 18 L.R.A.(N.S.) 93, 70 Atl. 1082; *Buch v. Amory Mfg. Co.* 69 N. H. 257, 76 Am. St. Rep. 163, 44 Atl. 800), the fact that it cannot be charged with that knowledge prevents the application of that doctrine, and shows that her injury is not attributable to its violation of any duty it owed to her. It had a right to burn the dry grass by the side of its track, without keeping watch for casual trespassers who might possibly get into the flames and be injured (*Shea v. Concord & M. R. Co.* 60 N. H. 361, 41 Atl. 774). Whether, if it had known the deceased was present, it would have been its duty to protect her from being burned by the fire, on the ground that the fire was "active intervention" by the landowner, it is unnecessary to consider.

The exception to the exclusion of evidence of the declaration of the little girl an hour after the accident, explaining how she caught fire, presents no question of law for the court. The evidence may have been excluded by the court as a matter of discretion 39 L.R.A.(N.S.)

tion. "Much must be left to the discretion of the court in admitting or rejecting such testimony." *Dorr v. Atlantic Shore Line R. Co.* 76 N. H. 160, 162, 80 Atl. 336, 337. Exceptions overruled.

All concur.

NEW YORK COURT OF APPEALS.

RE WILL OF WARREN B. FIELD, Deceased.

AMERICAN SOCIETY FOR PSYCHICAL RESEARCH, Appt.

MARY H. McALISTER, Resp't.

(204 N. Y. 448, 97 N. E. 881.)

Will — signature — superadded sheets.

A holographic will executed on a printed blank is properly subscribed by the testator at the end of it, if the signature appears in the proper place in the blank, although in the blank left for the disposing clause testator states that he disposes of his property as per the provisions of the pages attached and consecutively numbered to a number specified, which sheets are then pinned in the blank, one on top of the other, with writing on one side only, and when read as though inserted where pinned, the will reads logically and consecutively.

(February 20, 1912.)

APPEAL by a legatee from an order of the Appellate Division of the Supreme Court, Second Department, affirming a decree of the Surrogate's Court for Kings County refusing to admit to probate the will of Warren B. Field, deceased. Reversed.

Statement by Vann, J.:

A paper purporting to be the last will and testament of Warren B. Field, deceased, dated January 10, 1910, was refused probate by the surrogate of Kings county on the 25th of July, 1910. The American Society for Psychical Research, one of the legatees not cited in the surrogate's court, appealed to the appellate division, where the order of the surrogate was unanimously affirmed, and thereupon an appeal was taken to this court.

The paper was partly written and partly

Note.—The question when a will is deemed to have been signed or subscribed at the end is treated in notes to *Sears v. Sears*, 17 L.R.A.(N.S.) 353, *Mader v. Apple*, 23 L.R.A.(N.S.) 515, and *Re Stinson*, 30 L.R.A.(N.S.) 1173.

The question whether writing the name in the body of a holographic will is a signature thereto is discussed in the note to *Meads v. Earle*, 29 L.R.A.(N.S.) 64.

printed; but all the writing was by the decedent's own hand. In drafting it, a printed form was used, consisting of one sheet, at the head of the first page of which the printed part was as follows: "In the name of God, Amen. I, ..., being of sound and disposing mind and memory, and considering the uncertainty of this life, do make, publish, and declare this to be my last will and testament as follows: First, after all my lawful debts are paid, I." Then followed a blank space of 5 or 6 inches. Near the bottom of the sheet was the following printed matter: "I hereby appoint to be execut... of this my last will and testament, hereby revoking all former wills. In witness whereof I have hereunto subscribed my name and affixed my seal the day of in the year of our Lord one thousand, nine hundred Witnesses."

The first blank in the printed form was filled with the name of the decedent, and the last blanks with the name of the Kings County Trust Company, as executor, and the date in the clause commencing "In witness whereof." In the blank space of 5 or 6 inches, and directly beneath the printed line reading, "First, after all my lawful debts are paid, I," the decedent wrote as follows: "will and direct that my estate be settled as per the provisions of the pages hereto attached and numbered from one to six inclusive, and this is to stand unchallenged and unchanged in any form provided I decease before a will is drawn by my attorney." Immediately after these words in said blank space, there was attached, by two pins, six sheets in the handwriting of the decedent, numbered by him at the top consecutively from one to six, which contain the disposing provisions of the will. The first of the attached sheets begins as follows: "January 10, 1910. Provisions which I desire made in my will and which, should I pass away before will is drawn, that I desire executed exactly as though drawn in an ironclad legal form. Therefore, I, Warren B. Field, of 42 Garden Place, Brooklyn, N. Y., do appoint as my attorney to draw said will the law firm of George V. Brower, Temple Bar, Brooklyn, N. Y., and as executor of my said will the Kings County Trust Company, of Brooklyn, N. Y., under the following positive directions and instructions, to wit." Then follow the testamentary dispositions made in great detail. The last sentence of the sixth sheet of those attached in simply a direction to pay a certain fund in various proportions to three individuals.

Nothing was written in the blank spaces of the printed form, except as stated. The signature of the decedent was written in the 39 L.R.A. (N.S.)

usual place on the right-hand side at the bottom of the printed form, directly beneath the clause commencing, "in witness whereof," as filled out with the date. The signatures of the two witnesses were to the left of the signature of the decedent, and right beneath the printed word "witnesses" on the form. Below the signatures was a printed attestation clause; but it was not filled out or signed. When the paper was signed by the decedent and the two witnesses, the six separate pages were already attached in the manner above described. Due proof of the execution of the paper as a will in compliance with the requirements of the statute was shown by the testimony of the subscribing witnesses. The original paper, furnished for use on this review, reads continuously and naturally from the beginning to the end thereof; each of the "attached sheets" being written on one side only, so that it can be conveniently turned over backward in reading the instrument in the usual way.

Mr. Miles M. Dawson, for appellant:

Upon the respondent's theory that the will should be read commencing at the top of the printed form, the will is notwithstanding signed at the end thereof.

Re O'Neil, 91 N. Y. 516; Re Dake, 98 App. Div. 628, 90 N. Y. Supp. 213; Re Andrews, 162 N. Y. 1, 48 L.R.A. 662, 76 Am. St. Rep. 294, 56 N. E. 529, 43 App. Div. 394, 60 N. Y. Supp. 141.

Messrs. McKeen, Brewster, & Morgan, for respondent Mary H. McAlister:

The will was not subscribed at the end thereof.

Re Fults, 42 App. Div. 594, 59 N. Y. Supp. 756; Re Whitney, 153 N. Y. 259, 60 Am. St. Rep. 616, 47 N. E. 272; Re Field, 144 App. Div. 737, 129 N. Y. Supp. 590; Re Emmons, 110 App. Div. 701, 96 N. Y. Supp. 506; Re Dake, 75 App. Div. 403, 78 N. Y. Supp. 29; Re Andrews, 162 N. Y. 1, 48 L.R.A. 662, 76 Am. St. Rep. 294, 56 N. E. 529; Re O'Neil, 91 N. Y. 516; Re Blair, 84 Hun, 581, 32 N. Y. Supp. 845.

Vann, J., delivered the opinion of the court:

The surrogate refused probate, because the paper purporting to be a will was not "subscribed by the testator at the end" thereof as required by statute, and the decree was affirmed by the appellate division for the same reason. As the essential facts were stipulated, and the original paper itself is produced as one of the facts agreed upon, the question whether it was signed at the end is a question of law. The entire printed form was treated below as the first page, the sheets numbered from one to six as succeeding pages, and thus the conclusion was reached that the decedent did not sign

at the end of the paper. When read in this way the instrument does not read naturally or consecutively, and does not make sense. The physical position of the six sheets, the place and method of attaching them, and the closing paragraphs at the bottom of the printed form, are substantially ignored. The natural order of reading the paper is subverted and an artificial order substituted, not to aid, but to overturn, the obvious intention. The natural order of reading it is to begin with the opening words on the printed blank and, continuing with form and sense reasonably connected, to read the first of the numbered sheets, and, turning it over in the usual way with legal papers, to read the other sheets in their actual order, and after the last has been read, to turn that over also, when the closing paragraphs of the printed form follow, the end of the instrument is reached, and no part thereof follows the signature. Who would read it in any other way, unless he wished to destroy it as a will? Who would turn over the six sheets without reading them, read the testimonium clause, and then turn back to read the rest? In reading an ordinary card calendar with the record of the month of December printed on the card itself and descriptive matter printed above, with the records of the other months on slips attached in the usual way, that of January being on top, who would not regard December as the end, both of the calendar and the card? The slips become by the place and method of attachment virtually embodied in the card. So the six sheets of the paper in question are part of the body of the will, being physically incorporated therein, and not, as in some of the cases, wholly without the body and merely referred to therein. The essence of the paper subscribed is not the printed form alone, but the printed form with the six sheets so inserted therein as to become blended therewith at the point of insertion. Thus the physical and the literary beginning, body, and end of the instrument are the same, and the signature of the testator is found at the end.

The position of the courts below, however, finds some support in the adjudged cases; for we have gone far to protect testators from the danger of imposition and fraud through unauthorized additions and changes in their wills. That danger does not exist when, as in this case, the will is holographic, and, while we do not regard that fact as controlling, it is worthy of remark that none of the six numbered sheets could have been changed without the co-operation of the testator himself. While the pins could be removed and other sheets substituted, this is true of many wills written on different sheets and fastened together by riv-

ets or tape. There is no statute forbidding the use of separate sheets, or directing how they shall be joined together. Cases where wills have been altered after execution are very rare, as the records of the courts show, while cases where the intention of the testator has been wholly defeated by a rigid construction of the statute requiring subscription at the end of the will are alarmingly frequent. Thus, Judge Cullen, writing for the appellate division in *Re Andrews*, 43 App. Div. 394, 401, 60 N. Y. Supp. 141, 146, said: "With every disposition to uphold this will, we do not see how it can be done by this court. If limitations or qualifications are to be made on the cases on which this opinion is based, those limitations must proceed from the court of appeals. If the decision now made by us should be upheld by that court, it will follow that at least six wills (including one in the fourth department, *Re Fufts*, 42 App. Div. 593, 59 N. Y. Supp. 756), undoubtedly containing the true testamentary dispositions of testators, and executed by those testators with the intent to conform with the statutes of this state, will have been held void because of the interpretation placed on the statutory requirements for safeguards against fraud. The rule which our decision enforces in this case operates only to prevent fraudulent additions to testamentary instruments, and not as a security against wills forged in their entirety. We think the decisions of the courts of this state will be examined in vain in the attempt to find six cases of alleged fraudulent additions to wills, or even half that number; and it must be conceded that as to this supposed danger the remedy has proved in practice far worse than the disease. In England a statute similar to our own, and construed as strictly by the courts of that country as our statute has been construed by our courts, was passed in 1837 (1 Vict. chap. 26). The evils resulting from it proved so great that in 1853 (15 and 16 Vict. chap. 24) it was modified. 1 Jarman Wills, 5th Am. ed. 106."

The evil of fraudulent changes in wills is rare, while the evil of defeating wills altogether in the manner suggested is common. Hence we think we have gone far enough in the direction of rigid construction, and that the doctrine of certain authorities should not be extended, lest, in the effort to prevent wrong, we do more harm than good.

The appellate division, not without some reason, relief upon *Re Whitney*, 153 N. Y. 259, 60 Am. St. Rep. 616, 47 N. E. 272, and *Re Andrews*, 162 N. Y. 1, 48 L.R.A. 662, 76 Am. St. Rep. 294, 56 N. E. 529. In the earlier case, the facts, as stated by Judge Edward T. Bartlett, in his opinion,

were as follows: "The will is drawn upon a printed blank covering only one page, and the testator and subscribing witnesses signed at the foot thereof. The subdivisions of the will, marked, respectively, 'first' and 'second,' fill the entire blank space in the printed form, and at the end of the second subdivision are the words 'see annexed sheet.' On a separate slip of paper are written two additional subdivisions, marked, respectively, 'third' and 'fourth,' and this is attached to the face of the will, immediately over the first and second subdivisions, by metal staples, so that the slip annexed has to be raised up or turned back, in order to read the first two clauses." We held that probate of the instrument was properly denied, citing *Re O'Neil*, 91 N. Y. 516, and *Re Conway*, 124 N. Y. 455, 11 L.R.A. 796, 26 N. E. 1028.

In the *O'Neil Case*, the instrument was drawn on a printed blank, the formal commencement being on the first page, and the formal termination at the foot of the third page. The blank space was filled on the first, second, and third pages, and the last or thirteenth clause of the will was partly written on the third, and the balance carried over to the blank fourth page. The names of the testator and the witnesses were subscribed near the bottom of the third page, below the formal printed termination of the will, and there only. The last clause was below and beyond the signature.

In the *Conway Case*, there was a similar state of facts, with the exception that at the end of the provisions in the body of the will were the words "carried to back of will," and upon the back of the sheet was the words "continued." Following this word were various bequests, and then below them were added the words "signature on face of the will," and there only was the will signed.

In the *Whitney Case*, as is well said by the learned counsel for the appellant, the order of the sheets had to be disturbed, if the will was to be read consecutively, while in the case at bar the order must be disturbed violently, if one is to escape reading the will consecutively. The sheets attached in the *Whitney will* covered the preceding clauses thereof, and prevented its being read consecutively; in the case at bar, they covered only the subsequent clauses, and so enable it to be read consecutively. In other words, we held in the *Whitney Case* that when the instrument could not be read without turning the leaves backward and forward, it did not comply with the statute. That is not this case, and while the facts are somewhat similar, the principle involved cannot be extended without danger.

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In *Re Andrews*, a printed form was used, consisting of one sheet, the two leaves of which were joined from top to bottom on the left side. After the printed formal part at the top of the first page was a blank space that was filled by the draftsman, who then skipped the second page, which had the attestation clause at the top, and filled the third, writing at the top thereof "2d page." He then wrote on the second page, at the top, "3d page," filled out the attestation clause directly beneath, and it was subscribed and witnessed at that point only. Hence the end of the will was found on the second page, and the part written on the third page was neither subscribed by the testator, nor incorporated by reference into the part that was subscribed by him. When read in its natural order, the will did not run consecutively. It did not make sense without skipping backward and forward. As was said by Judge Bartlett in his opinion: "We have here on one entire piece of paper, folded so as to make four pages, a complete will, so far as form goes, on the first and second pages, and then follows on the third page of the blank, and after the signatures of testatrix and witnesses on the second page of the blank, a page marked '2d page,' not connected with the will proper in any way, but complete by itself." 162 N. Y. 10, 48 L.R.A. 662, 76 Am. St. Rep. 294, 56 N. E. 532.

We regard the decision in the *Andrews Case* as extreme, and as marking a boundary beyond which we should not go. The natural end of a will is where the draftsman stopped writing in the consecutive order of composition, which, in the *Andrews will*, preceded the third page, and in the will before us succeeded the six numbered pages. The will before us, when read consecutively as the mass of mankind would read it, has the signature at the physical and natural end thereof. We think that the will of the decedent should have been admitted to probate. We base our decision largely on the natural and consecutive method of reading, without turning backward or skipping a part and then looking forward, only to turn backward again, in order to have the sense connected and continuous. Form should not be raised above substance, in order to destroy a will, and the substantial thing in this case is a paper which reads straight-forward and without interruption from the beginning to the end, and when thus read the signature is found at the end.

The order of the Appellate Division and decree of the Surrogate should be reversed, with costs in all courts payable out of the estate, and the proceeding remitted to the

Surrogate of Kings County, with directions to admit the will to probate.

Cullen, Ch. J., and Haight, Werner, Willard Bartlett, Chase, and Collin, JJ., concur.

COLORADO SUPREME COURT.
(In Banc.)

TUNNEL MINING & LEASING COMPANY, Appt.,
v.

J. E. COOPER.

(50 Colo. 390, 115 Pac. 901.)

Trial — excessive verdict — remittitur — judgment for new trial.

1. The court cannot enter judgment upon

Note. — Power of trial court to cure an excessive verdict by requiring or permitting a reduction where true measure of damages not ascertainable by mere computation.

I. Introductory, 1064.

II. Peremptory reductions, 1064.

III. Permissive remittiturs.

a. In general.

1. Theory that trial court has power, 1067.

2. Contrary doctrine, 1075.

b. Where there is prejudice or passion.

1. Not allowable, 1079.

2. Allowable, 1083.

I. Introductory.

This note relates to the power of the trial court, and is limited to verdicts in actions where the damages are not capable of computation. Cases where, under the local practice, motions for a new trial are made in the appellate court, or before a general term, are not included.

For cases on the power of appellate courts to interfere with verdict for excessive damages, see the note to *Burdiet v. Missouri P. R. Co.* 26 L.R.A. 384. The questions as to the reduction of verdicts which exceed the claim of the declaration or writ, and as to reductions for the purpose of ousting appellate courts, are also excluded.

The practice by the trial court of denying a motion for a new trial upon condition that the plaintiff remit a part of a verdict, even in cases where the damages are not liquidated, is growing in favor, and this is now the more general rule, though it is still opposed in some jurisdictions. A few courts go further and permit this practice by the trial courts even where there is passion and prejudice in the verdict. As to peremptory reductions, there seems to be no court except that of Wisconsin which requires a reduction of part of a verdict for damages of this character without the con-

a verdict after remittitur, which was excessive as a result of passion or prejudice, where the statute provides for a new trial in such cases.

Same — finding of prejudice.

2. A finding by a court that the verdict in a personal-injury action was excessive, and its direction of a remittitur, amounts, as matter of law, to a finding that it was the result of passion or prejudice, where, under the statute, the court has no authority to interfere with the verdict except for such cause, although the court may expressly declare that it is not able to see that the verdict is the result of passion or prejudice.

Same — judicial declaration of prejudice.

3. The court will declare that the allowance of \$38,750, for injury to a miner capable of earning \$1,200 per year, which consists of the fracture of his collar bone, which shortened in knitting, and of three

sent of the party in whose favor the verdict is rendered.

The remittitur of wrongful items is, of course, not within the scope of this note, but it may be mentioned that, following the general rule as to such items, it has been held that a remittitur of exemplary damages will cure a wrongful inclusion of them in the case, if such inclusion has not had an improper influence on the rest of the verdict. (See *Freiberg v. Elliott*, — Tex. —, 8 S. W. 322; *Stone v. Chicago, St. P. M. & O. R. Co.* 88 Wis. 98, 59 N. W. 457; also *San Antonio & A. P. R. Co. v. Morgan*, — Tex. Civ. App. —, 45 S. W. 169, which was, however, reversed on another ground in 92 Tex. 98, 46 S. W. 281. The reader will remember that the action of the trial court in ordering a new trial absolutely for excessive unliquidated damages is rarely disturbed in the appellate courts.

II. Peremptory reductions.

As heretofore stated, in actions for unliquidated damages the trial court may not enter reductions of damages without the consent of the party favored by the verdict. *Kennon v. Gilmer*, 131 U. S. 22, 33 L. ed. 110, 9 Sup. Ct. Rep. 696 (*dictum*); *Duke v. St. Louis & S. F. R. Co.* 172 Fed. 684 (*dictum*) affirmed in 112 C. C. A. 564, 192 Fed. 306; *Albin v. Kinney*, 96 Ill. 214 (*dictum*) *Brown v. McLeish*, 71 Iowa, 381, 32 N. W. 385; *Sourwine v. Truscott*, 25 Hun, 67 (as explained in *Williams v. Empire Woolen Co.* 7 App. Div. 345, 39 N. Y. Supp. 941); *Isley v. Virginia Bridge & Iron Co.* 143 N. C. 51, 55 S. E. 416; *Atchison, T. & S. F. R. Co. v. Cogswell*, 23 Okla. 181, 20 L.R.A.(N.S.) 837, 99 Pac. 923; *Western U. Teleg. Co. v. Frith*, 105 Tenn. 167, 58 S. W. 118 (*dictum*); *Young v. Cowden*, 98 Tenn. 577, 40 S. W. 1088 (*dictum*); *Rodgers v. Bailey*, 68 W. Va. 186, 69 S. E. 693. See also, as indicating a similar view, *Dickie v. Henderson*, 95 Ark. 78, 128 S. W. 561; *Shayne v. White*, 81 App. Div. 600,

ribs, which failed to unite, so that normal protection is not given to certain vital parts, and he has to wear a belt to protect them, and the shortening of one leg a half inch, so that he is left slightly lame, is, because of its amount, the result of passion or prejudice, or of a total misconception by the jury of its duties and obligations.

(May 1, 1911.)

APPEAL by defendant from a judgment of the District Court for Teller County, entered upon a verdict in plaintiff's favor, after remittitur, in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servant. Reversed.

The facts are stated in the opinion.

Messrs. Milton Smith and Charles R. Brock, for appellant:

The court erred in allowing a remittitur,

81 N. Y. Supp. 372. See *contra*, Wisconsin cases, *infra*.

In *Kenyon v. Gilmer*, 131 U. S. 22, 33 L. ed. 110, 9 Sup. Ct. Rep. 696, an action for personal injuries, the Supreme Court of the United States, in reversing the decision of the supreme court of a territory, which reduced the amount of a judgment absolutely, without giving the plaintiff his election said, after referring to the Montana statutes: "Under these statutes, as at common law, the court, upon the hearing of a motion for a new trial, may, in the exercise of its judicial discretion, either absolutely deny the motion, or grant a new trial generally, or it may order that a new trial be had unless the plaintiff elects to remit a certain part of the verdict, and that, if he does so remit, judgment be entered for the rest. . . . In a case in which damages for a tort have been assessed by a jury at an entire sum, no court of law, upon a motion for a new trial for excessive damages and for insufficiency of the evidence to support the verdict, is authorized, according to its own estimate of the amount of damages which the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury."

In *Massadillo v. Nashville & K. R. Co.* 89 Tenn. 661, 15 S. W. 445, where the plaintiff, under protest, remitted a part of the verdict in order to prevent a new trial, it was held that this was error; that therefore the verdict must be considered as intact; and as it appeared to be excessive, and showed that there was passion and prejudice, a new trial was ordered.

Cutting off defendant's appeal.

In this connection it may be noted that the court may not, as a condition of a reduction, cut off the defendant's right to appeal.

In *Hall v. Northwestern R. Co.* 81 S. C. 522, 62 S. E. 848, where the trial court or-

dered "that if the defendant, within thirty days from the date of the filing of this order, tenders to plaintiff the sum of \$10,000 and costs, in full satisfaction of said verdict, and if the plaintiff declines to accept said amount and release the defendant upon record from all further liability for said verdict, then a new trial is ordered; but if defendant fail or decline, within said period of time, to make the tender aforesaid, then a new trial be, and is hereby, refused,"—it was held that this order was erroneous, and that it must be changed to an order granting the defendant a new trial unless the plaintiff should, within a certain time, remit \$5,000 from the verdict, which was for \$15,000.

F. M. Davis Iron Works Co. v. White, 31 Colo. 82, 71 Pac. 384; *Deep Min. & Drainage Co. v. Fitzgerald*, 21 Colo. 533, 43 Pac. 210; *Louisville & N. R. Co. v. Fox*, 11 Bush, 495; *Denver & R. G. R. Co. v. Scott*, 34 Colo. 99, 81 Pac. 763.

Mr. Charles C. Butler, for appellee:

The verdict was not the result of passion or prejudice.

Mitchell v. Broadway & S. A. R. Co. 70 Hun, 387, 24 N. Y. Supp. 32; *Chicago & A. R. Co. v. Flaherty*, 105 Ill. App. 14; *Postal Teleg. Cable Co. v. Coote*, — Tex. Civ. App. —, 57 S. W. 912; *Colorado Springs Electric Co. v. Soper*, 38 Colo. 126, 88 Pac. 161; *Todd v. Demeree*, 15 Colo. 88, 24 Pac. 563; *Browns v. Lutin*, 16 Colo. App. 263, 64 Pac. 674; *Haycraft v. Griggsby*, 94 Mo. App. 74,

dered "that if the defendant, within thirty days from the date of the filing of this order, tenders to plaintiff the sum of \$10,000 and costs, in full satisfaction of said verdict, and if the plaintiff declines to accept said amount and release the defendant upon record from all further liability for said verdict, then a new trial is ordered; but if defendant fail or decline, within said period of time, to make the tender aforesaid, then a new trial be, and is hereby, refused,"—it was held that this order was erroneous, and that it must be changed to an order granting the defendant a new trial unless the plaintiff should, within a certain time, remit \$5,000 from the verdict, which was for \$15,000.

The same was held in a similar case in *Jackson v. Southern Cotton Oil Co.* 81 S. C. 564, 62 S. E. 854.

See also *Yazoo & M. Valley R. Co. v. Wallace*, 90 Miss 609, 122 Am. St. Rep. 321, 43 So. 469 (*infra*, III. a, 1, Constitutional power of trial court).

In *Nashville, C. & St. L. R. Co. v. Foster*, 10 Lea, 351, the court, in reversing the judgment, said: "Upon considering the motion for a new trial, the court below stated that for certain specified reasons he considered the verdict excessive; but that, if the plaintiff would consent to reduce it one half, or to \$5,000, he would not grant a new trial; but if the plaintiff agreed to so reduce the amount of the verdict, the defendant must agree not to appeal, or else the verdict should stand for the whole amount; whereupon the plaintiff offered to reduce the amount of recovery to \$5,000, if the defendant would agree not to appeal, and would pay the amount and all costs promptly. This defendant declined to do. Whereupon the court overruled his motion for a new trial. This proceeding was in effect an attempt to compel the defendant to compromise the suit by paying an amount fixed by the court or else pay the whole amount of a verdict which, as is fairly deducible from the record, he considered excessive to

67 S. W. 965; *La Salle Pressed Brick Co. v. Coe*, 126 Ill. App. 308; *Harrison v. Harrison*, 129 Ga. 282, 58 S. E. 831; *Papot v. Southwestern R. Co.* 74 Ga. 296; *City & Suburban R. Co. v. Waldhaur*, 84 Ga. 706, 11 S. E. 452; *Bennett v. Runyon*, 4 Dana, 422; *Louisville & N. R. Co. v. Connelly*, 9 Ky. L. Rep. 993, 7 S. W. 914; *Peoria, D. & E. R. Co. v. Rice*, 46 Ill. App. 60; *Deep Min. & Drainage Co. v. Fitzgerald*, 21 Colo. 533, 43 Pac. 210.

Bailey, J., delivered the opinion of the court:

In this action, for the recovery of damages for personal injuries, the plaintiff had a verdict for \$38,750. One assignment of the motion for a new trial is based upon

the fifth subdivision of § 217 of the Code, providing therefor, where excessive damages appear to have been given under the influence of passion or prejudice. The trial court found the award excessive, and advised the plaintiff that a new trial would be granted, unless \$28,750 were remitted from the verdict. To this plaintiff assented and there was judgment for \$10,000. The defendant objected and excepted to the order allowing such remittitur, and to the judgment for \$10,000, claiming that, since the verdict was held excessive, it had an absolute right, under the Code, to a new trial.

These objections, with many others, are here for consideration, the case having been

the extent of \$5,000. He should have granted a new trial."

It may be here noted that in *St. Louis & N. A. R. Co. v. Mathis*, 76 Ark. 184, 113 Am. St. Rep. 85, 91 S. W. 763, it was held "that it was beyond the power of a legislature to prohibit an inquiry in this court as to the sufficiency of the evidence to sustain the amount of damages assessed by a jury, or require a litigant to surrender his right of appeal as a condition upon which he may accept the reduction by the trial court of an excessive verdict," and that therefore the statute of Arkansas of 1901 was so far invalid. The statute provides: "The verdict of any jury, rendered in any action for the recovery of damages, where the measure thereof is indeterminate or uncertain, shall not be held to be excessive, or be set aside as excessive, except for some erroneous instruction, or upon evidence, aside from the amount of the damages assessed, that it was rendered under the influence of passion or prejudice; provided, that the circuit judge presiding at the trial may, on motion for a new trial, filed by the losing party, if he deems the verdict excessive, indicate the amount of such excess, and thereupon, if the losing party shall offer to file and enter of record a release of all errors that may have accrued at the trial if the prevailing party will remit the amount so deemed excessive, and the prevailing party shall refuse to remit the same, the verdict shall be set aside."

Wisconsin practice.

In Wisconsin there has recently been created a peculiar method or practice which involves the reduction of a verdict without the plaintiff's consent, and the cutting off of the defendant's right of appeal as a condition. This is stated in *Heimlich v. Tabor*, 123 Wis. 565, 68 L.R.A. 669, 102 N. W. 10, as, on the one hand, permitting the plaintiff to remit, "and also to permit the defendant, in such a situation, to terminate the litigation, whether plaintiff is willing or not, by consenting to judgment for a sum

sufficiently less than the verdict to, in the judgment of the court, cure the error."

This method was laid down as the course to be pursued in the appellate court, in *Rueping v. Chicago & N. W. R. Co.* 123 Wis. 319, 101 N. W. 710, and is illustrated in *Beach v. Bird & W. Lumber Co.* 135 Wis. 550, 116 N. W. 245, where the court said, in affirming the judgment: "The plaintiff had a verdict for \$20,000, and the trial court, upon motion for a new trial, stating, among other things, that the damages awarded by said verdict were excessive, granted said motion conditionally; that is to say, regarding \$9,000 as the maximum amount for which an impartial jury would probably find a verdict for the plaintiff, and \$5,000 as the minimum, he awarded to the plaintiff the option to take judgment for \$5,000 and costs, to the defendant the option to submit to judgment for \$9,000 and costs, and in case neither party exercised his option, the verdict to be set aside and a new trial ordered. The plaintiff elected to take judgment for \$5,000 damages, and for this amount, with costs, judgment was rendered in his favor." And the opinion of the trial judge was approved, wherein he said: "The right and duty of this court to give the parties the option of having judgment entered for a less amount rather than be compelled to retry the case are no longer in doubt in this state. *Rueping v. Chicago & N. W. R. Co.* 123 Wis. 319, 101 N. W. 710; *Heimlich v. Tabor*, 123 Wis. 565, 68 L.R.A. 669, 102 N. W. 10. And it is immaterial what caused the jury to render the excessive verdict. It is sufficient that it is excessive, from prejudice or other cause. An excessively large verdict, in the absence of any other explanation, may be usually treated as *prima facie* evidence that the jury was not unprejudiced, fair, and impartial. . . . The court is not authorized to determine what amount of damages the plaintiff shall recover, thus substituting his judgment for that of the jury. But the court is to determine the maximum and minimum amounts that an impartial and unprejudiced jury would probably name, as no two juries,

brought up by defendant for review on appeal.

Whatever the rule may be in other jurisdictions, in this state it is settled, in the case of *F. M. Davis Iron Works Co. v. White*, 31 Colo. 82, 71 Pac. 384, in a well and carefully considered opinion, upon a comprehensive review of all the decisions to this point, that where, in an action for damages for personal injuries, and in other like actions, the verdict is excessive, and is returned as a result of passion or prejudice, it is beyond the power of the trial court to allow a remittitur of the excess, and enter a judgment for the residue, but that the verdict must be set aside, and a new trial granted. The conclusion of the court in that case, in an opinion by Chief Justice

fair and impartial and unprejudiced, would arrive at the same amount. The question is, what would be the smallest amount that any such jury might assess, and what the largest amount that any other such jury might honestly assess? and the only way suggested for solving this question is by ascertaining what such juries have done in similar cases, and what amounts have been held to be excessively large or small. When these two limits have been arrived at, reasonable doubts being resolved in favor of making the minimum small and the maximum large, the court then gives the defendant the option of consenting to judgment against him for the larger amount, and if he does not so elect, the option is then given to the plaintiff to take judgment for the smaller amount, and, in the event of neither option being exercised, the verdict is set aside and a new trial awarded."

This is an abandonment of the former views of the court, as shown in *Schultz v. Chicago, M. & St. P. R. Co.* 48 Wis. 375, 4 N. W. 399, where the court said: "The learned circuit judge denied the motion for a new trial, but stated that he thought the damages assessed by the jury excessive; and he declined to sign judgment for the sum so assessed until the plaintiff stipulated to discharge the judgment if the defendant should, within sixty days after the judgment should be signed, pay thereon the sum of \$3,000, together with the costs. . .

We are aware of no law or rule of practice which authorizes the court to impose the terms here imposed as a condition precedent to signing judgment. The court may grant or refuse a new trial, or, in a proper case, may grant a new trial nisi; but should do one thing or the other. It should not, as was done in this case, require the prevailing party to remit a portion of the damage awarded, and then deprive the other party of the benefit of the reduction unless he submits to onerous terms." But the court, considering that the entire damages awarded by the verdict in the first place were not so great as to have required them to reverse the judgment, it was affirmed.

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Campbell, was stated in this emphatic and unmistakable language:

"The result of our conclusion is—and that is the only point which we decide—that, under our Code, where, in an action for personal injuries, and others standing on like grounds, a verdict is excessive, and was returned as the result of passion or prejudice upon the part of the jury, it should be set aside in its entirety and a new trial awarded; and that it is beyond the power of a trial court to order a remittitur as to the part which it deems excessive, and enter judgment for the residue, because the entire verdict is vitiated by the improper motive, and it is impossible for the court to determine that any particular part is free from objection and some other part is bad.

III. *Permissive remittiturs.*

a. *In general.*

1. *Theory that trial court has power.*

As heretofore stated, it is now the more general rule that the trial court may make an order denying the motion for a new trial upon the condition that the successful party will remit a certain sum from the verdict, although the amount remaining is not capable of definite computation from the evidence. *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Blunt v. Little*, 3 Mason, 102, Fed. Cas. No. 1,578; *Bierbach v. Goodyear Rubber Co.* 15 Fed. 490 (C. C. E. D. Wis.); *Wood v. Louisville & N. R. Co.* 88 Fed. 44; *Porter v. Delaware, L. & W. R. Co.* 134 Fed. 155 (C. C. D. N. J.); *Darnell v. Krouse*, 134 Fed. 509 (C. C. E. D. Pa.); *Bulduzzi v. James Ramage Paper Co.* 140 Fed. 95 (C. C. D. Vt.); *Scheu v. Pennsylvania R. Co.* 141 Fed. 495 (C. C. W. D. Pa.); *Duke v. St. Louis & S. F. R. Co.* 172 Fed. 684 (C. C. W. D. Ark.); *Gagnon v. Klauder-Weldon Dyeing Mach. Co.* 174 Fed. 477 (C. C. N. D. N. Y.); *Latchtimacker v. Jacksonville Towing & Wrecking Co.* 181 Fed. 276 (C. C. S. D. Fla.); *Montgomery Traction Co. v. Knabe*, 158 Ala. 458, 48 So. 501; *Southern P. Co. v. Tomlinson*, 4 Ariz. 126, 33 Pac. 710; *Gila Valley G. & N. R. Co. v. Hall*, 13 Ariz. 270, 112 Pa. 845, overruling *Southern P. Co. v. Fitchett*, 9 Ariz. 128, 80 Pac. 359; *Little Rock & Ft. S. R. Co. v. Barker*, 39 Ark. 491 (remittitur voluntarily offered); *George v. Law*, 1 Cal. 363; *Benedict v. Cozzens*, 4 Cal. 381; *Phelps v. Cogswell*, 70 Cal. 201, 11 Pac. 628; *Davis v. Southern P. Co.* 98 Cal. 13, 32 Pac. 646; *Tobin v. Omnibus Cable Co.* — Cal. —, 34 Pac. 124; *North v. New Britain*, 77 Conn. 715, 58 Atl. 699; *Noxon v. Remington*, 78 Conn. 296, 61 Atl. 963; *Sinclair v. Washington & G. R. Co.* MacArth. & M. 13; *Hennessy v. District of Columbia*, 8 Mackey, 220; *Thomas v. Fischer*, 71 Ill. 576; *Chicago, B. & Q. R. Co. v. Dickson*, 88 Ill. 431; *Albin v.*

The learned district judge, upon first impression, was of opinion that the verdict should be set aside in its entirety; but, upon subsequent investigation, concluded that the power to order a remittitur, though not strictly one that was inherent in the court, might nevertheless be exercised if the plaintiff consent, because the reduction of the verdict is in favor of the defendant, and therefore he is not in a position to complain. This reason, at first blush plausible, is the one often given. The injury to a defendant in such circumstances does not consist in the mere striking from a verdict of a portion of it, but in entering judgment against him for any part of a verdict, the whole of which is vitiated by improper motives of a jury. The judgment should be

reversed and the cause remanded, and it is so ordered."

So that, if it can be fairly seen and held that the jury here returned an excessive verdict, influenced by passion or prejudice, or from any wrongful motive, a new trial must be granted, as it is a just inference that a finding for the plaintiff at all may have been brought about by improper considerations.

The legislature has given to a losing party an absolute right to a new trial when he brings his cause within any of the seven stated grounds for which new trials are to be granted under the Code. The provision upon which the court acted in allowing the remittitur in this case, and which ground,

Kinney, 96 Ill. 214; Union Rolling Mill Co. v. Gillen, 100 Ill. 52; Libby, McNeill & Libby, v. Scherman, 146 Ill. 540, 37 Am. St. Rep. 191, 34 N. E. 801; Clayton v. Brooks, 150 Ill. 97, 37 N. E. 574, affirming 31 Ill. App. 62; Cicero & P. Street R. Co. v. Brown, 193 Ill. 274, 61 N. E. 1093; Amann v. Chicago Consol. Traction Co. 243 Ill. 263, 90 N. E. 673; Conrad Seipp Brewing Co. v. Doody, 25 Ill. App. 305; Kolb v. Flages, 27 Ill. App. 531; Chicago & N. W. R. Co. v. Des Lauriers, 40 Ill. App. 654; Stummer v. Pitchman, 22 Ill. App. 399; Goldie v. Werner, 50 Ill. App. 297, affirmed in 151 Ill. 551, 38 N. E. 95; Illinois C. R. Co. v. Robinson, 58 Ill. App. 181; West Chicago Street R. Co. v. Wheeler, 73 Ill. App. 368 (in effect); Haymarket Theater Co. v. Rosenberg, 77 Ill. App. 183; McNulta v. Hendele, 92 Ill. App. 273; Johnson v. Eckberg, 94 Ill. App. 634; Hirsch v. Chicago Consol. Traction Co. 146 Ill. App. 501; Tucker v. Hyatt, 151 Ind. 332, 44 L.R.A. 129, 51 N. E. 469; Cleveland, C. C. & St. L. R. Co. v. Beckett, 11 Ind. App. 547, 39 N. E. 429; Brockman v. Berryhill, 16 Iowa, 183; Van Winter v. Henry County, 61 Iowa, 684, 17 N. W. 94; Duffy v. Dubuque, 63 Iowa, 171, 50 Am. Rep. 743, 18 N. W. 900; Baxter v. Cedar Rapids, 103 Iowa, 599, 72 N. W. 790; Doran v. Cedar Rapids & M. C. R. Co. 117 Iowa, 442, 90 N. W. 815; Union P. R. Co. v. Mitchell, 56 Kan. 324, 43 Pac. 244; Argentine v. Bender, 71 Kan. 422, 80 Pac. 935; Chicago, R. I. & P. R. Co. v. Brandon, 77 Kan. 612, 95 Pac. 573; Landry v. New Orleans Shipwright Co. 112 La. 515, 36 So. 548; Reems v. New Orleans G. N. R. Co. 126 La. 511, 52 So. 681 (recognizing the power); Detzur v. B. Stroh Brewing Co. 119 Mich. 282, 44 L.R.A. 500, 77 N. W. 948; Marshall v. Saginaw Valley Traction Co. 157 Mich. 541, 122 N. W. 131; Craig v. Cook, 28 Minn. 232, 9 N. W. 712; Pratt v. Pioneer-Press Co. 35 Minn. 251, 28 N. W. 708; Hall v. Chicago, B. & N. R. Co. 46 Minn. 439, 49 N. W. 239; Trow v. White Bear, 78 Minn. 433, 80 N. W. 1117; McKnight v. Minneapolis, St. P. & S. Ste. M. R. Co. 96 Minn. 480, 105 N. W. 673; Viou v. Brooks Scanlon Lumber Co. 99 Minn. 97, 39 L.R.A. (N.S.)

108 N. W. 891, 9 Ann. Cas. 318; Goss v. Goss, 102 Minn. 346, 113 N. W. 690; Burnside v. Minneapolis & St. L. R. Co. 110 Minn. 401, 125 N. W. 895; Clark v. Scandinavian-American Bank, 113 Minn. 93, 128 N. W. 1114; Kerling v. G. W. Van Dusen & Co. 113 Minn. 501, 123 N. W. 1048; Loyd v. Hannibal & St. J. R. Co. 53 Mo. App. 509; Walser v. Thies, 56 Mo. App. 89; Burdick v. Missouri P. R. Co. 123 Mo. 221, 26 L.R.A. 384, 45 Am. St. Rep. 528, 27 S. W. 453; Gordon v. Kansas City Southern R. Co. 222 Mo. 516, 121 S. W. 80; Barbour v. McKee, 7 Mo. App. 587; Holmes v. Atchison, T. & S. F. R. Co. 48 Mo. App. 79 (in effect); Freeman v. Missouri & K. Teleph. Co. 160 Mo. App. 271, 142 S. W. 733; Lewis v. Northern P. R. Co. 36 Mont. 207, 92 Pac. 469; Harrington v. Butte, A. & P. R. Co. 39 Mont. 22, 101 N. W. 149; Fremont, E. & M. Valley R. Co. v. French, 48 Neb. 638, 67 N. W. 472; Schofield v. Territory, 9 N. M. 526, 56 Pac. 306 (apparently); O'Donnell v. American Sugar Ref. Co. 41 App. Div. 307, 58 N. Y. Supp. 640; Brangan v. Long Island R. Co. 28 App. Div. 461, 51 N. Y. Supp. 112 (recognizing the power); Kalfur v. Broadway Ferry & M. Ave. R. Co. 34 App. Div. 267, 54 N. Y. Supp. 503 (recognizing the power); affirmed in 161 N. Y. 660, 57 N. E. 1113; (see also Williams v. Empire Woolen Co. 7 App. Div. 345, 39 N. Y. Supp. 941, for an explanation of Sourwine v. Truscott, 25 Hun, 67; Harvey v. Atlantic Coast Line R. Co. 153 N. C. 567, 69 S. E. 627; Carl v. Pierce, 20 Ohio C. C. 68, 10 Ohio C. D. 711; Pendleton Street R. Co. v. Rahmaun, 22 Ohio St. 446 (not essential to decision); Adcock v. Oregon R. Co. 45 Or. 173, 77 Pac. 78; Sorenson v. Oregon Power Co. 47 Or. 24, 82 Pac. 10; Doyle v. Southern P. Co. 56 Or. 495, 108 Pac. 201; Wirsing v. Smith, 222 Pa. 8, 70 Atl. 906; Myers v. Litts, 3 Lack. Leg. News, 363; Smith v. Times Pub. Co. 178 Pa. 481, 35 L.R.A. 819, 36 Atl. 296 (obiter); Finch v. Finch, 21 S. C. 342; Hall v. Northwestern R. Co. 81 S. C. 522, 62 S. E. 848; Branch v. Bass, 5 Sneed, 366; Young v. Cowden, 98 Tenn. 577, 40 S. W. 1088; Western U. Teleg. Co. v. Frith, 105 Tenn. 167, 58 S. W. 118; Alabama G.

among others, was relied upon by defendant for a new trial, reads thus:

"Fifth. Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice."

It is apparent that trial courts here, under this provision, no longer have power to set aside verdicts because simply excessive, but can only do so when it is also found that the excess award is due to passion or prejudice. When the finding is that the verdict was so reached, a new trial must be granted, as it is then beyond the power of the court to permit a remittitur of a portion of the verdict, and enter a judgment for such sum as, in its judgment, the jury should have returned.

Substantial support is found for this view

S. R. Co. v. Roberts, 113 Tenn. 488, 67 L.R.A. 495, 82 S. W. 314, 3 Ann. Cas. 937; (for Texas cases see *infra*); Reddon v. Union P. R. Co. 5 Utah, 344, 15 Pac. 262; Brown v. Southern P. R. Co. 7 Utah, 288, 26 Pac. 579; Kennedy v. Oregon Short Line R. Co. 18 Utah, 325, 54 Pac. 988; Preston v. Bowen, 6 Munf. 271 (apparently); McDonough v. Great Northern R. Co. 15 Wash. 244, 46 Pac. 334; Tyler v. North American Transp. & Trading Co. 24 Wash. 252, 64 Pac. 162; Grissom v. Hofius, 39 Wash. 51, 80 Pac. 1002, 4 Ann. Cas. 125; Comrade v. Atlas Lumber & Shingle Co. 44 Wash. 470, 87 Pac. 517; Bailey v. Cascade Timber Co. 35 Wash. 295, 77 Pac. 377 (*dictum*); Schultz v. Chicago, M. & St. P. R. Co. 48 Wis. 376, 4 N. W. 399; Corcoran v. Harran, 55 Wis. 120, 12 N. W. 468; Gillen v. Minneapolis, St. P. & S. Ste. M. R. Co. 91 Wis. 633, 65 N. W. 373; Donovan v. Chicago & N. W. R. Co. 93 Wis. 373, 67 N. W. 721; Taylor v. Chicago & N. W. R. Co. 103 Wis. 27, 79 N. W. 17; Heimlich v. Tabor, 123 Wis. 565, 68 L.R.A. 669, 102 N. W. 10; Beach v. Bird & W. Lumber Co. 135 Wis. 550, 116 N. W. 245; (see *contra* Nudd v. Wells, 11 Wis. 408). See also, as indicating a like opinion, Cunningham v. Underwood, 53 C. C. A. 92, 116 Fed. 803; Richardson v. Birmingham Cotton Mfg. Co. 116 Ala. 381, 22 So. 478; Alabama & V. R. Co. v. Davis, 69 Miss. 444, 13 So. 693.

The contrary opinions expressed in *Zurfluh v. People's R. Co.* 46 Mo. App. 636, and in *Unterberger v. Scharff*, 51 Mo. App. 102, are to be disregarded, in view of the foregoing Missouri cases.

In the brief report of *Sourwine v. Truscott*, 25 Hun, 67, it is stated that it was held "that the county court, on adjudging the damages to be excessive, could only order a new trial; it had no power to order judgment for a reduced sum, the damages being unliquidated, and the jury being the only tribunal by whom the amount of the damages could be fixed." But it is stated in *Williams v. Empire Woolen Co.* 7 App. Div. 345, 39 N. Y. Supp. 941, that "the case of *Sourwine v. Truscott*, *supra*, cited by the appellant, was a case where a trial 39 L.R.A. (N.S.)

in the case of *Wall v. Livezey*, 6 Colo. at page 465, where this is said: "In relation to the amount of damages awarded the plaintiff, we have to say that, in cases of this character, the law does not warrant us in disturbing the verdict where no important error has occurred on the trial unless the amount of damages allowed is so manifestly disproportionate to the injury received as to make it apparent that the jury were influenced by prejudice, misapprehension, or by some corrupt or improper consideration."

And again, in *Denver v. Dunsmore*, 7 Colo. 328, 3 Pac. 705, this court said: "Second. Upon the exception reserved to the overruling of the motion for a new trial, on the ground assigned by appellant, that

had been had in the county court and a verdict rendered, and the county court fell into the error of having ordered absolutely a reduction of the verdict."

In *Pendleton Street R. Co. v. Rahmann*, 22 Ohio St. 446, where the court, on a verdict of \$10,000 gave the plaintiff his election to take \$5,000 or a new trial, the court, in affirming the judgment, stated that they did not find that the original verdict was excessive, and therefore thought that there could be no objection to the reduced verdict, and that they could not presume that there had been prejudice and passion, which, under the statute, would have required a new trial.

In *Smith v. Times Pub. Co.* 178 Pa. 481, 35 L.R.A. 819, 36 Atl. 296, a case without the scope of this note, Mitchell, J., remarked that "it is customary, in setting aside verdicts as excessive, for the common pleas to fix an amount which, in their judgment, would not be unreasonable, and to give the party the choice to accept it, or take the chances of a new trial."

In *Preston v. Bowen*, 6 Munf. 271, an action for damages against an official surveyor, for failure to furnish copies of official surveys and for conspiracy to defraud, where the trial court thought the damages excessive, but had denied a motion for a new trial after a remittitur, and this judgment was affirmed, the case is not sufficiently reported to show whether there was any basis of computation.

In *Huston v. Quincy, O. & K. C. R. Co.* 151 Mo. App. 335, 131 S. W. 714, where the trial court granted a new trial for other reasons, notwithstanding remittiturs, on appeal, the court, in reversing the judgment, directed judgment on the remittiturs.

Constitutional power of trial court.

In *Yazoo & M. Valley R. Co. v. Wallace*, 90 Miss. 609, 122 Am. St. Rep. 321, 43 So. 469, where the trial court refused to reduce a verdict of \$50,000, on the ground that it had no power under the statute, the supreme court, in reversing the judgment for various reasons, stated, that the statute in

the damages given by the jury were excessive, many of the same principles just announced apply. The true measure of damages is, as contended for, compensatory only. But where the amount of damages does not depend on computation, as in cases for personal injuries, as we said in *Wall v. Livezey*, *supra*: 'It is exclusively the province of the jury to estimate and assess the damages, and the amount to be allowed in such cases rests largely in their sound discretion.' And, as there announced, to warrant the court in interfering with that discretion, it must be apparent that the amount of damages given by the jury is so disproportionate to the injury received as to show that the jury were influenced by

prejudice, misapprehension, or by some corrupt or improper consideration."

To the like effect is *Denver & R. G. R. Co. v. Heckman*, 45 Colo. 470, 101 Pac. 976.

In 18 Enc. Pl. & Pr. at page 125, it is said: "When by statute a new trial is given as of right to the defendant, and the recovery is excessive, a remittitur cannot be entered without his consent."

In 14 Enc. Pl. & Pr. page 756, it is said: "Where the damages are unliquidated or there is no fixed rule by which the measure of damages can be ascertained, as in torts and personal-injury cases, the amount is referred to the discretion of the jury, and the court will not ordinarily interfere. In such cases no mere difference of opinion as to the amount of damages will justify an interfer-

question was unconstitutional, and said: "Section 4910 of the Code of 1906 is this (*italics being ours*) 'The circuit court shall not in any case have the authority to cause the plaintiff to enter a remittitur on pain of suffering a new trial, but if there is no other error committed during the trial of any such cause except that the verdict is, in the opinion of the court, excessive, the court shall overrule the defendant's motion for a new trial. But the supreme court may, where it thinks the verdict of the jury excessive, reverse the case unless the appellee will enter a remittitur in such sum as the supreme court shall direct.' The court said: "This statute is plainly unconstitutional and void. It is for the benefit of plaintiffs. It shuts out defendants from having complete and final disposition of their rights in a forum provided by the organic law for all, and into which they have been forced by plaintiffs. It compels them to appeal which otherwise they might not wish to do, and then concludes with a clause, as a salve, by attempting, in the very face of the Constitution, to give the supreme court original, instead of mere appellate, jurisdiction. It works only against the defendant litigant. If the verdict against him be for too much, he must bear the injustice; but note, if it be for too little, the favored plaintiff is not concluded, but may move for new trial. If the jury gave too much, by a miscalculation of the amount due on a promissory note, the defendant must suffer or appeal. He must do this, even if the verdict be without any sort of support in the evidence. No other than the monstrous conclusions above indicated can be drawn from this act. . . . Such a clause as § 4910 would hardly have received a vote in a convention of the people to adopt a Constitution. If adopted by such a convention, it would probably be void, as in conflict with the Constitution of the United States, which forbids the deprivation of property 'without due process of law.' Our own Constitution provides (§ 31) that 'the right of trial by jury shall remain inviolate' When this was adopted, 'trial by jury' meant a 30 L.R.A.(N.S.)

trial in court under the forms of law, with a judge presiding to direct the proceedings in conformity with it. Twelve men in the woods or on a street corner were not imagined."

Where rule not applicable.

An error of law affecting the entire verdict will not be cured by a remittitur.

Thus, in *Jacoby v. Johnson*, 56 C. C. A. 637, 120 Fed. 487, an action for tearing down the plaintiff's signs, it was held to be error to allow a remittitur, where there was a failure of the court sufficiently to instruct the jury upon the measure of damages, which omission affected here the whole verdict.

So, where the jury were erroneously permitted to find punitive damages, but did not state them separately, it was held that the error was not cured by a remittitur which did not show to what it applied. *Reed v. Keith*, 99 Wis. 672, 75 N. W. 392.

In reversing the judgment in *Re Holmes*, 79 Ill. App 59, the court said: "If the court was of opinion, as it stated on the hearing of the motion for new trial, that for the alleged improper remarks of plaintiff's counsel to the jury said verdict should be reduced to \$400, then a new trial should have been granted, for it seems impossible that the learned trial judge could have determined to what extent the verdict was induced by counsel's remarks."

In *Flood v. Great Northern R. Co.* 102 Minn. 81, 13 L.R.A.(N.S.) 1196, 112 N. W. 875, the court, in reversing the judgment, said: "The jury returned a verdict for plaintiff in the sum of \$15,000, which the trial court considered excessive, and reduced it by one third. To what extent the verdict was influenced by the condition of the switch, as found by the juror who visited the yards, does not appear; but it will be presumed that the knowledge so obtained was prejudicial, and under such circumstances the error cannot be cured by a mere reduction of the verdict."

In *Lauth v. Chicago Union Traction Co.* 244 Ill 244, 91 N. E. 431, reversing 146 Ill.

ence by the court unless the amount is so unreasonable and excessive as to be indicative of passion, prejudice, partiality, or corruption of the jury."

The case of *Thomas v. Womack*, 13 Tex. 580, was an action for damages for assault and personal injury; there was a verdict for \$10,000; upon motion for new trial the plaintiff remitted \$8,500; thereupon the motion was denied and judgment entered for \$1,500. From this ruling defendant appealed, and assigned error upon it, and the court, after commenting upon the authorities relied upon to support the ruling, said:

"These, it will be seen, are but the ordinary cases of permitting a remittitur where the measure of damages is matter of law, and the court can determine with certainty

what damages the plaintiff is entitled to recover by applying the law to the evidence. But the present is a very different case. Here the law furnishes no other criterion by which to measure the damages which may be given than the discretion and sense of right and justice of the jury; and reserves to the court no other control over the verdict than to grant a new trial where the damages are so excessive as to bear the evident impress of prejudice, passion, gross ignorance, or corruption. . . . In cases where there is no certain measure of damages . . . the court will not substitute its own sense of what would be the proper amount of the verdict, and will not set aside a verdict for excessive damages, unless there is reason to believe that the jury were actu-

App. 584, for the admission of incompetent testimony, where there had been a remittitur by the appellate court the supreme court said: "Where an error has been committed as to some substantive fact which bears upon the right of recovery or the measure of damages in respect to some matter which is not susceptible of computation, a remittitur will not cure it."

So, in *Hughes v. Chicago, R. I. & P. R. Co.* 150 Iowa, 232, 129 N. W. 956, it was held that an erroneous instruction as to damages under the circumstances was not cured by the remittitur.

Where plaintiff objects.

If the plaintiff enters a remittitur in accordance with the court's conditional order, he cannot question the order, or appeal from it. *Pensacola Gas Co. v. Pebley*, 25 Fla. 381, 5 So. 593; *McCausland v. Wonderly*, 56 Ill. 410; *Colorado City v. Liafe*, 28 Colo. 468, 65 Pac. 630.

Where the plaintiff in his remittitur objected to the court's jurisdiction to make a conditional order, as no notice had been given, it was held that his appeal was properly dismissed. *Harrington v. Butte, A. & P. R. Co.* 39 Mont. 22, 101 Pac. 149.

In *Alabama & V. R. Co. v. Davis*, 69 Miss. 444, 13 So. 693, the court, in affirming a judgment for the plaintiff, said: "The cross appeal is not maintainable. The consent to a remittitur was not compulsorily obtained. The appellee might have declined to yield to what she thought the arbitrary course of the court, and, if the court had persisted, and had actually set aside the verdict and awarded a new trial, by taking appropriate steps the appellee might have had this court rectify the arbitrary action complained of, if, indeed, it had been ascertained to be wrongful. The appellee prudently chose not to take the hazard of that heroic course, and must be held to have voluntarily consented to the remittitur. She made her election to take the sure sum of \$2,000 rather than incur the chances of total loss, and we are not prepared to

say she did not act wisely in making that election."

But it was held in *Massadillo v. Nashville & K. R. Co.* 89 Tenn. 661, 15 S. W. 445, that it was error to permit a remittitur "under protest."

For cases where, on the plaintiff's declining to remit, the order granting a new trial was affirmed, see *Gregg v. San Francisco & N. P. R. Co.* 59 Cal. 312; *Swett v. Gray*, 141 Cal. 63, 74 Pac. 439; *Ingraham v. Weidler*, 139 Cal. 588, 73 Pac. 415; *Howey v. New England Nav. Co.* 83 Conn. 278, 76 Atl. 469; *Rigney v. Tacoma Light & Water Co.* 9 Wash. 245, 37 Pac. 297; *McOwen v. Seattle Electric Co.* 48 Wash. 362, 93 Pac. 518.

But in *Plaunt v. Railway Transfer Co.* 90 Minn. 499, 97 N. W. 433, where the plaintiff declined to consent to a reduction of \$450 from a verdict for \$600, the appellate court directed the verdict to be reinstated, on the ground that it was not excessive. See also, *Beller v. Levy*, 127 N. Y. Supp. 237, for a similar decision.

In *Kohler v. Fairhaven & N. W. R. Co.* 8 Wash. 455, 36 Pac. 253, 681, where the plaintiff appealed from an order granting a new trial, having refused to enter a remittitur, it was held that, on appeal, he could not be allowed to enter the remittitur, as there was nothing that the appellate court could do under the circumstances but affirm the order for a new trial.

Judicial statements and explanations of the rule.

In *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 29 L. ed. 765, 6 Sup. Ct. Rep. 590, the court said in affirming a judgment of the supreme court of a territory, which had affirmed a judgment in an action for personal injuries where the trial court had ordered a new trial unless the plaintiff would remit \$15,000 of \$25,000, which he did: "The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict, was a matter within the discretion of the court. It held that

ated by passion, or by some undue influence, perverting the judgment. . . . No more will the court substitute its sense of what would be the proper amount of the verdict where it is so excessive as to warrant the belief that the jury have been misled either by passion, prejudice, or ignorance; but will set the verdict aside altogether, and grant a new trial. For to permit the verdict to be reduced to an amount which the court might think reasonable in such a case would be to substitute the opinion of the judge for the verdict of the jury, and, in effect, to deny the aggrieved party the right to a trial by an impartial jury. Where the verdict was confessedly so flagrantly excessive as the remittitur admits it to have been in this case, it must be ascribed to prejudice, par-

tiality, passion, or some undue or improper influence or cause, perverting the judgment of the jury; and to permit any part of it to stand would not be consistent with the preservation of the impartiality, integrity, and purity of the trial by jury."

The right, by this provision, to grant new trials because of excessive verdicts, unless influenced by passion or prejudice, having been withdrawn from the courts, it logically follows that when, under this particular subdivision of the Code, it was found that the verdict was excessive, and a remittitur of nearly three-fourths of it was required, such finding, although the judge may have declared that he was not able to say that the verdict was returned as the result of passion or prejudice, was, as mat-

the amount found was excessive, but that no error had been committed on the trial. In requiring the remission of what was deemed excessive, it did nothing more than require the relinquishment of so much of the damages as, in its opinion, the jury had improperly awarded. The corrected verdict could therefore be properly allowed to stand."

In *Montgomery Traction Co. v. Knabe*, 158 Ala. 458, 48 So. 501, the court said, in declining to interfere with a judgment entered after a certain amount of the damages had been remitted by the plaintiff: "On motion to set aside a verdict on account of excessive damages, followed by the offer of the plaintiff to reduce the verdict to a certain amount, the trial court, if of opinion that the plaintiff is entitled to recover, but that the judgment is excessive, may properly make such reduction of the verdict, and enter judgment accordingly. Indeed, that such power and authority inhere in the trial court seems to be fully recognized by this court in the case of *Richardson v. Birmingham Cotton Mfg. Co.* 116 Ala. 381, 22 So. 478. See also *Western U. Tele. Co. v. Frith* 105 Tenn. 167, 58 S. W. 118; 13 Cyc. 134."

In *Gila Valley, G. & N. R. Co. v. Hall*, 13 Ariz. 270, 112 Pac. 845, where the court below, upon the plaintiff's offer of remittitur, entered a judgment for the balance, the appellate court, in affirming the judgment, stated that the court below had determined that the jury was not influenced by passion or prejudice, and that they saw no reason for not accepting its conclusion, and (overruling *Southern P. Co. v. Fitchett*, 9 Ariz. 128, 80 Pac. 359) said: "There is authority for the position that in no case of unliquidated damages should the court permit a remission where the verdict is excessive, without the consent of the defendant; but as we now view it, the great weight of authority supports the practice. . . . It is argued that to permit a remittitur, or to require it as a condition of refusing a new trial, is to substitute the court's judgment for that of a jury, to the latter of which the defendant is entitled. 39 L.R.A. (N.S.)

But it is to the jury's judgment that defendants object when they appeal to the court for new trials on the ground of excessive verdicts."

In *George v. Law*, 1 Cal. 363, it was held that where the court orders a new trial unless the plaintiff remits part of his verdict, and the plaintiff thereupon does so remit, there is no ground to object to the remittitur, as it makes the judgment smaller.

In *Libby, McNeill, & Libby v. Scherman*, 146 Ill. 540, 37 Am. St. Rep. 191, 34 N. E. 801, the court said: "It is urged that the court erred in rendering judgment for \$5,000, after finding that the damages awarded by the jury were excessive, and requiring the plaintiff to remit \$2,500 from the amount awarded, under penalty of setting the verdict aside and granting a new trial. The practice of requiring the plaintiff to remit a portion of his damages, and rendering judgment for the residue, where there is no ground for a new trial, except that the damages awarded by the jury are excessive, is so well established in this state that it cannot now be successfully called in question."

In *Kolb v. Flages*, 27 Ill. App. 531, the court, in affirming a judgment for the plaintiff where there had been a remittitur in an action for damages by a savage dog, said: "It is well settled practice in this state to enter judgment in cases sounding in damages, after requiring the plaintiff to remit from the verdict rendered by the jury, and while such remittitur will not always be regarded by the reviewing court as removing all vice from the verdict, yet it will, as a rule, sanctify it."

In *Cleveland, C. C. & St. L. R. Co. v. Beckett*, 11 Ind. App. 547, 39 N. E. 429, which was an action for putting a passenger off a train because of a refusal to pay an excess of fare, the court said, in affirming a judgment where the trial court had required the plaintiff to remit part of the verdict or submit to a new trial: "The right of the trial court to direct or permit a remission of a part of a verdict in cases where there is no definite standard by

ter of law, a finding to that effect, and the verdict must be so treated. Upon such a verdict, defendant had an absolute right, under the Code, to a new trial, and the court had no more authority to deny it, or disregard a portion of the verdict and enter a judgment upon the residue, than it had to deny the plaintiff a jury trial, or enter judgment against it without any trial at all. Still, without a verdict for that sum, and, indeed, without a lawful verdict, judgment was given for \$10,000 upon the mere consent of plaintiff to accept it. That action was a plain violation of law, because what the Code of Civil Procedure gives, in the situation here disclosed, and all that it gives, is a right to the losing party to

have, and it makes it the duty of the court to grant, a new trial.

In *Sloan v. New York C. & H. R. R. Co.* 1 Hun, 540, a personal-injury case, the New York court said: "The court cannot, in an action of tort, reduce the verdict of a jury because it is deemed excessive. The only remedy in such a case is to set it aside and order a new trial."

In 18 Enc. Pl. & Pr. page 144, it is said: "Where the damages are so excessive as to be accounted for only on the ground of passion or prejudice on the part of the jury, a remittitur will not cure the error, as such passion or prejudice will be deemed to have influenced the finding of the jury on the issues of fact."

In *Gulf, C. & S. F. R. Co. v. Coon*, 69

which to measure the damages seems not to have been definitely determined in our state. . . . While there is some conflict of authority, the great preponderance of the decisions appears to favor the right of the courts to direct conditionally the remission of a part of the damages in such cases where they deem them excessive."

In *Detzur v. B. Stroh Brewing Co.* 119 Mich. 282, 44 L.R.A. 500, 77 N. W. 948, where, upon a verdict of \$10,000 the court required a remittitur of \$6,500, the appellate court, in affirming the judgment, said: "We are also of the opinion that making a new trial dependent upon a refusal to remit a portion of the verdict in cases of this kind, is a well-settled practice in this state, where, as in this case, the amount of unliquidated damage is the only question involved. It has always been considered lawful for the trial judge in such a case to set aside a verdict as excessive; and it has been a common practice to grant a portion of the relief asked by requiring a remission of a portion of the verdict as a condition upon which the new trial will be denied. This has always been a matter of discretion and, where it is not clearly erroneous, the action of the trial court should not be disturbed."

In *Branagan v. Long Island R. Co.* 28 App. Div. 461, 51 N. Y. Supp. 112, where the trial court had said: "If it were not that I consider the weight of precedent against it, I should certainly grant a new trial unless plaintiff stipulated to reduce the verdict to \$500," the appellate division, in commenting upon this, and in reducing the verdict, or ordering a new trial unless it was reduced, said: "The final sentence may be open to the construction that the learned justice stated that the weight of precedent was against the right of the trial court to set aside or to reduce a verdict at the trial term, and it is only for this reason that we take occasion to say that the residence of such a power in the court at trial term is inherent and beyond question, and needs no citation of authority. We have had frequent occasion during the existence of the present appellate division of the 39 L.R.A. (N.S.)

supreme court to exercise the power of reducing verdicts which we considered excessive, but this power can never be used more satisfactorily than at the trial term, where the court has the opportunity, not only of seeing and hearing the parties and witnesses, but of judging of their behavior on the stand. *Bannon v. McGrane*, 13 Jones & S. 517. It is to be regretted that this power has not more frequently been resorted to in cases where it is so clear that such manifest injustice has been done that the appellate division has been constrained to review and reduce the amount of verdicts which have apparently been rendered under the influence of passion, prejudice, partiality, sympathy, or misconception." This was quoted with approval in *Kalfur v. Broadway Ferry & M. Ave. R. Co.* 34 App. Div. 267, 54 N. Y. Supp. 503. Compare a contrary dictum of Hunt, Ch. J., in *Cassin v. Delany*, 38 N. Y. 178.

In *Young v. Cowden*, 98 Tenn. 577, 40 S. W. 1088, the court, in affirming a judgment where there had been a remittitur, said: "We see no valid objection to the rule as laid down and followed in this state, and in almost all the states of the Union, of suggesting a remittitur as a condition of not granting a new trial, and while it cannot be made peremptory upon the plaintiff, but must remain optional, still, when it is accepted by plaintiff, and there is no attempt to prevent an appeal on the part of the defendant, and thus to coerce him to submit to the judgment, he has no right to complain, inasmuch as the court fixes the damages at an amount lower than that fixed by the jury."

In *Corcoran v. Haran*, 55 Wis. 120, 12 N. W. 468, where the appellate court had permitted the plaintiff in assault and battery to remit a part of the damages given by the verdict, the court said: "The practice adopted by the trial judge is clearly sanctioned by the great weight of authority. We must therefore hold that, in actions of tort as well as contract, where the damages are clearly excessive, the trial judge may either grant a new trial absolutely, or give the plaintiff the option to

Tex. 730, 7 S. W. 492, the court, in a suit for personal injury to a passenger, said: "The trial judge concluded that it was excessive, as he required plaintiff to enter a remittitur of \$3,000 as a condition to his overruling the motion for a new trial. If the judge was of opinion the verdict was excessive, he should have granted a new trial. The damages are assessed by the jury; if the verdict is excessive, the judge, in actions like this, has no measure by which to determine how much it is excessive; his attempt to do so is an invasion of the rights of the jury. His only course in such a case is to grant a new trial."

Since, therefore, on principle and authority, the finding of the court that the verdict was excessive must be treated, in legal ef-

fect, as a finding that it was returned under the influence of passion or prejudice, it was reversible error to allow plaintiff to remit a portion of it, and enter judgment for the residue, because the gist of the whole matter is that no trial by an impartial jury has been had. To permit the court, in such situation, to substitute its judgment, as to the amount which the plaintiff ought to have, for that of a jury, would be in effect to deny the right of the defendant to such a trial as the general laws provide and the Constitution guarantees.

Independent of a consideration of the finding of the court in its purely legal effect, in the light of former decisions of this court, and of the courts of last resort in other states, upon the same question, it is

remit the excess; and in case he does so order, the verdict to stand for the residue. Certainly the practice will tend to promote justice and lessen the expense to litigants and the public. Besides, the allowance of such option is no more of an exercise of arbitrary power by the trial judge than it would be for him to set aside the verdict absolutely, upon the sole ground that it is excessive, and then, in effect, direct a jury to bring in a verdict for a smaller sum, but not in excess of an amount named by the court. But we are unwilling to say that the verdict, as returned in this case, was so excessive as to authorize the interference of this court."

The excess in such cases is not necessarily the result of passion or prejudice. See *infra*, III. b. 1.

In *Conrad Seipp Brewing Co. v. Doody*, 25 Ill. App. 305, the court, while inclined to disagree with the remittitur in the trial court, nevertheless said: "Unless we can clearly see that the verdict is the result of misapprehension, or of passion, we are not authorized to set it aside."

Texas.

In Texas the earlier cases were opposed to the power of the trial court of allowing a remittitur where there was no criterion of computation. *Thomas v. Womack*, 13 Tex. 580; *Heidenheimer v. Schlett*, 63 Tex. 394; *Gulf, C. & S. F. R. Co. v. Coon*, 69 Tex. 730, 7 S. W. 492; *Kaufman v. Armstrong*, 74 Tex. 65, 11 S. W. 1048; *Clifford v. Lee*, — Tex. Civ. App. —, 23 S. W. 843; *St. Louis & S. F. R. Co. v. Williams*, — Tex. Civ. App. —, 37 S. W. 992; *Nunnally v. Taliaferro*, 82 Tex. 286, 18 S. W. 149. And it was held in *Hoskins v. Huling*, 4 Tex. L. Rev. 183, that the statute permitting a remittitur did not apply in such case, the court there saying: "It is provided by statute that any party in whose favor a verdict has been rendered may, in open court, remit any part of such verdict (Rev. Stat. art. 1351), and that such remittitur, from the making thereof, shall cure any error in the verdict or judgment 39 L.R.A. (N.S.)

by reason of such excess. (Rev. Stat. art. 1357.) These provisions of the statute, however, do not apply in an action to recover damages for a tort, when the damages are uncertain and rest within the discretion and sense of justice of the jury. . . .

In cases where there is no certain measure of damages, or where the evidence does not clearly and definitely ascertain the amount which should be awarded, the court cannot substitute its own sense of what would be the proper amount of the verdict, but must set the verdict aside altogether and grant a new trial."

In *Missouri, K. & T. R. Co. v. Perry*, 8 Tex. Civ. App. 78, 27 S. W. 496, where, during the argument for a new trial, the verdict being for \$9,000, the trial court intimated that he thought a verdict for more than \$5,000 was excessive, and the plaintiff thereupon voluntarily remitted one half the verdict, without direct suggestion or condition from the court, the appellate court, in reversing the judgment also on other grounds said: "It is quite clear to our minds that the trial judge regarded the verdict for \$9,000 as excessive, and so regarding the verdict, he would have doubtless done his duty and granted a new trial but for the entering of the remittitur. It is equally clear that appellee's counsel understood the views of the judge as to the verdict, and filed a remittitur to meet the difficulty, cure the error, and obtain favorable action on the motion for new trial. There is no statutory authority in our trial courts to receive a remittitur to cure the error of excessiveness in a verdict where the excess is not ascertainable by any rules of law or certain fixed methods of calculation, and the decisions of our supreme court have condemned the practice as erroneous. . . . Had the remittitur not been in response to the views of the trial judge that the verdict was excessive, but purely voluntary on the part of appellee, an entirely different question would be presented for our consideration. It is fairly manifest from the language of the trial judge, qualifying the bill of exceptions that he let counsel for appellee understand that he

inconceivable that, upon the facts proven, a verdict for the extraordinary sum of \$38,750 represents the sound, wholesome, unimpassioned and impartial judgment of a jury, whose sole duty, under the law and facts, was to award just and reasonable compensatory damages only. Upon all of the evidence, the amount of the award here, considered in comparison with verdicts in similar cases, which our own and other courts of last resort have said furnish inherent evidence, solely because of the large sums allowed, of having been returned through the influence of passion or prejudice, such or like considerations must also be held to have been the moving cause for the one under review. We are all the more persuaded to this view because another jury, at a for-

mer trial, having equal opportunity with the one that returned this verdict, to ascertain and know the character and extent of the injuries sustained, and as well all the facts and grounds upon which plaintiff's right to recover at all were based, fixed the sum of \$5,200 as proper compensation; and by the further fact that the presiding judge at the trial in which this particular verdict was returned required that \$28,750 should be remitted therefrom; and also by the further fact that the plaintiff consented to the surrender of that vast sum. If \$38,750 fairly represented the amount which plaintiff justly ought to recover for the injuries, temporary and permanent, which he sustained, and for his mental suffering and physical pain, we are quite persuaded that

considered the verdict excessive. He might as well, as far as effect be concerned, have told counsel that he considered the motion for a new trial based upon excessiveness of the verdict as well grounded, and then received the remittitur as curing the error. If the views of the trial court as to excessive verdict had not been made to appear, then the question of the excessiveness of the verdict as originally rendered would be addressed to this court."

But in *International & G. N. R. Co. v. Wilkes*, 68 Tex. 618, 2 Am. St. Rep. 515, 5 S. W. 491, where the plaintiff's attorney voluntarily remitted a part of the damage, the court affirmed the judgment on the ground that as the original amount was not excessive, there could be no objection to the remission.

And in *Gulf, C. & S. F. Co. v. Redeker*, 75 Tex. 310, 16 Am. St. Rep. 887, 12 S. W. 855, an action by a father for the loss of his son, it was held that as it was possible from the evidence to make an estimate of the loss with some distinctness, there was no error in a remittitur which left the damage less than was indicated by the evidence.

But since the passage of § 1029a, 1 Sayles's Civil Statutes, which gives the court of civil appeals power to refuse to grant a new trial on condition that a party will remit a part of the damages, it has been held that the trial court may take a similar course.

In *Galveston, H. & S. A. R. Co. v. Johnson*, 24 Tex. Civ. App. 180, 58 S. W. 622, the court said: "If the remittitur entered in the district court is the same as this court would have required, the result is the same as if this court had enforced it. If less, this court may require further reduction, and the result would be the same as if this court had exacted the entire reduction. We do not deny the district court's power or discretion to grant new trials in cases of excessive verdicts, but we think if they see fit to entertain a remittitur, there is no necessity of our reversing the judgment upon that ground, when we have express authority to require 39 L.R.A. (N.S.)

remittitur, which carries the power to approve them."

In *San Antonio & A. P. R. Co. v. Connell*, 27 Tex. Civ. App. 533, 66 S. W. 246, the court approved the practice of a remittitur in the trial court, but required an additional remittitur as a condition of affirmance. A similar course as to successive remittiturs was followed in *International & G. N. R. Co. v. Williams*, 55 Tex. Civ. App. 176, 118 S. W. 758, and in *Producers Oil Co. v. Barnes*, — Tex. Civ. App. —, 120 S. W. 1023; also in *International & G. N. R. Co. v. Shaughnessy*, — Tex. Civ. App. —, 81 S. W. 1026, where, however, on rehearing, the case was reversed on another ground.

And the practice of remittiturs in the trial court as a condition of denying motions for a new trial is now established. *Ft. Worth & D. C. R. Co. v. Linthicum*, 33 Tex. Civ. App. 375, 77 S. W. 40; *Houston, E. & W. T. R. Co. v. Jackson*, — Tex. Civ. App. —, 61 S. W. 440; *St. Louis Southwestern R. Co. v. Hengst*, 36 Tex. Civ. App. 217, 81 S. W. 832; *Chicago, R. I. & P. R. Co. v. Rhodes*, 35 Tex. Civ. App. 432, 80 S. W. 869; *St. Louis Southwestern R. Co. v. Price*, 44 Tex. Civ. App. 217, 99 S. W. 120; *International & G. N. R. Co. v. Poe*, — Tex. Civ. App. —, 62 S. W. 1071; *Roscoe, S. & P. R. Co. v. Jackson*, — Tex. Civ. App. —, 127 S. W. 872; *Southwestern Teleg. & Teleph. Co. v. Gehring*, — Tex. Civ. App. —, 137 S. W. 754.

2. Contrary doctrine.

In some jurisdictions the view obtains that the trial court may not allow remittiturs where there is no basis of computation. *F. M. Davis Iron Works Co. v. White*, 31 Colo. 82, 71 Pac. 384; *TUNNEL MIN. & LEASING Co. v. COOPER*; *Savannah F. & W. R. Co. v. Harper*, 70 Ga. 119; *Carlisle v. Callahan*, 78 Ga. 320, 2 S. E. 751; *Brunswick Light & Water Co. v. Gale*, 91 Ga. 813, 18 S. E. 11; *Albany v. Sikes*, 94 Ga. 30, 26 L.R.A. 653, 47 Am. St. Rep. 132, 20 S. E. 257; *Central of Georgia R. Co. v. Perkerson*, 112 Ga. 923, 53 L.R.A. 210, 38 S. E. 365, overruling *Central R. Co.*

it is highly improbable that another jury would have declared less than one seventh as much sufficient to satisfy his claim; nor is it likely that the judge presiding at the trial in which the verdict was returned, being well and fully advised, with all material facts before him, would, or could, under such circumstances, say that the amount returned was almost four times the sum which, in his calm, impartial, and judicial judgment, the jury should have given; nor does it seem possible that had the plaintiff himself, or his counsel, believed that he was entitled, in fairness and truth, to \$38,750, there would have been voluntarily remitted of that amount, once secured to him, more than two thirds of it.

The plaintiff was by occupation a miner,

and able, according to proofs, by working continuously, to earn approximately \$1,200 a year. That plaintiff was seriously, painfully, and to a degree permanently, injured, seems clear from the evidence. It appears that his right collar bone was fractured, and three ribs of the lower left side broken; that his general circulation was impaired, and that the broken ribs have never united, but extend out from the general contour of the chest about an inch, and do not give such full protection to some of the vital parts as they should and would afford in normal condition. That the right collar bone is shortened one half an inch, and also the left leg, to a like extent, which makes him permanently lame. He is compelled to constantly wear a belt, to mitigate the dis-

v. Crosby, 74 Ga. 737, 58 Am. Rep. 463; Daniel v. Bailey, 118 Ga. 408, 45 S. E. 379; Tifton, T. & G. R. Co. v. Chastain, 122 Ga. 250, 50 S. E. 105; Seaboard Air-Line R. Co. v. Randolph, 129 Ga. 796, 59 S. E. 1110 (brushing aside any remarks to the contrary in *Augusta R. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406); *Southern R. Co. v. Tollerson*, 135 Ga. 74, 68 S. E. 798; *Brown v. Morris*, 3 Bush, 81; *Louisville & N. R. Co. v. Earl*, 94 Ky. 368, 22 S. W. 607; *Hanson v. Henderson*, 20 S. D. 456, 107 N. W. 670; *Murray v. Leonard*, 11 S. D. 22, 75 N. W. 272 (as suggesting, if not necessarily holding, this view); *Unfried v. Baltimore & O. R. Co.* 34 W. Va. 260, 12 S. E. 512; *Osborne v. County Ct.* 68 W. Va. 189, 32 L.R.A.(N.S.) 418, 69 S. E. 470 (as stating this view); *Watt v. Watt* [1905] A. C. 115, 74 L. J. K. B. N. S. 438, 69 J. P. 249, 53 Week. Rep. 547, 92 L. T. N. S. 480, 21 Times L. R. 386, 2 Ann. Cas. 672.

It will be seen that in *TUNNEL MIN. & LEASING Co. v. COOPER*, it is held that under the Colorado statute the power to set aside a verdict as excessive is confined to cases of prejudice and passion, and that therefore, if the court interferes at all, it must order a new trial.

The court follows the decision in *F. M. Davis Iron Works Co. v. White*, 31 Colo. 82, 71 Pac. 384, as will be seen from its quotation of the opinion in that case. These cases would seem to settle the law in Colorado, but they do not refer to *Colorado City v. Liae*, 28 Colo. 468, 65 Pac. 630, where both parties appealed, and the court, in affirming the reduced judgment, said: "The plaintiff voluntarily remitted \$15,000. It was not the less voluntary because the court declined to allow the verdict of \$20,000 to stand, and intimated that unless there was a remittment he would grant a new trial; because the plaintiff had the alternative of submitting to a new trial or accepting a verdict for the sum of \$5,000; and having accepted a verdict for the sum of \$5,000, we think he cannot now complain that the court refused to enter judgment upon the verdict as rendered. 39 L.R.A.(N.S.)

In *Savannah, F. & W. R. Co. v. Harper*, 70 Ga. 119, where the trial court had ordered a new trial unless the plaintiff would write off part of the verdict, which he did, the judgment was reversed. The court quoted the statute which provided that "the question of damages being one for the jury, the court should not interfere, unless the damages are either so small or excessive as to justify the inference of gross mistake or undue bias" and said: "To require a portion of the amount so found by them to be remitted, and the balance to stand as their verdict, it seems to us unauthorized, either by the words of the law, or by the precedents and practice in such cases."

In *Carlisle v. Callahan*, 78 Ga. 320, 2 S. E. 751, an action for damages in forcibly entering and holding certain property, the court said: "The court has no power to write off, or order written off, any part of a verdict for damages in an action sounding in tort, where the tort is to the person; *aliter*, where it is to property."

But the practice was also condemned in torts as to property in *Albany v. Sikes*, 94 Ga. 30, 26 L.R.A. 653, 47 Am. St. Rep. 132, 20 S. E. 257; *Daniel v. Bailey*, 118 Ga. 408, 45 S. E. 379; *Southern R. Co. v. Tollerson*, 135 Ga. 74, 68 S. E. 798.

In *Brunswick Light & Water Co. v. Gale*, 91 Ga. 813, 18 S. E. 11, the court said: "Where the action is for a personal injury and for pain and suffering resulting therefrom, and there are no other elements of damage for which a recovery can be had, such as loss of earning capacity, etc., there is no guide or criterion by which the amount of damages may be measured, except the enlightened conscience of impartial jurors. There is no criterion, therefore, by which the court can estimate the proper amount of damages, and he has no power to reduce the verdict by ordering a certain amount written off. If the verdict is so excessive as to cause him to suspect bias or prejudice, he can set it aside and order a new trial before another jury, but he must do this unconditionally."

In *Central of Georgia R. Co. v. Perker*

comfort caused by the condition of the broken ribs. No injury is shown to his mental faculties; none of his limbs were broken, and none of his senses are impaired. The testimony shows that at the time of the trial he was able to be about without the aid of crutches or other assistance, and that he had recently been upon prospecting tours. The only direct evidence going to his ability to work at the time of the trial was the answer of the physician who attended him in his illness, to the question whether, in his present condition, he could do a man's work, which was, "Not at the present time."

The nature and extent of the injuries considered, the verdict is quite the largest to be found in the annals of judicial history. The deliberations of the jury are secret;

the presence or absence of passion or prejudice concerning them must therefore, as a rule, be determined from the amount of the verdict itself. If there is in the verdict inherent evidence of such passion or prejudice, there should be no hesitancy on the part of the court to so declare, and act accordingly. There are three cases of special interest which have been determined by this court, where it was held that the verdicts, because of their respective amounts, carried inherent evidence that they were induced by passion or prejudice. We refer to the reasoning in these opinions in support of our conclusion here, as being in harmony with it. The cases are *Deep Min. & Drainage Co. v. Fitzgerald*, 21 Colo. 533, 43 Pac. 210, *F. M. Davis Iron Works Co. v. White*, 31 Colo.

son, 112 Ga. 923, 53 L.R.A. 210, 38 S. E. 365, the court said: "After mature consideration, we are of the opinion that upon principle the rule denying the power of a trial judge to order a remittitur as a condition to the overruling of a motion for a new trial in actions for personal injuries should apply with equal force to an action for a tortious homicide; and, indeed, to all cases where, by the application of fixed principles of law to the evidence, the excess in a verdict cannot be accurately ascertained."

In view of the more recent Georgia cases it may be doubted whether the court would now approve the decision in *Savannah, F. & W. R. Co. v. Godkin*, 104 Ga. 655, 69 Am. St. Rep. 187, 30 S. E. 378, where the plaintiff, on the motion for a new trial, before any intimation by the trial court, "wrote off" a part of the verdict, and in affirming the judgment so reduced the appellate court said: "It does not appear from the record that a new trial was refused in this case because of the voluntary action on the part of the plaintiff in writing off a portion of his verdict. . . . The voluntary reduction of the verdict by plaintiff's counsel, whether they had a right to take such action or not, is not a matter of which the defendant can complain."

In *Louisville & N. R. Co. v. Earl*, 94 Ky. 368, 22 S. W. 607, where the court, on condition of denying a motion for a new trial, required the plaintiff to consent to the reduction of a verdict of \$4,000 to \$2,600, the appellate court said: "Both parties complain, and it is evident that if the company were entitled to a new trial, it should have been granted without the imposition of any terms. If not, the appellee should have had her judgment in pursuance of the jury finding. In any event, the judgment for \$2,600 is erroneous, and must be reversed."

It may be noted that in *Merrick v. Holt*, 8 Ky. L. Rep. 162, the court, in reversing a judgment where there had been a remittitur, did so on the ground that the entire verdict was impeached with the taint of positive wrong or reckless indifference; and 39 L.R.A. (N.S.)

that a similar principle is stated in the reversal in *Evansville Grain Co. v. Stout*, 14 Ky. L. Rep. 927, where, however, the case is not sufficiently reported to show what had occurred in the trial court.

The former English practice was to order a new trial if the parties would not come to terms. See *Davidson v. Molyneux*, 17 L. T. N. S. 289.

However in *Belt v. Lawes*, L. R. 12 Q. B. Div. 358, 53 L. J. Q. B. N. S. 249, 50 L. T. N. S. 441, 32 Week. Rep. 607, an action for libel, the court approved the course of the trial court in refusing a new trial on condition that the plaintiff remit a certain part of his damages.

But in *Watt v. Watt* [1905] A. C. 115, 74 L. J. K. B. N. S. 438, 69 J. P. 249, 53 Week. Rep. 547, 92 L. T. N. S. 480, 21 Times L. R. 386, 2 Ann. Cas. 672, where the court of appeal had made an order for a new trial unless the plaintiff consented to a reduction, which he did, the House of Lords reversed the judgment, holding that the court had no power, on consent of one party, to render judgment for an amount different from that found by the jury. *Halsbury, L. C.*, stated that the question was raised in the *Belt Case*, but was not necessary for its decision, and said: "The theory of all the cases seems to me to be that the right of the court to interfere with a jury's verdict was only to be by the assent of both parties. Assume it to be the constitutional view that a person can only have damages assessed against him for a tort, what right has a court to intervene and say that damages which, in its judgment, are appropriate, shall be the amount assessed against him? The only judgment by a jury is one which the court itself, by the hypothesis, says is unreasonable and excessive. Has not the defendant a right to say, 'I refuse to have judgment assessed against me by a court. The law gives me a right to a jury, and how does the fact that a jury have already found a verdict against me, which you decide cannot be allowed to stand, because it is unreasonable and excessive, displace my right to have the verdict of a jury upon the question?'"

82, 71 Pac. 384, and *Denver & R. G. R. Co. v. Scott*, 34 Colo. 99, 81 Pac. 763. In each the record shows the injuries to have been certainly as grievous as those received by plaintiff, and without doubt, in the *Fitzgerald Case*, vastly more serious and abiding.

An instructive and leading case, also in accord with our views, where a large number of authorities are reviewed and discussed, is that of *Louisville & N. R. Co. v. Fox*, 11 Bush, 495. That was an action for personal injuries, to recover the sum of \$150,000, with \$5,000 added for medical treatment and attendance, and \$500 for baggage lost. The verdict was for \$35,500. The opinion states that the value of the baggage was shown to have been \$500, and the

expense of medical treatment and attendance \$5,000; and for personal injuries, \$30,000. There was no evidence in the case of passion or prejudice, except as furnished by the amount of the verdict. Upon a full consideration of the whole record, and a searching analysis of the entire transaction, the court reached the conclusion that the amount of the verdict alone furnished evidence that it must have been reached through the influence of passion or prejudice. The injuries to Fox seem to have been far more severe and permanent, and his suffering far greater, than plaintiffs'. In concluding the opinion, having reference to the duties and obligations of courts under such circumstances, it was said:

"We concede that courts of all grades

Lord Davey, in concurring, said: "Can the court, when it considers that the damages are disproportionate and excessive, say there shall be no new trial if the plaintiff is willing to accept a verdict for a reduced amount, or (in other words), with the consent of the plaintiff, impose upon the defendant, without his consent, the payment of damages, the amount of which has been fixed by the court, and not by a jury? It was held by the court of appeal in *Belt v. Lawes*, supra, that the court has this jurisdiction. . . . No authority for the proposition laid down in *Belt v. Lawes*, supra, is quoted by the learned judges in that case, and no authority earlier than that case was brought to our attention by Mr. Mathew in his very careful argument. On the other hand, there are numerous *dicta* of learned judges to the contrary."

Upon this side of the question reference may be made here to the views expressed in some of the earlier Texas cases, although no longer of force in that jurisdiction.

In *Thomas v. Womack*, 13 Tex. 580, an action for assault and battery, where the plaintiff remitted \$8,500 from a verdict of \$10,000, the court, in reversing the judgment, said: "Where the verdict was confessedly so flagrantly excessive as the remittitur admits it to have been in this case, it must be ascribed to prejudice, partiality, passion, or some undue or improper influence or cause, perverting the judgment of the jury; and to permit any part of it to stand would not be consistent with the preservation of the impartiality, integrity, and purity of the trial by jury. . . .

Where the law recognizes some fixed rules and principles to regulate the measure of damages, by which it may be determined in how much the verdict is excessive, as in actions on contracts, and for torts done to property, the value of which may be ascertained by evidence, a remittitur of the excess may be received as an answer to a motion for a new trial, on the ground of excessive damages. . . . But where there are no such rules and principles by which to ascertain the excess, and it is uncertain

and considerable, a new trial ought to be awarded."

In *Gulf, C. & S. F. R. Co. v. Coon*, 69 Tex. 730, 7 S. W. 492, where the judgment was reversed for other reasons, and the original verdict was for \$10,000, the court said: "As the case will be reversed for the error just pointed out, we do not deem it proper to express our opinion as to whether the verdict was excessive. The trial judge concluded that it was excessive, as he required plaintiff to enter a remittitur of \$3,000 as a condition to his overruling the motion for a new trial. If the judge was of opinion the verdict was excessive, he should have granted a new trial. The damages are assessed by the jury; if the verdict is excessive, the judge, in actions like this, has no measure by which to determine how much it is excessive; his attempt to do so is an invasion of the rights of the jury. His only course in such a case is to grant a new trial."

In *Nunnally v. Taliaferro*, 82 Tex. 286, 18 S. W. 149, where, in an action of slander, the plaintiff remitted the exemplary damages and part of the actual damages, the court, in reversing the judgment, said as to this practice that where the "excess is not ascertainable by any rules of law, and 'the excess is uncertain and considerable,' it should not be permitted. *Thomas v. Womack*, 13 Tex. 584. In a case like this, the discretion of the jury and their sense of right and justice, as applied to the facts, is the only guide the law furnishes for the measure of damages. This discretion, whether legally and wisely exercised or abused, is ascertained from their verdict alone. If, then, a remittitur be allowed and judgment is entered not predicated on that verdict, but for a different sum, can it be said that the judgment for damages is that ascertained and reached by the discretion of the jury and their sense of right and justice under the facts? Unquestionably not. Concede that the evidence authorized a verdict for plaintiff for damages; how was the court to determine the amount of such damages, after deciding that the ver-

should exercise extreme caution in interfering with the verdicts of juries, and that an appellate court should hesitate not only because of the delicacy of undertaking to set aside the finding of the constitutional triers of fact, but because of the concurrence with the jury of the judge presiding at the trial. But if, after giving due weight to the verdict of the jury and the approval of the circuit judge, this court is clearly convinced, in a case in which the plaintiff is only entitled to recover compensatory damages, that the jury has gone beyond compensation, and inflicted punishment on the defendant, under the influence of passion or prejudice, it is bound by the weightiest considerations of duty to direct a new trial. To refuse to do so is to abandon the

defendant to the arbitrary will of the jury. The supervising control of the courts, both of original and appellate jurisdiction, is, in this country, an integral part of the jury system, and as indispensable to the right administration of justice as the panel of twelve men.

"We are well satisfied that the damages are excessive and the result of passion or prejudice in the jury, and the judgment is reversed and the cause is remanded, with directions to grant the appellant a new trial."

These suggestions are specially applicable here, and correctly, as we think, indicate the duty of the court in the present case, as upon a full consideration of the entire record, with all inferences legitimately to

dict was excessive and allowing the remittitur? It could only be determined by the court's own construction of the testimony; or, in other words, the amount permitted to remain would be that which the court's discretion and sense of right and justice, under the facts, recognized as being the proper measure of damages. This would manifestly be the substitution of the court's opinion for that of the jury, and necessarily a trial of the cause exclusively by the court. *Thomas v. Womack*, 13 Tex. 585; *Gulf, C. & S. F. R. Co. v. Coon*, 69 Tex. 730, 7 S. W. 492. There are disclosures made by the record sustaining the charge that the verdict was influenced by passion and prejudice or other improper motives."

b. Where there is prejudice or passion.

1. Not allowable.

It is generally held, even in jurisdictions which generally permit a remittitur, that such a remittitur will not cure a verdict tainted by prejudice and passion. *Southern P. Co. v. Tomlinson*, 4 Ariz. 126, 33 Pac. 710 (*dictum*); *Loewenthal v. Streng*, 90 Ill. 74; *Chicago & N. W. R. Co. v. Cummings*, 20 Ill. App. 333; *Chicago & A. R. Co. v. Barnett*, 56 Ill. App. 384; *West Chicago Street R. Co. v. Krueger*, 68 Ill. App. 450; *West Chicago Street R. Co. v. Johnson*, 69 Ill. App. 147; *Chicago & E. R. Co. v. Binkowski*, 72 Ill. App. 22; *Chicago Street R. Co. v. Wheeler*, 73 Ill. App. 368 (in effect); *Chicago City R. Co. v. Fennimore*, 78 Ill. App. 478; *Pennsylvania Co. v. Greso*, 78 Ill. App. 127; *Nicholson v. O'Donald*, 79 Ill. App. 195; *North Chicago Street R. Co. v. Hoffart*, 82 Ill. App. 539; *Chicago Terminal Transfer R. Co. v. Helberg*, 99 Ill. App. 563; *Pittsburgh, C. C. & St. L. R. Co. v. Story*, 104 Ill. App. 132; *Belt R. Co. v. Charters*, 123 Ill. App. 322; *Sackheim v. Miller*, 136 Ill. App. 132; (see contra, *Illinois C. R. Co. v. Ebert*, 74 Ill. 399); *Ahrens v. Fenton*, 138 Iowa, 559, 115 N. W. 233; *Atchison, T. & S. F. R. Co. v. Cone*, 37 Kan. 567, 15 Pac. 409; *Steinbuechel v. Wright*, 43 Kan. 307, 23 Pac. 500; *Atchison*, 39 L.R.A. (N.S.)

T. & S. F. R. Co. v. Dwelle, 44 Kan. 394, 24 Pac. 500; *Parsons & P. R. Co. v. Montgomery*, 46 Kan. 120, 26 Pac. 403; *Bell v. Morse*, 48 Kan. 601, 29 Pac. 1086; *Drumm v. Cessnum*, 58 Kan. 331, 49 Pac. 78; *Atchison v. Plunkett*, 61 Kan. 297, 59 Pac. 646; *Argentine v. Bender*, 71 Kan. 422, 80 Pac. 935 (*dictum*); *Chicago, R. I. & P. R. Co. v. Brandon*, 77 Kan. 612, 95 Pac. 573 (*dictum*); *Chitty v. St. Louis, I. M. & S. R. Co.* 148 Mo. 64, 49 S. W. 868; *Partello v. Missouri P. R. Co.* 217 Mo. 645, 117 S. W. 1138; *Doty v. Steinberg*, 25 Mo. App. 328; *Adcock v. Oregon R. Co.* 45 Or. 173, 77 Pac. 78 (*dictum*).

In *Southern P. Co. v. Tomlinson*, 4 Ariz. 126, 33 Pac. 710, the court, in affirming a judgment entered upon a remittitur, said: "Of course, if it is apparent to the trial court that the verdict was the result of passion or prejudice, a remittitur should not be allowed, but the verdict should be set aside. In passing upon this question the court should not look alone to the amount of the damages awarded, but to the whole case, to determine the existence of passion or prejudice, and to determine how far such passion or prejudice may have operated in influencing the finding of any verdict against the defendant. When the circumstances, as they may appear to the trial court, indicate that the jury deliberately disregarded the instructions of the court, or the facts of the case, a remittitur should not be allowed, but a new trial should be granted."

In *Belt R. Co. v. Charters*, 123 Ill. App. 322, the court said, in reversing a judgment for the plaintiff, where a child injured on a turntable recovered a verdict of \$14,000, which was reduced to \$7,000: "We, however, believe that no case can be found in which a judgment based upon a remittitur, although approved by the trial judge, has been allowed to stand where the reviewing tribunal is satisfied from the record that the verdict rendered was based upon passion or prejudice, or was founded upon a misconception of the evidence. In such a case the infirmity pervades the entire verdict; and the remission of the one half or

be drawn therefrom, we reach the irresistible conclusion that, when viewed in the light of the facts and circumstances disclosed by the evidence, a verdict of such unusual proportions must have been the result of either passion or prejudice, or of a total misconception by the jury of its duties and obligations under the law. In either event it is vitiated in its entirety. Upon the authority of *F. M. Davis Iron Works Co. v. White*, supra, such a verdict could not properly be made the basis for any judgment whatever. A new trial should have been granted.

There is no general charge of negligence in the complaint. The negligence complained of is alleged specifically, and is charged in these words:

of any other part of the whole amount does not free the remaining part from the taint."

In *Atchison, T. & S. F. R. Co. v. Cone*, 37 Kan. 567, 15 Pac. 499, the court, in reversing a judgment where, upon a verdict of \$50,000, there had been a remittitur of \$25,000, said: "Evidently when the court below required the plaintiff either to remit \$25,000 of the damages found in his favor, or to take a new trial, the court must have found that the verdict of the jury was rendered under the influence of passion or prejudice. And certainly if one half of the verdict was rendered under the influence of passion or prejudice, the other half must also have been rendered under the influence of passion or prejudice; and, as it is doubtful whether the jury should have rendered any verdict in favor of the plaintiff, it may be that this passion or prejudice affected the entire verdict and also the special findings, and caused the jury to find in favor of the plaintiff, where, except for the passion or prejudice, they would not have found in his favor at all."

In *Adcock v. Oregon R. Co.* 45 Or. 173, 77 Pac. 78, the court, in affirming a judgment where there had been a remittitur, said: "We are clear, therefore, that it is within the power of a trial court, as a condition to overruling a motion for a new trial, to require the entry of a remittitur of a part of the verdict in an action of tort, when, in its opinion, the verdict is excessive. It is contended, however, that in this case the court could not have required the plaintiff to remit one half of the verdict in her favor, except upon the theory that the jury were influenced by passion and prejudice. If such had been the view entertained by the court, the proper practice would undoubtedly have been to grant a new trial, as the part of the verdict allowed to stand would have been as much tainted by passion and prejudice as that which was remitted. Where the damages assessed are excessive, in the opinion of the trial court, or not justified by the evidence, the error may in many cases be obviated by remitting the excess; but where it clearly appears that the jury were influenced by passion or prejudice, the error cannot be cured by merely remitting a part of the verdict, but it must be entirely rejected."

"Plaintiff alleges that on the said 1st day of May, 1905, when the plaintiff entered on the first work of the day, the defendant Walter Swanson entered the stope and ordered him to get a bar and spread the top posts of the top square set so as to allow a displaced cap to slip back in its place; that plaintiff refused to do so, replying to Swanson that the braces below were shot away and it was dangerous to spread top posts without restoring them, and that if let alone he would restore the cap to its place safely and properly; that said Swanson, then knowing that the braces were shot away, and that pressure spreading the top posts would probably cause the entire timbering to collapse, without replacing the braces, negligently spread the top

udice, the error cannot be cured by merely remitting a part of the verdict, but it must be entirely rejected."

The same view has been taken where the verdict was the result of inconsiderate judgment or unfairness. Thus, where the trial court allowed a remittitur for an amount which it still considered to be \$500 too much, the appellate court, in reversing the judgment, said: "In the face of this expressed opinion, finding in reality that the verdict, as returned, was excessive, and in the face of the fact that, as remitted by plaintiff, it was still excessive by at least \$500, it cannot be allowed to stand. It has repeatedly been held by this court that, if a verdict for damages is, in the judgment of the trial court, excessive, and the result of inconsiderate judgment or unfairness of action, it is its duty to set it aside and award a new trial, instead of ordering a remittitur of the amount deemed to be excessive." *Atchison, T. & S. F. R. Co. v. Richards*, 58 Kan. 344, 49 Pac. 436.

So, where the jury has misconceived the evidence. In *Szczzech v. Chicago City R. Co.* 157 Ill. App. 150, the court, in reversing a judgment where there had been a remittitur, said: "The verdict is clearly the result of a misconception of the probative force of the evidence by the jury. The remittitur of four tenths of the amount of the verdict, so far from curing the vice confessedly in it, but accentuates its illegality. The assessment of damages, proceeding, as it does, upon improbable premises, cannot be maintained. It is clearly excessive as including compensation for ailments not traceable, upon a proper weighing of the evidence, to the accident chargeable to the negligence of defendant."

Probably the trial judge did not intend to suggest and defect as serious as passion or prejudice in the verdict in *Beller v. Levy*, 68 Misc. 182, 124 N. Y. 411, where, in reducing a verdict, he said: "It is apparent to me that the jury, in awarding her the sum of \$750, must have been influenced by sympathy or partiality. The amount so awarded is excessive for the injuries received, and should be reduced to the sum of

posts with a crossbar, and thereby caused the whole timbering at the point to collapse, burying plaintiff in the ruins, without any fault or negligence on his part."

The testimony of the plaintiff shows that the thing which in fact caused the timbering to collapse, burying him in the ruins, was the act of Swanson in giving a violent surge on the bar and throwing his weight heavily against one of the posts of the square set.

Upon his cross-examination the following testimony was adduced to this point:

Q. Do you mean to tell the jury that the collapse occurred without the stopping bar being tightened any more at all?

A. Yes, sir.

\$350, to which reduction the plaintiff should stipulate; and on her refusal to so stipulate, I order a new trial, without costs." But on appeal (127 N. Y. Supp. 237) the verdict was restored as not excessive, the court seeing nothing in the contention that the jury was swayed by sympathy.

Excess is not necessarily due to passion or prejudice. In *Lewis v. Northern P. R. Co.* 36 Mont. 207, 92 Pac. 469, the court said, in affirming a judgment where a remittitur of \$7,400 had been made from a verdict of \$17,400: "In a given case, it may be that the amount awarded is due to miscalculation, or based upon a wrong standard. In such cases the excessive award is not the result of passion or prejudice, but the result of an honest mistake; and in any case there is no presumption of wrongdoing, unless the award is so grossly out of proportion to the injury, looking to all the circumstances, as that it cannot be otherwise accounted for; for the statute (Code Civ. Proc. § 1171, subd. 5) allows a new trial on the ground of passion or prejudice only when one or the other is apparent."

In *Baxter v. Cedar Rapids*, 103 Iowa, 599, 72 N. W. 790, the court said: "Conceding that the effect and purpose of what was done were to overrule the motion for a new trial on condition that the plaintiff would accept judgment for the amount for which it was rendered, and, if he would not, that the motion would be sustained, that does not show that the district court found that the jury was influenced by passion and prejudice in reaching its verdict. It merely shows that, in the opinion of the court, the evidence did not authorize a verdict for so large an amount as that fixed by the jury. Juries may, and frequently do, err in estimating the amount of a recovery, when there is no ground for claiming that they were influenced by prejudice or passion."

In *Doran v. Cedar Rapids & M. C. R. Co.* 117 Iowa, 442, 90 N. W. 815, the court said: "As to the complaint that the verdict was the result of passion and prejudice, it is enough to say that the only evidence of passion and prejudice relied on is the amount of damages named in the verdict. It is not 39 L.R.A. (N.S.)

Q. How did that happen?

A. Mr. Swanson was standing here, and I stepped back, started to step out from here, where it was perfectly safe, and Mr. Swanson yelled at me; he said, 'The bar isn't tight yet,' at the same time giving a violent surge on the bar, throwing his weight heavily against this corner post here, and the square sets collapsed, and caught both of us.

There was other testimony by plaintiff, which showed that the bar between the square sets had not been tightened, and that there was no pressure from it against the timbers, and that the violent surge upon the bar and pressure of Swanson upon the corner post, in throwing his weight heavily

contended but that there was some evidence to support a verdict, and therefore the mere fact that a verdict was found for the plaintiff would certainly not indicate passion and prejudice. It is true that the trial court found the amount of the verdict to be excessive, and refused a new trial only on condition that a considerable amount should be remitted. But an excessive verdict is not necessarily a verdict which results from passion and prejudice. We could not assent to a proposition that wherever the trial court finds that the verdict was for too large an amount in cases of personal injury, we should conclude that it ought to have been entirely set aside on the other ground."

In *Argentine v. Bender*, 71 Kan. 422, 80 Pac. 935, where the trial court had given the plaintiff the opportunity of remitting two thirds of a verdict of \$7,500, stating that "the error of the jury in fixing the amount of damages does not permeate the entire verdict, but only affects the amount of the same," the appellate court, in affirming the judgment on the remittitur, said: "This court must enter upon the consideration of this case with the assumption that the evidence could not sustain the recovery of a greater amount than \$2,500. This is conclusively settled for the present purpose by the action of the district court. The mere fact that the jury, in estimating plaintiff's damage, so far exceeded this limit, must be regarded as having some tendency to show unfairness. If aided by anything in the evidence or elsewhere in the record tending in the same direction, or possibly if not offset by something of a contrary tendency, this fact alone might justify a conclusion that the jury were influenced by passion or prejudice, and require a reversal. On the other hand, the very departure from a proper amount should be otherwise accounted for if a reasonable basis for so doing can be found. A sufficient explanation of the course of the jury, without involving the supposition that they were actuated by unfair motives, may be found in the meagerness of the instruction given them as a guide to the amount of recovery."

be drawn therefrom, we reach the irresistible conclusion that, when viewed in the light of the facts and circumstances disclosed by the evidence, a verdict of such unusual proportions must have been the result of either passion or prejudice, or of a total misconception by the jury of its duties and obligations under the law. In either event it is vitiated in its entirety. Upon the authority of *F. M. Davis Iron Works Co. v. White*, supra, such a verdict could not properly be made the basis for any judgment whatever. A new trial should have been granted.

There is no general charge of negligence in the complaint. The negligence complained of is alleged specifically, and is charged in these words:

of any other part of the whole amount does not free the remaining part from the taint."

In *Atchison, T. & S. F. R. Co. v. Cone*, 37 Kan. 567, 15 Pac. 499, the court, in reversing a judgment where, upon a verdict of \$50,000, there had been a remittitur of \$25,000, said: "Evidently when the court below required the plaintiff either to remit \$25,000 of the damages found in his favor, or to take a new trial, the court must have found that the verdict of the jury was rendered under the influence of passion or prejudice. And certainly if one half of the verdict was rendered under the influence of passion or prejudice, the other half must also have been rendered under the influence of passion or prejudice; and, as it is doubtful whether the jury should have rendered any verdict in favor of the plaintiff, it may be that this passion or prejudice affected the entire verdict and also the special findings, and caused the jury to find in favor of the plaintiff, where, except for the passion or prejudice, they would not have found in his favor at all."

In *Adcock v. Oregon R. Co.* 45 Or. 173, 77 Pac. 78, the court, in affirming a judgment where there had been a remittitur, said: "We are clear, therefore, that it is within the power of a trial court, as a condition to overruling a motion for a new trial, to require the entry of a remittitur of a part of the verdict in an action of tort, when, in its opinion, the verdict is excessive. It is contended, however, that in this case the court could not have required the plaintiff to remit one half of the verdict in her favor, except upon the theory that the jury were influenced by passion and prejudice. If such had been the view entertained by the court, the proper practice would undoubtedly have been to grant a new trial, as the part of the verdict allowed to stand would have been as much tainted by passion and prejudice as that which was remitted. Where the damages assessed are excessive, in the opinion of the trial court, or not justified by the evidence, the error may in many cases be obviated by remitting the excess; but where it clearly appears that the jury were influenced by passion or prej-

"Plaintiff alleges that on the said 1st day of May, 1905, when the plaintiff entered on the first work of the day, the defendant Walter Swanson entered the stope and ordered him to get a bar and spread the top posts of the top square set so as to allow a displaced cap to slip back in its place; that plaintiff refused to do so, replying to Swanson that the braces below were shot away and it was dangerous to spread top posts without restoring them, and that if let alone he would restore the cap to its place safely and properly; that said Swanson, then knowing that the braces were shot away, and that pressure spreading the top posts would probably cause the entire timbering to collapse, without replacing the braces, negligently spread the top

udice, the error cannot be cured by merely remitting a part of the verdict, but it must be entirely rejected."

The same view has been taken where the verdict was the result of inconsiderate judgment or unfairness. Thus, where the trial court allowed a remittitur for an amount which it still considered to be \$500 too much, the appellate court, in reversing the judgment, said: "In the face of this expressed opinion, finding in reality that the verdict, as returned, was excessive, and in the face of the fact that, as remitted by plaintiff, it was still excessive by at least \$500, it cannot be allowed to stand. It has repeatedly been held by this court that, if a verdict for damages is, in the judgment of the trial court, excessive, and the result of inconsiderate judgment or unfairness of action, it is its duty to set it aside and award a new trial, instead of ordering a remittitur of the amount deemed to be excessive." *Atchison, T. & S. F. R. Co. v. Richards*, 58 Kan. 344, 49 Pac. 436.

So, where the jury has misconceived the evidence. In *Szczzech v. Chicago City R. Co.* 157 Ill. App. 150, the court, in reversing a judgment where there had been a remittitur, said: "The verdict is clearly the result of a misconception of the probative force of the evidence by the jury. The remittitur of four tenths of the amount of the verdict, so far from curing the vice confessedly in it, but accentuates its illegality. The assessment of damages, proceeding, as it does, upon improbable premises, cannot be maintained. It is clearly excessive as including compensation for ailments not traceable, upon a proper weighing of the evidence, to the accident chargeable to the negligence of defendant."

Probably the trial judge did not intend to suggest and defect as serious as passion or prejudice in the verdict in *Beller v. Levy*, 68 Misc. 182, 124 N. Y. 411, where, in reducing a verdict, he said: "It is apparent to me that the jury, in awarding her the sum of \$750, must have been influenced by sympathy or partiality. The amount so awarded is excessive for the injuries received, and should be reduced to the sum of

posts with a crossbar, and thereby caused the whole timbering at the point to collapse, burying plaintiff in the ruins, without any fault or negligence on his part."

The testimony of the plaintiff shows that the thing which in fact caused the timbering to collapse, burying him in the ruins, was the act of Swanson in giving a violent surge on the bar and throwing his weight heavily against one of the posts of the square set.

Upon his cross-examination the following testimony was adduced to this point:

Q. Do you mean to tell the jury that the collapse occurred without the stopping bar being tightened any more at all?

A. Yes, sir.

\$350, to which reduction the plaintiff should stipulate; and on her refusal to so stipulate, I order a new trial, without costs." But on appeal (127 N. Y. Supp. 237) the verdict was restored as not excessive, the court seeing nothing in the contention that the jury was swayed by sympathy.

Excess is not necessarily due to passion or prejudice. In *Lewis v. Northern P. R. Co.* 36 Mont. 207, 92 Pac. 469, the court said, in affirming a judgment where a remittitur of \$7,400 had been made from a verdict of \$17,400: "In a given case, it may be that the amount awarded is due to miscalculation, or based upon a wrong standard. In such cases the excessive award is not the result of passion or prejudice, but the result of an honest mistake; and in any case there is no presumption of wrongdoing, unless the award is so grossly out of proportion to the injury, looking to all the circumstances, as that it cannot be otherwise accounted for; for the statute (Code Civ. Proc. § 1171, subd. 5) allows a new trial on the ground of passion or prejudice only when one or the other is apparent."

In *Baxter v. Cedar Rapids*, 103 Iowa, 599, 72 N. W. 790, the court said: "Conceding that the effect and purpose of what was done were to overrule the motion for a new trial on condition that the plaintiff would accept judgment for the amount for which it was rendered, and, if he would not, that the motion would be sustained, that does not show that the district court found that the jury was influenced by passion and prejudice in reaching its verdict. It merely shows that, in the opinion of the court, the evidence did not authorize a verdict for so large an amount as that fixed by the jury. Juries may, and frequently do, err in estimating the amount of a recovery, when there is no ground for claiming that they were influenced by prejudice or passion."

In *Doran v. Cedar Rapids & M. C. R. Co.* 117 Iowa, 442, 90 N. W. 815, the court said: "As to the complaint that the verdict was the result of passion and prejudice, it is enough to say that the only evidence of passion and prejudice relied on is the amount of damages named in the verdict. It is not 39 L.R.A. (N.S.)

Q. How did that happen?

A. Mr. Swanson was standing here, and I stepped back, started to step out from here, where it was perfectly safe, and Mr. Swanson yelled at me; he said, 'The bar isn't tight yet,' at the same time giving a violent surge on the bar, throwing his weight heavily against this corner post here, and the square sets collapsed, and caught both of us.

There was other testimony by plaintiff, which showed that the bar between the square sets had not been tightened, and that there was no pressure from it against the timbers, and that the violent surge upon the bar and pressure of Swanson upon the corner post, in throwing his weight heavily

contended but that there was some evidence to support a verdict, and therefore the mere fact that a verdict was found for the plaintiff would certainly not indicate passion and prejudice. It is true that the trial court found the amount of the verdict to be excessive, and refused a new trial only on condition that a considerable amount should be remitted. But an excessive verdict is not necessarily a verdict which results from passion and prejudice. We could not assent to a proposition that wherever the trial court finds that the verdict was for too large an amount in cases of personal injury, we should conclude that it ought to have been entirely set aside on the other ground."

In *Argentine v. Bender*, 71 Kan. 422, 80 Pac. 935, where the trial court had given the plaintiff the opportunity of remitting two thirds of a verdict of \$7,500, stating that "the error of the jury in fixing the amount of damages does not permeate the entire verdict, but only affects the amount of the same," the appellate court, in affirming the judgment on the remittitur, said: "This court must enter upon the consideration of this case with the assumption that the evidence could not sustain the recovery of a greater amount than \$2,500. This is conclusively settled for the present purpose by the action of the district court. The mere fact that the jury, in estimating plaintiff's damage, so far exceeded this limit, must be regarded as having some tendency to show unfairness. If aided by anything in the evidence or elsewhere in the record tending in the same direction, or possibly if not offset by something of a contrary tendency, this fact alone might justify a conclusion that the jury were influenced by passion or prejudice, and require a reversal. On the other hand, the very departure from a proper amount should be otherwise accounted for if a reasonable basis for so doing can be found. A sufficient explanation of the course of the jury, without involving the supposition that they were actuated by unfair motives, may be found in the meagerness of the instruction given them as a guide to the amount of recovery."

against it, was in fact the proximate cause of the collapse. It is urgently argued by counsel that there is such variance between the proofs which show the particular negligence which resulted in the injury complained of, and that which is specifically charged in the complaint, as having occasioned it, that a recovery in the present state of the record cannot properly be sustained. While we do not place the reversal of the judgment upon this assignment, we recognize the force of the claim, and suggest, in the event of a new trial, that the

complaint, out of proper caution, be amended to correspond to the proof.

Since we conclude that the judgment must, in any event, be reversed for the reason stated, we deem it unnecessary and unwise to consider or pass upon the other numerous errors assigned and argued. The judgment is reversed, and the cause remanded to the trial court for further proceedings, in conformity with the views here expressed.

Reversed and remanded.

In *Chicago & N. W. R. Co. v. Des Lauriers*, 40 Ill. App. 654, where, in an action for the death of a child three years of age, the trial court required a reduction of the verdict from \$3,750 to \$2,000, to prevent the granting of a new trial, the court, in affirming the judgment, said: "This, it is said, was a substitution of the verdict of the judge for that of the jury, and thus not only deprived the defendant of its right to a trial by jury, but is a clear indication that, in the opinion of the trial judge, the verdict was the result of passion or prejudice. . . . Where juries are left to estimate damages, not from evidence, but from their varying observation and opinions founded thereon, it is not to be wondered at that their verdict should differ as widely as have the circumstances by which they have been surrounded. There are, doubtless, many parents who could truthfully affirm that, however poignant their sorrow, the death of a child of three could not be considered a pecuniary loss to its parents; many other parents think very differently. The trial judge in this case did not agree with the jury in this regard; but in the entire absence of evidence upon the question, how can it be said that the verdict of the jury was the result, not of their honest convictions, but of passion or prejudice?"

Yet, upon the question whether, in a particular case, there has been prejudice or passion, the amount or proportion of the remittitur is generally an important element. And there are many cases where the decision that there was such prejudice and passion rested largely, if not entirely, upon the relation of the amount of the remittitur to the verdict. Thus, this has been done where the verdict was reduced:

—by $\frac{1}{2}$. *Chicago & N. W. R. Co. v. Cummings*, 20 Ill. App. 333.

—by $\frac{1}{3}$. *Chicago & E. R. Co. v. Binkopski*, 72 Ill. App. 22.

—by $\frac{1}{4}$. *Chicago City R. Co. v. Fennimore*, 78 Ill. App. 478.

—by $\frac{1}{5}$. *North Chicago Street R. Co. v. Hoffart*, 82 Ill. App. 539.

—by $\frac{1}{6}$. *Pittsburgh, C. C. & St. L. R. Co. v. Story*, 104 Ill. App. 132.

—by $\frac{1}{7}$. *Atchison, T. & S. F. R. Co. v. Cone*, 37 Kan. 507, 15 Pac. 499; *Atchison v. Plunkett*, 61 Kan. 297, 59 Pac. 646; *Atchison, T. & S. F. R. Co. v. Dwelle*, 44 Kan. 394, 24 Pac. 500.

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—by $\frac{1}{8}$. *Bell v. Morse*, 48 Kan. 601, 29 Pac. 1086.

—by $\frac{1}{9}$. *Steinbuechel v. Wright*, 43 Kan. 307, 23 Pac. 560.

In *Chicago & N. W. R. Co. v. Cummings*, 20 Ill. App. 333, where, upon the requirement of the court, the plaintiff abated more than two thirds of his verdict in an action where he was assaulted by the defendant's conductor, the appellate court, while seeming to think that there would have been no error in law in affirming the judgment, stated, that they had power to reverse where that course would best tend to promote the impartial administration of justice, and said: "A verdict in such a case as this, so excessive that seven tenths of it will be remitted to prevent a new trial, cannot but be regarded as the result of passion and prejudice on the part of the jury, and it is difficult to see how the vice in such a verdict can be cured by a remittitur, for the passion and prejudice was in the jury, and must have entered into and permeated the whole finding, and must abide in that which remains as well as in that which is remitted."

In *Ahrens v. Fenton*, 138 Iowa, 559, 115 N. W. 233, where the jury allowed the defendant damages on a counterclaim, including exemplary damages for the malicious suing out of an attachment, the trial court reduced both the actual and the exemplary damages of the defendant. The appellate court, in reversing the judgment on the plaintiff's appeal, said: "The trial court evidently thought the verdict was the result of passion and prejudice, for it reduced the allowance of exemplary damages from \$800 to \$500. . . . As the allowance of exemplary damages is wholly within the discretion of the jury in a case where there is a legal basis for the allowance of such damages (*Reizenstein v. Clark*, 104 Iowa, 287, 73 N. W. 588), the finding of the jury can only be interfered with on the ground of such error of judgment as to indicate passion and prejudice; and where the allowance is so grossly excessive under the evidence that it should not be allowed to stand, the verdict should be set aside. *Saunders v. Mullen*, 66 Iowa, 728, 24 N. W. 529; *Tynberg v. Cohen*, 76 Tex. 409, 13 S. W. 315. If the verdict is vitiated by improper conduct of the jury, it is vitiated as a whole, and not simply to the extent that the trial

court may think it in excess of what should reasonably be allowed. *Darland v. Wade*, 48 Iowa, 547; *Loewenthal v. Streng*, 90 Ill. 74. The trial court should have sustained plaintiff's motion for new trial, and in rendering judgment against plaintiff for a portion of the amount found by the jury to be due by way of exemplary damages committed an error."

But, on the other hand a heavy reduction from a verdict has often been approved as not necessarily indicating that the original verdict was the result of prejudice and passion.

Thus, judgments have been affirmed where the verdict has been reduced:

—by *§*. *Goldie v. Werner*, 50 Ill. App. 297 (affirmed in 151 Ill. 551, 38 N. E. 35.)

—by over 45 per cent. *Doran v. Cedar Rapids & M. C. R. Co.* 117 Iowa, 442, 90 N. W. 815; *Baxter v. Cedar Rapids*, 103 Iowa, 599, 72 N. W. 790; *Carl v. Pierce*, 20 Ohio C. C. 68, 10 Ohio C. D. 711.

So, in a number of cases, reductions in the trial court have been followed by further remittiturs in the appellate court, which together reduced the verdict in a material proportion.

Thus, a verdict for:

—\$7,500, reduced to \$4,000, was further reduced on appeal to \$1,000 (*Phelps v. Cogswell*, 70 Cal. 201, 11 Pac. 628).

—\$12,500, reduced to \$10,000, was further reduced to \$7,000 (*Burdick v. Missouri P. R. Co.* 123 Mo. 221, 26 L.R.A. 384, 45 Am. St. Rep. 528, 27 S. W. 453).

—\$50,000, reduced to \$35,000, was further reduced to \$25,000 (*Gordon v. Kansas City Southern R. Co.* 222 Mo. 516, 121 S. W. 80).

—\$10,000, reduced to \$6,300, was further reduced to \$5,000 (*Fremont, E. & M. Valley R. Co. v. French*, 48 Neb. 638, 67 N. W. 472).

—\$25,000, reduced to \$15,000, was further reduced to \$10,000 (*O'Donnell v. American Sugar Ref. Co.* 41 App. Div. 307, 58 N. Y. Supp. 640).

—\$2,250, reduced to \$1,500, was further reduced to \$1,000 (*Comrade v. Atlas Lumber & Shingle Co.* 44 Wash. 470, 87 Pac 517).

2. Allowable

In a number of jurisdictions remittiturs are allowed although the amount of the original verdict is the result of prejudice or passion. *Craig v. Cook*, 28 Minn. 232, 9 N. W. 712; *Trow v. White Bear*, 78 Minn. 433, 80 N. W. 1117; *Bremer v. Minneapolis, St. P. & Ste. M. R. Co.* 96 Minn. 469, 105 N. W. 494; *Goss v. Goss*, 102 Minn. 346, 113 N. W. 690; *Western U. Teleg. Co. v. Frith*, 105 Tenn. 167, 58 S. W. 118; *Alabama G. S. R. Co. v. Roberts*, 113 Tenn. 488, 67 L.R.A. 495, 82 S. W. 314, 3 Ann. Cas. 937; *Gulf, C. & S. F. R. Co. v. Darby*, 28 Tex. Civ. App. 413, 67 S. W. 446; *Gulf, B. & K. C. R. Co. v. O'Neill*, 32 Tex. Civ. App. 411, 74 S. W. 960; *Galveston, H. & N. R. Co. v. Wallis*, 47 Tex. Civ. App. 120, 104 S. W. 418; *Reddon v. Union P. R. Co.* 5 Utah, 344, 15 Pac 262 (cited and followed in *Kennedy v. Oregon Short Line R. Co.* 18 39 L.R.A. (N.S.)

Utah, 325, 54 Pac. 988); *Brown v. Southern P. R. Co.* 7 Utah, 288, 26 Pac. 579; *Gillen v. Minneapolis, St. P. & Ste. M. R. Co.* 91 Wis. 633, 65 N. W. 373; *Heimlich v. Tabor*, 123 Wis. 565, 68 L.R.A. 669, 102 N. W. 10; *Beach v. Bird & W. Lumber Co.* 135 Wis. 550, 116 N. W. 245; *McNamara v. McNamara*, 108 Wis. 613, 84 N. W. 901 (*dictum*).

In *Craig v. Cook*, 28 Minn. 232, 9 N. W. 712, an action for assault and forcible ejection from premises of one in possession, the jury found a verdict for \$1,200, and the trial court, on the ground that the damages were so clearly excessive as to evince something like passion or prejudice, required a new trial or a remittitur of \$900. The appellate court held that the finding of passion and prejudice was not before them for review, and affirmed the judgment as with in the right of the trial court when it considers there has been passion or prejudice, although it should usually in such cases order a new trial.

In *Trow v. White Bear*, 78 Minn. 433, 80 N. W. 1117, the court, in affirming a judgment where a remittitur from \$1,400 to \$800 had been made, said: "The position of appellant's counsel is that, where it is determined by the trial court that excessive damages have been so awarded by a jury, a new trial should be granted, and the error of the jury cannot be corrected by a reduction of the verdict. Taken from a statutory point of view, there is, in the opinion of the writer, much logic and good sense in counsel's position. Our statutes provide for granting a new trial in cases where excessive damages have been awarded by a jury acting under the influence of passion and prejudice, and contain no exception or saving clause under which the trial court may correct the erroneous conduct of the jury by reducing the verdict. A strict following of the statutes would therefore require a new trial whenever such a verdict is returned. But the practice of correcting the error of the jury by reducing the damages to what the trial court deems reasonable and fair, not only in cases where it is found that the jury was actuated by motives other than passion and prejudice, but in cases where there was no other apparent cause, is too firmly rooted in this state to be now departed from. Of course, in cases where there is such a degree of passion and prejudice as to make it clear to the court that it permeated the entire case, and influenced the jury upon questions other than damages, such misconduct on the part of the jury (for it amounts to misconduct) will not be overlooked, or any attempt made to correct it by a reduction of damages."

After this decision any doubt shown by the opinion in *Hall v. Chicago, B. & N. R. Co.* 46 Minn. 439, 49 N. W. 239, may be disregarded.

In *Goss v. Goss*, 102 Minn. 346, 113 N. W. 690 the court, in affirming a judgment, said: "The rule is too well settled to be seriously questioned that the trial court may, in actions of tort, as well as in actions

on contract, in the exercise of a sound judicial discretion, when it deems a verdict excessive and the result of passion and prejudice on the part of the jury, deny a new trial on condition that the prevailing party remit such sum as shall leave the recovery not excessive in the judgment of the court. When, however, the damages are so excessive, and the circumstances, as disclosed by the evidence as to other issues, are such as to indicate a fair probability that the jury were influenced by passion or prejudice in the determination of the other issues, a new trial should be granted. Whether in any given case a new trial should be granted or denied on condition that the verdict be reduced rests largely in the sound judicial discretion of the trial court."

In *Western U. Teleg. Co. v. Frith*, 105 Tenn. 187, 58 S. W. 118, the court said, in affirming a judgment against a telegraph company for negligence in failure to deliver a telegram, where there had been a remittitur: "An ingenious and forcible argument is made, and it is not without authority, that in actions for personal injuries, when there is no fixed standard for the measure of damages, every verdict which is by the trial court considered as excessive must be so deemed on account of passion, prejudice, corruption, or caprice on the part of the jury; and that when a trial court refuses to approve such verdict, it can only be upon such ground. Even if this be conceded to be true, and if it be admitted that in the present case the trial judge refused to approve the verdict because he deemed it to be so excessive as to indicate passion, prejudice, corruption, or caprice, still the question remains, should the verdict be set aside, or a less amount approved and judgment rendered therefor upon a remittitur? Although a verdict may be the result of passion, prejudice, caprice, or corruption, it is nevertheless a valid verdict until and unless it is set aside. If it is reduced by the trial judge to such an amount as makes it a proper verdict on the facts of the case, and this is assented to by the plaintiff, it is purged of its taint, and judgment may be rendered for such reasonable amount without the necessity of another trial. This has been the practice and rule of this court and the court below for a long number of years; and we can see no reason why it should not apply in cases of tort as well as in cases of contract. It is true a plaintiff cannot be forced to remit, and if he protest and object the trial court should not render judgment, but should grant a new trial. The trial judge can only suggest, and if the plaintiff accept without protest or objection, then judgment may be rendered by the court."

In *Alabama G. S. R. Co. v. Roberts*, 113 Tenn. 488, 67 L.R.A. 495, 82 S. W. 314, 3 Ann. Cas. 937, the court said: "In a number of cases it has been held that when the damages are so excessive as to evince passion, prejudice, or caprice, the error cannot be corrected by remittitur, because such passion, prejudice, and caprice will be presumed to have permeated the entire verdict, 39 L.R.A. (N.S.)

and to have influenced or caused the finding of the question of any liability on the facts. . . . We cannot admit the soundness of the view of these cases under our practice."

And it seems from the opinion that the court probably took a similar view in *Branch v. Bass*, 5 Sneed, 366, where, in an action for damages for the abduction of the plaintiff's daughters, two thirds of a verdict of \$20,000 had been remitted in the trial court to save a new trial, and it was held on appeal that this was the proper course to pursue.

In *Gulf, C. & S. F. R. Co. v. Darby*, 28 Tex. Civ. App. 413, 67 S. W. 446, the court said: The verdict of the jury was for \$22,500. The appellee voluntarily remitted \$7,500 thereof, and the trial court, being of the opinion that it was still excessive, required a further remittitur of \$5,000, which was made, and judgment was entered for \$10,000. This amount is not complained of, but the complaint is that the amount of the verdict was so excessive as to show such a bias on the part of the jury as prevented them from giving proper consideration to the facts. It is a peculiar case, but the amount for which the judgment was entered having been arrived at by remitter, and being an amount that this court can approve, and the verdict as to liability being supported by the evidence, and there being no other ground for a reversal thereof, it is our duty to affirm the judgment."

This case was followed in *Gulf, B. & K. C. R. Co. v. O'Neill*, 32 Tex. Civ. App. 411, 74 S. W. 960, where the court said: "Counsel discusses only the excessiveness of the verdict, and is insistent upon the proposition that the judgment should be reversed because the facts and the amount of the verdict show that the jury was influenced by passion and prejudice; that the trial court held that they were by requiring the remitter; and that, as the passion affected the amount, it naturally affected the verdict on the issue of liability. This question has heretofore been presented, and has been determined against the contention of appellant."

In *Galveston, H. & N. R. Co. v. Wallis*, 47 Tex. Civ. App. 120, 104 S. W. 418, in an action for death by negligence, where the trial court had made a remittitur a condition of denying a motion for a new trial, the appellate court, in affirming the judgment, said: "We understand the contention of appellant under this assignment to be that because the verdict of the jury was so excessive as to indicate that it was the result of some improper motive, it should be set aside and a new trial granted, notwithstanding the remittitur filed by appellees may have reduced the judgment to a reasonable amount. There is force in the contention that where the evidence is conflicting upon the issue of liability and the verdict against the defendant is so unreasonably large as to show passion or prejudice on the part of the jury, that the right of the defendant to a trial by a fair and impartial jury, is denied when he is forced to accept upon the issue

of liability the verdict of a jury that has shown, by the unreasonable amount of the damages assessed, that it has been influenced by prejudice, sympathy, or some other improper motive. The point, however, was expressly decided by this court against appellant's contention in the case of *Gulf, C. & S. F. R. Co. v. Darby*, supra, and, by the refusal of a writ of error, that decision was approved by the supreme court."

In *Reddon v. Union P. R. Co.* 5 Utah, 344, 15 Pac. 262, the court, in affirming a judgment, said: "The appellant asks that the judgment be reversed because the damages were excessive, appearing to have been given under the influence of passion or prejudice. The argument is that the trial court, having determined that the damages are excessive, it taints the whole verdict, and that none of it should stand. The practice which was pursued in this case is thoroughly established by precedent. 1 *Sutherland, Damages*, 813-815, and cases there cited. It is a supervision which courts exercise over verdicts for the protection of defendants in what are deemed to be proper cases, and if the rule is ever to be disturbed, it should be on the application of parties injured, and not those who are benefited by it. We are not prepared to say that the damages, after the reduction, are excessive, in view of the severe character of the injuries."

In *Brown v. Southern P. R. Co.* 7 Utah, 288, 26 Pac. 579, where the verdict was for \$12,000, which was reduced in the trial court to \$10,000, on appeal the judgment was reversed on the ground that the verdict was given under the influence of prejudice or passion; but the plaintiff then offering to reduce his verdict to \$4,000, judgment was affirmed for that amount.

In *Gillen v. Minneapolis, St. P. & S. Ste. M. R. Co.* 91 Wis. 633, 65 N. W. 373, an action for putting a passenger off a train, the jury found a verdict for \$1,500. The trial court made the denial of a motion for a new trial conditioned on the plaintiff's remitting \$750, and the appellate court made an affirmance conditional on the further remittance for all damages in excess of \$350. The court said: "The judge might well have set aside the verdict altogether, for the large proportion of the verdict which he required to be remitted sufficiently indicates that he entertained the opinion that the verdict was so large as to make it manifest that it was the product of prejudice, partiality, or other improper bias. The parties are entitled to have even an assessment of damage made by a fair and impartial jury, and to have the impartial judgment of the jury in that behalf. But the trial court has a large discretion, in such cases, whether it will allow a part to be remitted and the verdict to stand for the balance, or whether it will set the verdict aside altogether and grant a new trial."

Any hesitation or doubt in the *Gillen* Case is now immaterial, as the doctrine is emphatically approved in the *Heimlich* Case, 39 L.R.A. (N.S.)

123 Wis 565, 68 L.R.A. 669, 102 N. W. 10, and the *Beach* Case, 135 Wis. 550, 116 N. W. 245.

Passion and prejudice affecting other questions than amount of damages.

While the language of some of the opinions is very broad, probably no court would avowedly hold that a verdict tainted with passion and prejudice in matters of fact outside the question of the amount of damages should be permitted to stand for any purpose or in any amount. The court in such cases should set it entirely aside. *Ewing v. Stickney*, 107 Minn. 217, 119 N. W. 802; see also the foregoing quotations from *Trow v. White Bear* and *Goss v. Goss*.

So, also, the affirming opinion in *McKnight v. Minneapolis, St. P. & S. Ste. M. R. Co.* 96 Minn. 480, 105 N. W. 673, indicates that the passion and prejudice might be so great as to require a new trial, and this was the ground of the decision in *Ger-mann v. Great Northern R. Co.* 114 Minn. 247, 130 N. W. 1021.

In *McNamara v. McNamara*, 108 Wis. 613, 84 N. W. 901, where, in an action by a son against his father for services for assisting him in his practice as a physician, the verdict was \$11,000, from which there was a remittitur of \$5,000 in the trial court, the appellate court, in reversing the judgment, said: "Where it appears with reasonable certainty that the recovery is so excessive as to create the belief that the jury have been misled by 'passion, prejudice, or ignorance' the trial court may either grant a new trial absolutely, or give the plaintiff the option to remit the improper excess. But the rule is only applicable in cases where it is clear that the perverse conditions mentioned only affected the amount of the recovery. If it appears that the elements of passion and prejudice may have entered into, and probably did affect, the decision of other questions in the case, the court's duty is to grant a new trial absolutely. Such we believe to be the situation in this case."

— B. B. B.

ARKANSAS SUPREME COURT.

FENNER B. BAKER, Appt.,

v.

W. W. BAILEY.

(— Ark. —, 145 S. W. 532.)

Innkeeper — passing time — liability for baggage.

1. One who goes into a hotel merely to

Note. — What acts with respect to baggage of an intending guest will initiate the relation of innkeeper and guest so as to create liability for its loss or injury.

This question was treated in the note in 23 L.R.A. (N.S.) 1107, and, in addition to

pass the time and write letters, without registering or purchasing any accommodations, is not a guest so as to render the keeper responsible for the safe-keeping of his baggage.

Same — gratuitous bailee — liability.

2. The acceptance by a hotel porter of baggage from one who intends to become a guest at the hotel, but does not do so, establishes merely a gratuitous bailment, and the innkeeper is bound to use only slight care in protecting it.

Trial — loss of baggage — care — question for jury.

3. Whether or not an innkeeper who has assumed the obligation of a gratuitous bailee for the care of baggage has performed his duty is, in case of an attempt to hold him liable for its loss, a question for the jury.

(March 18, 1912.)

APPEAL by plaintiff from a judgment of the Circuit Court for Sebastian County in defendant's favor in an action brought to enforce the liability of defendant as an innkeeper for the loss of certain baggage while in his possession. Reversed.

Statement by Kirby, J.:

Appellant, a traveling salesman, brought suit against appellee for the loss of one of his grips containing wearing apparel and other personal effects. He was passing through Ft. Smith on his journey, and on arriving there handed his baggage, two grips, to the porter of the Hotel Main, who was at the station to receive the baggage of incoming guests. The complaint alleged "that plaintiff went direct to the hotel from said station with the intention of remaining until some time the following day; but, upon arriving at said hotel, found that the train he would take would depart much earlier than he had anticipated, and, owing to the time of the departure, he did not procure a room, but remained in and about the hotel." The answer denied that appellant became a guest at the hotel, and any liability for the loss of his grip. He testi-

fied: "I was under the impression that the Kansas City Southern train going north left something like 4 or 5 o'clock next morning, and gave the porter the baggage with the expectation of staying all night there if the train did go at this time. When I reached the hotel, I found that the train went out earlier than I expected, upon inquiry of the clerk, and consequently I did not have any time to speak of to get any sleep if I had gone to bed, and did not register. If I had known the train was to leave as early as it did, I would have checked my baggage at the station, and not gone to the hotel." He stated further that he arrived at the hotel about 10 o'clock, too late for supper, and went out to a near-by restaurant for that meal, which consumed some time; that he later returned to the hotel and wrote some letters, and stayed in and around there until the time of the departure of his expected train, when he asked the clerk for his grips, and only one was returned to him, the one containing the wearing apparel and other effects not being found. There was some testimony relative to the rules of the hotel, as to its liability for baggage only when checked and put in the baggage room, and that there was a notice to this effect upon the check room door. From other testimony, it was doubtful whether this notice was in such a place as would likely attract the attention of or be seen by persons required to observe its provisions. The hotel porter testified that he took all the grips that were handed to him at the station; that he supposed he got the two belonging to appellant, although he did not know him, and that it was so dark at the station that he could not easily recognize any of the persons turning their grips over to him. He said, also, that he brought all the baggage delivered to him to the hotel; that none was lost; and that he put it down on the floor of the lobby at the accustomed place. When appellant got ready to leave, he inquired for and demanded his grips, but only one was delivered to him; the clerk not being able to find the other, which he

the cases therein cited, reference may be had to *Flint v. Illinois Hotel Co.* 149 Ill. App. 404, declaring that the relation of innkeeper and guest may be established by the reception of baggage by the innkeeper; and that therefore where baggage is delivered to an innkeeper as the property of an intending guest, who, within a reasonable time thereafter, actually becomes a guest, the responsibility of the innkeeper for the safe-keeping of the baggage relates back to the time when it was delivered.

Generally, as to when the relation of innkeeper and guest is initiated, see the note to the case of *Memphis Hotel Co. v. Hill*, 34 L.R.A.(N.S.) 420. The case itself holds 39 L.R.A.(N.S.)

that a traveler who is met at the door of an inn by a servant of the establishment, and delivers to him his baggage, which is placed with that of other guests, and who repairs to the dining room, where he is served with food for which he pays the customary price, is a guest, for the safety of whose baggage the innkeeper is responsible, although he does not register or notify the clerk or other officer of his intention to become a guest, or give any directions as to the care of the baggage.

On the duty of an innkeeper as to effects of one who has left without intention of returning as a guest, see the note in 28 L.R.A. (N.S.) 495. L. A. W.

thought might have been taken by mistake by some of the baseball club that had gone from the hotel out to Poteau, Oklahoma, to play there the next day. The clerk also stated that it was the rule of the hotel to require baggage checked before any responsibility for loss was assumed by it, of which rule notices were posted in the hotel. There was testimony, also, as to the value of the lost grip and its contents. The court directed a verdict for appellee. From the judgment thereon, this appeal comes.

Messrs. H. C. Locklar and Fred A. Isgrig, for appellant:

If the porter of a hotel had authority to receive baggage of guests, and appellant's baggage was delivered to the porter at the station, the hotel keeper became liable for the redelivery of the same to the appellant.

Cookery v. Nagle, 83 Ga. 696, 6 L.R.A. 483, 20 Am. St. Rep. 333, 10 S. E. 491; *Eden v. Drey*, 75 Ill. App. 102; *Williams v. Moore*, 69 Ill. App. 618; *Dickinson v. Winchester*, 4 Cush. 114, 50 Am. Dec. 760; *Sasseen v. Clark*, 37 Ga. 242.

If appellant delivered his baggage to the porter of the hotel at the station, and went direct to the hotel himself, with the intention of remaining over night at the hotel, but, upon arriving at the hotel, found his train would depart at a much earlier hour than he had anticipated, and for this reason did not register or take a room, but remained in and about the public room of the hotel, he became a guest.

Overstreet v. Moser, 88 Mo. App. 72; *Hill v. Memphis Hotel Co.* 124 Tenn. 376, 34 L.R.A. (N.S.) 420, 136 S. W. 997.

It is not necessary that the baggage should be in the innkeeper's special keeping, but it is generally sufficient that it is in the inn under his implied care.

Packard v. Northcraft, 2 Met. (Ky.) 439; *Norcross v. Norcross*, 53 Me. 163.

Messrs. Read & McDonough, for appellee:

The relation of landlord and tenant never having existed, defendant is not liable.

Bunn v. Johnson, 77 Mo. App. 596; *Hill v. Memphis Hotel Co.* 124 Tenn. 376, 34 L.R.A. (N.S.) 420, 136 S. W. 997; *Gastenhofer v. Clair*, 10 Daly, 265; *Tulane Hotel Co. v. Holohan*, 112 Tenn. 214, 105 Am. St. Rep. 930, 79 S. W. 113, 2 Ann. Cas. 345; 16 Am. & Eng. Enc. Law, 518; *Brewer v. Caswell*, 132 Ga. 563, 23 L.R.A. (N.S.) 1107, 131 Am. St. Rep. 216, 64 S. E. 674, 16 Ann. Cas. 936.

The liability of the gratuitous bailee in case of loss arises only in consequence of gross negligence on his part.

16 Am. & Eng. Enc. Law, 2d ed. 531; *O'Brien v. Vaill*, 22 Fla. 627, 1 Am. St. 39 L.R.A. (N.S.)

Rep. 219, 1 So. 137; *Wear v. Gleason*, 52 Ark. 364, 20 Am. St. Rep. 186, 12 S. W. 756.

Kirby, J., delivered the opinion of the court:

It is insisted that appellant became a guest of the hotel, and that it was liable to him as such for the loss of his property; but we do not agree to this contention. In *Gastenhofer v. Clair*, 10 Daly, 265, the court said: "The universal rule seems to be that one cannot become the guest of a hotel unless he procures some accommodation. He must procure a meal, room, drink, feed for his horse, or at least offer to buy something of the innkeeper, before he becomes a guest." *Tulane Hotel Co. v. Holohan*, 112 Tenn. 216, 105 Am. St. Rep. 930, 79 S. W. 113, 2 Ann. Cas. 345. In *Hill v. Memphis Hotel Co.* 124 Tenn. 376, 34 L.R.A. (N.S.) 420, 136 S. W. 997, the court said: "To establish the relation of host and guest, the traveler must visit the inn for the purpose of availing himself of the entertainment offered, and the innkeeper must receive the traveler for the purpose of entertaining him," and it is not necessary that he should register. And further: "An application to the innkeeper for entertainment is sufficient notice of the traveler's intention to become a guest; and supplying his wants and furnishing the entertainment in the way in which the innkeeper publicly professes to entertain travelers are sufficient acceptance to constitute the relation of host and guest." "It is sufficient if he visit the inn for the purpose of receiving entertainment and is entertained by the keeper." Appellant did not take supper nor a room, neither did he buy anything at the hotel after his arrival, and, at most, wrote a few letters upon its stationery without expense to himself. According to his own statement, he spent nothing but the evening with the hotel; neither did he offer to spend anything else, and we hold that he did not become a guest thereof under the circumstances, and the hotel company incurred no liability on that account.

Its porter, however, was duly authorized for that purpose, and received the baggage of appellant, at the train, who at the time of its delivery to him intended to become a guest of the hotel, and the undisputed testimony shows that the grip containing the wearing apparel was not returned to him. Certainly, if he had procured some entertainment or refreshment at the hotel, the relation of guest and host would have been established, and the hotel company's liability fixed in accordance with such relation. Not having done so, and the porter of the hotel having received his grips and placed

them in the hotel, along with the baggage of all others stopping there, the hotel thereby became a bailee of such baggage. The bailment, being solely for the bailor's benefit, was a gratuitous one, and the hotel was only bound to the use of slight care in the protection of the property, and responsible for its loss only in case of gross neglect. 16 Am. & Eng. Enc. Law, pp. 518, 531; Wear v. Gleason, 52 Ark. 364, 20' Am. St. Rep. 186, 12 S. W. 756; Van Zile, Bailm. § 19; Story, Bailm. § 23.

As to whether the bailee, the hotel, exercised the care the law required in the protection of appellant's property, or was guilty of such gross negligence as would make it responsible for the loss thereof, was a question of fact to be determined by the jury, under proper instructions from the court. Preston v. Prather, 137 U. S. 604, 34 L. ed. 788, 11 Sup. Ct. Rep. 162.

It follows that the court erred in directing a verdict, and the judgment is reversed, and the cause remanded for a new trial.

CALIFORNIA SUPREME COURT. (Department No. 1.)

RE ESTATE OF PATRICK KIRBY, Deceased.

JAMES KIRBY, Assignee, Appt.

BRIDGET MANNION, Admx., etc., of Jane Roach, et al., Resp'ts.

(— Cal. —, 121 Pac. 370.)

Descent — murder of ancestor — statutory disinheritance.

A conviction of manslaughter does not come within a statute forbidding an heir to inherit any portion of the estate of an ancestor for whose murder he has been convicted, where by statute technical words are

to receive their technical meaning in statutory construction.

(January 27, 1912.)

A PPEAL by James Kirby, assignee of an interest in the estate of Patrick Kirby, deceased, from an order of the Superior Court for the City and County of San Francisco distributing said estate. Reversed.

The facts are stated in the opinion.

Messrs. Sullivan & Sullivan and Theo. J. Roche, for appellant:

In the absence of the positive declaration contained in § 1409, Civil Code, appellant's assignor would still be entitled to inherit.

Re Stanford, 126 Cal. 114, 45 L.R.A. 788, 58 Pac. 462; Carpenter's Estate, 170 Pa. 203, 29 L.R.A. 145, 50 Am. St. Rep. 765, 32 Atl. 637; Shellenberger v. Ransom, 41 Neb. 631, 25 L.R.A. 564, 59 N. W. 935; Deem v. Milliken, 53 Ohio St. 668, 44 N. E. 1134; Owens v. Owens, 100 N. C. 240, 6 S. E. 794; Gollnik v. Mengel, 112 Minn. 349, 128 N. W. 292; Re Kuhn, 125 Iowa, 449, 101 N. W. 151, 2 Ann. Cas. 667; Wellner v. Eckstein, 105 Minn. 444, 117 N. W. 831.

Messrs. Cullinan & Hickey, for respondents:

Under the common law one who feloniously killed another could not inherit from the slain person.

Box v. Lanier, 112 Tenn. 393, 64 L.R.A. 458, 79 S. W. 1042; Lundy v. Lundy, 24 Can. S. C. 650; Gollnik v. Mengel, 112 Minn. 349, 128 N. W. 292; Riggs v. Palmer, 115 N. Y. 506, 5 L.R.A. 340, 12 Am. St. Rep. 819, 22 N. E. 188; Wellner v. Eckstein, 105 Minn. 444, 117 N. W. 830.

Shaw, J., delivered the opinion of the court:

This is an appeal from a final order of distribution of the estate of Patrick Kirby, deceased.

Note. — Homicide as affecting devolution of property.

This note is supplemental to that part of the note in 3 L.R.A.(N.S.) 726, which applies to transfers by devise or operation of common-law rules, and is intended to include only such cases as have been decided since that time. The part of that note that relates to the proceeds of life insurance is supplemented by the note to Filmore v. Metropolitan L. Ins. Co. 28 L.R.A.(N.S.) 675.

In Perry v. Strawbridge, 209 Mo. 621, 16 L.R.A.(N.S.) 244, 123 Am. St. Rep. 510, 108 S. W. 641, 14 Ann. Cas. 92, it was held that a husband who murders his wife cannot inherit one half of her estate under a statute which gives the widower of a childless wife one half the estate of which she died seized; 39 L.R.A.(N.S.)

and so a claim to title to such an estate by children, by a former marriage, of a man who killed his wife and then committed suicide, was denied.

In Beddingfield v. Estill, 118 Tenn. 39, 9 L.R.A.(N.S.) 640, 100 S. W. 108, 11 Ann. Cas. 904, it was held that a man holding an estate by entail with his wife does not, upon her death, inherit it from her, within the meaning of a statute which provides that anyone who feloniously kills one from whom he would inherit property shall forfeit all right thereto.

In Wellner v. Eckstein, 105 Minn. 444, 117 N. W. 830, by reason of a divided court, the question of the right of a widow who had murdered her husband that she might acquire his realty, to inherit under the statute of descent, was not decided.

But in Gollnik v. Mengel, 112 Minn. 349,

Patrick Kirby died intestate on January 18, 1910, leaving neither wife, issue, father, nor mother surviving. His surviving heirs, according to § 1386 of the Civil Code, were two brothers, Michael and James Kirby, one sister, Bridget Mannion, and the children of Ellen Daly, a deceased sister. On December 1, 1910, Michael Kirby transferred his interest in Patrick's estate to one James Kirby, a son of said Michael. Said James Kirby is the appellant herein. On February 23, 1910, Michael Kirby was duly charged by information, in the superior court of the city and county of San Francisco, with the murder of said Patrick Kirby. On July 1, 1910, he was, upon said charge, convicted of the crime of manslaughter. An appeal was taken from the judgment of conviction, and it has been affirmed and has become final. Because of this conviction, the court below refused to distribute the share of Michael Kirby to his assignee, James Kirby, and distributed the entire estate to the other persons above mentioned. It is claimed that this was error.

By § 1386, if a person dies intestate, leaving neither issue, husband nor wife, father nor mother surviving, his estate goes to his brothers and sisters, and to the children or grandchildren of any deceased brother or sister by right of representation. An exception to this rule is declared by § 1409, a new section added to the same title in 1905. It is as follows: "No person who has been convicted of the murder of the decedent shall be entitled to succeed to any portion of his estate; but the portion thereof to which he would otherwise be en-

titled to succeed descends to the other persons entitled thereto under the provisions of this title." If Michael Kirby was not "convicted of the murder" of Patrick Kirby within the meaning of this section, then James Kirby, the assignee of Michael, is entitled to succeed to one fourth of the estate. What, then, is the true meaning of the words last quoted?

"Words and phrases are construed according to the context and approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition." Civil Code, § 13. The word "murder" is a technical word. It not only has acquired a peculiar and appropriate meaning in the law of this state, and in the law generally, but it has been precisely defined by our statute. The Penal Code defines it as follows: "Murder is the unlawful killing of a human being, with malice aforethought." Section 187. It is divided into two degrees, the first degree including all premeditated, wilful, and deliberate murders, and all killing done in the perpetration or attempt to perpetrate certain lesser crimes, the second including all other kinds of murder. Section 189. Murder of the first degree is punishable by death or imprisonment for life. Murder of the second degree by imprisonment not less than ten years. In ordinary usage and at common law the word has the same meaning. Webster's Dict; 1 Wharton, Crim. Law. § 303. The word "manslaughter," whether

128 N. W. 292, it was held that under the statutes a widow who had been convicted of murder in the second degree, because of the killing of her husband, was not barred from her statutory inheritance in her husband's property because his death was caused by her criminal act; the ground for the decision being that the court deemed itself powerless to interfere with the statutory devolution of property, though recognizing the injustice of permitting a murderer to inherit the property of the victim. Judge O'Brien said: "We are now asked to add a clear and unambiguous statute an exception, and while the demand in this instance appeals to every normal person's sense of justice, it would establish a rule of construction the limitation of which no one could foresee. This is well illustrated by the present case. The respondent was convicted of murder in the second degree, which excludes the idea of deliberation or premeditation, so that the motive for the crime could not have been the acquisition of her husband's property. If her right to inherit in this case is denied, the same reasoning would justify a similar denial where the 39 L.R.A. (N.S.)

claimant was convicted of homicide in a still lower degree, and the judgment of judicial officers as to when and in what cases the statutory heir is entitled to inherit would be substituted for a legislative determination of that question." But Judge Lewis, who concurred in the result, because of the fact that it did not conclusively appear that the murder was committed for the purpose of acquiring property of her husband, said: "I am of the opinion that the statute of descent was never intended to apply to a case such as *Wellner v. Eckstein*, supra. When a statute may be construed in accordance with reason, and a strict reading of the language leads to a result abhorrent to reason, the rule of implied exception should apply. In the application of this rule to cases of murder in the first degree, I can see no infringement of the legislative power, nor danger of conflict between the co-ordinate branches of the government. According to the construction given the statute by the majority, it becomes an inducement for the commission of murder."

J. H. B.

in common usage, at common law, or by our statute, has a very different meaning. The Penal Code defines it as "the unlawful killing of a human being, without malice," and declares it to be of two kinds: First, "voluntary,—upon a sudden quarrel or heat of passion;" second, "involuntary,—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution or circumspection." The meaning at common law and in ordinary usage is substantially the same. See Webster's Dict. 1 Wharton, Crim. Law, §§ 304, 305. It will be noted that it excludes the element of deliberation and premeditation.

With relation to each other, the provisions of the four Codes must be construed as though they were all parts of the same statute. Pol. Code, § 4480. From these rules and definitions the conclusion necessarily follows that a conviction of manslaughter is not a conviction of murder. It is a conviction of a different offense, an offense which does not include all the criminal elements of the crime of murder. The distinction has indeed been carried so far that it is well settled that a conviction of manslaughter upon a charge of murder is, in legal effect, an acquittal of the murder charge. *People v. Gilmore*, 4 Cal. 376, 60 Am. Dec. 620; *People v. Backus*, 5 Cal. 278; *People v. Gordon*, 99 Cal. 230, 33 Pac. 901; *People v. Muhlner*, 115 Cal. 307, 47 Pac. 128. It follows that Michael Kirby has not been convicted of the murder of Patrick Kirby; that he does not come within the exception made by § 1409, and that he was entitled to the share provided by § 1386. Whether this accords with natural right and justice is a question upon which we cannot enter. The right of inheritance in this state does not depend upon the ideas of court or counsel as to justice and natural right. The entire matter is in the control of the legislature, and depends wholly upon the provisions of the statute, regardless of our notions of natural right and justice. *Re Wilmerding*, 117 Cal. 284, 49 Pac. 181; *Sharp v. Loupe*, 120 Cal. 91, 52 Pac. 134, 586; *Re Porter*, 129 Cal. 88, 79 Am. St. Rep. 78, 61 Pac. 659. The statute having made the distinction between murder and manslaughter, the courts cannot ignore it, or create a definition of the word "murder" different from that declared in the statute and from that of the common-law and ordinary usage. There is no ambiguity in the language, and nothing is left to construction. The appellant should have received one fourth of the es-

tate, and the refusal to give it to him was erroneous.

The order is reversed.

We concur: Sloss, J.; Angellotti, J.

NEW YORK COURT OF APPEALS.

HENRY W. WATSON, Resp't.,

CARMELO GUGINO, Appt.

(204 N. Y. 535, 98 N. E. 18.)

Corporation — contract for services — duration — withdrawal — liability.

A promoter of a corporation who undertakes, as part of the inducement to the undertaking, to devote his whole time and attention to the corporate business, without specifying the period over which the services are to extend, is not bound to continue such services for a reasonable time, but may cease to render them at pleasure, without liability to persons who invested their money on the faith of the promise, although the withdrawal of the service wrecks the corporation.

(March 8, 1912.)

APPEAL by defendant from an order of the Appellate Division of the Supreme Court, Fourth Department, reversing a judgment of nonsuit of a Trial Term, Part III., for Erie County, in an action brought to recover damages for alleged breach of contract to organize a corporation for the manufacture and sale of macaroni. Reversed.

Statement by Vann, J.:

This action was brought to recover damages from the defendant on account of his alleged breach of a contract made by him with the plaintiff. Upon the trial, it appeared that for some time prior to October, 1904, the firm of Gugino Brothers, composed of Carmelo and Natale Gugino, was engaged in the manufacture and sale of macaroni in the city of Buffalo. They had a plant, machinery, and stock worth about \$10,000, of which Carmelo owned two thirds and Natale one third. About the 20th of October, 1904, Carmelo, who was an expert manufacturer of macaroni, familiar with the business and acquainted with the customers, induced the plaintiff, who knew nothing about the manufacture, business,

Note. — As to duration of contract of hiring which specifies no term, but fixes compensation at a certain amount per day, week, month, or year, see note to *Warden v. Hinds*, 25 L.R.A. (N.S.) 529.

or customers, to purchase the interest of Natale, and he did so, paying therefor the sum of \$3,400 in cash. On the same day that the money was paid, Carmelo and the plaintiff entered into an agreement of which the following is a copy, the purely formal parts being omitted:

"The said parties above named have agreed, and by these presents do agree, to form and organize a corporation under and pursuant to the laws of the state of New York, to carry on and conduct the business heretofore conducted by Gugino Brothers, and to that end and purpose the said Carmelo Gugino hereby agrees to put into said corporation all of his interest and property now owned by him in said copartnership of Gugino Brothers, and the sum of eight hundred dollars (\$800) in cash; and the said Henry W. Watson hereby agrees to put into said corporation all the property this day sold to him by Natale Gugino, being said Natale Gugino's interest in said copartnership business of Gugino Brothers, and also to put into said corporation the sum of four hundred dollars (\$400). And the said Carmelo Gugino, in the consideration of the forming and organizing of said corporation, hereby covenants that the title to all the property used in the said copartnership business of Gugino Brothers is free and clear of any lien or encumbrance, and that the machinery used in the plant of Gugino Brothers is in perfect running order and in good repair.

"The said parties further agree that upon the organization of said corporation, sixty-five shares of the stock therein shall and will be issued to Carmelo Gugino, and he is to be president and manager thereof; one share of stock in said corporation to be issued to Antonio Gugino, and he is to be vice president of said corporation; one share of stock to be issued to Henry W. Watson, who is to be the secretary and treasurer of said corporation; and the remaining thirty-three shares of stock is to be issued to Hiram R. Watson.

"The said Carmelo Gugino further agrees to devote his whole time and attention to the said corporation business, and is to receive the weekly salary of twenty dollars (\$20), and the said Henry W. Watson is to receive a weekly salary of fifteen dollars (\$15), and also to devote his entire time, and the said Antonio Gugino is to receive the weekly salary of ten dollars (\$10); and it is further agreed that the said Henry W. Watson shall have entire charge of the office work, and all checks of said corporation to be signed by treasurer and countersigned by the president.

"The said Carmelo Gugino hereby gives said Henry W. Watson an option on six-
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teen shares of stock in said corporation, and the said Carmelo Gugino hereby agrees to sell unto the said Henry W. Watson sixteen shares of stock at \$100 per share, at any time within six months, upon demand, and in the event of such transfer of stock, an inventory is to be had and proportionate dividends apportioned at date of transfer, before said transfer.

"Carmelo Gugino further agrees that if, by reason of illness or other cause of which said Carmelo Gugino does not now know of, which would necessitate his giving up business, said Carmelo Gugino agrees to provide a person fully as competent as he is, and who is acceptable to said Henry W. Watson, to take his place."

Within a few days after the agreement was executed, the parties organized a corporation under the name of "the Gugino Macaroni Company," each transferred his interest in the firm assets to the corporation, and each paid thereto the amount agreed upon. Officers were elected and stock issued in accordance with the terms of the agreement. The directors were the three officers, who were also the incorporators. The corporation accepted the property transferred and the money paid to it, and forthwith employed the parties and paid them the salaries agreed upon. For a short time, Carmelo attended to his duties, the enterprise prospered, and the company made money. Evidence was given tending to show that after a few months had passed Carmelo left the business, at first temporarily, under the pretext of sickness, and then permanently. He ceased to be either an officer or director. He substituted his brother Natale in his place as manager, and not only abandoned the business absolutely, but organized a rival corporation, which undersold the Gugino Company and took away its customers. In February, 1906, it was forced out of business, and its assets were sold at a sacrifice.

The plaintiff, alleging that he lost the greater part of his investment through the failure of the defendant "to devote his whole time and attention to the said corporation business," as provided in the contract, brought this action to recover \$3,400 as damages for the breach of said covenant. While fraud in making the contract is suggested, but not distinctly alleged in the complaint, no evidence was given in support of that theory. On the trial, at the close of the evidence for the plaintiff, the defendant moved to dismiss the complaint, substantially on the grounds, among others, that the cause of action, if any, did not belong to the plaintiff, but to the corporation, and that no period was specified in the contract during which Carmelo was to

devote his whole time and attention to the business. The motion was granted, although the plaintiff asked to go to the jury. An exception was taken to this ruling, and no other appears in the record. On appeal, the appellate division reversed the judgment entered accordingly and granted a new trial. The defendant appealed to this court, and at first did not give the usual stipulation for judgment absolute; but this omission was finally corrected by stipulation and order.

Messrs. Thomas E. Boyd, and Henry W. Willis, with Mr. Gordon F. Matthews, for appellant:

Plaintiff established no breach of the agreement, rather that it was modified, and as modified fully performed by defendant.

Kidd v. Belden, 19 Barb. 266; *Jenks v. Robertson*, 2 Thomp. & C. 255, affirmed in 58 N. Y. 621; *Brooklyn Oil Refinery v. Brown*, 61 N. Y. 643; *Rutty v. Consolidated Fruit Jar Co.* 52 Hun, 492, 6 N. Y. Supp. 23; *Myers v. DeMier*, 52 N. Y. 647; *Weller v. Tuthill*, 66 N. Y. 347.

Any breach by defendant, if made, was waived by plaintiff, who was first in default in performing the agreement.

Winch v. Mutual Ben. Ins. Co. 86 N. Y. 618; *Dunn v. Steubing*, 120 N. Y. 232, 24 N. E. 315; *Pike v. Nash*, 3 Abb. App. Dec. 610, 1 Keyes, 335; *Allen v. Robinson*, 2 Barb. 341; *Sinclair v. Tallmadge*, 35 Barb. 602; *Parker v. Parmele*, 20 Johns. 130, 11 Am. Dec. 253; *Johnson v. Wygant*, 11 Wend. 48; *Gallagher v. Nichols*, 60 N. Y. 438; *Martin v. Johnston*, 6 Misc. 310, 26 N. Y. Supp. 1105, affirmed in 148 N. Y. 740, 42 N. E. 724.

Mr. Edward C. Randall for respondent:

Vann, J., delivered the opinion of the court:

The learned justices of the appellate division held that the action was not brought by one stockholder against another to recover for corporate losses, and that the covenant of the defendant to devote his whole time and attention to the business of the corporation was personal to the plaintiff. They also held in effect that said covenant required the defendant to continue with the corporation for a reasonable time, and that it was a question of fact for the jury to decide "whether the agreement was broken by the defendant to the damage of the plaintiff." 140 App. Div. 33, 124 N. Y. Supp. 321.

The defendant claims that, while the corporation was not bound by the agreement entered into between its promoters before it was organized, it had the power, when incorporated, to ratify the contract, which, 39 L.R.A.(N.S.)

on the happening of that event, became its property, so far as it applied to the corporate business, and could be enforced by it or against it. He further claims that just before the corporation was formed the plaintiff owned an interest in the copartnership assets worth \$3,400 and had the sum of \$400 in money, while at the same time the defendant had an interest in the copartnership assets worth \$6,800 and had the sum of \$800 in money; that, pursuant to the contract between the promoters, of which the corporation is presumed to have had knowledge as soon as it was incorporated, they transferred to it their respective interests in the firm property and paid over to it said sums of money; that the corporation promptly accepted said transfers, employed the promoters, who were also the incorporators, at the salaries provided, and thus adopted the contract and made it its own: that the promoters' agreement thereupon became the property of the corporation, and imposed upon it a corresponding liability: that the legal interest of the promoters therein then ceased, and in the place of such interest and of the property and money transferred, they simply owned shares of stock in the corporation; that therefore their sole interest was that of stockholders; and that for any subsequent breach by either of the provisions relating to corporate matters, the only remedy of the other was through the corporation in an action brought by it, or, if it refused to act, or was under hostile control, by a representative action brought by one stockholder in behalf of all; the corporation being made a party defendant. Much could be said in support of this theory; but a majority of the judges prefer not to consider it, as the order appealed from must be reversed, in any event, upon another ground.

The covenant sued upon is as follows: "The said Carmelo Gugino further agrees to devote his whole time and attention to the said corporation business, and is to receive the weekly salary of \$20." It is to be observed that no period of service was specified, and even if the stipulation as to "the weekly salary" implies a hiring by the week, it would not aid the plaintiff. The effect of a general contract of hiring, no time being specified, varies in different jurisdictions. In England, it is presumed to be a hiring for a year, regardless of the nature of the service, unless there is a custom relating to the subject, and it appears that the contract was made with reference to the custom. *Fawcett v. Cash*, 3 Nev. & M. 177, 5 Barn. & Ad. 904, 3 L. J. K. B. N. S. 113; *Lilley v. Elwin*, 11 Q. B. 742, 17 L. J. Q. B. N. S. 132, 12

Jur. 623; *Davis v. Marshall*, 4 L. T. N. S. 216, 9 Week. Rep. 520. In some states, a stipulation as to the method of payment, such as weekly, monthly, or yearly, is held to denote the period of service contracted for. *Tatterson v. Suffolk Mfg. Co.* 106 Mass. 56; *Franklin Min. Co. v. Harris*, 24 Mich. 116; *Beach v. Mullin*, 34 N. J. L. 343. In this state, the rule is settled that, unless a definite period of service is specified in the contract, the hiring is at will; and the master has the right to discharge, and the servant to leave, at any time. In *Martin v. New York L. Ins. Co.* 148 N. Y. 117, 42 N. E. 416, the defendant employed the plaintiff to take charge of its real estate department at a salary of \$5,000 a year. Subsequently his salary was raised to \$6,500, and finally to \$10,000 a year, payable monthly. We held that the hiring was at will, and that the contract could be terminated at any time by either party. Judge Bartlett, speaking for the court, adopted the language used by Mr. Wood in § 136 of his work on Master and Servant, as follows: "The rule is inflexible that a general or indefinite hiring is prima facie a hiring at will; and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve. . . . A contract to pay one \$2,500 a year for services is not a contract for a year, but a contract to pay at the rate of \$2,500 a year for services actually rendered, and is determinable at will by either party. Thus, it will be seen that the fact that the compensation is measured at so much a day, month, or year does not necessarily make such hiring a hiring for a day, month, or year, but that in all such cases the contract may be put an end to by either party at any time, unless the time is fixed, and a recovery had at the rate fixed for the services actually rendered." 148 N. Y. 121, 42 N. E. 417.

This rule was deliberately adopted, all the judges concurring to settle the differences of opinion which had prevailed in the lower courts. It applies to the contract before us, and must control the decision of this appeal, unless the theory of the appellate division is correct, that the covenant, under the circumstances, means a hiring for a reasonable time. No authority was cited by the learned court in support of this position. As the contract is in writing, it is presumed to express all that the parties intended. No parol evidence was offered to

explain any latent ambiguity. No contract can be implied, because the express contract covers the entire subject-matter. There is nothing in the context to enlarge the covenant, and no stipulation inconsistent with a hiring at will. Even when the contract is read in the light of the surrounding circumstances, that the defendant had much experience in the business and the plaintiff none, it does not change the hiring from an unspecified into a specified period of service, or to one for a reasonable time. The other attending circumstance, that the interest of the defendant in the business was double that of the plaintiff, was doubtless regarded as enough to hold him in his position as manager. When the parties contracted for a hiring at will, it is presumed that they meant a hiring at will, and that if they had intended a hiring for a reasonable time, they would have said so. Whether the covenant was personal to the plaintiff or finally passed to the corporation, either party could end the service at any time. The right of the master to discharge, and of the servant to leave, was absolute.

We find no error in the record that justified the action of the Appellate Division, and their order must therefore be reversed, and the judgment of the Trial Term affirmed, with costs in both courts.

Cullen, Ch. J., and Gray, Haight, Werner, Hiscock, and Collin, JJ., concur.

OKLAHOMA SUPREME COURT. (Division No. 1.)

D. M. BLUNK, Plff. in Err.,
v.

B. J. WAUGH et al.

(— Okla. —, 122 Pac. 717.)

Intoxicating Liquor — possessory action — evidence.

1. In an action by one individual against another individual to recover the possession

Headnotes by AMES, C.

Note. — Right of one who intends to make an illegal use of property to invoke aid of court for recovery from one who has wrongfully taken the same.

As to the general question of the right to levy legal process upon intoxicating liquors, see *Hines v. Stahl*, 20 L.R.A. (N.S.) 1118, and note. It is to be observed that this note does not include cases as to the right of the government or official to confiscate property; nor cases that turn upon the lawfulness or unlawfulness of the

of intoxicating liquors, it is not necessary for the plaintiff to affirmatively show that the defendant did not secure possession of the liquors under the provisions of § 7, art. 3, of chapter 69 of the Session Laws of the state, 1907 and 1908.

Same — distributing agent — rights.

2. One Blunk, doing business under the name "Oklahoma Distributing Company," was engaged in the business of receiving large consignments of intoxicating liquors, consigned to him as consignee by a brewer in another state. These consignments were intended for distribution to a number of individuals whose names were written upon the respective parcels. Blunk's business was to pay the freight, receive the shipments, and deliver the several parcels to the various persons whose names were written thereon. Held:

(a) That this business is in violation of the laws of the state of Oklahoma (Comp. Laws 1909, § 4180).

(b) That this business is not protected by the Constitution and laws of the United States regulating interstate commerce in intoxicating liquors.

(c) That the courts will not entertain an action of replevin to enable Blunk to recover such intoxicating liquors from a trespasser, where it is shown by his pleadings in the case that the purpose of his attempted recovery is to engage in a business in violation of the laws of the state.

(March 12, 1912.)

ERROR to the Superior Court for Oklahoma County to review an order sus-

seizure of the property. So the right to maintain an action for the conversion of such property is beyond the scope of the note.

The courts are not in accord as to whether one who intends to make an unlawful use of property may invoke the aid of the courts to recover possession of it from one who has wrongfully deprived him of the possession thereof.

Thus, in *Ridgeway v. West*, 60 Ind. 371, which was an action of replevin by the owner of gambling devices, against an officer who had seized them, the court held that, in the absence of a statute or ordinance authorizing their seizure and destruction, the owner was entitled to recover their possession.

In *Monty v. Arneson*, 25 Iowa, 383, where intoxicating liquor belonging to plaintiff was seized by an officer under an execution against another person, it was held that plaintiff could recover possession of it in an action of replevin, though it was kept by him in violation of law.

And in *Barron v. Arnold*, 16 R. I. 22, 11 Atl. 298, which was an action of replevin for liquors attached while in the hands of an agent for the agent's debt, it was held that plaintiff was entitled to recover them, though they were being kept for sale in

taining a motion to quash a writ of replevin procured by plaintiff for the recovery of possession of intoxicating liquors. Affirmed.

The facts are stated in the opinion.

Messrs. Giddings & Giddings for plaintiff in error.

Mr. Charles West, Attorney General, *amicus curiæ*:

The business of transporting liquor for another from depot to home is illegal.

United States v. First Nat. Bank, 190 Fed. 336; *Delamater v. South Dakota*, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733; *State v. Wignall*, 150 Iowa, 650, 34 L.R.A.(N.S.) 507, 128 N. W. 935.

Ames, C., delivered the opinion of the court:

D. M. Blunk, the plaintiff, brought an action of replevin, in the superior court of Oklahoma county, against B. J. Waugh and John Queenan, the defendants, to recover the possession of 105 casks of beer. He alleged that he was the special owner of the beer, because it had been shipped to the Oklahoma Distributing Company, which was the name under which he was doing business, from St. Louis, Missouri, and that his purpose was to deliver it to certain parties, for whose benefit it was intended by the shippers. He procured the issuance of a writ of replevin, and in his affidavit on which the writ was based he sets up

violation of law, notwithstanding a statute which provided that "no action of any kind shall be had or maintained in any court of this state for the possession or value of any liquors held, purchased, or sold contrary to the provisions of this chapter;" this provision being held to operate only to prevent the enforcement of an unlawful transaction between plaintiff and defendant, and not to render such property open as free booty to anyone who might seize it.

However, in the similar case of *Donohue v. Maloney*, 49 Conn. 163, under a statute providing: "Nor shall any action be maintained for the possession of any intoxicating liquor held by the owner or possessor thereof contrary to law," it is held that recovery of possession cannot be had, the court saying: "Therefore, if, by his illegal act and intent, the owner of intoxicating liquors makes them a nuisance, and while in that condition they are lost to his possession by the peaceful act of an officer of the law, under the forms of law, it will leave them in his possession so far forth as this writ of replevin is concerned; and this, not because the defendants have any rights in the matter which it is bound thus to protect, but for the reason that, in listening to the complaint of the plaintiffs, the court has come to a knowledge of the fact that they are

the facts constituting his claim of special ownership as follows: "Now comes D. M. Blunk, plaintiff, doing business under the name and style of the Oklahoma Distributing Company, and says that he is the special owner of, and entitled to the immediate possession of, the following described property, to wit, 105 casks of Anheuser-Bush beer, known as Budweiser beer, each cask marked 'B. S.' and each cask of the value of \$10.02, said 105 casks being of the aggregate value of \$1,052.10, each cask containing thereon certain tags by which it could further be identified, but said tags have been destroyed and obliterated by the defendants since they obtained possession thereof, as hereinafter set forth, and plaintiff cannot give any further description thereof. Plaintiff alleges that his special ownership of said beer arises out of the following facts: That said beer was shipped from the state of Missouri by the Anheuser-Busch Company, consigned to the Oklahoma Distributing Company, which is the style under which plaintiff is doing business, to certain parties in Oklahoma City, whose names were marked upon each cask, but whose names have been obliterated by the defendants since they took possession thereof; it being intended by the consignors and consignees that plaintiff, in whose name they were consigned for the benefit of said parties, should receive the same from the railroad company, pay the freight thereon, and deliver same to said

consignee. That plaintiff is entitled to the immediate possession of said beer, but the same is wrongfully detained from him by the said defendants, and that said property was not taken in execution or on any order of judgment against said plaintiff, or for the payment of any tax, fine, or amercement assessed against him, or by virtue of any order of delivery issued in replevin, or any other valid means or final process issued against him." Some of the material facts disclosed by this affidavit are: (1) That the beer was shipped from another state; (2) that the plaintiff was the consignee; (3) that he was doing business under the name of the Oklahoma Distributing Company; (4) that the names of a number of people were marked on the casks; (5) that it was intended by both the consignor and the consignees that the plaintiff should receive the beer from the railroad company; (6) that he should pay the freight thereon; (7) and that he should deliver the same to the various persons for whom it was intended. Bond was given, a writ was issued, and the beer taken under the writ. The defendants filed a motion to quash the writ, for the following reasons: "That the affidavit filed in said cause is insufficient in that it does not state that said property was not taken under or by reason of any order, execution, or writ issued under and by virtue of the provisions of § 7 of article 3 of chapter 69 of the Session Laws of the state of Oklahoma

asking its aid in regaining possession of that which by their act had become a nuisance; which they held and intended to use in violation of law; and which the law does not recognize as property. And upon this knowledge, the statute compels the court to close its ear to any further suggestion from them; they are not to have its assistance in violating the law, and by the statute this result ensues, regardless of the fact that this complaint is against defendants, who gained a peaceful possession of the liquors under forms of law, and not against an officer who had seized them for condemnation as a nuisance. The illegal acts and intents of the plaintiffs are proven in a cause instituted by themselves; and they have had their day in court upon that question. This satisfies the law."

In *Robertson v. Porter*, 1 Ga. App. 223, 57 S. E. 993, the court denies the right of a person to invoke the aid of the court in recovering property intended to be used for an unlawful purpose, saying: "Courts are created for the upholding of the law and of morals, and will therefore decline to allow their processes used to further the maintenance of crimes and public evils. The law has the right of self-defense; it will not, by its own strong arm, assist in placing into the possession of anyone instrumental-

ties designed for no other purpose than the breaking of the law. . . . The plaintiff, by his demurrer, is not entitled to challenge the legality of the raid, or of the methods by which the property was seized, or of the purposes for which it was being held. So long as he concedes, as he must do in order to demur, that the articles sought to be recovered are instrumentalities of crime, designed for that use, and intended to be returned to that employment, the law will not hear him at all."

In *Marienthal, L. & Co. v. Shafer*, 6 Iowa, 223, in which the vendors of intoxicating liquor sought by replevin to recover possession of them after they had been seized by an officer under an attachment by creditors of the vendee, the vendors claiming ownership of the liquors on the ground that the sale was illegal and void, it was held that they were not entitled to the aid of the court in recovering possession of them, but that they would be left in the hands of the officer, regardless of whether the officer could sell them without violation of law.

And in *Howe v. Stewart*, 40 Vt. 145, the court says the courts will not aid in reclaiming the possession of liquors when sold and held with the deliberate intention of violating the law.

R. L. S.

for the years 1907 and 1908, commonly called the 'Billups bill.' That said affidavit is insufficient in that it does not show that the plaintiff or affiant has such an ownership in the property as entitles him to the possession thereof." This motion was sustained by the trial court, and this appeal is prosecuted to review that ruling.

The first question presented is whether or not it is necessary, in an action of replevin to recover intoxicating liquors, for the plaintiff to show that they have not been seized by the defendants pursuant to the provisions of § 7, art. 3, chap. 69, of the Session Laws of 1907 (Comp. Laws 1909, § 4186), which provides as follows: "No liquors, vessels, fixtures, furniture, or other property seized by virtue of any warrant issued under the provisions of this act, shall be taken from the possession of the officer seizing same under any replevin or other process." The affidavit complies with the requirements prescribed for an affidavit in replevin. Comp. Laws 1909, § 5688. There is nothing in this record to show that the defendants are officers, or that they had seized, or had a right to seize, the liquor by virtue of any authority. If they were officers and had made this seizure pursuant to their duties, it would have been very easy for them to have disclosed this fact, and thereby brought themselves within the protection of the statute quoted. It is the settled law of this state that a person may acquire intoxicating liquors in a lawful way and for lawful purposes. *Schwedes v. State*, 1 Okla. Crim. Rep. 245, 99 Pac. 804; *St. Louis & S. F. R. Co. v. State*, 26 Okla. 300, 109 Pac. 230; *Titworth v. State*, 2 Okla. Crim. Rep. 268, 101 Pac. 288; *Gulf, C. & S. F. R. Co. v. State*, 28 Okla. 754, 35 L.R.A.(N.S.) 456, 116 Pac. 176. It is also held that the mere possession of intoxicating liquor in considerable quantities is not a violation of the law. *Johnson v. State*, 6 Okla. Crim. Rep. 490, 119 Pac. 1019; *McCarthy v. State*, 6 Okla. Crim. Rep. 483, 119 Pac. 1020.

As such liquors may be lawfully held, the mere fact that one seeks to recover their possession by an action of replevin does not raise any presumption that the defendants have seized them because the plaintiff was holding them for the purpose of violating the law, and it therefore follows that the plaintiff is not required to negative the theory that he is guilty of an intent to violate the law, because guilt is never presumed. We do not think, therefore, that the first ground of the motion to quash is well taken. This conclusion finds support in *Easter v. Traylor*, 41 Kan. 493, 21 Pac. 606; *Ament v. Greer*, 37 Kan. 648, 16 39 L.R.A.(N.S.)

Pac. 402; *Black, Intoxicating Liquors*, § 342.

A more serious question is raised by the second ground of the motion to quash, and in considering this question we will determine: First, whether the business in which the plaintiff is engaged is in violation of the laws of this state; second, if so, is it protected by the Constitution and laws of the United States regulating interstate commerce; and, third, if not so protected, has the plaintiff such a right of property in the liquors as will be protected in a civil action.

The affidavit in replevin has been previously analyzed. The business in which the plaintiff is engaged is that of receiving large consignments of intoxicating liquors, paying the freight thereon, and delivering the same to numerous persons for whom the various packages are intended. The name under which the plaintiff transacts this business is suggestive,—"Oklahoma Distributing Company." It does not appear whether the plaintiff is the agent for the consignors or the ultimate purchasers, or both, or whether the orders are solicited by him. But it does distinctly appear that he is engaged in the business as stated. Such a business might be carried on in various ways. The 105 persons for whom these 105 casks of beer were intended might have requested the plaintiff to make the order for them, and he might have communicated this request to the brewery, and the brewery might have consigned him the beer with the several names of these 105 persons on the several casks. The plaintiff might have solicited the orders from these 105 persons, and then ordered from the brewery. The brewery might have sold direct to the 105 persons, and shipped to the plaintiff to distribute for it. It is manifest that, in order to engage in this business, there must have been concert of action between the plaintiff and the brewery, and likewise between the plaintiff and the individuals for whose benefit the beer was shipped. Section 4180 of Comp. Laws 1909 is as follows: "It shall be unlawful for any person, individual, or corporate, to manufacture, sell, barter, give away, or otherwise furnish, except as in this act provided, any spirituous, vinous, fermented, or malt liquors, or any imitation thereof or substitute therefor; or to manufacture, sell, barter, give away, or otherwise furnish any liquors or compounds of any kind or description whatsoever, whether medicated or not, which contain as much as one half of 1 per centum of alcohol, measured by volume, and which is capable of being used as a beverage, except preparations compounded by any licensed pharmacist, the

sale of which would not subject him to the payment of the special tax required by the laws of the United States; or to ship or in any way convey such liquor from one place within this state to another place therein, except the conveyance of a lawful purchase as herein authorized; or to solicit the purchase or sale of any such liquors, either in person or by sign, circular, letter, card, price list, advertisement, or otherwise, or to distribute, publish, or display any advertisement, sign, or notice where any such liquor may be manufactured, bartered, sold, given away, or otherwise furnish, or to have the possession of any such liquors with the intention of violating any of the provisions of this act. A violation of any provisions of this section shall be a misdemeanor, and shall be punished by a fine of not less than \$50 nor more than \$500, and by imprisonment for not less than thirty days nor more than six months; provided, however, that the provisions of this act shall not apply to the manufacture and sale of unfermented cider and wine made from apples, grapes, berries, or other fruit grown in this state, and to the use of wine for sacramental purposes in religious bodies."

If the plaintiff was the agent of the brewery and was distributing its beer for its benefit, it is manifest that he was furnishing such liquor within the prohibition of the statute. If, on the other hand, the plaintiff received this consignment as the agent of the 105 persons to whom the beer was to be delivered, it is plain that, after he received it from the railroad company, it had been delivered to the consignee, he being the consignee, and that his subsequent acts in delivering the 105 casks to the 105 owners was conveying it from one place to another within this state. It is likewise manifest, if the plaintiff was engaged in the business on his own account, that he was merely operating a saloon in this ingenious manner, and that therefore he was either selling or giving away, or otherwise furnishing, the beer. It is manifest therefore that the business of the plaintiff is in violation of the laws of this state.

The next inquiry, therefore, is whether such unlawful business is protected by the Constitution and laws of the United States regulating interstate commerce. The Constitutional provision is as follows (article 1, § 8): "Congress shall have power: . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the

United States, or in any department or officer thereof." Under this section of the Constitution, it was held, in *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, popularly known as the "original package decision," that intoxicating liquors were protected as interstate commerce after their shipment into a prohibition state, and until their sale in the original package in which they were transported. As the effect of this decision was practically to strike down the prohibition laws of any state, Congress passed an act on August 8, 1890, commonly known as the "Wilson act," providing as follows (Act Aug. 8, 1890, chap. 728, 26 Stat. at L. 313, 3 Fed. Stat. Anno. 853, U. S. Comp. Stat. 1901, p. 3177): "That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory, or remaining therein, for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The question soon arose as to the proper interpretation of the words "upon arrival in such state," and they were finally interpreted to mean upon arrival in the state and delivery to the consignee. *State v. 18 Casks of Beer*, 24 Okla. 786, 25 L.R.A. (N.S.) 492, 104 Pac. 1093; *St. Louis & S. F. R. Co. v. State*, 26 Okla. 300, 109 Pac. 230; *Schwedes v. State*, 1 Okla. Crim. Rep. 245, 99 Pac. 804; *High v. State*, 2 Okla. Crim. Rep. 161, 28 L.R.A. (N.S.) 162, 101 Pac. 115; *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; *Vance v. W. A. Vandercook Co.* 170 U. S. 468, 42 L. ed. 1111, 18 Sup. Ct. Rep. 674; *Heyman v. Southern R. Co.* 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130; *Adams Exp. Co. v. Kentucky*, 206 U. S. 129, 51 L. ed. 987, 27 Sup. Ct. Rep. 606. On March 4, 1909, Congress, in order to further restrict interstate commerce in intoxicating liquors, enacted §§ 238, 239, and 240, of the New Federal Criminal Code (Act March 4, 1909, chap. 321, 35 Stat. at L. 1136, 1137; Fed. Stat. Anno. Supp. 1909, 472, 473, U. S. Comp. Stat. Supp. 1909, pp. 1464, 1465). Section 238 is as follows: "Any officer, agent, or employee of any railroad company, express company, or other common carrier, who shall knowingly deliver or cause to be delivered to any person other than the person to whom it

has been consigned, unless upon the written order in each instance of the bona fide consignee, or to any fictitious person, or to any person under a fictitious name, any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, which has been shipped from one state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, shall be fined not more than five thousand dollars, or imprisoned not more than two years, or both." It will be observed that this section accomplishes two objects: First, it prohibits any employee of any carrier from delivering such a shipment to any one except the bona fide consignee, or upon his written order; and, second, it prohibits any such employee from making any such delivery to any fictitious person, or to any person under a fictitious name. The question may arise as to whether the Oklahoma Distributing Company is a fictitious name; but it is not necessary for us to determine that precise question in this case.

Section 239 is as follows: "Any railroad company, express company, or other common carrier, or any other person, who, in connection with the transportation of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, shall collect the purchase price or any part thereof, before, on, or after delivery, from the consignee, or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same, shall be fined not more than five thousand dollars." It will be noticed that this section prohibits C. O. D. business, and also prohibits any person from in any manner acting as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery. Un-39 L.R.A. (N.S.)

der this section Judge Amidon, sitting as a district judge in North Dakota, has sustained the conviction of a bank for collecting a draft to which was attached a shipper's order bill of lading for a consignment of liquor. *United States v. First Nat. Bank* (D. C.) 190 Fed. 336.

Section 240 is as follows: "Whoever shall knowingly ship or cause to be shipped, from one state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, any package of or package containing any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, unless such package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein, shall be fined not more than five thousand dollars; and such liquor shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law." It will be observed that this section prohibits the shipment of intoxicating liquors in interstate commerce without plaintiff designating the name of the consignee, the contents of the package, and the quantity of liquor.

It is manifest that these three sections greatly limit the previous course of dealing in interstate shipments of intoxicating liquors, and, broadly speaking, they limit such commerce to a direct transportation only of the liquor from the seller to the buyer. If the plaintiff is "any person under a fictitious name," then it was a criminal offense for the carrier to deliver to him the liquor. If he was the bona fide consignee, then the interstate transaction was completed upon delivery to him, and any subsequent delivery by him to the 105 owners was a plain violation of the state law. If he was not the bona fide consignee, then it was a violation of the congressional act for the liquor to be delivered to him without a written order. If he was acting as the agent of the buyer in completing this sale, then he was guilty of a criminal offense. If he was acting as the agent of the seller in completing the sale, then he was guilty of a criminal offense. If the payment of the freight was a payment of the purchase price, or any part thereof, then a criminal offense was committed. Even before these last expressions of Congress on the subject,

the court had held that a state had the power to prohibit a foreign dealer in liquors from maintaining a soliciting agent in the state, although the sales were not completed until acceptance outside the state, and the agent did nothing but solicit the orders. *Delamater v. South Dakota*, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733. And in *Buchanan v. State*, 4 Okla. Crim. Rep. 645, 38 L.R.A. (N.S.) 83, 112 Pac. 32, it was held that an agent of the buyer of intoxicating liquor sold in violation of the law is guilty of a crime. And in the recent case of *State v. Wignall*, 150 Iowa, 650, 34 L.R.A. (N.S.) 507, 128 N. W. 935, the supreme court of Iowa has upheld a statute prohibiting a consignee from employing a third person to transport intoxicating liquor from the depot to his residence, although the correctness of this decision is subject to doubt in view of § 238 of the Penal Laws previously quoted, as well as the decisions of this court and of the criminal court of appeals of this state, which have previously been cited. Comp. Laws 1909, § 4197.

The argument is made by the plaintiff, however, that if these 105 casks of beer might have been shipped in 105 separate express packages, and have been delivered by the express company to the 105 consignees, there is nothing illegal in the business which he is transacting. This argument, however, overlooks the fundamental and substantial difference between the plaintiff and the express company. The express company is a common carrier pure and simple, and can be compelled to accept for transportation and delivery any legitimate article of commerce, and its entire service rendered in connection with a shipment of intoxicating liquors is in the actual transportation and delivery thereof. For us to believe this of the plaintiff requires an amount of credulity which we do not possess. The plaintiff is engaged in the business of receiving large consignments of intoxicating liquor by interstate carrier, and distributing them to a large number of small consumers in Oklahoma City. He is either the bona fide consignee of these large shipments, or he is not. If he is the bona fide consignee, it is plain that the shipment is terminated when received by the plaintiff, and certainly his disposition of it thereafter cannot possibly be protected as a part of interstate commerce. To do so would in substance reinstate the original package law, which Congress has expressly legislated against. If the plaintiff is not the bona fide consignee, then his business involves a violation of the sections in the Penal Laws of 1909, which we have quoted. It therefore seems to us a demonstrable fact 39 L.R.A. (N.S.)

that the business of the plaintiff is not, and cannot be, protected by the Constitution and laws of the United States, and this conclusion is reached without considering several other aspects of the plaintiff's business which seem to conflict with those sections of the Penal Laws.

The last question for consideration, then, is whether the plaintiff will be permitted to recover this property which he designs to use in violation of the laws of the state. Will the courts open their doors to enable a man to engage in a business which is condemned by the law? In this case the plaintiff bases his application for the writ of replevin upon a desire to complete a violation of our laws, which the seizure by the defendants has interrupted. It seems to us that the mere asking of this question is its answer, and particularly is this true when we bear in mind the provision of our statute (Comp. Laws 1909, § 4192) which is as follows: "There shall be no property rights of any kind whatsoever, in any liquors, vessels, appliances, fixtures, bars, furniture, and implements kept or used for the purpose of violating any provision of this act." Some of the cases which support this conclusion are *Oviatt v. Pond*, 29 Conn. 479; *Preston v. Drew*, 33 Me. 558, 54 Am. Dec. 639; *Lord v. Chadbourne*, 42 Me. 429, 66 Am. Dec. 290; *Barron v. Arnold*, 16 R. I. 22, 11 Atl. 298; *Harrison v. Nichols*, 31 Vt. 709. There are several decisions which hold that, in the absence of a statute to the contrary, the owner of such liquors may maintain an action for their possession. *Smith v. Dinkelspiel*, 91 Ala. 528, 8 So. 490; *Niles v. Fries*, 35 Iowa, 41; *Priest v. Pinkham*, 18 N. H. 520. Other cases are referred to in 23 Cyc. 334, and 17 Am. & Eng. Enc. Law, 2d ed. 302.

It is well established—we might say universally established—that the courts will not enforce any rights which directly arise out of an illegal contract. *Holden v. Lynn*, — Okla. —, 38 L.R.A. (N.S.) 239, 120 Pac. 246; *Citizens' Nat. Bank v. Mitchell*, 24 Okla. 488, 103 Pac. 720, 20 Ann. Cas. 371; *Wagner v. Minnie Harvester Co.* 25 Okla. 558, 106 Pac. 969; *Binswanger v. Stanford*, 28 Okla. 429, 114 Pac. 621, in which the earlier Oklahoma cases are cited; *Bowman v. Phillips*, 41 Kan. 364, 3 L.R.A. 361, 13 Am. St. Rep. 292, 21 Pac. 230; *Tatum v. Kelley*, 25 Ark. 209, 94 Am. Dec. 717; *Graves v. Johnson*, 156 Mass. 211, 15 L.R.A. 834, 32 Am. St. Rep. 446, 30 N. E. 818; *Banchor v. Mansel*, 47 Me. 58; *Hanauer v. Doane*, 12 Wall. 342, 20 L. ed. 439; *Fisher v. Lord*, 63 N. H. 514, 3 Atl. 927.

If the courts will not open their doors to enforce an illegal contract, we do not think they should lend their aid to enable a per-

son to unlawfully engage in the liquor traffic, particularly where the statute provides that "there shall be no property rights of any kind whatsoever" in any liquors kept or used for illegal purposes.

The attorney general presents an elaborate brief in support of the position that the various acts of Congress prohibiting the introduction of intoxicating liquors into the Indian county are still in force in this state; but, in view of the conclusion that we have reached, it is unnecessary for us to determine this question.

For the reasons herein stated, we think the judgment of the trial court should be affirmed.

Petition for rehearing denied April 9, 1912.

ARKANSAS SUPREME COURT.

T. M. DODSON et al., Appts.,
v.

TURNER BUTLER, Admr., etc., of Joseph Meehan, Deceased.
MALINDA M. PLAIR, Intervener.

(— Ark. —, 142 S. W. 503.)

Judgment — reversal — restitution — contempt.

Contempt proceedings will not lie to enforce an order of restitution of money secured in satisfaction of a judgment which is subsequently reversed, if, when the order is passed, the money is no longer in possession of the judgment creditor.

(January 1, 1912.)

Note.—Refusal to restore money or property secured under judgment subsequently reversed or set aside, as contempt.

The decision in *DODSON v. BUTLER*, to the effect that contempt proceedings will not lie to enforce an order of restitution of money secured in satisfaction of a judgment which was subsequently reversed, where, when the order was passed, the money was no longer in the judgment creditor's possession, is in accord with the rule that courts have not the power to punish by contempt proceedings disobedience of their orders of restitution, where it is not found that the specific property in question, or the specific fund involved, is in the possession or under the control of the one ordered to make restitution.

This rule was given effect in *Johnson v. Yoemans*, 41 Ga. 368, by holding that a party who was successful on the trial of a possessory warrant, and received the property in controversy upon giving security, could not be attached for contempt, when, before the reversal of the judgment under 39 L.R.A. (N.S.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Ashley County adjudging them in contempt for failure to obey an order directing them to pay money into court for distribution. Reversed.

The facts are stated in the opinion.

Messrs. Greaves & Martin for appellants.

Messrs. Turner Butler and George W. Norman for appellee.

Frauenthal, J., delivered the opinion of the court:

This is an appeal from a judgment declaring the appellants guilty of contempt for a failure to comply with an order adjudging that they pay into court certain funds received by them under a judgment which was subsequently reversed. The case has been before this court on two former occasions, and the opinions then rendered will be found in the cases of *Butler v. Dodson*, reported in 78 Ark. 569, 94 S. W. 703, and 95 Ark. 615, 130 S. W. 581.

Briefly stated, the matters leading up to the present appeal are these: The appellants originally instituted an action for debt against one Joseph Meehan, and at the same time sued out a writ of attachment, which was levied upon certain personal property owned by him. The attached property was sold by virtue of an order of the circuit judge, made in vacation, which was subsequently confirmed by the circuit court; and the proceeds arising therefrom were then held by the sheriff making the sale. In that suit, Malinda Plair intervened, and claimed the property by virtue of a mortgage executed to her by said Meehan. Upon a trial

which he had received possession, he had sold the property. The court said: "Johnson, by his answer, shows that it is out of his power to deliver the property. Is a man in contempt for failing to obey an order of the court which it is admitted he cannot obey? At the time he disposed of the property there was no order requiring him not to do so, and it is not therefore proper to punish him for contempt in selling it; and it is just as improper to punish him for contempt for not obeying the order now that it is impossible for him to do so. For myself, I am of opinion that, after the property was turned over to Johnson, on his giving the bond required by the statute, there could be no supersedeas of the judgment. It is idle to talk about superseding a judgment that has been performed, and when the property was, in pursuance of the judgment, turned over to Johnson, on his giving the bond required by the statute, the judgment was performed. If, subsequently to this, a certiorari was sued out, and the judgment was reversed, it was not in the power of the court to order the property back by such a proceeding as this. Why

of the case in the circuit court, the attachment was dissolved, and personal judgment was rendered in favor of the appellants against the estate of Meehan (who in the meanwhile had died) for the amount of their debt, and also in favor of Melinda Plair for the amount of her debt; and the court then adjudged that the funds in the hands of the sheriff arising from the sale of the attached property should be divided between the appellants and said Plair in proportion to the amounts for which they had recovered judgment. No appeal was taken from the order dissolving the attachment, but an appeal was taken to this court from the judgment ordering the distribution of the funds in the hands of the sheriff. No supersedeas was given to stay the further proceedings under said judgment of distribution, and the sheriff by virtue thereof paid to appellants their proportion of the funds arising from the sale of said attached property.

In disposing of that appeal, this court affirmed the personal judgment in favor of appellants for the recovery of their debt, but reversed so much thereof as ordered any portion of the funds arising from the sale of the attached property turned over to them. The cause was remanded, with directions for further proceedings to determine the amount due to Malinda Plair upon her mortgage, and, upon such amount being ascertained, it was ordered that the money in the hands of the sheriff should be applied to the payment thereof, and that the balance, if any, should be paid to the legal representatives of Meehan, deceased.

Upon the case being remanded to the cir-

is not this just such a case as one in which a money judgment is had, and the money collected under it, and subsequently the judgment is reversed on certiorari? Can the magistrate, in such a case, order the money paid back, and punish the party for contempt if he fails? Clearly not. And so I think in this case. Having permitted the judgment to be performed, before he sued out his certiorari, Yoemans is left, on the reversal of the judgment, to the ordinary remedies. He can proceed against Johnson, as though such judgment had never been had, but he cannot punish him for having obeyed it whilst it was unreversed."

But in accord with the distinction drawn in *DODSON v. BUTLER*, where it does not appear that the person ordered to make restitution has not the money or the property in his possession, it seems to be generally held that he may be punished for contempt if he fails to comply with an order directing restitution.

Thus, in *Jenkins v. State*, 60 Neb. 205, 82 N. W. 622, where the Code conferred upon courts of record authority to punish 39 L.R.A. (N.S.)

cuit court, the respective parties appeared, and that court proceeded to try the issues as to the amount which was due from Meehan to Malinda Plair on said mortgage, and as to the amount which had been paid to appellants by order of the court out of the funds arising from the sale of said attached property. The jury returned a verdict finding that the mortgage indebtedness to Malinda Plair amounted to \$2,591.32, and that the sum of \$1,232.75 had been paid to appellants out of funds arising from the sale of said attached property. The court then proceeded to hear the motion of said intervener, Plair, to require appellants to pay the money thus received by them into court, and entered a judgment in which is the following: "The court doth order and adjudge that the plaintiffs, T. M. Dodson and C. W. Dodson, shall, within thirty days from this date, pay into court the said sum of \$1,232.75, to be distributed, after being so paid into court, according to the further order thereof to be made herein." From that judgment, an appeal was taken to this court, and the same was affirmed. But in the opinion rendered in that case it was stated: "The question whether the judgment can be enforced by contempt proceedings is not presented by the record, and we do not decide that point."

The judgment of affirmance was rendered in July, 1910, and in August, 1910, upon motion of appellee, the circuit court made an order commanding appellants "to show cause, if any they had, why they should not be adjudged in contempt of this court for failing to pay into court the sum of money in obedience to the order of this

as for criminal contempt any wilful disobedience of, or resistance wilfully offered to, any lawful process or order of the court, it was held that the plaintiff in a replevin suit, who received possession of the property after giving the statutory bond, might be convicted of a contempt where he wilfully failed to comply with an order for restitution made after the judgment of the lower court in his favor was vacated upon appeal.

But it was held in this case that the defendant might purge himself from the contempt by showing that his failure to comply with the order was due to an inability, not voluntarily created, to obtain the property or the necessary funds. *Ibid*.

In *Dawley v. Brown*, 43 How. Pr. 17, where judgment had been awarded to the plaintiff in an action brought to recover possession of certain premises, and the judgment was set aside, it was held that disobedience of an order directing a restitution of the premises might be treated as a contempt.

And a party to an action is punishable as for a contempt by commitment, for a failure to comply with an order of restitution di-

court heretofore made." Notice of this order being served upon appellants, they filed a response thereto, in which, amongst other things, they stated that, "if any sum of money was paid to these respondents in this cause, said sum of money has long since been expended, and the same is not now in the possession, custody, or control of the respondents;" and therein also alleged that "the only lawful way in which said money can be recovered, if these respondents owe defendant any sum, which they deny, would be to procure a judgment and sue out execution thereon." The court held that the matters set out in the response were not sufficient to set up a defense to the motion asking that appellants be adjudged guilty of contempt for failure to pay said money into court, and thereupon it entered a judgment declaring them guilty of contempt, and further ordered that they "be imprisoned in the county jail of Ashley county until they comply with said orders, or be otherwise legally discharged from said imprisonment."

It will thus be seen that this was a proceeding to require a restitution by judgment creditors of money received by them under an order or judgment of court which was subsequently declared erroneous and annulled, and to enforce such restitution by attachment and punishment as for contempt in failing to comply with the order directing such restitution. In this case, certain at-

tached personal property had been sold under the judgment of the circuit court, and the funds arising therefrom had by its order been paid to appellants. Subsequently the judgment was reversed, and that portion thereof adjudging appellants entitled to any part of the funds arising from the sale of the attached property was annulled.

It is well settled that when a judgment is reversed restitution must be made of all that has been received under it. When a court enters a judgment which is subsequently declared erroneous and reversed, the party against whom such judgment was rendered should be restored to all that he has lost thereunder, so far as this can be done. In the case of *Bank of United States v. Bank of Washington*, 6 Pet. 8, 8 L. ed. 299, it is said: "The reversal of the judgment gives a new right or cause of action against the parties to the judgment, and creates a legal obligation on their part to restore what the other party has lost by reason of the erroneous judgment; and, as between the parties to the judgment, there is all the privity necessary to sustain and enforce such right." As long as the erroneous judgment is in force, it is a protection to an officer acting thereunder, and to all persons who purchase in good faith. But such judgment is no protection to the party in whose favor it was rendered, because it was subsequently reversed and as to him became the same as if it never had been

recting her to restore, by payment to the county treasurer, money obtained by her from the depository of the court under and by virtue of a judgment previously rendered in her favor and thereafter reversed on appeal. *Devlin v. Hinman*, 161 N. Y. 115, 55 N. E. 386.

And in *Anonymous*, 2 Salk. 588, it was held that where a judgment is set aside for irregularity after it has been satisfied, no scire facias for restitution is necessary, but an attachment should be granted upon the rule for contempt if there is not a restitution.

In *Greer v. McClelland*, 1 Phila. 128, where the plaintiff had obtained judgment in ejectment, which was afterwards set aside by an agreement of the parties under which their relation to the land was entirely changed, and the possession left in the defendant, it was held that restitution might be enforced by order and attachment for contempt.

In *Newell v. Hall*, 74 App. Div. 278, 77 N. Y. Supp. 610, it appeared that one section of the Code provided that the court had power to punish by fine and imprisonment, or both, a party to an action for the nonpayment of money ordered by the court to be paid, in a case where by law execution could not be awarded for the collection of it, and, further, that in any other case where an attachment or other proceeding

to punish for contempt had usually been adopted to enforce a civil remedy, or protect the rights of a party, the punishment referred to might be imposed; another section provided that where any sum of money directed to be paid by a court was not paid within the time specified, an execution might issue against the personal property of the party required to pay, but further provided that nothing therein should be so construed as to relieve a party from punishment as for contempt of court for disobedience to an order in any case where the remedy of enforcement by such proceedings then existed; and a third section provided that where the offense consisted of a refusal to obey an order requiring the payment of a sum of money, and the court was satisfied that a personal demand had been made and payment refused or neglected, it might issue without notice a warrant to commit the offender to prison until the money was paid, or until he was discharged according to law. Under these several provisions it was held that the court had power to punish the plaintiff for contempt where it appeared that a receiver had been appointed who had collected and paid money to the plaintiff, which the latter refused to return after the receiver's appointment had been set aside and an order made for the return of the money.

J. T. W.

made. The court, by its own act having occasioned wrong by the rendition of an erroneous judgment, has the inherent power by summary proceedings to afford redress to the injured party. The redress to which the aggrieved party is entitled is the restitution of the specific property which he has lost by the enforcement of the erroneous judgment, if that can be done. It is the duty and legal obligation of the party to the action securing such property to make restitution upon a reversal of such erroneous judgment; and the court, having jurisdiction of the subject-matter and of the parties, has ample authority to enforce the performance of that duty. *Galpin v. Page*, 18 Wall. 374, 21 L. ed. 965; *Reynolds v. Harris*, 14 Cal. 677, 76 Am. Dec. 459; *Jones v. Hacker*, 5 Mass. 264; *Fleming v. Riddick*, 5 Gratt. 272, 50 Am. Dec. 119; *Lott v. Swezey*, 29 Barb. 87; *Haebler v. Myers*, 132 N. Y. 363, 15 L.R.A. 588, 28 Am. St. Rep. 589, 30 N. E. 963; *Hess v. Deppen*, 125 Ky. 424, 101 S. W. 362, 15 Ann. Cas. 670.

But an erroneous judgment is valid until it is reversed. By the rendition of such judgment, it is the court which makes the mistake, and not the party in whose favor it is rendered. The judgment, though erroneous, is not void, and protects all persons acting under it until it is reversed. The judgment creditor who has simply permitted the law to take its course, and received money on the judgment in his favor, is only liable for the money so received after such judgment is reversed. *Freeman, Executions*, § 346; *Rorer, Judicial Sales*, §§ 590, 599.

Where property has been recovered or money has been received upon a judgment subsequently reversed, the remedy of the judgment debtor is to obtain restitution of the identical property recovered, or specific money received, if that can be done; but, in event this cannot be had, because the same is not in the possession of the judgment creditor, then the remedy of the judgment debtor is the recovery against him for the value of such property obtained by him, or of such money received. In such a case, the remedy afforded to the judgment debtor is thus stated, in substance, by *Freeman on Judgments*, and is quoted with approval by this court in the case of *McCracken v. Paul*, 65 Ark. 556, 67 Am. St. Rep. 948, 47 S. W. 855: "Plaintiff purchasing at his execution sale on reversal of the judgment under which the sale is made, is entitled to the benefits of the order of restitution, so that he may restore the property *in specie*, if he can. If he cannot, he is responsible to the defendant for its loss. If the property is purchased by a third person, the measure of

damages is the price it brought at the sale, and interest; and if the defendant is purchaser, there is no recovery against plaintiff, except for money paid, because the defendant has what he claims." See also *Ringgold v. Randolph*, 13 Ark. 328; *Stout v. Brown*, 67 Ark. 481, 55 S. W. 838.

When the property taken under a judgment which is subsequently reversed is in the actual possession or control of the judgment creditor, or, in case the identical funds received by him thereon are still in his possession or under his control, then the court may compel specific restitution thereof by a proper order, and, in event such order is not complied with, may enforce the same by contempt proceedings. 18 Enc. Pl. & Pr. 182.

As is said in the case of *Meeks v. State*, 80 Ark. 679, 98 S. W. 378: "According to the decided weight of authority, an order directing the payment of specific funds adjudged to be in the possession or control of the person at the time of the trial may be enforced by contempt proceeding, and punishment may be inflicted for disobedience of the order." See also *Hand v. Haughland*, 87 Ark. 105, 112 S. W. 184.

But this power to punish, as in cases of contempt for disobedience of such order of restitution, only applies where the court has first found that the specific property, or the specific funds, are in the possession or under the control of the person ordered to make restitution thereof at the time of the trial. *Coughlin v. Ehlert*, 39 Mo. 285; *Clements v. Tillman*, 79 Ga. 451, 11 Am. St. Rep. 441, 5 S. E. 194. A party may be put in contempt for disobeying a lawful order of court for the performance of acts within his power. But where such order is for the production of specific property or specific funds, before it can be said that he is in contempt of the court in failing to comply with its order to produce or restore the same, he must be able and unwilling to obey the order. When such judgment creditor shows that his failure to make restitution is not attributable to mere contumacy, but is due to an inability to comply with the order, for the reason that he has not the possession and control of the specific funds ordered restored, then he purges himself of any contempt for which he can be legally punished. *Jenkins v. State*, 60 Neb. 205, 82 N. W. 622.

This is not a case where a party had wrongfully, and without the order of the court, taken the possession of attached property which was still *in custodia legis*. That would be in the nature of an abuse of the process of the court, and punishable as such, as was held in the case of *Atkins v. Swope*, 38 Ark. 528. In the case at bar, the appel-

lants received the money upon an order of court, valid at the time of such receipt. If the funds so received by them were spent in good faith before the reversal of such judgment and the institution of these restitution proceedings, and if they did not actually have same in their possession or under their control at the time of the trial thereof, then it was error to require specific restitution of such funds, and to adjudge them in contempt of court upon failure to comply with such order.

In their response, the appellants in effect alleged that they had obtained the money lawfully from the officer under an order of court, and had thereafter, in good faith, disposed thereof, and that they did not have possession or control of such money or funds, either at the time of the institution of the proceedings for restitution, or of the trial thereof. If these allegations are true, the appellants should not be adjudged in contempt of court for failure to comply with its order to make restitution of these specific funds. In such event, the remedy of the judgment debtor is to obtain judgment against appellants for the full amount paid to them upon the reversed judgment, with interest. By § 1240 of Kirby's Digest, it is provided: "If any judgment of the circuit court shall be reversed by the supreme court on writ of error or appeal, and such judgment may have been carried into effect before the reversal thereof, such defendant may recover from the plaintiff in such judgment the full amount paid thereon, including costs."

We are of opinion that the remedy given by this statute is not exclusive, where the specific property or funds recovered or received upon such judgment, before reversal thereof, are still in the possession or under the control of the party obtaining same at the time of the institution of the proceedings for the restitution thereof. We think that the court has, in such case, the inherent power to order the restitution of such specific property or funds, and to enforce such order by proceedings in the nature of contempt. The remedy given by the statute is cumulative in such case; and it becomes the sole remedy in those cases only where the specific property or fund is not in the possession or control of the party obtaining it under the judgment which was subsequently reversed.

In the present case, the circuit court entered an order finding that the appellants had received, on a judgment which was subsequently reversed, the sum of \$1,232.75, and adjudging that they should pay the same to the appellee. This, we think, was in effect held by this court, upon the former appeal, to be a judgment against appellants 39 L.R.A. (N.S.)

for said sum. Upon this judgment, therefore, an execution may be issued.

We are therefore of the opinion that the Circuit Court erred in finding that the response filed by the appellants did not state facts sufficient to constitute a defense to the contempt proceeding. For this error, the judgment is reversed, and the cause remanded for a new trial.

ARKANSAS SUPREME COURT.

FRED ASHFORD et al., Appts.,

v.

A. J. MACE.

(— Ark. —, 146 S. W. 474.)

Landlord and tenant — illegal use — knowledge of intention — effect.

A lease is not rendered void by mere knowledge on the part of the lessor of intention to sublet the premises for the purpose of running a bawdyhouse.

(Hart and Kirby, JJ., dissent.)

(March 11, 1912.)

APPEAL by defendants from a judgment of the Circuit Court for Garland County in plaintiff's favor in an action brought to recover rent alleged to be due and unpaid. Affirmed.

The facts are stated in the opinion.

Messrs. Greaves & Martin, for appellants:

Where real property is leased with knowledge that it is to be used for an illegal purpose, a recovery cannot be had.

Sherman v. Wilder, 106 Mass. 537; Riley v. Jordan, 122 Mass. 231; Graves v. Johnson, 179 Mass. 53, 88 Am. St. Rep. 355, 60 N. E. 383; Benjamin, Contr. 2d ed. 280; 2 Taylor, Land. & T. 8th ed. §§ 521, 644; 18 Am. & Eng. Enc. Law, 316; Sherman v.

Note. — Effect of landlord's knowledge that tenant intends to use premises in violation of law.

This note is supplementary to the note to Harbison v. Shirley, 19 L.R.A. (N.S.) 663.

It will be noticed that the court in ASHFORD v. MACE make a distinction as to mere knowledge on the part of the landlord, and an intention, that the leased premises are to be used in violation of law. This distinction has been noted in previous cases, but by reference to the earlier note it will be seen that not all courts have agreed with the court in ASHFORD v. MACE, but that some have refused to enforce the terms of a lease where the premises were rented with the mere knowledge on the part of the landlord that they were to be used in violation of law.

Wilder, 106 Mass. 537; Edelmuth v. McGarren, 4 Daly, 467; Ernst v. Crosby, 140 N. Y. 364, 35 N. E. 603; Mitchell v. Scott, 62 N. H. 596; Dougherty v. Seymour, 16 Colo. 289, 26 Pac. 823; Sprague v. Rooney, 104 Mo. 349, 16 S. W. 505; Ryan v. Potwin, 62 Ill. App. 134; Chateau v. Singla, 114 Cal. 91, 33 L.R.A. 750, 55 Am. St. Rep. 63, 45 Pac. 1015; Mound v. Barker, 71 Vt. 253, 76 Am. St. Rep. 767, 44 Atl. 346; Ralston v. Boady, 20 Ga. 449; Kathman v. Walters, 22 La. Ann. 54; Hunstock v. Palmer, 4 Tex. Civ. App. 459, 23 S. W. 294; State v. Wilson, 73 Kan. 334, 117 Am. St. Rep. 511, 80 Pac. 639, 84 Pac. 737.

The lessor is criminally liable for leasing the premises.

State v. Porter, 38 Ark. 637; Lismore v. State, 94 Ark. 207, 126 S. W. 853; Com. v. Harrington, 3 Pick. 26; Dougherty v. Seymour, 16 Colo. 289, 26 Pac. 823; Benjamin, Contr. 2d ed. 248; Tucker v. West, 29 Ark. 386; Martin v. Hodge, 47 Ark. 378, 58 Am. Rep. 763, 1 S. W. 694.

On petition for rehearing.

One who runs a bawdyhouse is indictable and punishable in this state for misdemeanor.

State v. Porter, 38 Ark. 637; Lismore v. State, 94 Ark. 207, 126 S. W. 853.

All persons who aid, participate in, or assent to the commission of, misdemeanors, are indictable and punishable as principals.

Bishop, New Crim. Law, § 1090; Com. v. Harrington, 3d Pick. 26; Dougherty v. Seymour, 16 Colo. 289, 26 Pac. 823; Cahn v. State, 110 Ala. 56, 20 So. 380; Com. v. Kellar, 8 Ky. L. Rep. 537; Bourlier v. Com. 10 Ky. L. Rep. 154; Rhodes v. Com. 10 Ky. L. Rep. 722; Ford v. Com. 11 Ky. L. Rep. 860; State v. Frazier, 72 Me. 95, 8 Atl. 347; State v. Leach, 50 Mo. 535; People v. Erwin, 4 Denio, 129; Smith v. State, 6 Gill, 425; Com. v. Johnson, 4 Clark (Pa.) 398; Wolf v. State, 3 Shannon Cas. 345; Bishop, Contr. § 560; Martin v. Hodge, 47

Ark. 378, 58 Am. Rep. 963, 1 S. W. 694; Tucker v. West, 29 Ark. 386.

Messrs. Rector & Sawyer, for appellee: The mere avowal by the lessee of an intent to use the leased premises for an immoral purpose does not justify the lessor in repudiating his contract.

Michael v. Bacon, 49 Mo. 474, 8 Am. Rep. 140; O'Brien v. Brietenbach, 1 Hilt. 304; Almy v. Greene, 13 R. I. 350; Updike v. Campbell, 4 E. D. Smith, 570; Tegler v. Shipman, 33 Iowa, 194, 11 Am. Rep. 118; Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205; Smith v. White, L. R. 1 Eq. 626, 35 L. J. Ch. N. S. 454, 14 Week. Rep. 510, 14 L. T. N. S. 350.

Wood, J., delivered the opinion of the court:

The question presented by this appeal is whether or not mere knowledge on the part of the lessor that his lessee intended to sublet the premises leased for the purpose of running a bawdyhouse would render the contract or lease void. In the case of O'Bryan v. Fitzpatrick, 48 Ark. 487, 3 S. W. 527, liquor was sold with knowledge on the part of the seller that the liquor would be resold in violation of the law, and under circumstances which showed that the seller intended that it should be resold. This court, speaking through Judge Cockrill, said: "Mere knowledge by the vendor that liquor is to be resold in violation of the statute, without a participation in the illegal act, will not vitiate the sales he may make to the intermediate dealers; . . . but if the vendor designedly contributes to the scheme, or is to derive a benefit from it, or if there is a unity of purpose between him and the party to be supplied, he is infected with the latter's criminality, and the contract is void."

In Anheuser-Busch Brewing Asso. v. Mason, 44 Minn. 318, 9 L.R.A. 506, 20 Am. St. Rep. 580, 46 N. W. 558, the court,

In Stillman v. Loveless, 152 Ill. App. 332, where the agent of the landlord understood that the premises were to be used for gambling, it was held that there could be no recovery for rent during a period when the premises were vacant. It does not clearly appear from the opinion in this case whether the court regarded mere knowledge as sufficient to avoid the lease, or whether it is meant to state that the agent participated in the unlawful purpose.

In Hickey v. Sciutto, 10 B. C. 187, where a building which had not a sufficient number of rooms to comply with the law as to hotels was leased with the agreed purpose of both parties that it should be used as a hotel, the lease was held void, and recovery of rent was denied.

In McRae v. Cassan, 15 N. M. 496, 110 Pac. 574, it was assumed that it was necessary to show an intent, and that mere knowledge that the leased building was to be used as a house of prostitution was not sufficient to avoid the lease; but there is no direct holding to this effect.

In Burgett v. Loeb, 43 Ind. App. 657, 88 N. E. 346, a case not exactly in point, a lease of a building for saloon purposes for a period of five years was held not void, although the lessee had a license for only one year, and without a license it was against the law to sell intoxicating liquors.

So, in Gaston v. Gordon, 208 Mass. 265, 94 N. E. 307, it was held that a lease that bound the lessee to use the leased premises for the period of three years for the retail liquor business was not rendered void because the lessee failed to obtain a license, without which his selling would be in violation of law.

W. A. E.

after referring to the cases of *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132, and *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205, said: "These cases, now regarded as leading on this side of the Atlantic, announce the rule to be that mere knowledge by a vendor of the unlawful intent of a vendee will not bar a recovery upon a contract of sale, yet, if in any way the former aids the latter in his unlawful design to violate a law, such participation will prevent him from maintaining an action to recover. The participation must be active to some extent. The vendor must do something in furtherance of the purchaser's design to transgress, but positive acts in aid of the unlawful purpose are sufficient, though slight." Continuing, the court said: "While it is certain that a contract is void when it is illegal or immoral, it is equally as certain that it is not void simply because there is something immoral or illegal in its surroundings or connections. It cannot be declared void merely because it tends to promote illegal or immoral purposes. The American text writers generally admit this to be the prevailing rule of law in the States upon this point."

There is an exception to the rule in cases where the seller knows that the commodity sold is intended to be used by the buyer "in flagrant violation of the fundamental rights of man or of society, as in cases of murder, treason, or other heinous felonies that are *mala in se*." See *Steele v. Curle*, 4 Dana, 381; *Anheuser-Busch Brewing Asso. v. Mason*, 44 Minn. 318, 9 L.R.A. 506, 20 Am. St. Rep. 580, 46 N. W. 558; *Hanauer v. Doane*, 12 Wall. 342, 20 L. ed. 439; *Milner v. Patton*, 49 Ala. 423; *Lewis v. Latham*, 74 N. C. 283; *Bickel v. Sheets*, 24 Ind. 1. In the cases of *Tatum v. Kelley*, 25 Ark. 209, 94 Am. Dec. 717, *Ruddell v. Landers*, 25 Ark. 238, 94 Am. Dec. 719, and *McMurtry v. Ramsey*, 25 Ark. 350, the court held that the payee in a note given for the purchase of articles to be used in the war between the states, who knew at the time the articles were to be used in aid of the Confederate states, could not recover. These decisions were based upon the ground that the buyer was engaged in rebellion, which was treason, against the government, and that therefore the seller, knowing of these facts, concurred with and actively promoted the treasonable purpose of the buyer. From the viewpoint of the judges who then constituted the court, and who participated in and rendered these opinions, it was treason against the government to sell articles to be used by the Confederate army. Hence those cases came within the exception to the general rule. But in the later cases this court, while citing these decisions in 25th 39 L.R.A. (N.S.)

Arkansas, nevertheless refused to follow them in cases similar to the one under consideration.

While the keeping of bawdyhouses on account of its corrupting influence on public morals and its detrimental effects upon society, has been denounced in the jurisprudence of civilized nations as a common nuisance, a flagrant misdemeanor, nevertheless it has not heretofore been classified by law makers and law writers among the heinous felonies, such as treason, murder, rape, etc. 3 Coke, Ins. 205; 1 Bishop, *Crim. Law*, 1083—3; 1 Russell, *Crimes*, 299; 4 Bl. Com. 1671; *Rex v. Higginson*, 2 Burr. 1232; *Rex v. Rogier*, 2 Dowl. & R. 431, 1 Barn. & C. 272, 25 Revised Rep. 393; 1 Wharton, *Crim. Law*, § 1449. Hence it is within the rule, and not the exception mentioned above. In the case of *Hollenberg Music Co. v. Berry*, 85 Ark. 11, 122 Am. St. Rep. 17, 106 S. W. 1172, where the seller knew that it was the intention of the buyer to use the article purchased in a house of prostitution, this court cited all the former cases, but followed the rule announced by Chief Justice Cockrill in *O'Bryan v. Fitzpatrick*, supra, and said: "The rule supported by the weight of authority, and approved by this court, is that, though the contract is entered into by one of the parties for the furtherance of an illegal purpose, the contract will not be rendered illegal as to the other party, though he had knowledge of such illegal purpose, provided he does nothing in furtherance thereof." Again, in *Belmont v. Jones House Furnishing Co.* 94 Ark. 96, 140 Am. St. Rep. 112, 125 S. W. 651, the same rule is recognized and adhered to.

The instant case cannot be distinguished in reason and principle from the latter cases. The lower court, in its admission and exclusion of evidence, and in the giving and refusing of prayers for instructions, followed the rule announced by this court in *Belmont v. Jones House Furnishing Co.* and *Hollenberg Music Co. v. Berry*, supra. We believe that the rule announced in these cases is in accord with the weight of authority in this country, though we are free to confess that there is great conflict in the adjudicated cases. In 9 Cyc. p. 571, it is said: "In the United States, while some courts have followed the English rule, most of the courts have taken a different view, and have held that the mere knowledge of the seller of goods or services, or of the vendor or lessor of property, that the buyer intends an illegal use of them, is no defense to an action for the price or for rent." From such research as we have been able to give, we are of the opinion that this is a correct statement. See *Ralston v. Boady*,

20 Ga. 449; Michael v. Bacon, 49 Mo. 474, 8 Am. Rep. 138; Almy v. Greene, 13 R. I. 350. One of the most exhaustive and thoroughly considered cases in this country is that of Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205, where the authorities in the opinion and in the dissenting opinion are extensively reviewed. In that case the court said: "We are bound to look at the contract alone, quite independent of subsequent transactions growing out of it. The contract was ended when Stewart delivered the goods, and subsequent dealings with the property by Emerson and others, either in furtherance of or contrary to the original design of the purchaser, cannot relate back to the original sale, and make that illegal which at the conclusion of the original contract was not illegal." So here the contract of lease was complete when the parties agreed upon the price to be paid, the time the premises were to be occupied, and when possession thereof was taken under the contract. Although the lessor may have had knowledge that the premises would be used for an immoral purpose, unless, coupled with that knowledge, there was an intention on his part when he executed the lease that the premises should be used for such immoral purpose, the lease contract would not be void. Unless there was a common intent on the part of the lessor and the lessee at the time the contract was made, that the leased premises should be used for the unlawful purpose indicated, the contract would not be against public policy and void. The lessor is not the keeper of the conscience of the lessee, and has no police control over him in such matters, and mere knowledge on the lessor's part that the lessee is going to use the premises for an unlawful purpose does not make the lessor a participant in that purpose; for mere knowledge that the lessee may or will use the premises for an unlawful purpose is not of itself sufficient to show that the lessor intended that they must or shall be so used. The lessee might change his mind and use the leased premises for a lawful purpose. If he did not do so, but proceeded to put the premises to an unlawful use, then the lessor might sue in equity to restrain the unlawful use, but he could not forfeit the lease. See 18 Am. & Eng. Enc. Law, 379. The lease contract is good, unless, as stated, the intention of both parties in making it is that the premises shall be used for the unlawful purpose. In the case of Armstrong v. American Exch. Nat. Bank, 133 U. S. 469, 33 L. ed. 760, 10 Sup. Ct. Rep. 461, the court says: "An obligation will be enforced, although indirectly connected with an illegal transaction, if it is supported by an independent 39 L.R.A.(N.S.)

consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case,"—citing a number of authorities. The appellee did not require the aid of the illegal use of the property to enable him to recover on the lease contract. The consideration of that was independent of the illegal use to which the premises were afterwards devoted. See Armstrong v. American Exch. Nat. Bank, supra. The judgment is affirmed.

Hart and Kirby, JJ., dissent.

Petition for rehearing denied.

IDAHO SUPREME COURT.

ENDA R. KOHNY, Admr., etc., of Albert B. Kohney, Deceased, Respt.,

v.

WILLIAM C. DUNBAR, Probate Judge, Appt.

(21 Idaho, 258, 121 Pac. 544.)

Husband and wife — community.

1. Under the statute of this state (§§ 2680, 3060, Rev. Codes), all property acquired after marriage by either husband or wife, not defined by §§ 2676 and 2679 as the separate property of the husband or wife, is community property.

Same — management — statutory provision.

2. Under the provisions of § 2686, the husband has the management and control of the community property, with the like absolute power of disposition as he has of his separate property.

Same — descent.

3. Under the provisions of § 5713, on the death of either husband or wife, one half of the community property goes to the survivor, subject to the community debts, and the other half is subject to the testamentary disposition of the deceased husband or wife.

Same — respective rights of parties.

4. Under the community property law of this state, the wife has an equal interest and ownership with the husband in com-

Headnotes by AILSHIE, J.

Note. — Liability of community property to succession tax.

This note is supplemental to a note covering the same question, appended to Re Moffitt, 20 L.R.A.(N.S.) 208.

Aside from KOHNY v. DUNBAR, no other case subsequent to that note has been found which has passed upon the question as to whether community property is liable to the succession tax.

In Re Majot, 199 N. Y. 29, 29 L.R.A.

munity property, and the only particular in which their rights differ is in the fact that the statute constitutes the husband the managing and sales agent and trustee of the community partnership, and authorizes him to sell and pass title to such property, and exercise absolute control over the same.

Same—right of surviving wife.

5. The one-half interest which the wife receives from the community property upon the death of her husband comes to her in her own right by reason of the death of the community agent and her survival of the dissolution of the community partnership.

Tax—inheritance—community.

6. The wife is not liable under § 1873, Rev. Codes, upon the death of her husband, to pay an inheritance tax on her one half of the community property, for the reason that the property does not pass to her "by will or by the intestate laws of this state."

Definition—Intestate laws.

7. "The intestate laws of this state" comprise that body of laws which provide and prescribe the devolution of estates of persons who die without disposing of their property by last will or testament. One who dies intestate dies without leaving a will and without disposing of his property and estate by will or testament.

(January 30, 1912.)

APPEAL by defendant from a judgment of the District Court for Ada County reversing a judgment of the Probate Court which refused to settle the accounts of the administratrix until she had paid an inheritance tax. Affirmed.

The facts are stated in the opinion.

Messrs. D. C. McDougall, Attorney General, O. M. Van Duyn and J. H. Peterson, Assistant Attorneys General, and C. P. McCarthy, for appellant:

Inheritance tax statutes should be given a reasonable and liberal interpretation, with a view to effectuate the intention of the legislature.

State ex rel. Foot v. Bazille, 97 Minn. 11, 6 L.R.A.(N.S.) 732, 106 N. W. 93, 7 Ann. Cas. 1056; State ex rel. Kalme v. Vance, 97 Minn. 532, 106 N. W. 98; Re Gordon, 186 N. Y. 471, 10 L.R.A.(N.S.) 1089, 79 N. E. 722; Re Moffitt, 153 Cal. 359, 20 L.R.A.(N.S.) 207, 95 Pac. 653, 1025.

(N.S.) 780, 92 N. E. 402, where certain property acquired in a state where the law gave the wife no community interest in her husband's property was claimed to be exempt from the transfer tax by virtue of the laws of the country where the husband and wife had previously lived and were married, and which gave the wife community interest in it, the decision that such property was subject to the tax was based on the grounds that the laws of such foreign country had no extraterritorial effect. The court declined to decide as to whether the 39 L.R.A.(N.S.)

The legal title to the community property is in the husband.

Re Burdick, 112 Cal. 387, 44 Pac. 734; Spreckels v. Spreckels, 116 Cal. 330, 36 L.R.A. 497, 58 Am. St. Rep. 170, 48 Pac. 228; Sharp v. Loupe, 120 Cal. 89, 52 Pac. 134, 586.

The interest of the wife is a mere expectancy, like the interest which any heir may possess in the property of his ancestor.

Re Moffitt, 153 Cal. 359, 20 L.R.A.(N.S.) 207, 95 Pac. 653, 1025; Van Maren v. Johnson, 15 Cal. 308; Packard v. Arellanes, 17 Cal. 525; Fallrock Irrig. Dist. v. Abila, 106 Cal. 362, 39 Pac. 794; Platt, Property Rights of Married Women, § 38, p. 122; People v. Lebus, — Cal. —, 96 Pac. 1118; Re Kennedy, 157 Cal. 523, 29 L.R.A.(N.S.) 428, 108 Pac. 280; Re Wilmerding, 117 Cal. 284, 49 Pac. 181; Billings v. People, 189 Ill. 472, 59 L.R.A. 807, 59 N. E. 799; Hall v. Johns, 17 Idaho, 224, 105 Pac. 71; Ray v. Ray, 1 Idaho, 566; Wilson v. Wilson, 6 Idaho, 597, 57 Pac. 708; Bedal v. Sake, 10 Idaho, 270, 66 L.R.A. 60, 77 Pac. 638; Bank of Commerce v. Baldwin (Bank of Commerce v. Bowers) 14 Idaho, 75, 17 L.R.A.(N.S.) 676, 93 Pac. 504.

Messrs. Cavanah & Blake and J. F. Nugent, for respondent:

The wife's half interest in the community property, and which her husband cannot dispose of by will, is not inherited from him.

Re Moffitt, 153 Cal. 359, 20 L.R.A.(N.S.) 207, 95 Pac. 654, 1025; McKay, Community Property, § 462; Wright v. Hays, 10 Tex. 130, 60 Am. Dec. 200; Edwards v. Brown, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87; Kircher v. Murray, 54 Fed. 626; Cullers v. James, 66 Tex. 494, 1 S. W. 314; Arnold v. Hodge, 20 Tex. Civ. App. 211, 49 S. W. 715; Johnson v. Harrison, 48 Tex. 268; Holyoke v. Jackson, 3 Wash. Terr. 235, 3 Pac. 841; Sadler v. Niesz, 5 Wash. 182, 31 Pac. 630, 1030; Adams v. Black, 6 Wash. 528, 33 Pac. 1074; Tustin v. Adams, 87 Fed. 377; Warburton v. White, 176 U. S. 484, 44 L. ed. 555, 20 Sup. Ct. Rep. 404; Arnett v. Reade, 220 U. S. 311, 53 L. ed. 477, 36 L.R.A.(N.S.) 1040, 31 Sup. Ct. Rep. 425; Ryan

community interest of a wife in the property of the husband, under the law of such foreign country, is such as to constitute her the present and continuing owner during their married life, of an undivided one-half interest in his personal property acquired during his residence in such foreign country.

For a note on conflict of laws as to matrimonial property, see 29 L.R.A.(N.S.) 781. As to succession tax on dower, curtesy, statutory homestead, or allowances, see note in 29 L.R.A.(N.S.) 428.

J. H. B.

v. Fergusson, 3 Wash. 356, 28 Pac. 910; Lawrence v. Bellingham Bay & B. C. R. Co. 4 Wash. 664, 30 Pac. 1099; Re Hill, 6 Wash. 285, 33 Pac. 585; Re Cannon, 18 Wash. 101, 50 Pac. 1021; Re Riemann, 42 Misc. 648, 87 N. Y. Supp. 731; Re Weiler, 122 N. Y. Supp. 608; Re Starbuck, 137 App. Div. 866, 122 N. Y. Supp. 585; Re Green, 86 Misc. 1, 124 N. Y. Supp. 863; Commonwealth's Appeal, 34 Pa. 204; Small's Estate, 11 Pa. Co. Ct. 1.

An inheritance or succession tax is a special, not a general, tax, and must be strictly construed against the government, and favorably to the taxpayer.

People v. Koenig, 37 Colo. 283, 85 Pac. 1130, 11 Ann. Cas. 140; Lynch v. Union Trust Co. 90 C. C. A. 147, 164 Fed. 163; Eidman v. Martinez, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515; Clapp v. Mason, 94 U. S. 589, 24 L. ed. 212; 27 Am. & Eng. Enc. Law, 2d ed. p. 340.

Allshie, J., delivered the opinion of the court:

This appeal involves the construction of § 1873 of the Rev. Codes, commonly known as the "inheritance tax law." The respondent, Edna R. Kohny, is the widow of Albert B. Kohny, deceased, and is the administratrix of his estate. On the 9th of February, 1909, the administratrix duly made and returned to the probate court of Ada county an appraisal of the estate of her deceased husband, which showed the estate to be of the value of \$88,962.70, of which sum \$25,485 was the separate estate of Albert B. Kohny and \$63,477.70 represented the community estate and property of Albert B. Kohny and Edna R. Kohny, his wife. The administratrix offered to pay the inheritance tax upon one half of the community property less the amount of her exemption under § 1877, but the probate judge refused to settle, approve, and allow her final account until she first paid the inheritance tax upon the whole of the community property, less her exemption of \$10,000. The administratrix appealed to the district court from the ruling and order of the probate judge, and her contention was there sustained, and the probate judge thereupon appealed to this court.

Section 1873 of the Rev. Codes provides, among other things, as follows: "All property which shall pass by will or by the intestate laws of this state, from any person who may die seised or possessed of the same while a resident of this state, . . . shall be and is subject to a tax hereinafter provided for, to be paid to the treasurer of the proper county. . . ." It necessarily follows from the plain wording of the statute that this tax is laid upon the transfer

of any and all property "which shall pass by will or by the intestate laws of this state." The vital question then to be determined is whether the one-half interest which the wife has in the community property passes to her by will or by the intestate laws of the state. This proposition may be further reduced for the reason that it is not contended that she receives it by will, so the only remaining question is: Does she receive a one-half interest in the community property through or under the intestate laws of this state?

It ought not to be difficult to determine what is meant by the words "intestate laws of this state." One who dies intestate dies without leaving a will and without disposing of his property and estate by last will and testament. Re Green, 68 Misc. 1, 124 N. Y. Supp. 863; 4 Words & Phrases, 3732; 23 Cyc. 41, notes 40 and 41. The intestate laws of this state comprise that body of the statutes which provide and prescribe the devolution of estates of persons who die without disposing of their estates by last will or testament. In other words, intestate laws deal with intestate estates, and provide for the passing of title to such person or persons as the lawmakers in their judgment and wisdom have thought best entitled to such estates. Now, then, it being conceded that Albert B. Kohny did not dispose of his property and estate by will, and that he therefore died intestate, the question to be determined is, Did his widow, Edna R. Kohny, come into the possession and enjoyment of one-half of the community estate under and by virtue of the intestate laws of the state? In order to intelligently determine this question, it is necessary to consider the nature and character of the estate known as "community property."

Section 3060 of the Rev. Codes defines community property as follows: "Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either." Chapter 3, title 2, of the Civil Code, comprising §§ 2674 to 2693, inclusive, is devoted to the subject "Husband and Wife." Section 2676 defines the separate property of the wife, and 2677 gives her the "management, control, and absolute power of disposition of her separate property," both real and personal, and authorizes her to sell and convey her separate property without procuring the consent or concurrence of her husband. Section 2679 defines the separate property of the husband, and § 2680 is as follows: "All other property acquired after marriage by either husband or wife, including the rents and profits of the separate property of the husband and wife, is community property, unless by the

instrument by which any such property is acquired by the wife, it is provided that the rents and profits thereof be applied to her sole and separate use; in which case the management and disposal of such rents and profits belong to the wife, and they are not liable for the debts of the husband."

Section 2686 constitutes the husband the agent and trustee of the marital community, and is as follows: "The husband has the management and control of the community property, with the like absolute power of disposition (other than testamentary) as he has of his separate estate; but such power of disposition does not extend to the homestead, or that part of the common property occupied or used by the husband and wife as a residence." It will be seen from an examination of the chapter on Husband and Wife, and especially the above enumerated sections, that the law deals with the husband and wife as a kind of partnership with reference to all their community property accumulations. It segregates all property "owned by . . . [the wife] before her marriage and that acquired afterwards by gift, bequest, or descent, or that which she shall acquire with the proceeds of her separate property" as her "separate estate," and it likewise segregates "all property owned by the husband before marriage and that acquired by gift, bequest, devise, or descent" as his "separate property." It then provides "all other property acquired after marriage by either husband or wife" shall constitute the community property. The statute therefore intends that all property acquired by either the joint effort of the two members of the community or their individual and separate effort shall constitute a community fund and estate. The lawmakers evidently thought it wise and expedient in the interest of business and commercial transactions, that this community have a business and managing agent vested with the authority to manage, sell, and transfer such property, and so they prescribed by § 2686 supra, that the husband should be the managing and sales agent and a kind of trustee for the community. The statute, however, has given to the husband no better or higher title to the community property than it has given to the wife.

The only difference or distinction whatever the law has made between the husband and wife with reference to community property is that during the continuance of the community the husband is the managing agent, vested with absolute power of disposition of the property, and that the wife cannot sell or encumber such property except in specified instances. The receipts, however, from any disposition that may be

made of the property, still remain community property, and the wife's interest in the receipts from any sale of community property are just as great as they were in the original community property which was thus sold or transferred.

Section 5713 of the Rev. Codes, which was in force at the time of the death of Albert B. Kohny, provides: "Upon the death of either husband or wife, one half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her, or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall all pass to the survivor, to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration."

The foregoing section of the statute recognizes the husband and wife as equal partners in the community estate, and it authorizes each to dispose of his or her half by will. It also provides that the survivor shall continue to be the owner of half of such property, subject only to the payment of the community debts. This statute clearly and unmistakably provides that the surviving spouse take his or her half of the community property, not by succession, descent, or inheritance, but as survivor of the marital community or partnership. The same section provides, further, that, in the event there be no issue of the marriage living at the time of the death of one of the spouses, and he or she leaves no will or testament, the half of the community property which belonged to the deceased shall go to the survivor as an heir, and, therefore, by descent and under and by virtue of the "intestate laws of this state." While, therefore, the survivor in this case receives the entire community estate by reason of the death of her husband, half of it was already hers, and the only additional interest or right she acquires in that half by reason of the death of her husband is the right of management, control and disposition. The death of the statutory managing agent and trustee leaves the wife without such agent, and reduces her to the status of a *feme sole*, and the law authorizes her to act in her own right. Death has worked a dissolution of the community partnership, and left the surviving partner to act for herself. She al-

so receives the other half of the community property, but by an entirely different means. It comes to her likewise by reason of the death of the husband, but through the means of her heirship. The statute makes her an heir of her husband, and so, in the absence of testamentary disposition of the husband's share of the community property, she inherits his half, and therefore takes her share under the intestate laws of the state. It is clear, however, that she does not inherit her share of the common property.

Counsel for appellant have called our attention to the case of *Hall v. Johns*, 17 Idaho, 224, 105 Pac. 71, wherein this court said: "The title to community property is in the husband, and during the existence of the community the wife's interest in the community property is a mere expectancy." That case involved the right of the wife to contract in a matter which did not have reference to her separate property and estate, and to bind the community thereby, and the above observation was made in the course of a consideration of the power of the wife to bind herself or separate estate or the community estate by contract which had no reference to her separate property and estate. It was held that she could not bind the community in such manner, and in that connection it was suggested that her interest during the continuance of the marital relation was a mere expectancy. Similar language has been frequently used by the courts, and especially in California, as will be seen from an examination of *Re Burdick*, 112 Cal. 387, 44 Pac. 734; *Spreckels v. Spreckels*, 116 Cal. 339, 36 L.R.A. 497, 58 Am. St. Rep. 170, 48 Pac. 228, and *Re Moffitt*, 153 Cal. 359, 20 L.R.A.(N.S.) 207, 95 Pac. 653, 1025. The California court in *Re Moffitt*, supra, held under a statute almost identical with ours, that the interest of the wife in the community property during the continuance of the community is a mere expectancy, and that upon the death of the husband the wife takes her share of the community property, not as survivor or in her own right, but (in some manner not clearly disclosed) under the intestate laws of the state or the laws of descent and succession, and that she is liable to pay an inheritance tax on her half of such estate. That case apparently rests upon the authority of *Re Burdick* and *Spreckels v. Spreckels*. The *Burdick* Case held that the "wife takes her interest in such property (community property) by way of succession from the husband, and through distribution of his estate." Mr. Justice Harrison dissented from that view, and wrote a separate opinion dealing with this phase of the statute, and Mr. Justice Garoutte concurred in this dissent. The opinion by Jus-

tice Harrison is very clear and concise, and, to our minds, expresses the logical and reasonable interpretation of the statute, and is better reasoned than the opinion of the court. Among other things he says: "She receives it [half the community property], however, not as the heir of her husband, but in her own right as her half of the property which was acquired by herself and her husband during the marriage, but freed from all restrictions in its use and enjoyment, and with the same title as if the marriage had been dissolved by a decree of divorce." The community property law has been in force in Washington since about 1869. It has been changed slightly from time to time with reference to the right of disposition of the property and the management and control by the husband, but the community property law in the main has been in force continuously in that state. In *Warburton v. White*, 18 Wash. 511, 52 Pac. 233, 532, the question arose as to the necessity of the wife joining the husband in the disposition of community property. The case was carried by writ of error to the Supreme Court of the United States, and in *Warburton v. White*, 176 U. S. 485, 44 L. ed. 555, 20 Sup. Ct. Rep. 404, the Supreme Court of the United States, speaking through Mr. Justice (now Chief Justice) White, reviewed the Washington decisions on the subject, and considered the matter at some length, and in commenting upon the right or interest of the wife in the community property, said: "Property acquired during marriage with community funds became an acquêt of the community, and not the sole property of the one in whose name the property was bought, although by the law existing at the time, the husband was given the management, control, and power of sale of such property; this right being vested in him, not because he was the exclusive owner, but because by law he was created the agent of the community, the proceeds of the property being sold by him becoming an acquêt of the community, subject to the trust which the statute imposed upon the husband, from the very nature of the property relation engendered by the provision for the community." In *Arnett v. Reade*, 220 U. S. 311, 55 L. ed. 477, 36 L.R.A.(N.S.) 1040, 31 Sup. Ct. Rep. 425, the *Warburton* Case was quoted with approval, and the court, speaking through Mr. Justice Holmes, said: "It is very plain that the wife has a greater interest than the mere possibility of an expectant heir; for it is conceded by the court below and everywhere, we believe, that in one way or another she has a remedy for an alienation made in fraud of her by her husband."

Mr. McKay of the Seattle bar, in his work on the Law of Community Property, p. 542, says: "In Washington the question has not been expressly decided whether the wife takes her moiety by inheritance from her husband, but the decisions defining her right are so clear and decisive that but one conclusion is possible, *viz.*, that she does not. Assuming this conclusion to be true, no inheritance tax could be imposed on her moiety on the death of her husband." In a note to the same section (476) the author says: "The state board of tax commissioners expressly disclaim any power to impose an inheritance tax on the survivor's share of the common property." Since the interests of both husband and wife are the same and equal in and to the community property, and each takes one half upon the death of the other, and each may dispose of a one-half interest therein by will, it is clear to us that, if the wife must pay an inheritance tax on her half of the property upon the death of the husband, the husband would likewise be obliged to pay an inheritance tax on his half of the property on the death of his wife. The law clearly places them both on an equality in this respect. This illustration, however, accentuates the unreasonableness of the contention, for no one claims that the husband is required to pay such tax on his interest in the community estate.

Counsel have called our attention to a number of other authorities which consider and discuss this question, but we shall not enter upon an analysis of them here. The following are some of the cases which deal with this question: Wright v. Hays, 10 Tex. 130, 60 Am. Dec. 200; Edwards v. Brown, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87; Kircher v. Murray (C. C.) 54 Fed. 626; Tustin v. Adams (C. C.) 87 Fed. 377; Holyoke v. Jackson, 3 Wash. Terr. 235, 3 Pac. 841; Adams v. Black, 6 Wash. 528, 33 Pac. 1074; Re Hill, 6 Wash. 285, 33 Pac. 585; Re Starbuck, 137 App. Div. 866, 122 N. Y. Supp. 585; Re Green, 68 Misc. 1, 124 N. Y. Supp. 863; Re Weiler, 122 N. Y. Supp. 608; Billings v. People, 189 Ill. 472, 59 L.R.A. 807, 59 N. E. 798; Re Gordon, 186 N. Y. 471, 10 L.R.A. (N.S.) 1089, 79 N. E. 722.

We conclude that upon the death of husband or wife the survivor takes one half of the property in his or her own right as survivor, and is not liable under § 1873 to pay an inheritance tax on such interest in the community estate.

The judgment is affirmed, with costs in favor of respondent.

Stewart, Ch. J., and Sullivan, J., concur.
39 L.R.A. (N.S.)

KANSAS SUPREME COURT.

GERTRUDE L. JENREE

v.

METROPOLITAN STREET RAILWAY
COMPANY et al., Appts.

(86 Kan. 479, 121 Pac. 510.)

Sidewalk — duty to repair — railway company.

1. A city ordinance granted to a street railway company the right to construct, maintain, and operate its railway over a viaduct forming a part of a street in the city. One of the conditions was that the railway company should repair and maintain in good condition and safe for public travel all parts of the viaduct. The ordinance was accepted, and the railway was constructed and operated. A sidewalk forming a part of the structure, but not the part used by the railway company, was suffered to become out of repair and unsafe for

Headnotes by BURCH, J.

Note. — Will breach of contract with municipality to keep a street or highway in repair sustain an action by a person injured directly against the contractor.

As indicated in its title, this note is concerned merely with the question whether the breach of a contract with a municipality to keep a street or highway in repair will render the contractor directly liable to a person injured because of a defect or dangerous condition of the highway for which, in the absence of such a contract, it would not be responsible. The general subject of the liability of a street railway company for a defect in the track or street is covered in the notes to Groves v. Louisville R. Co. 52 L.R.A. 448, and Slater v. North Jersey Street R. Co. 15 L.R.A. (N.S.) 841, and the cases there cited are not in point in this note, except as they may involve the question whether a contract by a street railway company with the municipality to keep the highway in repair affords an independent ground of liability, assuming that the company has not been guilty of any act or omission in respect of its track or highway which would render it responsible in the absence of such a contract. The question, moreover, presupposes that the contractor has been guilty of a breach of his contract for which he would be answerable at least to the municipality; and is therefore not concerned with cases that turn upon the question as to the duty of the contractor under the terms of the contract, or whether there had, in fact or law, been a breach of that duty.

The doctrine that a contract with a municipality to keep a street or highway in repair will sustain an action by the person injured, directly against the contractor, has been adopted in a number of cases either as the sole or as an alternative ground of liability on the part of a street railway com-

use, in consequence of which the plaintiff, while traveling on the sidewalk, was injured. Held, the plaintiff may recover directly from the railway company the damages resulting from the injury.

Municipal corporation — ordinance — street repair — primary liability.

2. The ordinance further provides that the railway company shall respond to the city and save it harmless from damage resulting from acts and negligence of the railway company. Held, this provision of the ordinance merely secures to the city the right to be reimbursed in the event that its own liability, which, under the law, still exists, shall be enforced. It does not confine the railway company's liability to the city alone.

(February 10, 1912.)

pany that has so contracted toward a person injured by a defect in the street. Rockford City R. Co. v. Matthews, 50 Ill. App. 267 (*dictum*); Ober v. Crescent City R. Co. 44 La. Ann. 1059, 32 Am. St. Rep. 386, 11 So. 818; McMahon v. Second Ave. R. Co. 75 N. Y. 231; Brooklyn v. Brooklyn City R. Co. 47 N. Y. 475, 7 Am. Rep. 469; Sullivan v. Staten Island Electric R. Co. 50 App. Div. 558, 64 N. Y. Supp. 91; Bateman v. Forty-Second Street & M. & St. N. Ave. R. Co. 5 N. Y. Supp. 13.

So, where the duty to repair a street is imposed upon a railway company by statute or ordinance, one injured as the result of the breach of that statutory duty may maintain a suit against the company. Mayberry v. Second & T. Streets Pass. R. Co. 9 W. N. C. 404. And this is so whether the city is liable (Doyle v. New York, 58 App. Div. 588, 69 N. Y. Supp. 120) or not (Houston City R. Co. v. Dawson, 2 Posey Unrep. Cas. (Tex.) 223).

And in Philadelphia v. Weller, 4 Brewster (Pa.) 24, it is held, as against the contention that a street railway was primarily liable for death by nonrepair of street, that it is immaterial whether, under the acts of assembly and the city ordinances, the primary duty to keep the streets in repair is upon the city or railway company, for both are liable in damages to a citizen injured by neglect to repair, and he may recover against whichever party he sues.

So, in Simon v. Metropolitan Street R. Co. 29 Misc. 126, 60 N. Y. Supp. 251, it is held that notice is not a condition precedent to the performance by a street railway of the duty assumed by it of keeping the public thoroughfare in repair, neglect of which renders it liable in a civil action to any one of the public sustaining special damage from such neglect.

And it is held in Indianapolis Traction & Terminal Co. v. Springer, 47 Ind. App. 35, 93 N. E. 707, that where the duty on the part of a railway company to repair the street is one imposed by law, a failure so to do renders the company liable for any injury resulting therefrom.

So, a person injured by reason of a defective highway bridge which a railroad

APPEAL by defendants from a judgment of the District Court for Wyandotte County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the opinion.

Messrs. O. L. Miller, O. A. Miller, and Nathan Cree for appellants.

Mr. James F. Getty, for appellee:

One who, for a consideration, agrees with a municipal corporation to perform a public duty which the law imposes upon it, and negligently fails to perform such duty, is liable jointly with such corporation to one who is injured by reason of such failure.

McMahon v. Second Ave. R. Co. 75 N. Y. 231; Union Street R. Co. v. Stone, 54 Kan.

effective highway bridge which a railroad company undertakes to care for and maintain may sue the company notwithstanding that an action would lie for the injury against the township. Gates v. Pennsylvania R. Co. 16 L.R.A. 554 (see note to this case as to right of one injured on highway to proceed in the first instance against the one ultimately liable).

So, one contracting with the state to repair a canal (Phinney v. Boston Elev. R. Co. 201 Mass. 286, 131 Am. St. Rep. 400, 87 N. E. 490; Fulton F. Ins. Co. v. Baldwin, 37 N. Y. 648; Robinson v. Chamberlain, 34 N. Y. 389, 90 Am. Dec. 713), or canal bridge (French v. Donaldson, 57 N. Y. 496; Johnson v. Belden, 47 N. Y. 130; Conroy v. Gale, 5 Lans. 344, affirmed in 47 N. Y. 665), is liable to a suit by one suffering special damage as the result of the breach of such contractual duty.

And where a company contracted with a city to lay water pipes and to keep the work properly guarded, and to be responsible for damages which might occur by the neglect of their employees, a party injured through a defect or want of repair in a street, occasioned by the neglect or carelessness of such a contractor in doing the work, or of those for whose acts he is responsible, may, at his election, sue the contractor for redress, or pursue his remedy against the municipality. St. Paul Water Co. v. Ware, 16 Wall. 566, 21 L. ed. 485.

That a contractor may be held directly responsible to one injured in consequence of the breach of its statutory or contractual duty to keep a street or highway in repair is also assumed in some cases in which the liability in the particular instance was denied because a breach of such duty had not been established. See, for example: Crotty v. Danbury, 79 Conn. 379, 65 Atl. 147; Leary v. Boston Elev. R. Co. 180 Mass. 203, 62 N. E. 1; Hyde v. Boston, 186 Mass. 115, 71 N. E. 118; Snell v. Rochester R. Co. 64 Hun, 476, 19 N. Y. Supp. 496; Swift v. Brooklyn Heights R. Co. 134 App. Div. 134, 118 N. Y. Supp. 827; Campbell v. Frankford & S. City R. Co. 139 Pa. 522, 21 Atl. 92.

J. D. C.

83, 37 Pac. 1012; *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713; *Fulton F. Ins. Co. v. Baldwin*, 37 N. Y. 648; *Johnson v. Belden*, 47 N. Y. 130; *French v. Donaldson*, 57 N. Y. 496; *Weet v. Brockport*, 16 N. Y. 163; *Bolster v. Ithaca Street R. Co.* 79 App. Div. 239, 79 N. Y. Supp. 597; *Doyle v. New York*, 58 App. Div. 588, 69 N. Y. Supp. 120; *Gates v. Pennsylvania R. Co.* 150 Pa. 50, 16 L.R.A. 554, 24 Atl. 638; *St. Paul Water Co. v. Ware*, 16 Wall. 566, 21 L. ed. 485; *Kincaid v. Walla Walla Valley Traction Co.* 57 Wash. 334, 135 Am. St. Rep. 982, 106 Pac. 918; *Bateman v. Forty-Second Street M. & St. N. Ave. R. Co.* 5 N. Y. Supp. 13.

The railway company and the city were properly joined.

Kansas City v. File, 60 Kan. 157, 55 Pac. 877; *Union Street R. Co. v. Stone*, 54 Kan. 83, 37 Pac. 1012; *Osage City v. Larkin*, 40 Kan. 206, 2 L.R.A. 56, 10 Am. St. Rep. 186, 19 Pac. 658; *Missouri, K. & T. R. Co. v. Merrill*, 61 Kan. 671, 60 Pac. 819; *Kansas City v. Slangstrom*, 53 Kan. 431, 36 Pac. 706; *Fliege v. Kansas City Western R. Co.* 82 Kan. 147, 30 L.R.A. (N.S.) 734, 107 Pac. 555; *Carstesen v. Stratford*, 67 Conn. 428, 35 Atl. 276; *Call v. Portsmouth K. & Y. Street R. Co.* 69 N. H. 562, 45 Atl. 405; *Jarrell v. Wilmington*, 4 Penn. (Del.) 454, 56 Atl. 379; *Pollock, Torts*, 181, 182; *Sweet v. Perkins*, 196 N. Y. 482, 90 N. E. 50; *Eining v. Georgia R. & Electric Co.* 133 Ga. 458, 66 S. E. 237; *Clabaugh v. Southern Wholesale Grocers' Assn.* 181 Fed. 706; *Brown v. Cox Bros. & Co.* 75 Fed. 689; *Allison v. Hobbs*, 96 Me. 28, 51 Atl. 245; *Day v. Louisville Coal & Coke Co.* 60 W. Va. 27, 10 L.R.A. (N.S.) 167, 53 S. E. 776; *Straulhal v. Asiatic S. S. Co.* 48 Or. 100, 85 Pac. 230.

The judgment may stand against the city, even if reversed as to the railway company.

St. John v. Andrews Institute, 191 N. Y. 254, 83 N. E. 981, 14 Ann. Cas. 708; *Hubbell v. Meigs*, 50 N. Y. 480; *Buffum v. Ramsdell*, 55 Me. 252, 92 Am. Dec. 589; *Whiting v. Cochran*, 9 Mass. 532; *Shirley v. Lunenburg*, 11 Mass. 379; *Citizens' R. & Light Co. v. Atwood*, — Tex. Civ. App. —, 138 S. W. 1101; *Sweeney v. Hanley*, 61 C. C. A. 153, 126 Fed. 97; *Louisville Southern R. Co. v. Tucker*, 105 Ky. 492, 40 S. W. 314; *Mulderig v. St. Louis, K. C. & C. R. Co.* 116 Mo. App. 655, 94 S. W. 801; *Norton v. Parker*, 17 Ohio C. C. 715, 8 Ohio C. D. 572; *Missouri, K. & T. R. Co. v. Enos*, 92 Tex. 577, 50 S. W. 928; *Alter v. State*, 62 Neb. 239, 86 N. W. 1080; *Southern R. Co. v. Forgey*, 105 Va. 599, 54 S. E. 477; *Kansas City v. File*, 60 Kan. 157, 55 Pac. 877; *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 43 L. ed. 543, 19 Sup. Ct. Rep. 296, 39 L.R.A. (N.S.)

Burch, J., delivered the opinion of the court:

An ordinance of the city granted to the railway company the right to construct, maintain, and operate street railways upon the streets of the city, and upon and over certain viaducts and bridges forming portions of such streets. Section 25 of the ordinance contained the following provision: "Said railway company shall re-floor, repair, and maintain in good condition and safe for public travel all parts of the aforesaid bridges and viaducts, including the viaduct approaches." The terms of the ordinance were accepted by the railway company, and a line of street railway was constructed upon and operated over what is known as the "Seventh street viaduct," over the tracks, yards, and grounds of the Union Pacific and Chicago, Rock Island, & Pacific Railroad Companies. A sidewalk forming part of the viaduct was negligently suffered to become out of repair and dangerous for public use, in consequence of which the plaintiff, while traveling upon it, was seriously injured. She recovered damages against both the city and the railway company, and both appeal.

The railway company denies liability under the section of the ordinance referred to, and reinforces its contention by appealing to another section, numbered 13, which reads as follows: "In constructing, repairing, and operating such street railway, said company shall use every reasonable and proper precautions to avoid damages or injury to persons or property, and shall at all times respond to the city of Kansas City, and save it harmless from all and every damage, loss, cost, or expense caused or occasioned by reason of any act or negligence of said company in the construction, reconstruction, repairing, or repaving of said streets, or the operation of said street railway, or by reason of any and every act done under the provisions of this ordinance."

The argument is that the ordinance is merely a private contract between the city and the railway company; that § 25 merely determines between the parties which one of them shall be to the expense of keeping the viaduct in repair and safe for public use; that § 13 limits the liability of the railway company to respond in damages to actions by the city; and that the plaintiff, not being privy to the contract, and being only incidentally and indirectly benefited by it, is not entitled to sue for a breach of it. The sidewalk is 6 feet wide, and is supported by cantilevers on the east side of the viaduct. West of the sidewalk is a roadway for vehicles, and the railway track is laid upon this portion of the structure.

The railway company made no use of the sidewalk, and the regulation concerning it had no reference to the construction, maintenance, or operation of the railway itself, so that the duty, default, and liability of the railway company, if any existed, lay outside the scope and boundaries of its ordinary business. The petition counted upon the negligence of the company in suffering the sidewalk to become out of repair and unsafe for use. The ordinance was pleaded as the source of the company's duty to keep the sidewalk in proper condition. If the duty existed, it was created by that instrument.

The railway company refuses to view the ordinance as anything but a private contract. It is more than a contract, and there are cogent reasons for giving to § 25 the effect of a public statute. It is not necessary, however, to rest the decision upon this ground, and the obligation of the railway company may be treated simply as one which was contractually assumed. In granting to the railway company the right to occupy and use the streets for railway purposes, the city was acting in its governmental capacity for the welfare of the general public. Its private, proprietary affairs were not involved, except as they might be related in the most incidental way to the public ends to be attained. The benefit resulting from a secure sidewalk was one to be reaped by the public. The maintenance of such a way was a matter of public concern. The duty to keep the sidewalk in a condition which would prevent it from becoming a public nuisance, and which would permit all pedestrians, including the plaintiff, to use it in safety, was a public duty, and the manifest purpose of § 25 was to cast this duty which the city owed to the traveling public, including the plaintiff, upon the railway company as a condition to the street railway grant. The city was not engaging a contractor or employing an agent or servant to perform for it and on its behalf the work of inspection, repair, reconstruction, and the like, essential to the maintenance of a secure way. It was taking advantage of an opportunity to shift the whole burden of taking those steps upon another, who should stand, in relation to the public safety and convenience, in the city's place and stead. The obligation being a public one, to be performed for the public benefit, the party assuming it was responsible to the public. Therefore the contract was one for the benefit of the plaintiff as a member of the public.

The principle involved was apprehended and stated with reasonable clearness by Lord Abinger in the case of *Winterbottom v. Wright*, 10 Mees. & W. 109, 114, which 39 L.R.A. (N.S.)

is one of the familiar landmarks of the law on the subject of liability to third persons for the negligent breach of a contractual duty. The opinion contains the following observations: "Where a party becomes responsible to the public by undertaking a public duty, he is liable, though the injury may have arisen from the negligence of his servant or agent. So, in cases of public nuisances, whether the act was done by the party as a servant or in any other capacity, you are liable to an action at the suit of any person who suffers. Those, however, are cases where the real ground of the liability is the public duty, or the commission of the public nuisance. There is also a class of cases in which the law permits a contract to be turned into a tort; but unless there has been some public duty undertaken, or public nuisance committed, they are all cases in which an action might have been maintained upon the contract." Perhaps the leading American cases in which the principle has been stated and applied are *Brooklyn v. Brooklyn City R. Co.* 47 N. Y. 475, 7 Am. Rep. 469, and *McMahon v. Second Ave. R. Co.* 75 N. Y. 231. In the *Brooklyn Case* a portion of the opinion reads as follows: "A municipal corporation by the conferring and acceptance of a charter with powers of opening and controlling streets and ways has put upon it the correlative duty to the public of keeping those ways in repair, so that they may be safe for the passage of the public. When one contracts with that corporation to keep any portion of those streets in repair, in consideration of a license to use them to his benefit in an especial manner, he in effect contracts to perform that duty to the public in the place and stead of the municipality, and the way is given over to him for that purpose, and he takes it into his care and charge therefor; and his failure to perform his contract is a failure to do that duty, and the damages which naturally and proximately result from nonperformance are all the damages which naturally and proximately fall upon the corporation from the duty not being performed. The different principles which govern the different classes of cases grow out of the differences in the contracts with which the classes of cases are respectively concerned. The one relates to private matters alone. The other relates to matters with which the public and third persons are also concerned. And, as we read the decision in *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713, that case goes on the same principle, or one near of kin. That was an action against the defendant, a contractor with the state to keep in repair a section of the canals, for an injury

resulting to a boat of the plaintiff from a lock gate being out of repair. It was held that, by the contract of the defendant with the state, he assumed the duties and was invested with the powers of a public officer, and that the portion of canals covered by the defendant's contract was a public highway; that he, by his contract, assumed the duty of keeping in repair a public thoroughfare, and was therefore liable in a civil action to any one of the public sustaining special damage from his neglect to keep it in repair. His contract was not with the injured party, but with the state. But it was a contract to perform a duty to the public, for a neglect of which the state, but for its sovereignty, would be liable to the party injured. And so, by the force of his contract, he having thereby assumed public duties, he was held liable to one injured by a neglect to perform them." 47 N. Y. 485. In the McMahon Case the conclusion of the court is stated in the headnote to the opinion as follows: "Where one contracts with a municipality to perform in its stead the duty resting upon it of keeping its streets in repair and safe for the passage of the public, and where, because of neglect to perform the duty, a cause of action arises against the municipality, the action may be brought by the party injured directly against the contractor." 75 N. Y. 231.

It is impossible to say that the plaintiff was a stranger to the contract. The subject of the undertaking was a sidewalk, safe for use as such. The public interest in that subject cannot be refined away, and, unless mere fiction and form are to prevail over substance and fact, the contract was made for the benefit of every individual whose rights as one of the public might be specially affected. Because the city owed the plaintiff the duty to keep the sidewalk in repair and safe for travel, the plaintiff had a legal interest in the performance of the contract, and so became privy to it. "To give a third party who may derive a benefit from the performance of the promise an action, there must be, first, an intent by the promisee to secure some benefit to the third party, and, second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally. It is true there need be no privity between the promisor and the party claiming the benefit of the undertaking, neither is it necessary that the latter should be privy to the consideration of the promise; but it does not follow that a mere volunteer can avail

himself of it. A legal obligation or duty of the promisee [in this case the city] to him [the plaintiff] will so connect him with the transaction as to be a substitute for any privity with the promisor [the railway company] or the consideration of the promise, the obligation of the promisee furnishing an evidence of the intent of the latter to benefit him, and creating a privity by substitution with the promisor." *Vrooman v. Turner*, 69 N. Y. 280, 283, 25 Am. Rep. 195. The words of the contract, "safe for public travel," were equivalent to "safe for the traveling public;" and in principle the plaintiff, as a traveler on the sidewalk, stood toward the railway company in the same relation of privity that a mortgagee bears to a grantee of the mortgagor, who assumes and agrees to pay the mortgage debt. In the case of *Mott v. Water Co.* 43 Kan. 12, 15 L.R.A. 375, 30 Am. St. Rep. 267, 28 Pac. 989, in which it was held that the water company was not liable to an individual for damages which it had agreed with the city to pay when occasioned by an insufficient supply, the city itself was under no obligation either to furnish water or to pay the contemplated damage. Here the duty rests upon the city to keep the street safe for use and to pay all damages which result proximately from a breach of the duty. It may be observed, however, that the modern tendency is to hold that a contract made between a municipality and a public-service corporation inures directly to the benefit of the individual citizen in the very cases in which the city rests under no legal duty or liability respecting the subject of the contract. *Independent School Dist. v. Le Mars City, Water & Light Co.* 131 Iowa, 14, 10 L.R.A. (N.S.) 859, 107 N. W. 944; *Pond v. New Rochelle Water Co.* 183 N. Y. 330, 1 L.R.A. (N.S.) 958, 76 N. E. 211, 5 Ann. Cas. 504.

Section 13, upon which the railway company relies, must be interpreted in the light of the true meaning and effect of § 25. It is not clear that the damages suffered by the plaintiff fall within the terms of § 13. There is a room for the contention that the city is to be indemnified only for damages resulting from the prosecution of street work in a negligent or otherwise wrongful manner. Leaving this question undetermined, however, the section merely secures to the city the right of reimbursement in the event that its liability, which, notwithstanding the railway company's contract, remained uncanceled, should be enforced.

In the brief for the city reasons are given for reversing the judgment against the city in case it should be reversed as to the railway company. Because of the con-

clusion which the court has reached, the question thus presented need not be decided.

The judgment of the District Court is affirmed.

FLORIDA SUPREME COURT.

MAGGIE HILL, by Guardian *ad Litem*,
Appt.,
v.

CARY HILL, by Next Friend.

(— Fla. —, 56 So. 941.)

Husband and wife — desertion — what constitutes.

1. The essence of a wilful, obstinate desertion by a wife consists in her refusing to live with her husband when he does his marital duty, and wants her to live with him.

Divorce — desertion — duty of husband.

2. Where a very young wife, without her husband's consent, goes to her parents' home, and soon thereafter the first child of the couple is born at her parents' home, and the husband makes no proper effort in the discharge of his duty to the wife and child, and the wife and child remain with her parents, he is not entitled to a divorce on the statutory ground of a wilful, obstinate desertion by his wife.

(December 6, 1911.)

APPEAL by defendant from a decree of the Circuit Court for Jackson county in complainant's favor in a suit for divorce. Reversed.

The facts are stated in the opinion.

Mr. William B. Farley, for appellant:
Complainant was not entitled to a divorce on the ground of desertion.

Williams v. Williams, 130 N. Y. 103, 14 L.R.A. 221, 27 Am. St. Rep. 517, 29 N. E. 98; Herold v. Herold, 9 L.R.A. 696, and note, 47 N. J. Eq. 210, 20 Atl. 375; Newing v. Newing, 45 N. J. Eq. 498, 18 Atl. 166; Wright v. Wright, 80 Mich. 572, 45 N. W. 365; 14 Cyc. 613 (b.); Hardie v. Hardie, 162 Pa. 227, 25 L.R.A. 697, 29 Atl. 886; Dennis v. Dennis, 68 Conn. 186, 34 L.R.A. 459, 57 Am. St. Rep. 95, 36 Atl. 34.

Messrs. Thomas E. Walker and Paul Carter, for appellee:

If the husband establishes a matrimonial domicile, and makes a peremptory and unconditional demand upon the wife to live with him, her refusal to do so, if without justifi-

cation and persisted in for the statutory period of time, constitutes a desertion.

14 Cyc. 613.

Whitfield, Ch. J., delivered the opinion of the court:

The complainant husband obtained a divorce on the ground of "wilful, obstinate, and continued desertion of complainant by the defendant for one year," and the defendant wife appealed. It is alleged that the parties were married September 8, 1908; that shortly after the marriage the defendant wife without cause deserted the complainant husband and remained away for six weeks, but by persuasion of the husband she returned; that she then lived with complainant till July 12, 1909, when she again, without reason and without cause, deserted complainant, and returned to her parents' home, where she has continuously remained ever since, notwithstanding complainant has tried to persuade her to return to the home of complainant, but she refuses to return, and complainant has no hopes of her ever returning because of her extreme youth and of the influence of her mother over her. The bill of complaint was not demurred to, and, after final decree, all fair intendments should be indulged in favor of the sufficiency of the pleading. *Kirton v. Atlantic Coast Line R. Co.* 57 Fla. 87, 49 So. 1026.

It is essential to prove an intention to desert where the ground upon which a divorce is sought is wilful, obstinate, and continued desertion. Continued separation between husband and wife, which may be consistent under the proofs with no intention to wilfully and obstinately desert, is not a desertion within the meaning of the statute. *Crawford v. Crawford*, 17 Fla. 180.

If a wife deserts without cause, and afterwards realizes that she has acted foolishly, and would return if the way was open for her, but her husband refrains from doing anything to induce her to return, for the purpose of making her absence a ground of divorce, her desertion is not obstinate. *Trall v. Trall*, 32 N. J. Eq. 231.

The essence of the wrong of desertion by a wife consists in her refusing to live with her husband when he wants her to live with him. *Newing v. Newing*, 45 N. J. Eq. 498, 18 Atl. 166.

When a husband, not entirely blameless for the act, makes no effort to prevent his desertion by his wife, and acquiesces in and appears satisfied with its continuance, he is not entitled to a divorce on the ground of desertion. *Herold v. Herold*, 47 N. J. Eq. 210, 9 L.R.A. 696, 20 Atl. 375.

The evidence shows that the husband was about seventeen and the wife about fifteen

Headnotes by WHITFIELD, Ch. J.

Note. — See note, post, 1118.
39 L.R.A. (N.S.)

years of age at the time of the marriage; that they lived for a time with the husband's parents, and the wife was not happy in her new surroundings; that the couple removed to a home given by the husband's father not far from the parental home; that life here was not happy for the young wife, because of the uncongeniality of the husband's parents; that the first time the wife left the husband as alleged it was to visit her parents not far off; that on July 12th the wife went to visit her parents, and met her husband at church the next day; that they disagreed there, and she returned to the home of her parents, and he to his home. There was little if any communication between the couple thereafter; and in September, 1909, a child was born to the couple. It clearly appears that the husband made no proper and sufficient manly effort to prevail upon his wife to return to his home. The birth of the child two months after her return to her parents' home is some justification for remaining there, and it does not appear that the husband paid any attention whatever to his child, or manifested any desire to do so as he should have done; there being no indication that he could not have done so had he desired to, even though he was not on

very friendly terms with his wife's parents. This condition did not relieve the complainant of his obligations as husband and father, but imperatively demanded persistent effort in the line of parental duty. He failed to do his full duty, and this indicates a desire on his part to allow time to mature a cause of divorce on the ground of desertion. The entire evidence does not show a wilful, obstinate desertion of the husband by the wife, particularly in view of the peculiar duties due from the husband and father to his wife and infant child under the circumstances disclosed by the record. It is his duty to do all in his power to make a happy home for his wife and child, and to make the relations between the wife and his parents as pleasant as possible. This case is wholly unlike that of *Hudson v. Hudson*, 59 Fla. 529, 29 L.R.A. (N.S.) 614, 138 Am. St. Rep. 141, 51 So. 857, 21 Ann. Cas. 278.

The evidence does not show a wilful and obstinate desertion of the complainant by the defendant, and the decree is reversed.

Shackleford and Cockrell, JJ., concur.

Taylor, Hocker, and Parkhill, JJ., concur in the opinion.

Note.—Effort by one spouse to induce the other to return home as a condition of desertion by the latter.

I. Scope, 1118.

II. In general, 1119.

III. Duty of husband.

a. Separation not caused by his misconduct.

1. Generally, 1120.

2. Consent or mutual agreement, 1121.

3. Unjustified and wilful departure of wife, 1122.

b. Separation caused by his misconduct, 1123.

IV. Duty of wife.

a. Separation not caused by her misconduct, 1125.

b. Effect of wife's consent or misconduct, 1126.

I. Scope.

The question here discussed is as to whether the party alleged to have been deserted was bound to take the initiative and induce a reconciliation and the other spouse's return. The question whether the

party alleged to have been deserted is bound to accept the deserter's offer to return is not within the scope of the note.

The duty of the husband will be treated separately from that of the wife, because in a few jurisdictions it is expressly declared that the duty devolving upon the wife is not always the same as that imposed upon the husband in similar circumstances, and for the further reason that, although in other jurisdictions this distinction is not expressly made, it may have entered into the decisions, inasmuch as a determination of this question is apt to turn upon the particular facts of a case.

Elsewhere discussed are such analogous questions as condonation of desertion:¹ whether the plaintiff's desertion or cruelty constitutes a defense to an action for divorce upon the ground of the defendant's subsequent adultery;² whether insisting upon a separation constitutes cruelty;³ desertion by forcing spouse to leave marital home;⁴ whether the refusal of the wife to follow the husband upon a change of domicile constitutes desertion;⁵ and as to the effect of the relations between one spouse and the relatives of the other upon the question of desertion or cruelty.⁶

¹ See the note to *Laflamme v. Laflamme*, post, 1133.

² See the note to *Ellett v. Ellett*, post, 1135.

³ See *McClintock v. McClintock*, post, 1127, 39 L.R.A. (N.S.)

⁴ Note in 29 L.R.A. (N.S.) 614.

⁵ Note in 4 L.R.A. (N.S.) 145.

⁶ Notes in 13 L.R.A. (N.S.) 222, and 34 L.R.A. (N.S.) 759.

II. In general.

This question, depending as it does largely upon the particular facts presented, does not lend itself to any generalization further than the statement that the courts quite uniformly make an effort at reconciliation a condition of desertion, except, of course, where, in a particular case, the arbitrary application of that doctrine would work a hardship or injustice. The rule is not, as has sometimes been intimated or declared *obiter*, that when one party, without cause, terminates the cohabitation by desertion, the other is not bound to take any steps to restore it.⁷ The rule is rather that a divorce will not be granted for abandonment only, if it appears that the parties may be reconciled by a reasonable effort on the part of the complaining party;⁸ and certainly neither party can make a

separation which was begun and prolonged by their common consent a ground of divorce, where neither has ever made an effort at reconciliation.⁹ *A fortiori*, where one spouse withdraws from cohabitation, entertaining a reasonable belief that by reason of the actual misconduct of the other the cohabitation cannot be longer continued with health, safety, or self-respect, wilful desertion does not begin until the offending party has in good faith exhausted all reasonable efforts to right the wrong, and to satisfy the injured spouse that there will be no recurrence of the causes which induced the separation, nor until the lapse of a reasonable time for a consideration of the overtures for a reconciliation.¹⁰ To be effective, the overtures must be made before the other party acquires a right to divorce;¹¹ and they must be bona fide,¹² and not made simply for the purpose of laying a founda-

⁷ Ford v. Ford, 143 Mass. 577, 10 N. E. 474, which makes such a declaration summarily, although it holds only that where a husband files a libel for divorce for adultery before the lapse of the statutory period of desertion, he cannot maintain a suit upon the ground of desertion upon the lapse of such statutory period.

While the point involved in this note was apparently not urged in Prather v. Prather, 26 Kan. 273, the existence of any duty upon the part of the husband to seek a reconciliation under the facts of that case was negated by the court's statement that a wife cannot deliberately abandon her husband, sue for separate maintenance, and, when defeated in such action, issue under the advice of counsel formal propositions for reconciliation, which are never received by the husband, and then, without personally approaching him, defeat an action for abandonment.

And the existence of any duty upon the part of the husband in this respect was negated in Fulton v. Fulton, 36 Miss. 517, holding that where a wife unjustifiably left her husband because of his refusal to permit the visits of a son by a former marriage, her officer to return to him upon the condition that the son should visit her did not terminate the desertion, nor deprive it of the character of wilfulness, so as to disentitle the husband to a divorce.

⁸ Friemann v. Friemann, 120 Mo. App. 430, 97 S. W. 186.

⁹ Gilmer v. Gilmer, 37 Mo. App. 672.

¹⁰ Stocking v. Stocking, 76 Minn. 292, 79 N. W. 172, 668.

¹¹ If an offending husband desires to put his wife in fault as a deserter by an offer of reconciliation, it must be made before she acquires the right to a divorce against him. Benkert v. Benkert, 32 Cal. 467; Bovaird v. Bovaird, 78 Kan. 315, 96 Pac. 666.

¹² Phelan v. Phelan, 135 Ill. 445, 25 N. E. 751; Paul v. Paul, 75 Ill. App. 383; 39 L.R.A. (N.S.)

Grady v. Grady, — N. J. Eq. —, 64 Atl. 440; Middleton v. Middleton, 187 Pa. 612, 41 Atl. 201.

And if, at the time of offering to return to live with his wife, the husband was in fact living in adultery, or was at least willing to let her believe that he was so living, the offer to return cannot be considered as one made in good faith. Lister v. Lister, 65 N. J. Eq. 109, 55 Atl. 1093, affirmed without additional opinion in 66 N. J. Eq. 434, 57 Atl. 1132; Fred v. Fred, 67 N. J. Eq. 495, 58 Atl. 611.

The expression of a willingness to receive the wife again, when made under duress of arrest for nonsupport, and neither accompanied nor followed by any facts or even words to indicate that he was honestly desirous that she should return, cannot be considered as sufficient proof that he wished to change their relation or the separation to come to an end, so as to entitle him to a divorce upon the ground of wilful and obstinate desertion. Broom v. Broom, 47 N. J. Eq. 215, 20 Atl. 377, affirmed without additional opinion in 49 N. J. Eq. 347, 25 Atl. 963.

See also Howard v. Howard, 134 Cal. 346, 66 Pac. 367, where it was contended that the husband was not entitled to a divorce for desertion since his effort to bring about a reconciliation was not sincere or made in good faith, and the court seems to accept the contention as a logical one, but held that it did not apply since the offer was made in good faith.

It is held in McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808, that where the parties to the marriage separate by consent, in which case either party may under the provisions of the statute revoke his consent, and in good faith seek a reconciliation and restoration, the refusal of the other to yield constitutes desertion, which, if continued for a year, becomes a ground for divorce. In this case there is a strong dissenting opinion, which takes the position

tion for the suit.¹³ So, too, they must have been conciliatory, and without unreasonable conditions,¹⁴ such as, for instance, requiring a wife to relinquish all claims in the husband's real estate;¹⁵ and not merely requests which are formal and perfunctory,¹⁶ or which partake of the nature of a command rather than of an invitation,¹⁷ or are couched in terms calculated to arouse resentment.¹⁸ In short, the invitation must have at least the appearance of being sincere, and must manifest an actual desire for the absent one's return.¹⁹ Indeed, it is held that where the husband's misconduct on account of which the wife left, is such that it in itself constitutes a ground for divorce, he cannot, by mere invitation to her to return, put her in the position of a wife who has wilfully and obstinately deserted the husband, even if she refuses to come back.²⁰

In Louisiana this question is governed by

that the evidence showed that the officer of reconciliation was not made in good faith.

¹³ *Olcott v. Olcott*, — N. J. Eq. —, 26 Atl. 469.

¹⁴ *Middleton v. Middleton*, 187 Pa. 612, 41 Atl. 291.

A husband must, in a conciliatory manner and in good faith, and without conditions, invite the wife to return, before wilful desertion and abandonment can be made out of her continuation of a voluntary separation which took place upon his demand, when he refused longer to live with her upon her confession that she no longer loved him, although she was willing to remain with him for appearance sake. *Woolard v. Woolard*, 18 App. D. C. 326.

To entitle a husband who deserts his wife to invoke a statutory provision that the husband may choose any reasonable place or mode of living, and that, if the wife does not conform thereto, it is desertion, he must show that the place or mode of living chosen by him is reasonable. *Kenniston v. Kenniston*, 6 Cal. App. 657, 92 Pac. 1037.

¹⁵ *Day v. Day*, 84 Iowa, 221, 50 N. W. 979.

¹⁶ A husband who leaves his wife, and unsuccessfully prosecutes an action for divorce upon the alleged ground of her impotency, cannot render her the deserter by taking a witness with him and making a formal and perfunctory request for her return to the marital home, where she replies that she will take the matter under consideration and he never thereafter makes any overtures. *Chambers v. Chambers*, 20 Pa. Co. Ct. 41.

¹⁷ *Musgrave v. Musgrave*, 185 Pa. 260, 39 Atl. 961.

¹⁸ A husband who leaves his wife cannot make her the deserter by making a formal offer of a home to her in a letter couched in terms calculated to arouse resentment. 39 L.R.A.(N.S.)

a statute providing that the abandonment with which the husband or wife is charged must be made to appear by three reiterated summonses made to him or her from month to month, directing him or her to return to the place of the matrimonial domicile, and followed by a judgment which has sentenced him or her to comply with such request, together with a notification of said judgment given to him or her from month to month for three successive times.²¹

III. Duty of husband.

a. Separation not caused by his misconduct.

1. Generally.

The husband must seek the wife's return after a separation,²² and he cannot, without doing this, accept her departure as a desertion and demand a divorce,²³ where she

and opposition, and not giving her a reasonable time to consider the matter. *Heaton v. Heaton*, 8 Pa. Dist. R. 658.

¹⁹ *Wright v. Wright*, — N. J. Eq. —, 43 Atl. 447.

²⁰ *Crickler v. Crickler*, 58 N. J. Eq. 427, 43 Atl. 1064.

²¹ *Derby v. Dancy*, 112 La. 891, 36 So. 795, in which the court said that the law presupposes the possibility of a reconciliation of the parties, and that no separation can be decreed for cause of abandonment without a strict compliance of all the requisites of the statute.

²² *Briggs v. Briggs*, — N. J. Eq. —, 59 Atl. 878.

²³ A husband cannot accept the departure of his wife from the home as a desertion and demand a divorce, when he refuses to invite her return, makes no effort to induce her to resume her place in his household, and rejects her overtures for a reconciliation. *McElhanev v. McElhanev*, 125 Iowa, 333, 101 N. W. 93.

A husband will not be granted a divorce for desertion where he made no effort to induce the wife to return to him after the dismissal of a former suit instituted by him upon the same ground, and after a continuance granted therein upon her statement to the judge that she was willing to live with him if he would treat her as his wife. *Bradley v. Bradley*, 160 Mass. 258, 35 N. E. 482. The court said in this case that, so far from showing desertion by her since the first suit was dismissed, these facts indicated desertion by him.

Where a man uses undue means to coerce a girl of fourteen to marry him against her declarations that she has no love for him, and contrary to the advice of friends, he will not be divorced for her absence among her friends without clear and decided efforts to win her affections and induce her to live with him. *Bigelow v. Bigelow*, *Wright* (Ohio) 416.

fails to return from a visit,²⁴ or after going away for medical attention,²⁵ or to engage in business;²⁶ and the same is true where the estrangement follows the husband's departure from home for the purpose of finding employment,²⁷ or because of financial necessity.²⁸ But the right of the husband to a decree upon the ground of desertion is not dependent upon his having made an effort to effect a reconciliation, where the circumstances attending or following the separation afford a ground for reasonable belief that any such effort on his part to induce the wife's return would most probably have resulted in strengthening her determination to remain away,²⁹ that is, where it is reasonably clear that any efforts on his part would have been unavailing,³⁰ or that, even if successful in bringing the desertion to an end, it would be so only temporarily.³¹ The true rule has been stated to

be that when the circumstances under which the separation occurred were such as to impose upon the husband the duty of using active efforts to terminate it, by making such advances or concessions as might reasonably be expected to induce the wife to return to him, he is excused from making such efforts when, and only when, it is manifest from the facts in the case that to do so will be unavailing.³²

2. Consent or mutual agreement.

A voluntary separation does not amount to desertion, nor can desertion be inferred from the mere unaided fact that the parties do not live together. To establish a case of desertion, it should appear that the wife left her husband of her own accord, without his consent and against his will, or that she obstinately refused to return without just cause upon his request,³³ and therefore,

²⁴ An effort to induce the wife's return is necessary to entitle a husband to a divorce for desertion where, after living peaceably with him for thirty five years, she left their home and went to a distant state on a visit, after which no correspondence passed between the parties. *Wright v. Wright*, 80 Mich. 572, 45 N. W. 365.

And it was declared in *Conger v. Conger*, 13 N. J. Eq. 286, that where the wife left home with the consent of her husband, and with a bona fide purpose of visiting her mother, her subsequently formed purpose not to return could not convert her absence into a wilful desertion as of the date of her departure, the court apparently taking the position that she did not become a wilful deserter until her husband had made an effort to induce her to return and she had refused.

²⁵ A divorce will not be granted a husband upon the ground of desertion, where the wife left the home temporarily for medical attention, and remained away during convalescence, and for a few months thereafter due to the express indifference of the husband, who a few months after her departure sold the household furniture and never requested her to return. *Kupka v. Kupka*, 132 Iowa, 191, 109 N. W. 610.

²⁶ A husband who permits his wife to engage in business elsewhere than at their home city, without making any effort to have her remain with him, and without offering any inducements for her return, and who on the contrary appears pleased at her departure, is not entitled to a divorce for desertion, since her departure was not against his will. *Beller v. Beller*, 50 Mich. 49, 14 N. W. 696.

²⁷ A wife who goes to live with her friends when her husband departs to work at a distance for several months is not guilty of wilful desertion, where it does not appear that upon his return he sought her, desired her to return, or informed her

that he had returned. *Frarell v. Frarell*, Wright (Ohio) 455.

²⁸ The fact that a wife who was separated from her husband by reason of financial necessity may not have wanted him to come to her until he could support her and the family does not absolve him from his duty to find her and solicit her return. *Ferrari v. Ferrari*, — N. J. Eq. —, 22 Atl. 261.

²⁹ *Trall v. Trall*, 32 N. J. Eq. 231.

³⁰ *Hudson v. Hudson*, 59 Fla. 529, 29 L.R.A.(N.S.) 614, 138 Am. St. Rep. 141, 51 So. 857, 21 Ann. Cas. 278; *Ojserkis v. Ojserkis*, — N. J. Eq. —, 62 Atl. 113; *Currier v. Currier*, 68 N. J. Eq. 7, 59 Atl. 4, affirmed without additional opinion in 68 N. J. Eq. 797, 64 Atl. 1133.

³¹ Where a husband is in no way responsible for his wife's departure, and it is apparent from the circumstances that an honest effort on his part to terminate the separation will be unavailing, or only temporarily successful, no duty to make such effort devolves upon him. *Purnell v. Purnell*, — N. J. —, 70 Atl. 187. So, too, where her desertion, though not without some fault on his part, was unjustified. *Lammertz v. Lammertz*, 59 N. J. Eq. 649, 45 Atl. 271.

³² *Hall v. Hall*, 60 N. J. Eq. 469, 46 Atl. 866; *Hall v. Hall*, 65 N. J. Eq. 709, 55 Atl. 300. The latter decision, although affirming — N. J. Eq. —, 53 Atl. 455, thus states the rule in correction of a statement in the opinion in 53 Atl. 455, to the effect that when the facts show that the action of a wife in leaving her husband is the result of a settled determination on her part to separate from him, the husband is not bound to seek her out and endeavor to induce her to return to him; but that it is only when the wife leaves her husband on the impulse of the moment, without premeditation, that this duty rests on the latter.

³³ *Jennings v. Jennings*, 13 N. J. Eq. 38; *Taylor v. Taylor*, 28 N. J. Eq. 207.

where the parties are living apart under articles of separation,³⁴ or where the husband assents either expressly or by implication to the separation or to the wife's continued absence,³⁵ he will not be entitled to a divorce until he has revoked that consent by seeking a reconciliation³⁶ by something more than a mere request for her return, unaccompanied by an offer in any sense of protection, maintenance, or a home, or a manifestation of any sincere desire to reinstate her to the conjugal relation.³⁷ And especially where the parties separate after the marriage and never live together, the wife does not become a deserter until she has refused a bona fide offer of a home.³⁸ Likewise, where the wife leaves upon the husband's insistence, although it was induced by her conduct,³⁹ or the parties separate because of mutual incompatibility,⁴⁰ or because of a quarrel,⁴¹ the husband will not be granted a divorce, unless he sincerely and unreservedly sought her return, for, as said in one case when a husband, upon disagree-

ment with his wife and her declaration that she will not live with him, assents to her going where she chooses, and furnishes her with money for her support, and never insists, as a condition of her support, that she shall perform her duties as a wife, although he asks and entreats her to come back, it has too much the character of a friendly arrangement to be called wilful, obstinate, and continued desertion.⁴²

3. Unjustified and wilful departure of wife.

The view has been taken that where the wife deserts the husband without cause, he is not called upon to make overtures to her or to entreat her to return, upon the theory that his silence should be construed as a consent to her separation from him;⁴³ and that it is sufficient in such circumstances if the wife has not refused an unconditional offer to return.⁴⁴ While this position may be warranted under the peculiar facts of a particular case,⁴⁵ or under a particular

³⁴ And where the parties are living apart under articles of separation, a divorce for desertion will not be granted where the plaintiff has not expressed a desire to revoke the agreement. *Moore v. Moore*, 16 N. J. Eq. 275.

³⁵ *Rose v. Rose*, 50 Mich. 92, 14 N. W. 711; *Simpson v. Simpson*, 31 Mo. 24; *Scott v. Scott*, 44 Mo. App. 600.

³⁶ *Reed v. Reed*, 62 Ark. 611, 37 S. W. 230; *Gates v. Gates*, 59 N. J. Eq. 100, 43 Atl. 436, affirmed without additional opinion in 60 N. J. Eq. 486, 46 Atl. 1100; *Ojserkis v. Ojserkis*, — N. J. Eq. —, 62 Atl. 113; *Currier v. Currier*, 68 N. J. Eq. 7, 59 Atl. 4, affirmed without additional opinion in 68 N. J. Eq. 797, 64 Atl. 1133; *Luper v. Luper*, — Or. —, 96 Pac. 1099; *Butler v. Butler*, 1 Pars. Sel. Eq. Cas. 329.

³⁷ *Eisenberg v. Eisenberg*, 1 Pa. Co. Ct. 590.

³⁸ *Ball v. Ball*, 8 Pa. Dist. R. 678.

³⁹ *Smithkin v. Smithkin*, 62 N. J. Eq. 161, 49 Atl. 815.

⁴⁰ Where, from mutual dislike, incompatibility of temper, uncongeniality, or other cause, the parties voluntarily separate, such separation, however long continued, will not of itself constitute desertion on either side, within the meaning of the statute; and it becomes such when, and only when, a renewal of marital cohabitation is sincerely sought by the complaining party. *Hankinson v. Hankinson*, 33 N. J. Eq. 66.

So, a husband who makes no effort to induce his wife's return will not be granted a divorce for desertion against his wife, where she left as a result of their mutual incompatibility, it appearing that there were some things alleged against the husband which would give countenance to the wife's departure. *Thorpe v. Thorpe*, 9 R. I. 57.

⁴¹ An order denying the husband a divorce. *L.R.A. (N.S.)*

divorce for desertion will not be disturbed where it appears that the parties have been living separate and apart for several years, owing to a trifling quarrel, and that neither of them has ever attempted to become reconciled, or to resume the marital relations, but that they have been mutually satisfied with existing relations, without making any serious charges of misconduct against each other. *Hosmer v. Hosmer*, 53 Minn. 502, 55 N. W. 630.

So, a husband who makes no effort at a reconciliation will not be entitled to a divorce for wilful and malicious desertion, where, upon the wife's departure as the result of a quarrel, he declared that this act ended everything between them. *Thorpe v. Thorpe*, 30 Pittsb. L. J. N. S. 133.

No such abandonment as constitutes a ground for limited divorce is shown by the fact that the parties were living apart as the result of a disagreement, and with the virtual consent and approbation of the plaintiff (husband). *Adams v. Adams*, 20 N. Y. Supp. 765.

⁴² *Goldbeck v. Goldbeck*, 18 N. J. Eq. 42.

⁴³ *Ogilvie v. Ogilvie*, 37 Or. 171, 61 Pac. 627.

⁴⁴ *Seeds v. Seeds*, 139 Iowa, 717, 117 N. W. 1069 (desertion by wife).

⁴⁵ To entitle a husband to a divorce upon the ground of wilful desertion, it is not necessary that he manifest an active desire for her return, where she left him without legal cause and without his consent or connivance, and soon thereafter instituted a suit for separate maintenance. *Hitchcock v. Hitchcock*, 15 App. D. C. 81.

So, where a wife leaves her husband with the purpose of not returning, although she leads him to believe that she will return, and immediately institutes in bad faith an action for divorce, it cannot be said that because he has not since solicited her re-

statute,⁴⁶ the better rule, as a general proposition, would seem to be that though the wife's desertion may have been wilful and unjustified, it does not become obstinate, so as to constitute a ground for divorce, until the husband has sought a reconciliation,⁴⁷ since it devolves upon the husband, as the head of the household, to take the initiative in the maintenance or re-establishment of domestic harmony.⁴⁸ Where, by refusing to accompany him upon his change of domicile,⁴⁹ or in some other manner, the wife wilfully and unjustifiably separates herself from her husband, and he passively acquiesces in the separation,⁵⁰ for the purpose of making her absence a ground for divorce,⁵¹ he will be denied relief. *A fortiori*, where it appears that the wife had on previous occasions left him, but had always yielded to his persuasions to return,

his failure to urge her return will be fatal to his application for relief;⁵² and likewise he has no standing to seek a divorce where he has ignored her conciliatory letters upon the assumption that they were insincere and untruthful.⁵³

b. Separation caused by his misconduct.

The reasons which impel the courts to charge the husband with the duty of seeking the return of a wife who has left him without his own fault apply with greater force where her departure was due to misconduct on his part. He must make an effort at reconciliation where he is not blameless for the separation.⁵⁴ Thus, where he is himself

turn, and is willing for her to stay away, he has consented to the separation, so as to disentitle him to a divorce upon the ground of desertion. *Redford v. Redford*, 162 Mo. App. 127, 144 S. W. 125.

⁴⁶ A statute authorizing a divorce for wilful or malicious desertion or absence of either party without a reasonable cause, for two years, was held in *Lanier v. Lanier*, 5 Heisk. 462, to warrant a divorce in favor of the husband, irrespective of his efforts for a reconciliation, where his wife left him without cause during a sickness, there being ground for suspicion on his part that his illness was due to poison administered by her.

The view was taken in *Patterson v. Patterson*, 45 Wash. 296, 88 Pac. 196, that a statute merely providing that "abandonment for one year" should be a cause for divorce did not require that a husband who was abandoned by his wife should make any effort to induce her to return, the court saying: "Whether or not this is a wise statute, and whether it would not be better to require the husband, after desertion by the wife, to make an earnest effort to secure her return before instituting divorce proceedings, and whether the question of the age of the parties and their situation should, or should not, accord the court some discretion in the premises, are questions that are not before us, but are matters that might pertinently be addressed to the attention of the legislature."

⁴⁷ *Sterling v. Sterling*, 71 N. J. Eq. 59, 63 Atl. 548; *Taylor v. Taylor*, 73 N. J. Eq. 745, 70 Atl. 323; *Hunt v. Hunt*, — N. J. Eq. —, 59 Atl. 642.

And where a husband who is told by his wife that she is about to leave him, invites her to remain with him, but never thereafter asks her to return or remonstrates with her for her continued absence, although he at all times knew where she was, he will be deemed to have acquiesced in her absence, and cannot successfully seek a decree of divorce upon the ground of 39 L.R.A. (N.S.)

obstinate desertion. *Payne v. Payne*, — N. J. Eq. —, 28 Atl. 449.

⁴⁸ *Wood v. Wood*, 63 N. J. Eq. 688, 53 Atl. 51.

⁴⁹ *Gunther v. Gunther*, — N. J. Eq. —, 57 Atl. 1015.

⁵⁰ Although the wife's departure is unjustified, yet where it appears from the fact that he never asked her to return, and from other circumstances, that he passively acquiesced in the separation, he is not entitled to a divorce for desertion, under a statute defining desertion to be the voluntary separation of one of the married parties from the other, or the voluntary refusal to renew a suspended cohabitation without justification either in the consent or the wrongful conduct of the other. *Droege v. Droege*, 55 Mo. App. 482; *Davis v. Davis*, 60 Mo. App. 545.

In *Twigg v. Twigg*, 107 Md. 676, 69 Atl. 517, the court, in denying the husband a divorce for desertion, thus summarized the evidence: "So far as the plaintiff was concerned, the separation was regarded by him with entire complacency, a complacency so profound that he has been living in the same city with his wife and seven children for nearly four years, and has made absolutely no effort either to win her back, or to meet in any way the natural obligation under which he was and is to provide for and take care of his own flesh and blood."

⁵¹ *Taylor v. Taylor*, 28 N. J. Eq. 207, following *Bowlby v. Bowlby*, 25 N. J. Eq. 406, affirmed without additional opinion in 25 N. J. Eq. 570.

⁵² *Smith v. Smith*, 72 N. J. Eq. 5, 65 Atl. 986.

⁵³ *Meier v. Meier*, 68 N. J. Eq. 9, 59 Atl. 234.

⁵⁴ A husband who, not being blameless for the act, makes no effort to prevent his desertion by his wife, and appears to acquiesce in and be satisfied with its continuance, is not entitled to a divorce on the ground of desertion. *Herold v. Herold*, 47 N. J. Eq. 210, 9 L.R.A. 696, 20 Atl. 375.

guilty of desertion,⁵⁵ or cruelty,⁵⁶ or even where his conduct has been nothing more than overbearing and unkind,⁵⁷ or consisted only of threats,⁵⁸ he will be denied a divorce unless he takes proper steps to induce her to return, and to assure her of her future happiness in the home. This applies not only where the indignities to which he subjects the wife justify her in leaving the marital home, though not themselves constituting grounds for divorce,⁵⁹ but even where his treatment of her is merely a provoking cause of the separation, but not a

justification therefor.⁶⁰ This rule, of course, applies where the wife leaves in obedience to his counsel,⁶¹ or where he excludes the wife from the home and forbids her to remain there,⁶² or because she cannot live peaceably with the members of his family in the household,⁶³ and even where the wife leaves the husband because of his misconduct and declares that she will not return, he cannot seize upon that declaration and make it a pretext for disposing of his home, so as to prevent her from returning, and then claim that he is entitled to a divorce.⁶⁴

⁵⁵ A husband who deserted his wife after his discharge from arrest for cruel treatment is in no position to claim that she is the deserter, where he never made any effort at reconciliation. *Goldstein v. Goldstein*, — N. J. Eq. —, 26 Atl. 862.

A husband who without cause deserts his wife cannot make her the deserter by showing that he requested her to come and reside with him, but must show that he in good faith offered her a home. *Phelan v. Phelan*, 135 Ill. 445, 25 N. E. 751; *Paul v. Paul*, 75 Ill. App. 383.

So, where the wife leaves the marital home under circumstances that more nearly tend to place him in the position of a deserter, he cannot, in turn, base an action of divorce for desertion upon her absence, without making an offer of reconciliation in good faith and with the appearance of sincerity. *Spille v. Spille*, 68 N. J. Eq. 647, 61 Atl. 742.

⁵⁶ And a husband will not be granted a divorce for desertion from the wife who left him because of his cruelty, and thereafter stated in response to a conciliatory letter of his that any attempt at reconciliation was useless, where thereafter he became satisfied with the separation, and admits that he did not care about her coming back. *Grant v. Grant*, 38 N. J. Eq. 502.

Where the wife leaves the husband by reason of his cruel and inhuman treatment, the separation is, so far as she is concerned, involuntary at its inception, and it does not thereafter become voluntary so as to constitute a ground of divorce, where he makes no effort at a reconciliation. *Jakubke v. Jakubke*, 125 Wis. 635, 104 N. W. 704.

A husband who by personal violence, gross language, and constant neglect, has driven the wife from his home, is not entitled to a divorce for desertion, where he has made no effort to induce her to return. *Meldowney v. Meldowney*, 27 N. J. Eq. 328.

⁵⁷ A husband whose wife leaves him because of his overbearing and unkind conduct is not entitled to a divorce upon the ground of desertion, unless he makes sincere and opportune concessions and advances to induce her return. *Hall v. Hall*, 59 N. J. Eq. 402, 45 Atl. 690, modified for further reasons in 60 N. J. Eq. 469, 46 Atl. 866.

⁵⁸ A divorce for wilful desertion will not be granted in favor of a husband whose wife left him because of threats superin-

duced by his belief that she took money in his possession, where, upon discovering that she did not take it, he took no steps to induce her return, or to assure her of her future happiness in the home, for in such circumstances the desertion is not wilful, but is deemed to have been with his consent. *Ward v. Ward*, 7 Penn. (Del.) 364, 75 Atl. 611.

A divorce from the wife upon the ground of obstinate desertion will not be granted where she leaves because of threatening language and conduct of the husband, and he, instead of seeking to induce her to return, publishes an advertisement stating that she has left him and warning the public against trusting her on his account. *Rittenhouse v. Rittenhouse*, 29 N. J. Eq. 274.

⁵⁹ *Dwyer v. Dwyer*, 16 Mo. App. 422.

⁶⁰ *Cornish v. Cornish*, 23 N. J. Eq. 208; *Bowlby v. Bowlby*, 25 N. J. Eq. 406, affirmed without additional opinion in 25 N. J. Eq. 570; *Van Wart v. Van Wart*, 57 N. J. Eq. 598, 41 Atl. 965; *Loux v. Loux*, 57 N. J. Eq. 561, 41 Atl. 358; *Sarfaty v. Sarfaty*, 59 N. J. Eq. 193, 45 Atl. 261.

⁶¹ A wife is not guilty of wilful desertion of her husband where she leaves the home upon what she regards as his counsel or consent, and he makes no effort to induce her to return; and it is immaterial whether or not she misunderstood his language, for it was his duty to invite her to return if he repented and desired her to return, or if he was misunderstood. *Smithson v. Smithson*, 7 Mackey, 227.

⁶² And a husband who excludes his wife from their home, and tells her she can no longer remain there, cannot convert her absence into a desertion by writing a cold and formal note which is more of a command than an invitation, that she return to his house, "which you have wilfully and without cause deserted," the letter containing an intimation of his purpose to institute proceedings for divorce if she neglected to comply with his request. *Musgrave v. Musgrave*, 185 Pa. 260, 39 Atl. 961.

⁶³ When a wife leaves her husband with the announcement that she cannot live with his mother, her departure does not become wilful and obstinate desertion until he makes a bona fide effort of reconciliation. *Edwards v. Edwards*, 69 N. J. Eq. 522, 61 Atl. 531.

⁶⁴ *Gillinwaters v. Gillinwaters*, 28 Mo. 60.

IV. *Duty of wife.*a. *Separation not caused by her misconduct.*

The duty of a deserted husband to induce the return of the wife does not devolve with all its rigor upon a deserted wife,⁶⁵ and although a divorce will not be decreed to the wife merely upon evidence that the husband went away and lived apart from her,⁶⁶ a deserted wife is not bound to hunt for the husband, or to go to the place to which he has fled.⁶⁷ And no duty devolves upon her to seek the return of an absent husband, who deserted her without reason on his part or fault on hers,⁶⁸ or who left with her consent to obtain employment, but failed in any way to contribute to her support on account of his drunkenness.⁶⁹ Indeed, the position has been taken that where the husband's desertion is wilful and without cause, the wife may be found entitled to a divorce although she ignored his indefinite and obviously insincere letters touching upon an ultimate resumption of the marital relation.⁷⁰ So, where he deserts her after making her life miserable in pursuance of an avowed purpose, she is relieved of the necessity of making an effort to terminate the separation,⁷¹ for if by his conduct he has alienated her affections, and given her good cause to dislike him, and to have no desire to live with him, he cannot take advantage of her feelings to excuse himself for the continued desertion, without any serious and honest effort to terminate it.⁷²

But where the husband's departure does not constitute desertion in the first instance,⁷³ as in the case of an enforced separation because of the wife's ill health,⁷⁴

his absence does not become desertion until the wife in good faith demands a resumption of the marital relationship. So, where, so far from attempting to effect a reconciliation, a wife is prosecuting a suit for divorce on the ground of adultery, she cannot maintain that the separation during the pendency of such suit was obstinate on the part of the husband as that term is used with reference to desertion as a ground for divorce.⁷⁵

And while a wife is not justified in leaving merely because of quarrels with the husband,⁷⁶ nor relieved of the duty to seek a reconciliation merely because to some extent their financial circumstances were reduced by his dissipated habits,⁷⁷ where she leaves the husband because of intoxication, cruelty, and other misconduct of such a character that he is deemed the deserter, a divorce will be granted her, unless during the statutory period of desertion he reforms with her knowledge.⁷⁸ Indeed, it has even been held that where the separation is due to the cruelty and drunkenness of the husband, it is his duty to reform his habits, and after such reformation within the statutory period, to seek out the wife and urge her to return, giving her reasonable assurances of his sincerity, of his reformation, and of her probable safety in resuming the marital relation,⁷⁹ although it is otherwise where it appears that the wife failed to keep him informed as to her whereabouts, and otherwise apparently acquiesced in the separation without regard to whether he had reformed or not.⁸⁰ Where her acquiescence in his continued absence is superinduced by a reasonable belief that if he should return, he would, notwithstanding

⁶⁵ *McVickar v. McVickar*, 46 N. J. Eq. 490, 19 Am. St. Rep. 422, 19 Atl. 249; *Wilson v. Wilson*, 66 N. J. Eq. 237, 57 Atl. 552.

⁶⁶ *Cook v. Cook*, 13 N. J. Eq. 263.

⁶⁷ *Millowitsch v. Millowitsch*, 44 Ill. App. 357.

⁶⁸ *Sargent v. Sargent*, 36 N. J. Eq. 644.

⁶⁹ *Coe v. Coe*, 68 N. J. Eq. 157, 59 Atl. 1059.

⁷⁰ *Gordon v. Gordon*, 208 Pa. 186, 57 Atl. 525.

⁷¹ *Martin v. Martin*, 78 N. J. Eq. 423, 79 Atl. 261.

⁷² *Smith v. Smith*, 55 N. J. Eq. 222, 37 Atl. 49.

⁷³ *Provost v. Provost*, 71 N. J. Eq. 204, 63 Atl. 619.

⁷⁴ An enforced separation because of the wife's ill health does not become desertion on the part of the husband, where, convalescent, she makes no offer to return, after having been compelled to refuse compliance with his request that she do so, because made before her recovery. *Keech v. Keech*, L. R. 1 Prob. & Div. 641, 38 L. J. Prob. N. S. 7, 19 L. T. N. S. 462. 39 L.R.A.(N.S.)

⁷⁵ *Chipchase v. Chipchase*, — N. J. Eq. —, 22 Atl. 588 affirmed without additional opinion in 49 N. J. Eq. 594, 26 Atl. 468.

⁷⁶ A wife is not justified in leaving the marital home merely because of quarrels with the husband; and when she does so, she cannot assert that there is a desertion on his part, where she never offers to return; and her duty to make the offer is not affected by his removal to a foreign country, it not appearing that the place of his residence was unknown to her. *Edwards v. Edwards*, 20 Grant, Ch. (U. C.) 392.

⁷⁷ *Provost v. Provost*, 71 N. J. Eq. 204, 63 Atl. 619.

⁷⁸ *McVickar v. McVickar*, 46 N. J. Eq. 490, 19 Am. St. Rep. 422, 19 Atl. 249.

⁷⁹ *Jerolaman v. Jerolaman*, — N. J. Eq. —, 54 Atl. 166; *Lister v. Lister*, 65 N. J. Eq. 109, 55 Atl. 1093, affirmed without additional opinion in 66 N. J. Eq. 434, 57 Atl. 1132.

⁸⁰ But the wife cannot escape the consequences of her failure to notify the husband that she would come to him if he would reform, upon the ground that she did not

her efforts to effect his reformation, resume his course of objectionable conduct, she will not be denied a divorce;⁸¹ nor is her right to relief affected by the fact that she made an offer to live with him conditional upon his giving up his habits of intemperance and gambling, at least where it appears that at the time of the offer he was living in adultery and stated that he had given up his wife.⁸²

b. Effect of wife's consent or misconduct.

Although, as stated in the last subdivision, the duty of the deserted wife to invite her husband to return is not measured by the rule which is applied to the case of a deserted husband, reason and justice make it at least her duty, when her husband has been absent from her for years pursuant to their express and mutual agreement, plainly to signify to him when it is possible

for her to do so, that she withdraws from that agreement, before his absence will become an obstinate desertion.⁸³ It is fatal to the wife's application for divorce upon the ground of desertion, that she has consented to the separation either by way of a mutual agreement,⁸⁴ or by implication arising from the fact that she, without objection, permitted him to leave for a trifling cause;⁸⁵ and this is especially true where, in pursuance of an antenuptial agreement, the parties have never lived together.⁸⁶

Likewise the wife's failure to make any effort towards reconciliation disentitles her to a divorce where she refused to follow the husband when he left because of trouble with members of her family;⁸⁷ or where she voluntarily absented herself and subjected the husband to groundless charges;⁸⁸ or where he abandoned her after being arrested upon her complaint and discharged from the charge.⁸⁹

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know whether or not he had reformed, where he left her with her approval to find employment after he had lost his position because of drunkenness, and she failed to keep him informed as to her whereabouts, and otherwise apparently acquiesced in the separation without regard to whether he had reformed or not. *Grover v. Grover*, 63 N. J. Eq. 771, 50 Atl. 1051.

⁸¹ *Wilson v. Wilson*, 66 N. J. Eq. 237, 57 Atl. 552.

⁸² *Gibson v. Gibson*, 29 L. J. Prob. N. S. 25.

⁸³ *Costill v. Costill*, 47 N. J. Eq. 346, 21 Atl. 35.

⁸⁴ *King v. King*, 36 Pa. Super. Ct. 33.

A wife is not entitled to a divorce upon the ground of abandonment and failure to support, where the parties separated and remained apart by mutual consent, neither making any effort at reconciliation, and the husband never having been requested to contribute to the support of his family, and never having refused to make such provision. *Barnett v. Barnett*, 27 Ind. App. 466, 61 N. E. 737.

Ingersoll v. Ingersoll, 49 Pa. 249, 88 Am. Dec. 500, holds merely that separation by mutual agreement, made necessary by the husband's thriftlessness, does not of itself constitute wilful and malicious desertion on his part, although he failed to provide for his wife or to answer her letters.

⁸⁵ And where the husband leaves as the result of a quarrel, and without objection on the part of the wife, his desertion will not be deemed obstinate so as to entitle her to a divorce, where, although she sees him often, she neither by word or act indicates that she is willing that he shall return. *Kipp v. Kipp*, 77 N. J. Eq. 585, 78 Atl. 682.

⁸⁶ Where, in pursuance of an antenuptial agreement, the parties lived separately, the husband cannot be deemed to have abandoned or deserted her so as to entitle her to a decree of separation, where she has made no attempt to require him to live with her. *Dennison v. Dennison*, 52 Misc. 37, 102 N. Y. Supp. 621.

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Where the parties intermarry clandestinely without any intention of establishing a matrimonial domicile, and on an agreement to live separately for the present, the separate living of the husband will not be a desertion of the wife until she repudiates the agreement for separate living by offering to live with him, and demands that he should provide for their living together; and a demand by the wife that the husband should support her will not be sufficient unless accompanied by a bona fide offer to live with him. *McAllister v. McAllister*, 71 N. J. Eq. 13, 62 Atl. 1131.

Where it appears that the parties separated temporarily and by mutual consent the day following the marriage, and that shortly thereafter the wife came to the *locus fori* with the avowed purpose of acquiring a residence in order to get a divorce, and has remained steadfast to that purpose, it is clear that the separation was not against her will and she will not be granted a divorce. *McGean v. McGean*, 63 N. J. Eq. 285, 49 Atl. 1083.

⁸⁷ The wife will not be granted a divorce for desertion by her husband, who, upon being upbraided by her father, left the home with the request that she accompany him, with which she refused to conform, where she has never offered to live with him or expressed her willingness to do so. *Mayer v. Mayer*, 30 N. J. Eq. 411.

⁸⁸ A wife who voluntarily absents herself from the marital home for a number of years, and subjects her husband to suits upon groundless charges, cannot, merely because he refused to let her stay in the home, upon her sudden appearance there with friends, have a decree of separate maintenance upon the ground of their living apart "without her fault," unless the manner of her return was of a conciliatory nature and not inconsistent with the possibility that she came to resume the marital relation. *Jenkins v. Jenkins*, 104 Ill. 134.

⁸⁹ A wife whose husband abandoned her

after his discharge from arrest upon her complaint for cruel treatment will not be granted a divorce for desertion, where it appears that the separation was quite to her liking, and she never made any effort at reconciliation. *Goldstein v. Goldstein*, — N. J. Eq. —, 26 Atl. 862.

KENTUCKY COURT OF APPEALS.

MAGGIE ROGERS McCLINTOCK, Appt.,
v.

J. D. McCLINTOCK.

(147 Ky. 409, 144 S. W. 68.)

Venue — divorce — residence of wife.

1. A wife who has separated from her husband and gone to the home of a relative to live, with the intention of making it her home, establishes there a residence so as to give the courts of the county jurisdiction of a suit by her for divorce.

Divorce — separation — grounds — impairing health.

2. Under a statute permitting the court to grant a separation for such cause as, in its discretion, it may deem sufficient, one may be granted with separate maintenance to a wife whose husband has treated her with indifference and neglect, and said and done things in the presence of strangers to annoy and humiliate her, has exhibited rage towards her without cause, and told her they must separate, the effect of which has been to make her ill.

Same — alimony — amount.

3. \$100 per month may be awarded to a wife as support, upon granting her a separation from her husband, with the custody and care of her infant child, where he is worth from \$20,000 to \$40,000, and has an income from his business of from \$2,000 to \$3,000.

(March 7, 1912.)

APPEAL by plaintiff from a judgment of the Circuit Court for Fayette County, dismissing her petition, and denying her any relief whatever in a suit for divorce. Reversed.

The facts are stated in the opinion.

Note. — No other cases have been found which deal with the question whether the mere fact that a spouse insisted upon a separation, apart from other acts or statements, constitutes cruelty within the divorce law.

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Messrs. George C. Webb and Talbot & Whitley, for appellant:

There can be no doubt about the jurisdiction of the Fayette circuit court to try and determine plaintiff's case.

Gooding v. Gooding, 19 Ky. L. Rep. 967, 42 S. W. 1123; *Johnson v. Johnson*, 12 Bush, 487; *Hall v. Hall*, 102 Ky. 299, 43 S. W. 429.

The mother, when a suitable person, is the proper one to have charge of the child.

Irwin v. Irwin, 105 Ky. 636, 49 S. W. 432, 96 Ky. 320, 28 S. W. 664, 30 S. W. 417; *Thiesing v. Thiesing*, 16 Ky. L. Rep. 115, 26 S. W. 718; *Adams v. Adams*, 1 Duv. 169; *Baker v. Baker*, 27 Ky. L. Rep. 535, 85 S. W. 729.

Allowance for the support and maintenance of the appellant and her child should be granted.

Tuggles v. Tuggles, 17 Ky. L. Rep. 221, 30 S. W. 875; *Tilton v. Tilton*, 16 Ky. L. Rep. 539, 29 S. W. 290; *Pore v. Pore*, 20 Ky. L. Rep. 1981, 50 S. W. 681.

Mr. Maury Kemper also for appellant.

Messrs. Allen & Duncan and Denis Dundon for appellee.

Lassing, J., delivered the opinion of the court:

Appellant and appellee were married in July, 1906, and separated in August, 1909. Shortly after the separation she instituted a suit for divorce *a mensa et thoro*, on the statutory grounds of cruel and inhuman treatment. The answer is a traverse. Much proof was taken, covering practically all of the married life of the litigants, and upon final submission the chancellor dismissed the petition, and denied plaintiff any relief whatever. She appeals.

In the lower court the point was made that the Fayette circuit court had no jurisdiction to try and determine the case. The evidence shows that when appellant left her husband's home in Paris, Bourbon county, she went out to the home of a relative near that city, and a few days later went to Lexington to the home of another relative. Shortly thereafter she brought this suit in Fayette county. She had no home of her own to go to, and had to decide where she wanted to live. It was purely a matter of election on her part, and, as said by this court in *Gooding v. Gooding*, 19 Ky. L. Rep. 967, 42 S. W. 1123, "the intention of the party and fact of location at any point make the residence." It is conceded that,

The question whether an effort by one spouse to induce the other to return home is a condition of desertion by the latter is treated in the note to *Hill v. Hill* ante, 1118. In that note also will be found references to other notes on analogous questions.

had she rented premises in Lexington and gone to housekeeping, under the authority of the Gooding Case, her residence would have been established in Fayette county; but that, because she stopped with a relative, a different rule should apply. This reasoning is not sound. One may have a residence in a boarding house as well as in a rented building or property owned outright. The question is not how she lived, but had she determined to make Lexington her home? In her petition she says that she had, and the best evidence of such determination on her part we find in her going there and declaring when she filed her suit that it was her home. The trial court correctly so held. While denying the plaintiff any relief whatever, the chancellor in his judgment awarded to her the custody of their eighteen-months-old child, and directed that her husband should pay monthly for the support of herself and her child, during this litigation, \$62.50 per month; but made no provision for the support of either the appellant or the child after the termination of this litigation. The judgment giving to the wife the custody of the child was eminently proper, and the provision made for its father to see it at stated intervals and to have the custody of it on certain days of the week was fair and reasonable to both parties. The child is still in the custody of the court; and, although no order has been made by the court for its support by its father after the termination of this litigation, the chancellor would have ample power to make such further order from time to time as its needs and condition required.

The real question raised upon this appeal was the correctness of the chancellor's ruling in dismissing plaintiff's petition. Under our rule of evidence, allowing neither husband nor wife to testify in divorce proceedings, it frequently happens that no accurate insight into their home life can be obtained, and we are furnished but fragmentary or broken bits of evidence of their marital woes. This record presents such a case. Appellee, at the date of their marriage, was past fifty years of age. Appellant was about twenty-five. His habits in life were fixed. Hers were in the formative period. He was a man of the world, of large business experience. She was raised in the country, and was apparently younger in experience than in years. He was a shrewd, cool, calculating, methodical business man; she, an unsophisticated country girl. She was of a very affectionate disposition; he not at all demonstrative. Shortly after their marriage she was taken sick of a trouble peculiar to women, and it became necessary for her to submit to a surgical operation a few months after their marriage. She remained

at the hospital in Lexington for some weeks and until she was apparently relieved of the trouble. About a year after her return home a girl baby was born to them. The record furnishes but little evidence of their home life during the interval between her return from the hospital and the birth of their child. Some difference arose between them as to the proper method of raising the child. Appellee did not think that his wife's milk was sufficiently nourishing. She insisted that it was and wanted to nurse her baby, and was opposed to raising it on a bottle. After some considerable trouble over the matter, she was permitted to have her way. But this difference was evidently not regarded by her as of a serious nature, because in the spring of 1908, when she went on a visit to some of her people in St. Paul, Minnesota, she wrote frequent letters to her husband, and from the tone thereof it is apparent that she entertained none other than the kindest of feelings towards him. All of these letters are filled with terms of endearment, and manifest beyond question that she was entertaining no feeling of resentment toward her husband for his trying to make her wean her baby or raise it by hand.

She was a member of the Christian Church before they were married, and it appears that, during a revival in the Christian Church in Paris in the winter of 1908 and 1909, at the earnest solicitation of John McClintock, a brother of appellee, she put her letter in that church, and, while she made no secret at her home of her intention so to do, and discussed the matter with her brother-in-law, Mr. McClintock, in the presence of her husband, it is reasonably apparent that her husband did not know she had done so, and did not discover this fact until the latter part of February or early in March, 1909. His attention was drawn sharply to this fact by a request on the part of his wife that he pay her dues to the church, then amounting to some \$12 or \$13. He became very much offended on account of his wife's having put her letter in the church without notifying him, and worked himself up into such a rage over it that it was necessary to send for and have a doctor minister to him in order to quiet his nerves. At that time, and while he was in what the witnesses term a "tantrum," he notified his wife that there would have to be a separation. Insisting that she had done no wrong in transferring her membership from the country church to the city church of the same faith, and that he was wholly unjustified in treating her in the way and manner in which he was on account of it, she nevertheless pleaded with him not to carry out his intention of separating from her,

and urged that, even though he had no regard for her, he should not do so on account of their child. He left the home on that night, and did not return for two days. According to the testimony of the witnesses, when he did return, he still said that a separation would be necessary and insisted that it should take place, and wanted to arrange to have one of his wife's relatives make proper division of his estate among himself, his wife, and their child. He was a member of the First Presbyterian Church, which, at that time, however, was not holding services regularly. From that time until their separation it is apparent that the home life of Mrs. McClintock was very unhappy. Mr. McClintock was engaged in looking after his business affairs. He would eat his breakfast in the morning, go downtown, returning at noon for his lunch, when he would again leave, and not return until time for dinner in the evening, and after dinner it was his custom to go back downtown and remain there until 9 or 10 o'clock. His wife spent practically all of her time at home with her baby. She saw little of her husband. He paid but little attention to her. The servant testifies that many times she found her in tears, and that this was particularly true during the two latter months of her stay at her husband's home, when she cried most every day. The latter part of June, or early in July, the baby was taken sick with summer complaint and whooping cough. Dr. Vansant was called upon to treat her. Mrs. McClintock did not think that the child was improving under this treatment, and became dissatisfied with it, and wanted another doctor. Her mother had a prescription which she had used successfully in the treatment of her own family and others for whooping cough, and she wanted it filled and the child given some of that medicine. It thereupon resulted that, on account of the anxiety of each parent for the health and welfare of their child, another quarrel was brought on, and again he notified his wife that they would have to separate; that, while he had sought to avoid it, he found it to be necessary. At that time she was in a highly nervous condition, due to the return of the old trouble for which she had been treated at the hospital prior to the birth of her child, and the worry incident to its present sickness, and, following this quarrel with her husband and the announcement on his part that there would have to be a separation, she was taken down sick and remained in bed under the care of a physician and a nurse for some eight or ten days. During this illness her husband paid no attention to her whatever, did not go to her room or manifest any interest in her further than to in-

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quire of the nurse how she was. When she had practically recovered from this illness, she notified her brother, living in the Northwest, of the trouble she was having with her husband, and he came on to render such assistance as he could. He called upon her husband for an explanation of his conduct, and asked him why he had notified his wife that there would have to be a separation. Appellee at first denied having made the statement, but, when confronted by his wife with the charge that he had, he admitted that he had lost control of his temper, and did not know what he did say. He made no effort whatever to effect a reconciliation with his wife and offered no explanation, further than that he had lost his temper, for the way and manner in which he had treated her. Shortly thereafter she took her baby and left his home, and thus the separation, which he had declared in February or March was necessary, was brought about.

He insists that the whole trouble was due to the presence in his home of his wife's mother a good part of the time, and her sister on two or three occasions, and perhaps a dissipated brother, who visited them on one occasion for a few weeks. There is no foundation in fact for this charge. The record shows that there was never the slightest disagreement or unpleasantness between Mr. McClintock and either Mrs. Rogers, his mother-in-law, or her sister, Miss Rogers. The relation between them at all times was cordial. It is in proof that he insisted on Mrs. Rogers making her home with them, and Miss Rogers was there for the purpose of assisting his wife with sewing for his wife and her baby. Nothing occurred to mar the pleasantness of the family relations during the period that they were visited by his brother-in-law, although it is shown that during his stay there he was frequently intoxicated, and Mr. McClintock would have to go out and bring him in, much to their mortification, though he did not complain to the family or anyone else, so far as the record shows, or blame his wife on account of the trouble they were having or humiliation they were being put to because of her dissipated brother. The whole trouble, as appears from this record, is that Mr. McClintock, prior to his marriage, had become so fixed in his ways and habits of living, and had been so accustomed to doing as he pleased, that he found it difficult to accommodate himself to the changed condition, and he was wholly lacking in appreciation of the duties which the marriage state imposed upon him. Instead of treating his wife like a helpmate or companion, he seemed to look upon her as a tool or piece of machinery, brought into the house to add to his further pleasure. Many illustrations

are given in the record evidencing this lack of appreciation of the duties he owed to his wife. Instead of trying to please her, he was given to saying things and doing things in the presence of visitors that were calculated to greatly annoy and embarrass her. When she traded with merchants who were not customers of his in his business, he threatened to advertise her if she did not quit. When she used the long-distance telephone in an emergency call to talk to a lady friend in Lexington who had been very nice to her, he notified her that, if she did not stop it, he would take out the telephone. And just a short time before the separation, when she was sitting on their porch, in the presence of two neighbor women, he asked her if she had given their child the medicine, as directed. She stated that she had not, because the child had been asleep most of the time; and in a very unkind, fault-finding tone, he said: "About as I expected;" and then stated that he would have to get a trained nurse to attend to the wants of his child.

Although finding fault with her because she had transferred her membership to her own church without consulting him, there is not a line of evidence that during the three years of their married life he ever accompanied her to church or offered to accompany her to church, either to his or to her church. His lady acquaintances called upon them after their marriage, and appellant wished to return the calls of some of them who lived too far away for her to walk conveniently. It is in proof that he declined to furnish her a means of conveyance in order that she might return these calls; nor was he willing to share even a part of this expense, although it is shown that he is worth from \$20,000 to \$40,000 and had a good business that produced annually from \$2,000 to \$3,000 besides. Frequently she wanted money, and his response to her would be that she did not have sense enough to spend money intelligently, and, when he did give her any, he did it apparently begrudgingly. During the whole and particularly the latter part of their married life, according to the record, he was dogmatic, domineering, and dictatorial in his treatment of her, and, while he furnished her a good home, suitable provisions, necessary clothing, and the service of servants when required, he seemed utterly oblivious of the fact that the one thing needed by his wife to make her supremely happy was withheld from her. She wanted some manifestation, some evidence, that he loved and cared for her. She wanted to feel that she was more to him than the dogs of his kennel, or his moneys in the bank, or his interests in the many businesses conducted

by him. These essentials to her happiness were wholly lacking; and it is not surprising that when, for the second time, he told her there would have to be a separation, she acceded to his demands, accepted the inevitable, and left him.

We have carefully searched the record, and find no evidence of any wrongdoing whatever upon her part. When her baby was to be born, she went to an infirmary, away from him, alone, to pass through that trying ordeal. She returned to him as soon as she was able to do so, and from that time on she was a dutiful, loving wife. She wanted to raise her baby herself, as every true mother wants to do. She was opposed to raising it by hand as he wanted her to do, and surely this desire on her part furnished to her husband no just ground of complaint. The transfer of her letter from the country church to the city church should have been pleasing to him rather than otherwise, for his brother was a pillar in that church, and he seems fond of his brother. Since he had not been accompanying his wife to church, either to his own or to hers, the reason he gives for wanting to know when she was going to put her letter in the church is not satisfactory. And since no complaint was made until she was called upon to pay her church dues, we are forcibly impressed with the idea that he opposed the transfer of membership in order to avoid the expense. But, whatever his reasons for objecting may have been, the conduct of his wife furnished him no ground of complaint.

And, lastly, coming down to the trouble that culminated in her leaving home, she did nothing which any fond and considerate mother might not do. The medicine which Dr. Vansant was giving was doing the child no good. She was with it day and night, watching over it, and knew much better than her husband the effect the medicine was having upon it, and she wanted a change; and instead of finding fault with her for wanting a change, he should have joined her in welcoming any suggestion that would look toward the improvement of the child. Instead, however, of sympathizing with his wife in her distress over its sickness, we find him flying into a rage and declaring that nothing short of a separation would satisfy him.

The question that presents itself is, To what extent must a wife submit to indignities of this character? How far shall her feelings be outraged because of the ungovernable, uncontrollable temper of her husband? Will the law afford her no relief, or must she silently submit to this character of treatment until he actually physically ejects her from his home? She is not seek-

ing an absolute divorce, but merely a separate maintenance. Section 2121 of the Kentucky Statutes provides, in part, that "judgment for separation or divorce from bed and board may also be rendered for any of the causes which allow divorce, or for such other cause as the court in its discretion may deem sufficient." In *Freeman v. Freeman*, 11 Ky. L. Rep. 824, 13 S. W. 247, and again in *Zumbiel v. Zumbiel*, 113 Ky. 841, 69 S. W. 708, this statute was construed. In the former case, in speaking of the power of the court, it is said: "It is plain, however, from the language of the statute, that he is not restricted to the statutory grounds which authorize an absolute divorce. Before the adoption of our statutes the law gave to the wife, upon sufficient grounds, the right to a decree of separation and alimony, although no legal cause for divorce existed." And in the latter case the court said: "It is to be observed that the circuit court is not restricted to the statutory causes for granting divorces *a vinculo matrimonii* in granting divorce from bed and board. He may, in his discretion, grant the latter separation for a less cause than those enumerated in the statute. Section 2117. But, as said in *Shrock v. Shrock*, 4 Bush, 684: 'Of course, the discretion thus conferred is not to be understood as arbitrary or unlimited, but a sound legal discretion, and only to be exercised for such causes as may be deemed sufficient, when considered with a just and reasonable regard to the legal rights and obligations of both parties.'" In *Reinhard v. Reinhard*, 96 Wis. 555, 65 Am. St. Rep. 66, 71 N. W. 803, the court had under consideration the right of a wife to a divorce from her husband on the ground of cruel and inhuman treatment. It was shown in that case that they lived in the same house, ate at the same table the food prepared by her, and that frequently he failed to speak to her except in an unkind manner for as much as three months at a time. The court held that the wife was entitled to the decree, and in the course of the opinion said: "Marriage implies companionship, and is supposed to be based upon mutual regard and affection. For a husband and wife to live and sleep in the same house, and eat at the same table food prepared by the wife, without the husband speaking to the wife, except in anger, for a period of three months at a time, must have been, at least, very disagreeable, if not unbearable. That such was the fact does not seem to be very seriously disputed. It certainly evinced abnormal affections, persistent wantonness, and deliberate perversity. The effect of such conduct upon a nervous, sen-

sitive woman can better be imagined than described, and may have seriously impaired the plaintiff's health, as found by the court. This court has repeatedly held that personal violence, whether actual or threatened, or even gross and abusive language, is not absolutely essential to constitute cruel and inhuman treatment." In *Robinson v. Robinson*, 66 N. H. 600, 15 L.R.A. 121, 49 Am. St. Rep. 632, 23 Atl. 362, a divorce was sought upon the ground of cruelty, and "treatment endangering reason or injuring health," as authorized by the statute. It appears that in that case the parties were married and lived happily together for two years, when the wife became interested in Christian Science, attended lectures, took a course of instruction, and subsequently received the degree of Doctor of Christian Science. She began and continued to practise as such doctor. Her husband did not believe in the doctrine, and had no sympathy with his wife in her advocacy of or practice under it. He did not object to her believing in it, but was opposed to her practising it, because it exposed him to ridicule and injured his business as a druggist; and he requested his wife to give it up. She refused to do so and a separation resulted. Thereafter he sought to bring about a reconciliation and induce his wife to return to him, making as a basis of such proposition, however, that she give up the practice of Christian Science. This she declined to do. The court found that the only ground for difference between them rested in her determination to practise this doctrine, in which she was a firm believer. In disposing of the question the court said: "Whether one party has been so treated by the other as seriously to injure health or endanger reason is a pure question of fact. It cannot be declared as matter of law that any particular treatment may not have that effect. The gist of these causes of divorce is the injury to health and the danger to reason. Conduct which to a serious extent produces either, though not intended to have such a result, . . . is a cause of divorce." We have no such statute as that upon which the judgment in the case quoted from was rested. But the provision of the Kentucky statute is even broader, in that it authorizes the chancellor, in the exercise of his discretion, to grant to the wife a separate maintenance where, from the evidence, it appears that the best interests of the parties require it, even though a cause for absolute divorce may not have been made out.

In *Gardner v. Gardner*, 104 Tenn. 410, 78 Am. St. Rep. 924, 58 S. W. 342, the court, in considering the plaintiff's rights under a

statute very similar to ours, said: "It is now well settled by this court that cruel and inhuman treatment within the meaning of the statute is not confined to acts of personal violence, but includes such treatment as endangers the wife's health and renders cohabitation intolerable." The ground upon which the divorce was sought there was excessive intercourse. In *Cole v. Cole*, 23 Iowa, 433, a divorce was sought on the ground of cruel and inhuman treatment. In the course of the opinion the court said: "If the conduct is marked with cruelty, if it is cruel and unfeeling, indicating an absence of that kindness and tenderness that belongs to a human being, it is sufficient, if it endangers life." In that state the statute authorized a divorce for cruel and inhuman treatment endangering life, and in the case under consideration it was insisted that any treatment which merely showed an injury to health would not authorize a divorce under this statute. But the court, in further considering the question, said: "It is true that not every fancied or real wrong which may for a while render unpleasant the complainant's life or subject her to momentary pain or temporary illness would amount to legal cruelty. But if the act involves—that is, if it is connected by natural consequences or effects with—the health, not for a moment, not temporarily, but to its actual and real prejudice, it amounts to legal cruelty." In *Reed v. Reed*, 4 Nev. 395, the court used this language: "There may be extreme cruelty without the slightest violence. The happiness of a life may be destroyed by a course of conduct which could furnish no ground for apprehending bodily harm or injury. . . . In our judgment it is the effect and probable consequence of the misconduct complained of which should control the actions of the courts more than anything else. Hence, if it appear probable that the life of one of the parties is rendered miserable by any character of misconduct on the part of the other, although no personal violence be apprehended, or if there be reason to apprehend bodily harm if the marriage relations be continued, the separation should be decreed." In *Glass v. Wynn*, 76 Ga. 319, in defining legal cruelty, the court uses this language: "Mental anguish, wounded feelings, constantly aggravated by repeated insults and neglect, are as bad as actual bruises of the person; and that which produces the one is not more cruel than that which causes the other." In *Myrick v. Myrick*, 67 Ga. 771, after reviewing at length the facts of the various cases under which 39 L.R.A. (N.S.)

a divorce was authorized on the ground of cruel treatment, the court says: "Thus, if the husband, by neglect and indifference, or by studied acts of insult and wrong practised upon the wife, that have an open and manifest tendency to degrade the wife in her social position, to render her life miserable and unhappy, to make her life intolerable, and her intercourse with her husband a source of pain and suffering rather than of pleasure and happiness, although no personal violence is done or threatened, in all such cases a divorce should be granted." In *Rosenfeld v. Rosenfeld*, 21 Colo. 16, 40 Pac. 49, the court said: "The law does not require that acts of cruelty authorizing a divorce should show that it was absolutely impossible for the parties to live together as husband and wife. Extreme cruelty, under our statute, may consist of words and of personal treatment and conduct short of acts of personal or physical violence." And in *Marks v. Marks*, 62 Minn. 212, 64 N. W. 561, it is held that "a systematic course of ill-treatment, consisting of continual scolding and fault-finding, using unkind language, studied contempt, and many other petty acts of a malicious nature, may, when sufficiently long continued, and when producing sufficiently serious results, constitute cruel and inhuman treatment."

Upon the current weight of authority, it may be said that any conduct on the part of the husband or wife which is calculated to seriously impair the health or permanently destroy the happiness of the other is sufficient ground to justify an absolute divorce; and that a divorce from bed and board will be granted upon grounds insufficient to support a decree of absolute divorce. In either case the object of the court is not to punish the offender, but to protect the unfortunate; and while a decree should never be granted upon slight differences, which are likely to arise from time to time in the best of well-regulated families, it should not be denied when it is made clearly to appear that the conduct of the offending party is such that to continue the marital relation would either permanently destroy the happiness or ruin the health of the other.

In the case at bar it cannot be doubted that the declaration on the part of the husband in the early spring that there would have to be a separation had a very serious and injurious effect upon the life and health of his wife, for, according to the testimony of his servant, who was a most unwilling witness upon this point, appellant spent

much of her time in tears thereafter. And while she bore her sorrow in silence and with becoming fortitude, this cruel, inexcusable, and uncalled-for declaration on the part of her husband undoubtedly caused her great mental distress and suffering, and, when it was repeated in August, it so unnerved, unstrung, and affected her that she become very sick, and was for some time under the care of a physician.

If appellant had done anything in any way to justify this treatment on the part of her husband, the record fails to disclose it. In all of the testimony that he has produced there is not even an intimation that she was not at all times a kind, affectionate, loving, and dutiful wife. Physically weak and nervous, this conduct on his part had a very injurious effect upon her health. She did not want a separation. She did everything that a woman could reasonably be expected to do to avoid it, and only finally yielded to this expressed desire of her husband when she was satisfied that it could not be avoided. To deny her any relief under such circumstances would be both inequitable and unjust. If the conduct of her husband has made life so intolerable in his home that she can no longer remain there without endangering her health and destroying permanently her peace and happiness, he should be required to support her elsewhere; and the chancellor, in the exercise of his discretion, should have so directed.

The evidence shows that appellee is worth from \$20,000 to \$40,000, and has an income of from \$2,000 to \$3,000. His wife has nothing. The court properly awarded her the custody of her child. It must be supported. The provision which the chancellor made is not sufficient, taking into consideration his financial condition and standing in life. He should have allowed her at least \$100 a month for the support of herself and child; and this sum may be increased as the child grows older and its wants and necessities for clothing, schooling, etc., require the expenditure of additional sums, or it may be reduced if the circumstances of the parties require it. The judgment is reversed and cause remanded, with instructions to the chancellor to enter a judgment granting to appellant the relief sought; to wit, a divorce from bed and board and a separate maintenance, which he will fix in his order for the present at \$100 per month, to be paid upon the first of each and every month.

Petition for rehearing denied.
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MASSACHUSETTS SUPREME JUDICIAL COURT.

FRANCIS X. LAFLAMME

v.

MARY H. LAFLAMME.

(210 Mass. 156, 96 N. E. 62.)

Divorce — desertion — renewal of cohabitation — effect.

Under a statute permitting divorce for desertion for three years next preceding the filing of the libel, renewal of cohabitation as man and wife, even for four days after the three years have expired, removes the cause of divorce, which is not revived by renewed desertion at the expiration of the four days.

(October 17, 1911.)

REPORT by the Superior Court for Worcester County for the opinion of the Supreme Judicial Court, after a ruling against libellant, of a proceeding to secure a divorce on the ground of desertion. Libel dismissed.

The facts are stated in the opinion.

Messrs. W. Williams and S. D. Vincent for libellant.

No appearance for libellee.

Sheldon, J., delivered the opinion of the court:

We must take it that no difficulty arose in this case under the provisions of Rev. Laws, chap. 152, §§ 4, 6. The only question is whether, upon the findings of the judge, it ought to be ruled as matter of law that the libel cannot be maintained. We are of opinion that this ruling properly was made.

It is true, as was argued in behalf of the appellant, that in December, 1909, he had become entitled to a divorce from his wife on the ground of her desertion. *Cargill v. Cargill*, 1 Swabey & T. 235. He did not, however, attempt to avail himself of this right, but visited her at the house in which she was living, at Milford, in this common-

Note. — Divorce: condonation of desertion.

The Oregon court takes the position that a case of desertion is not a proper one for the application of the rule that the subsequent cohabitation is upon an implied or express understanding that the offender, in seeking a renewal of the marriage relation, is acting in good faith, and is promising not to repeat the offense, so that when a breach of this condition occurs, the former offense is revived. "This," says the court, "in general terms, is the law of condonation, applicable to a cause of action for divorce arising out of a specific or single act, such as cruelty or adultery. But desertion, for which a divorce will be granted, is a breach

wealth, and remained there with her for about four days. During this period, it is found that "they cohabited together as man and wife." This was a complete renewal in all respects of the marriage relation between them. It was not simply that they occupied the same room and bed, although this also was found. Accordingly we need not consider whether the latter fact alone, unexplained, would not import as a necessary inference the complete cohabitation as man and wife which has been found. The wife's desertion ceased and he again received her as his wife when they thus resumed the matrimonial relations that had been interrupted in 1906 by her desertion. If afterwards, no matter how soon, she deserted him anew, this was merely a new act

of matrimonial duty, accompanied by an intent to desert in the mind of the offender, concurrently existing in uninterrupted combination during at least the entire statutory period of one year, and until the entry of a decree. . . . It must be a continuous, unbroken desertion. Two periods of desertion cannot be added together for the purpose of making up the time required by the statute." *Luper v. Luper*, — Or. —, 96 Pac. 1099. A like result is reached in *Burk v. Burk*, 21 W. Va. 445 (in which it appeared that the husband cohabited with his wife for the greater part of the statutory period before instituting the suit); and *Tracey v. Tracey*, — N. J. Eq. —, 43 Atl. 713.

And it has been declared by the English courts that as soon as there is a resumption of cohabitation, the previous desertion is blotted out. *Williams v. Williams* [1904] P. 145, 73 L. J. Prob. N. S. 31, 68 J. P. 188, 90 L. T. N. S. 174, 23 Times L. R. 213; *Ex parte Aldridge*, 1 Swabey & T. 88.

So, it is held that where the husband makes the absent wife occasional visits, and at times remains overnight, and occupies the same bed with her, the continuity of her desertion will be broken, even though it be conceded that she was guilty of wilful desertion in the first instance. *Reed v. Reed*, 62 Ark. 611, 37 S. W. 230. In this case the court said: "We do not hold that a husband whose wife had wilfully deserted him would, if he afterwards visited her and assisted in supporting her, necessarily lose his right to divorce, or condone such desertion. Such acts might, under some circumstances, evince regret for her absence and a desire for her return, and serve to make more clear the fault of the wife in remaining away from his home. But, if he goes further, and continues to exercise the right of matrimonial intercourse upon such visits, he will be treated as having condoned the conduct of the wife, and the continuity of her desertion will be broken."

This being true, there is no abandonment for a year within the meaning of the statute, where, within one year before the institution of the suit, the parties met and

of misconduct on her part. But it is not barely "utter desertion continued for three consecutive years" that is a ground for divorce under our statute; the three consecutive years must have been "next prior to the filing of the libel." Rev. Laws, chap. 152, § 1. Here, the parties lived together as husband and wife in December of 1909, though only for four days; and so there was no desertion for the "three consecutive years next prior to the filing of the libel." For this reason, no cause of divorce was shown at the hearing, and the ruling made was correct. *Gaillard v. Gaillard*, 23 Miss. 152.

It cannot be said that the husband's conduct in resuming matrimonial relations with his wife was merely a condonation or

cohabited on different occasions. *Woolfolk v. Woolfolk*, 96 Ky. 657, 29 S. W. 742.

So, where a husband deserts his wife and again leaves her after a reconciliation of but ten days, during which the parties lived together as man and wife, the continuity of the separation is broken, and the two periods of desertion cannot be tacked so as to entitle the wife to a divorce upon the statutory ground of "wilful, continued, and obstinate desertion for the term of three years." *Gaillard v. Gaillard*, 23 Miss. 152.

And where the husband visits the wife and cohabits with her on several occasions, remaining at least on one occasion a week or more, he will be deemed to have condoned her desertion. *Phelan v. Phelan*, 135 Ill. 445, 25 N. E. 751.

But making a single visit to the absent wife within the space of two years, and remaining on that occasion with her during one night and a portion of two days, does not constitute a condonation of her wilful desertion, where it was not then or at any other time agreed that she would return and perform her marital duties, and she at no time evinced an inclination to do so. *Kennedy v. Kennedy*, 87 Ill. 250.

And a divorce from a wife for "utter desertion continued for three consecutive years," within the meaning of the statute, may be granted where she deserts her husband and remains away from him for the full period continuously, and unreasonably refuses to return, although once during that time he visited her, and for two or three nights occupied the same bed with her. *Danforth v. Danforth*, 88 Me. 120, 31 L.R.A. 608, 51 Am. St. Rep. 380, 33 Atl. 781.

As to whether the plaintiff's desertion or cruelty or nonsupport, etc., constitutes a defense to an action for divorce for subsequent adultery, see the note to *Ellett v. Ellett*, post, 1135.

See also the note to *Hill v. Hill*, ante, 1118, dealing with the question whether an effort by one spouse to induce the other to return home is a condition of desertion by the latter, and also containing references to other L.R.A. notes on analogous questions.

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conditional forgiveness of her previous misconduct; and that her subsequent refusal to accompany or follow him to his home in Canada was the beginning of a new desertion by her (*Franklin v. Franklin*, 190 Mass. 349, 4 L.R.A.(N.S.) 145, 77 N. E. 48, 5 Ann. Cas. 851), which avoided the effect of his condonation, and so entitled him to rest his libel upon her first desertion. If we assume that this reasoning otherwise would be correct, yet we have not here a case of mere condonation, although it doubtless included that element. It was voluntary action on the part of the libellant, which, by putting an end to the earlier desertion, made it impossible to say that any desertion had continued for the statutory period up to the filing of this libel. It was an absolute removal of the existing clause of divorce, and the fact that it involved also a forgiveness of the past wrong that had been done, cannot diminish its full effect.

The cases of *Danforth v. Danforth*, 88 Me. 120, 31 L.R.A. 608, 51 Am. St. Rep. 380, 33 Atl. 781, and *Kennedy v. Kennedy*, 87 Ill. 250, turned on the fact that in them no complete renewal of matrimonial cohabitation was found. It is not necessary to consider whether, under the same facts, we should be inclined to follow those decisions. See *Woolfolk v. Woolfolk*, 96 Ky. 657, 29 S. W. 742; *Burk v. Burk*, 21 W. Va. 445; *Reed v. Reed*, 62 Ark. 611, 37 S. W. 230; *Holmes v. Holmes*, 44 Mich. 555, 7 N. W. 228.

Under the terms of the report, the libel must be dismissed.

So ordered.

NORTH CAROLINA SUPREME COURT.

F. M. ELLETT, Appt.,

v.

ELIZABETH B. ELLETT.

(157 N. C. 161, 72 S. E. 861.)

Evidence — adultery — character.

1. To justify a divorce for adultery, a preponderance of evidence of the fact is suf-

Note. — Divorce: desertion or cruelty as a recriminatory defense to subsequent adultery.

See the note to *Hill v. Hill*, ante, 1118, for reference to other notes on analogous questions.

Upon the principle that the province of the courts in divorce proceedings is to grant relief to those who have been wronged, it is settled in this country, except under statutory provisions hereinafter shown, that one who has been guilty of misconduct which is in itself a ground for absolute divorce

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efficient; it need not be clear, cogent, and convincing.

Divorce — abandonment — adultery — effect.

2. That a man maliciously turned his wife out of doors is no defense to a suit by him for divorce on the ground of her subsequent adultery, where she could have maintained an action for separate maintenance.

(Hoke, J., dissents in part.)

(November 22, 1911.)

APPEAL by plaintiff from a judgment of the Superior Court for Rockingham County in defendant's favor in a suit for a divorce. Reversed.

The facts are stated in the opinion.

Messrs. F. L. Fuller, C. O. McMichael, A. D. Ivie, and W. P. Bynum for appellant.

Mr. A. L. Brooks for appellee.

Clark, Ch. J., delivered the opinion of the court:

This is an action for an absolute divorce, brought by the husband against the wife.

The seventh issue was as follows: "(7) Did the defendant commit adultery with one George B. Gatling, as alleged in the complaint?" On this issue, the judge charged: "The plaintiff must show such adulterous intercourse by evidence which is clear, cogent, and convincing. If you find from the evidence, which is clear, cogent, and convincing, that the defendant committed adultery with George B. Gatling, your answer to the seventh issue will be, 'Yes.' If not, your answer to the seventh issue will be, 'No.'" The exception of the plaintiff to this charge must be sustained. In criminal cases the burden is upon the plaintiff to prove the charge "beyond a reasonable doubt," or "to the satisfaction of the jury." But in civil cases the rule is that the party upon whom lies the burden of proof is called upon to establish his allegation merely "by the preponderance of the evidence." There are some exceptions to this in matters of an equitable nature, as to which the evidence must be "clear, strong, and convincing."

has no standing to demand a divorce upon the ground of the other party's subsequent adultery. This is upon the ground that, since the legislature has seen fit to put other marital misconduct upon the same basis as adultery as a ground for absolute divorce, the parties will be denied relief because they are deemed in equal fault, although the misconduct of one may involve more of moral turpitude than the other. This principle, however, does not apply where the plaintiff's misconduct falls short of that which constitutes a ground for absolute divorce. *A fortiori*, a wife cannot de-

For instance, when a party asserts, and endeavors to prove by parol, that a deed which is absolute on its face was in fact a mortgage. 8 Enc. Ev. 714; *Watkins v. Williams*, 123 N. C. 174, 31 S. E. 388; *Porter v. White*, 128 N. C. 45, 38 S. E. 24, and cases cited therein. The same rule as to intensity of proof applies, also, where a party seeks the reformation of a written instrument. *Ely v. Early*, 94 N. C. 1; *Kornegay v. Everett*, 99 N. C. 30, 5 S. E. 418; *Hemphill v. Hemphill*, 99 N. C. 436, 6 S. E. 201; *Southern Finishing & Warehouse Co. v. Ozment*, 132 N. C. 846, 44 S. E. 681. Also the same intensity of proof is required to prove the terms of a lost will, and there are a few other instances. But they are all cases in which formerly the

facts would have been found by the chancellor. *Ferrell v. Broadway*, 95 N. C. 551. Such intensity of proof is not required as to the issues in divorce, which is an action at law. Certainly it has never been required in this state.

It is true that in *Kinney v. Kinney*, 140 N. C. 321, 63 S. E. 97, the judge charged the jury that the evidence of adultery must be "strong, convincing, and conclusive," but, notwithstanding this erroneous charge, the jury found the issue "Yes," and therefore there was no appeal by the plaintiff which would have presented the question as to the correctness of that part of the charge.

The plaintiff contends, however, that, inasmuch as the jury found "Yes," in response to the eighth issue, "Did the plaintiff, be-

fore an action for divorce upon the ground of adultery by setting up misconduct on the part of the husband, which, although not a ground for absolute divorce, would have entitled her to immediate relief such as, for instance, a decree of separate maintenance, since in such circumstances she cannot be heard to contend that when she was left without the necessities of life, she was justified in forming a new alliance. This last is substantially the position of *ELLETT v. ELLETT*, which also intimates that, if left without means or provisions, in circumstances which did not afford any immediate relief, she might perhaps excuse the formation of a new alliance so as to disentitle the husband to a divorce for adultery.

It has been said in cases holding desertion or cruelty, when itself a ground for absolute divorce, a good defense to adultery, that the English ecclesiastical courts took the contrary view, but such is not the case, for at the time those courts considered the question, desertion or cruelty was not a ground for absolute divorce, and therefore one guilty of cruelty or desertion was not *in eodem delicto* with one who was guilty of adultery. For this reason it was held that a wife could not plead cruelty as a bar to divorce for her violation of the marriage bed. *Harris v. Harris*, 2 Hagg. Eccl. Rep. 376; *Chambers v. Chambers*, 1 Hagg. Consist. Rep. 439. In other cases, the ecclesiastical courts assumed or recognized that cruelty was not a bar: *Dillon v. Dillon*, 3 Curt. Eccl. Rep. 86, holding that the allegation of cruelty in bar is not rendered permissible by the fact that the cruelty may have been committed with the ulterior design of getting rid of the wife by driving her into adultery; *Cocksedge v. Cocksedge*, 1 Rob. Eccl. Rep. 90, holding that while cruelty cannot be pleaded alone in bar, it may be set up in connection with a recrimination of adultery, upon the theory that it lays a good ground for the probability of the truth of the charge of adultery; and *Arkley v. Arkley*, 3 Phillim. Eccl. Rep. 500, holding that the husband's cruelty, though not a bar to a charge of adultery, might be

pleaded as introductory to the history of an adulterous intercourse.

That desertion was likewise not a bar to an action for divorce for adultery seems to have been the position taken by the ecclesiastical courts. This rule was recognized in *Forster v. Forster*, 1 Hagg. Consist. Rep. 144; and it was declared *obiter* in *Sullivan v. Sullivan*, 2 Addams, Eccl. Rep. 299, that the husband's desertion, though malicious, was not a bar to a divorce for the wife's adultery, since desertion was not a substantive ground of divorce.

Later in England this matter was expressly adjusted by statute which gave the courts jurisdiction to deny a divorce where the plaintiff had been guilty of certain specified acts or misconduct "conducting to the" defendant's adultery. While it will be of no avail in this connection to discuss the cases which involve merely the application of that statute, a further point made in two of such cases throws considerable light upon the position of the English courts. Thus, after denying a divorce in obedience to the statute referred to, the court in *Lempriere v. Lempriere*, L. R. 1 Prob. & Div. 569, 37 L. J. Prob. N. S. 78, 19 L. T. N. S. 50, 16 Week. Rep. 1192, intimated that possibly if the husband were to seek merely a judicial separation on the ground of adultery, the fact that he had been guilty of cruelty and desertion would disentitle him to the relief sought, since so far as a judicial separation was concerned, adultery and cruelty stood upon the same basis. This point was passed upon in *Hodgson v. Hodgson*, 74 L. J. Prob. N. S. 140 [1905] P. 233, 93 L. T. N. S. 446, 53 Week. Rep. 623, 21 Times L. R. 601, where, after a dissolution of the marriage upon the petition of the husband was denied, apparently by virtue of the same statute, the petitioner filed an amended bill for a judicial separation, upon the ground of adultery, and the question arose as to whether the desertion would constitute a defense to such petition. The court said that it felt bound to do what in its opinion the ecclesiastical courts would have done in similar circumstances, if a divorce *a mensa et thoro* had been

fore the time of the alleged adultery, maliciously turn the defendant out of doors?" that the error in the instruction as to the intensity of the proof on the seventh issue was harmless error. But this proposition is neither good law nor good morals. There is no legal or moral reason why a woman who has been abandoned by her husband shall be privileged to commit adultery any more than if she were a widow or a single woman. It is true that, prior to the act of 1872 (now Revisal 1908, § 1561 [2]), such was deemed the law in this state (*Moss v. Moss*, 24 N. C. [2 Ired. L.] 55), and that the same was practically reiterated after that act in *Tew v. Tew*, 80 N. C. 316, 30 Am. Rep. 84, but, as was strongly intimated in *Steel v. Steel*, 104 N. C. 636, 10 S. E.

707, the latter decision cannot be sustained, "and was evidently tinged by the restrictive ideas of the older law." The court further says in the latter case that the reason of the former law was that the wife, having no property (which at that time all belonged to the husband, as the law was formerly), might be forced, and probably would be, to form a new connection, in order to obtain a support, "but now, under our statutes of 1869, 1874, and 1879, she can compel her husband to provide her adequate support, both for herself and her children." *Steel v. Steel* in effect overruled *Tew v. Tew* on that point.

Nor is an agreement for separation, as formerly, *ipso facto* void, because "against law and public policy." As Smith, Ch. J.,

sought upon the ground of adultery, and thereupon proceeded to hold that since desertion for a certain period had, by statute, been made a ground of relief, and that since the desertion in this case had brought about the wife's adultery, a decree of judicial separation should have been denied the husband. So, it seems that even in the English courts the test for determining whether the parties were in the same fault so as to warrant the application of the doctrine of recrimination was not whether the respective acts of misconduct were of the same moral turpitude, but was essentially whether the law attached to them the same legal consequences. In short, any misconduct which stood legally on a level with adultery was, in England, a good recriminatory defense thereto, and therefore conduct which was a ground for a judicial separation only was not a bar to an absolute divorce for adultery, although it was a bar to a judicial separation, even though the latter was sought upon the ground of adultery.

This is quite in harmony with the American cases which hold that where the legislature has put desertion, cruelty, and adultery on the same level by making them all a ground for absolute divorce, each is a good recriminatory defense to the other. The only American cases found to dissent from this proposition are decisions of the courts of Illinois, where it seems that desertion and cruelty are grounds for divorce *a vinculo matrimonii* only. But it is to be observed that the cases do not discuss the matter, but simply declare summarily that a right of action upon the ground of adultery is not affected by the fact of the plaintiff's previous desertion (*Bast v. Bast*, 82 Ill. 584; *Huling v. Huling*, 38 Ill. App. 144), or "extreme and repeated cruelty" (*Stiles v. Stiles*, 167 Ill. 576, 47 N. E. 867, *obiter*; *Zimmerman v. Zimmerman*, 242 Ill. 562, 90 N. E. 192; *Hughes v. Hughes*, 133 Ill. App. 654).

But as said before, it is settled by the great weight of authority that where certain marital misconduct is a ground for divorce *a vinculo matrimonii*, it is a good

recriminatory defense to an action for divorce upon the ground of adultery. Where each of the married parties has committed a matrimonial offense which the law has made a ground for divorce in favor of the other, so that the conduct of each, disassociated from that of the other, warrants a divorce in favor of the latter, the court will grant the prayer of neither. This prevents a divorce for adultery in favor of one guilty of legal cruelty (*Wilson v. Wilson*, 89 Neb. 749, 132 N. W. 401; *Church v. Church*, 16 R. I. 667, 7 L.R.A. 385, 19 Atl. 244; *Pease v. Pease*, 72 Wis. 136, 39 N. W. 133; *Bordeaux v. Bordeaux*, 30 Mont. 36, 75 Pac. 524, assuming, incidentally to the discussion of other matters, that the husband's cruelty was a good defense to a divorce upon the ground of adultery, where the statute defined recrimination as "a showing by defendant of any cause of divorce against the plaintiff," and another provision made cruelty a ground for divorce); and likewise makes desertion, when continued for the statutory period, a good defense to an action for divorce upon the ground of adultery (*Pierce v. Pierce*, 70 Vt. 270, 40 Atl. 728).

The argument is that the rule of recrimination applies to all the causes for divorce, and that an action for divorce on any one of the statutory grounds may be defeated by proof of the existence of another statutory ground, without regard to the nature or gravity of the several causes; and that therefore an appellate court will not set aside a decree denying to the husband a divorce for adultery where he had been guilty of extreme cruelty and gross neglect of duty, and the decree was rendered in the exercise of the discretion granted in a statute providing that, when the parties appear to be in equal wrong, the court may in its discretion refuse to grant a divorce. *Day v. Day*, 71 Kan. 385, 80 Pac. 974, 6 Ann. Cas. 169. Here the court referred to the rule of the ecclesiastical courts that there could be no recrimination unless the offenses were of the same character, and also the rule of some American cases that have refused to allow a cause to be barred by any

pointed out in *Sparks v. Sparks*, 94 N. C. 532, the law now recognizes the validity, under certain conditions, of such a deed, by providing in Code, § 1831 (now Revisal, § 2116), that "every woman who shall be living separate from her husband . . . under a deed of separation executed by said husband and wife, and registered, . . . shall be deemed and held . . . a free trader," etc. *Sparks v. Sparks*, supra, has been cited as authority in *Smith v. King*, 107 N. C. 273, 12 S. E. 57; *Cram v. Cram*, 116 N. C. 294, 21 S. E. 197. Besides, under Code, § 1292 (now Revisal, § 1567), the wife who has been abandoned or deserted by her husband can sue for a support for herself and children, without asking for a divorce. *Cram v. Cram*, 116 N. C. 288, 21 S. E. 197; *Skittletharpe v. Skittletharpe*, 130 N. C. 72, 40 S. E. 851; *Bidwell v. Bidwell*, 139 N. C. 409, 2 L.R.A.(N.S.) 324, 111 Am. St. Rep. 797, 52 S. E. 55. Our older authorities, therefore, which made the adultery of the wife committed after

desertion or abandonment by her husband, no ground for divorce, are without the reason which gave support to such rulings. They have now as little support in law as they ever had in morals.

The remedy which the statute gives to a wife abandoned or deserted by her husband is alimony and divorce *a mensa et thoro*. It does not privilege either one to commit adultery. If she does, the husband is entitled to a divorce. This was the ecclesiastical law. *Nelson, Divorce*, § 430. His wrong does not authorize her to commit a greater one. She can go back to live with him after his desertion; but he cannot be required to live with her after her adultery. The American decisions are conflicting, being based upon statutes of varying tenor.

Besides, in this case, the husband placed the wife in a sanatorium for the cure of her habit of drunkenness, and paid her, or for her benefit, regularly \$50 per month for her support under the agreement of separation. He also paid her \$400 per year rent for a

matrimonial offense other than adultery, but held that since the legislature, in prescribing ten grounds for divorce, had treated each ground as the equal of any other, and had visited upon each offense the same legal consequences, the court could not well distinguish between them because one offense might appear to involve more of turpitude or disgrace than the other.

Likewise it was declared in *Hall v. Hall*, 4 Allen, 39, that whatever may be the doctrine in jurisdictions in which desertion was not a legal ground for divorce from the bonds of matrimony, there was no sufficient reason why desertion continued for the statutory period might not be set up in defense of the wife's libel against the husband charging him with adultery, where, as in Massachusetts, a continued wilful desertion by the wife for the period of five years would, as respects her husband, who had fully observed his conjugal duties, be as good a cause for divorce as adultery. To a like declaration, the New Jersey court added that it would be inconsistent to grant a divorce to one who is himself liable to a charge which, if true, is a foundation for a divorce. *Reading v. Reading*, — N. J. Eq., 5 Atl. 721 (denying husband who was guilty of cruelty a divorce for the wife's subsequent adultery). In *Rapp v. Rapp*, infra, it was pointed out that cruelty was a ground of divorce *a mensa et thoro* only.

Indeed, it is held that where desertion is a ground for absolute divorce, the court will seize upon the husband's desertion for the statutory period as a recriminatory defense, though it is not pleaded by the wife, where in his suit upon the ground of adultery he has shown his own guilt. *Rapp v. Rapp*, 67 N. J. Eq. 236, 58 Atl. 167.

It has been further held that a statute providing that the court may deny a divorce though the adultery be established, in case

of connivance, condonation, or laches, does not impliedly abrogate the principle that one cannot have redress for breach of the marriage contract which he has violated by committing an offense of the legal status, so as to disentitle a wife who is sued for a divorce upon the ground of adultery, to set up the recriminatory defense of cruelty and inhuman treatment. *Pease v. Pease*, 72 Wis. 136, 39 N. W. 133. So, in *Nagel v. Nagel*, 12 Mo. 53, in which a husband was denied a divorce for the wife's adultery, where, in confirmation of the wife's recriminatory plea, the husband was found guilty of cruelty and inhuman conduct, the court pointed out that, although it was possibly true that by enacting a statute providing that in case of collusion, or where "both parties have been guilty of adultery," no divorce shall be decreed, the legislature intended at the time to limit recrimination to cases of adultery, it was but just to allow recrimination for all enumerated offenses, where, since the passage of the act referred to, the grounds of divorce had been extended from adultery and desertion merely, so that there were nine separate causes for divorce, and the principle pervading the whole act seemed to be that a divorce should be decreed only to an innocent party.

Recognizing that intolerable severity and refusal to support, which is a ground for absolute divorce, is a defense to an action for an absolute divorce upon the ground of the wife's adultery, the court in *Tillison v. Tillison*, 63 Vt. 411, 22 Atl. 531, holds that the rule is not applicable, and the defendant will not be permitted to set up such conduct in defense, where a previous bill for divorce based upon those grounds was dismissed on its merits.

So, the rule does not apply where the plaintiff's conduct, although partaking of the nature of the acts prescribed in the

home worth \$5,000, which he had given her, and supported the children himself. She was not therefore subjected to temptation by the necessity of procuring a support, which was the reason for the rulings of the court in *Tew v. Tew*, 80 N. C. 316, 30 Am. Rep. 84, and cases prior thereto.

It may be that on another trial the jury will again find the wife was not guilty, but the plaintiff is entitled to a new trial, to the end that the issue may be submitted under proper instructions as to the intensity of proof required to establish the charge. Error.

Allen, J., concurs in result.

Hoke, J., concurring in the result:

I concur in the decision awarding a new trial in this case for the error in the charge of the court on the degree of proof required to establish the seventh issue, and it may

statute in relation to absolute divorce, does not, because not sufficiently serious or for other reasons, amount to the marital offenses specified. Thus, a divorce will not be denied upon the finding that, although the wife's conduct did not amount to desertion, there was on her part an unmindfulness of the marital obligations (*Cushman v. Cushman*, 194 Mass. 38, 79 N. E. 809); nor will it be denied where the plaintiff's conduct, though justifying the defendant's separation, did not constitute statutory cruelty (*Bailey v. Bailey*, 67 N. H. 402, 29 Atl. 847). So, a divorce will be granted notwithstanding a recriminatory defense of desertion, where the conduct alleged did not in fact constitute desertion, either because the separation occurred by the defendant's consent (*Stokes v. Stokes*, 1 Mo. 320), or had not continued for the statutory period (*Adams v. Adams*, 17 N. J. Eq. 324; *McCannon v. McCannon*, 73 Vt. 147, 50 Atl. 799), at the time of the defendant's adultery (*Wilson v. Wilson*, 40 Iowa, 230; *Dupont v. Dupont*, 10 Iowa, 112, 74 Am. Dec. 378; *Hall v. Hall*, 4 Allen, 39; *Clapp v. Clapp*, 97 Mass. 531; *Walker v. Walker*, 172 Mass. 82, 51 N. E. 455).

And the rule of recrimination does not apply where the statute vests a discretion in the court to grant either absolute or limited divorces, it being held in such circumstances that the applicant must, in order to obtain relief *a vinculo matrimonii*, be without reproach, and however guilty the defendant, if the applicant is chargeable either with similar guilt or with an offense to which the law attaches similar consequences, the relief must be denied; but that if the applicant, though not thus guilty, is still not blameless, the relief must be limited to a divorce *a mensa et thoro*. Through the application of this doctrine, it was held that, to be an absolute bar, desertion must

be that there are no facts amounting to legal evidence tending to show that plaintiff maliciously turned defendant out of doors. I do not agree to the position, however, nor do I think that it has the support of any authoritative decision, that a husband who has wrongfully abandoned his wife may successfully maintain an action for divorce *a vinculo* on account of her adultery. Under a long line of well-considered precedents, relief in such case was denied, not because the act of the wife was justifiable,—it was never so regarded,—but because the husband, on account of his own conduct in wrongfully withdrawing his association and protection from the wife, was not in a position to ask relief from the court. Neither the moral nor the legal aspect of this position is changed, because the wife may, under certain conditions, now obtain alimony. The doctrine and the principle upon which it rests lie deeper, and, in my opinion, should now and always prevail.

have continued long enough to constitute a statutory ground of divorce, and that where a wife's desertion had not continued for the statutory period, though she was entitled to equitable relief upon the ground of the husband's subsequent adultery, that relief must be limited to a divorce *a mensa et thoro*, where her departure was without excuse or justification. *Conant v. Conant*, 10 Cal. 249, 70 Am. Dec. 717.

And, of course, a wife who is guilty of abandonment cannot claim a divorce for the husband's subsequent adultery, under a statute authorizing a divorce "in favor of the wife, where the husband shall have left her for three years with intention of abandonment, or where he shall have abandoned her and lived in adultery with another woman." *Johnson v. Johnson*, — Tex. Civ. App. —, 23 S. W. 1022.

Then again, where the conduct alleged in defense is such as is made a ground for divorce only from bed and board, although it is such as is made in other jurisdictions a ground for absolute divorce, it is held to constitute no defense to subsequent adultery. Thus, it is held in New York that cruel and inhuman treatment entitling the party to a limited divorce is not a good defense against a complaint showing a right to an absolute divorce on the ground of adultery. *Griffin v. Griffin*, 23 How. Pr. 183. So it was held in a later case that the husband's abandonment, though of sufficient duration to entitle the wife to a limited divorce, cannot be regarded as disentitling him to a divorce upon the ground of her subsequent adultery, upon the theory that because he deserted the defendant he thereby consented to the adultery charged against her, or that there was in any sense either connivance, privity, or procurement of the act. *Mattison v. Mattison*, 60 Misc. 573, 113 N. Y. Supp. 1024, expressly dis-

approving a holding to the contrary in a referee's report which was affirmed *per curiam* in *Richardson v. Richardson*, 114 N. Y. Supp. 912. In the *Mattison Case* the court said: "Abandonment confers no license on the deserted party to offend against the marital vows. If deserted, she has her remedy under the law; but she may not violate its enactments without incurring its penalties. I am not unmindful of the duties imposed upon the husband, nor of the consequences which may result when an abandoned wife, a stranger in a great city, is forced to battle against adverse circumstances. However, if spouses live apart, whether by consent or by decree, each is liable for any transgression of the conjugal relationship; and, should either disobey the statute, an action for divorce would lie, and it seems to me that the same rule applies to the case of desertion. In the cause before me, the abandonment was conceded, and, whether justified or not, need not, in the view I take of it, be considered." But see *Reading v. Reading*, — N. J. Eq. —, 5 Atl. 721, *supra*. The *Richardson Case*, in which it appeared that the wife left the husband wilfully and unjustifiably and without other reason than that she had ceased to love him, placed its decision not only upon the broad ground that one who breaks the marriage contract should not be permitted to take advantage of the other's subsequent breach of it, or claim absolution for herself and punishment for him; but also upon the ground that she must be deemed to have consented and connived at his offense. In discussing the latter ground, the referee said that since the wife testified that she naturally supposed that when she left him he would seek the embraces of other women, she must be deemed to have consented to such action on his part, and also to have connived in the sense of "winking at" or helping by not hindering.

It will be observed that in the *Mattison Case*, *supra*, the court called attention to the fact that the wife had a remedy which she should have pursued instead of violating the marriage vows. This is not only in line with the position taken in *ELLETT v. ELLETT*, but also accords with a statement in an English case. Thus, in referring to the early English decisions, the court said in *Hodgson v. Hodgson*, 74 L. J. Prob. N. S. 140 [1905] P. 233, 93 L. T. N. S. 446, 63 Week. Rep. 623, 21 Times L. R. 601, that it was easy to understand why in some cases cruelty had been held not a bar, since cruelty was committed at some time when the parties were living together, and that the moment the wife chose to separate from the husband she could at once have taken proceedings in the ecclesiastical courts on the ground of cruelty, and that therefore it was of no use for her afterwards to say, when she was charged with subsequent adultery, that her misconduct occurred after the husband's cruelty,—that is, inasmuch as she had a remedy at the time, she had no reason herself to become guilty of matrimonial misconduct.

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Likewise, in *Van Horn v. Arantes*, 116 La. 130, 40 So. 592, the failure of the wife to pursue the statutory remedies was held fatal to her recriminatory defenses of abandonment and nonsupport. Here it was pointed out that, to be a ground for a separation from bed and board, abandonment must, under the statute, be established by three monthly reiterated summonses directing the absent spouse's return, followed by a judgment directing compliance and three monthly notices of such judgment. In addition to this, another statute made the husband's wilful desertion and failure to support a misdemeanor, and authorized the courts to suspend sentence and order the payment of a weekly sum to the wife. The court declared that since the wife had neither taken the statutory steps in relation to a separation from bed and board for abandonment, nor availed herself of the statute which indirectly afforded her a relief for nonsupport, there was no conduct on the part of the husband which constituted even a ground for a separation from bed and board. In a general way the court stated the true rule to be that, to admit of recrimination, the mutual fault of the parties must be such as to furnish grounds for a divorce or separation from bed and board, and must be of a similar nature or gravity.

In this connection, attention is also directed to *Mayer v. Mayer*, 5 Ohio Dec. Reprint, 444, which seemed to attach little or no importance to the fact that the wife had in fact obtained a decree for separate maintenance, where the husband had wilfully deserted her, whom he had married after seducing her while the wife of another,—holding that in such circumstances he must be deemed to have abandoned her knowing her weakness and liability to commit adultery, and that therefore his petition for a divorce against her on that ground should be dismissed. L. A. W.

WASHINGTON SUPREME COURT. (Department No. 2.)

AUGUST E. FISCHER, Resp't.,

v.

CLARENCE D. HILLMAN et al., Appts.

ALBERT E. STAATS, Resp't.,

v.

SAME, Appts.

(— Wash. —, 122 Pac. 1016.)

Vendor and purchaser — rescission —
fraud — negligence of purchaser.
That a purchaser might have ascertained

Note.—*Fraud: may fraud be predicated of misstatement as to title to real property.*

As to the right of a purchaser of land to rely upon representations of the seller as to

the untruthfulness of the representation does not prevent his rescinding a contract for purchase of real estate because the vendor falsely represented that he had a good title, that the land was in a recorded plat to which the deed referred, and that he would build an electric railway line and a highway to the property.

(April 10, 1912.)

APPEAL by defendants from judgments of the Superior Court for King County in plaintiffs' favor in actions brought to rescind a contract for the purchase of certain real estate. Affirmed.

The facts are stated in the opinion.

boundaries, see note in 14 L.R.A.(N.S.) 1210; whether fraudulent representations by the vendor as to area within boundaries correctly pointed out are actionable, see note in 23 L.R.A.(N.S.) 487; and whether fraudulent representations by the vendor of the extent or proportion of land of a particular kind included within the tract sold are actionable where the purchaser inspects the land, see note in 30 L.R.A.(N.S.) 55; as to misrepresentations as to the location of land, see note in 38 L.R.A.(N.S.) 301; whether or not false statements as to cost, selling or market price of property, or as to offers therefor, constitute fraud, see note in 35 L.R.A.(N.S.) 175; as to whether false statements as to the use to which property is to be put are ground for rescinding a deed thereof, see note in 32 L.R.A.(N.S.) 127; and as to the effect of the purchaser's concealment or misrepresentation of facts affecting the value of real estate, see note in 30 L.R.A.(N.S.) 748.

The present note is supplemental to a note on the same subject in 28 L.R.A.(N.S.) 202.

Executory contracts.

As to executory contracts to purchase real property, the rule very generally obtains that if the vendor's title to the property is defective, the purchaser may rescind the contract of purchase, and recover the amount paid thereon, without reference to whether or not the vendor made false or fraudulent statements as to the title. *Min-to v. Moore*, 1 Ala. App. 556, 55 So. 542; *Musselwhite v. Olson*, 60 Fla. 342, 53 So. 944; *Tague v. McCollm*, 145 Iowa, 179, 123 N. W. 960; *Parsons v. Kelso*, 141 Mo. App. 369, 125 S. W. 227; *Kling v. A. H. Greef Realty Co.* — Mo. App. —, 148 S. W. 203; *Justice v. Button*, 89 Neb. 367, 38 L.R.A.(N.S.) 1, 131 N. W. 736; *Reynolds v. White*, 143 App. Div. 595, 128 N. Y. Supp. 529; *Davis v. Lee*, 52 Wash. 330, 132 Am. St. Rep. 973, 100 Pac. 752; *Colpe v. Lindblom*, 57 Wash. 106, 106 Pac. 634; *McWhorter v. Fornay Bros.* — Wash. —, 125 Pac. 164.

And the rule applies although the contract of purchase merely calls for a quit-
39 L.R.A.(N.S.)

Messrs. Frederick R. Burch and Oliver Hulback, for appellants:

Failure of title will not, under any circumstances, support a decree of rescission and cancellation of the deeds.

Washington Cent. Improv. Co. v. Newlands, 11 Wash. 212, 39 Pac. 366; *Slaughter v. Gerson*, 13 Wall. 379, 20 L. ed. 627; *West Seattle Land & Improv. Co. v. Herren*, 16 Wash. 665, 48 Pac. 341; *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613; *Walsh v. Bushell*, 26 Wash. 576, 67 Pac. 216; *Samson v. Beale*, 27 Wash. 557, 68 Pac. 180; *Hulet v. Achey*, 39 Wash. 91, 80 Pac. 1105; *Irby v. Tilsley*, 41 Wash. 211, 83 Pac. 97; *Tacoma v. Tacoma Light & Water Co.* 16

claim deed. *Davis v. Lee*, 52 Wash. 330, 132 Am. St. Rep. 973, 100 Pac. 752.

And also where, because of the destruction of the records of title, the vendor is unable to produce evidence of a marketable title at the time agreed upon. *McDermott v. Chatfield*, — Cal. App. —, 123 Pac. 539; *Crim v. Umbsen*, 155 Cal. 697, 132 Am. St. Rep. 127, 103 Pac. 178.

Where the title is defective, a purchaser of real estate on executory contract may refuse to complete the contract, without reference to whether it is procured through the fraud of the vendor. *Wilson v. Bolen*, 152 Ill. App. 210; *Rochella v. Brockman*, 152 Ill. App. 253.

For a fraudulent representation by the vendor of real estate as to his title, the purchaser may either rescind the executory contract of purchase, or he may sue and recover damages resulting to him from such fraud. *Maxwell v. Sherman*, — Ala. —, 55 So. 520.

Where the vendor of land, by selling same by executory contract, receives from the purchaser money paid in reliance upon false representations by the former that he has a valid title to the land, the money so paid may be recovered by the purchaser in an action at law. *O'Neal v. Miller*, 9 Ga. App. 180, 70 S. E. 971.

In *Allen v. Talbot*, — Mich. —, 131 N. W. 97, without discussing the question as to the right to rely thereon, it is held that false statements by the vendor with reference to his title, if relied upon by the purchaser of real estate by executory contract, authorize a rescission of the contract.

And for false representations by the vendor that the land he is selling is entitled to certain water rights, the purchaser, if he relies thereon, may rescind the executory contract of purchase, and recover the amount paid on the purchase price. *Martinez v. Coggin*, — Tex. Civ. App. —, 135 S. W. 699.

On the theory that it constituted a constructive fraud for the vendor to undertake to sell land to which he does not have the title he purports to have, the right of a purchaser to rescind is sustained in *Jay v. Sweatt*, 8 Ga. App. 481, 70 S. E. 16.

It has been held that to obtain a rescis-

Wash. 288, 47 N. W. 738, 17 Wash. 458, 50 Pac. 55; *Simons v. Cissna*, 52 Wash. 115, 100 Pac. 200.

The promise to build an electric railroad to Everett, or to build a wagon road to English, or to furnish an abstract, is not an existing material fact.

13 Cyc. 583; 2 Pom. Eq. Jur. 385; 1 Beach, Contr. 978; *Dawe v. Morris*, 149 Mass. 188, 4 L.R.A. 158, 14 Am. St. Rep. 404, 21 N. E. 313; *Adams v. Schiffer*, 11 Colo. 15, 7 Am. St. Rep. 202, 17 Pac. 21; *Beard v. Bliley*, 3 Colo. App. 479, 34 Pac. 271; *Moore v. Cross*, 87 Tex. 557, 29 S. W. 1051; *Balue v. Taylor*, 136 Ind. 368, 36 N. E. 269; *Smith v. Parker*, 148 Ind. 127, 45 N. E. 770; *Chicago, T. & M. C. R. Co.*

v. Titterington, 84 Tex. 218, 31 Am. St. Rep. 39, 19 S. W. 472.

Whatever representations concerning title were made, they are merged in the warranties and covenants in the deed; and plaintiff's remedy for any failure of title or peaceable enjoyment is an action on the covenants and warranties contained in the deed.

West Coast Mfg. & Invest. Co. v. West Coast Improv. Co. 25 Wash. 627, 62 L.R.A. 763, 66 Pac. 97; *Jackson v. McAuley*, 13 Wash. 298, 43 Pac. 41; *Leddy v. Enos*, 6 Wash. 247, 33 Pac. 508, 34 Pac. 665; *Decker v. Schulze*, 11 Wash. 47, 27 L.R.A. 335, 48 Am. St. Rep. 858, 39 Pac. 261; 1 *Sugden, Vendors*, p. 383; *Rawlins v. Timberlake*, 6 T. B. Mon. 225; *James v. M'Kernon*, 6

sion of an executory contract for the purchase of real estate on the ground of fraudulent representations by the vendor as to encumbrances on the property, the burden is upon the purchaser to prove the fraud, and also to establish his right to rescind because thereof. *Adams v. Hill*, — Tex. Civ. App. —, 149 S. W. 349.

The right to rescind, either on the ground of defect or failure of title, or false representations as to title, is lost if not exercised before the defect complained of has been cured by the vendor. *Buckingham v. Thompson*, — Tex. Civ. App. —, 135 S. W. 652.

In an action to rescind an executory contract for the purchase of real estate on the ground of fraud, in that there was an encumbrance existing against the property, oral evidence to show that the purchaser knew of the encumbrance and assumed same is inadmissible where the written contract is not ambiguous, and contains no reference to an encumbrance, and provides how the purchase price shall be paid. *Parsons v. Kelso*, 141 Mo. App. 369, 125 S. W. 227. The foregoing case is not disposed of on the theory of fraud, but on the theory that a court of equity in a proper case will declare a rescission of an executory contract to purchase real estate for the violation of covenants in the same, since it would be against conscience to permit a person to violate such a contract and still hold the other party thereto to a compliance with it.

Executed contracts.

And even as to executed contracts of sale, the rule has been applied that the purchaser of real estate under such a contract may rescind for defective title, and recover the purchase price paid, and the doctrine is asserted that it is not necessary in such case to prove actual fraud or misrepresentation on the part of the vendors. "It is enough if both parties believed defendants possessed a good title which they were authorized to convey, and it was subsequently found that the title was in third parties, and the deed 39 L.R.A. (N.S.)

to plaintiff proved ineffective to vest in her the property she had purchased. Such mistake would involve no fraud in the moral sense of that word; but to permit the seller to insist upon an advantage so obtained, and refuse to place the purchaser *in statu quo*, so far as that is possible by a proper decree, would be to make the law an instrument of fraud." *Strothers v. Leigh*, 151 Iowa, 214, 130 N. W. 1019.

So, where a purchase of real estate is made under a mistake as to title, the purchaser, upon discovering the mistake, is entitled to rescind, although the contract has been executed. *Howard v. Sebastian*, 143 Ky. 237, 136 S. W. 226.

Although the contract for the sale of land is executed, the title having wholly failed, the purchaser is entitled to defend an action by the vendor on purchase money notes, by setting up such failure of consideration, and also entitled in the same action to recover the amount paid on the purchase price. *Joiner v. Ardmore Loan & T. Co.* — Okla. —, 124 Pac. 1073.

The purchaser of land subject to a mortgage the interest on which the vendor falsely represented he had paid is entitled to recover the amount of unpaid interest, where the purchaser relied upon the statements of the vendor in this regard. *Timmerman v. Whiting*, — Minn. —, 137 N. W. 9.

False and fraudulent representations as to the title to land, if relied upon, furnish ground for an action for deceit, although the land is conveyed by a quitclaim deed. *Carr v. Sanger*, 138 App. Div. 32, 122 N. Y. Supp. 593.

It has been held that when land is conveyed by quitclaim deed, although the grantor had no title thereto, there is not a failure of consideration, and the purchaser is not entitled to recover the purchase price paid, on the theory that to hold otherwise would be to give a quitclaim deed the same effect as a deed of warranty. A recovery, however, may be had if the vendor has been guilty of false representations as to title, and such representations induce the purchaser to contract for the land. *Goldman v. Hadley*, — Tex. Civ. App. —, 122 S. W. 282.

Johns. 543; *Bumpus v. Platner*, 1 Johns. Ch. 213; *Woodruff v. Bunce*, 9 Paige, 443, 38 Am. Dec. 559; *Denston v. Morris*, 2 Edw. Ch. 37; *Simpson v. Hawkins*, 1 Dana, 303; *Chase v. Weston*, 12 N. H. 413; *English v. Thomasson*, 82 Ky. 281; *Litchfield v. Cowley*, 34 Wash. 574, 76 Pac. 81; *Johansson v. Stephanson*, 154 U. S. 625, appx. and 23 L. ed. 1009, 14 Sup. Ct. Rep. 1180.

Mr. James A. Snoddy, for respondents: Knowledge by the vendor of the falsity of his representations is not necessary.

20 Cyc. 27; *Kirkpatrick v. Reeves*, 121 Ind. 280, 22 N. E. 139; *Hanson v. Tompkins*, 2 Wash. 511, 27 Pac. 73; *Sears v. Stinson*, 3 Wash. 618, 29 Pac. 205; *Lawson v. Vernon*, 38 Wash. 429, 107 Am. St. Rep. 880, 80 Pac. 559; 9 Cyc. 418.

The representation that the vendors intended, and their promise, to construct two means of access to this land, the land having no other, and the promise to furnish an abstract showing clear title, were made with an intention to induce a purchase, were material, and are proved to have been false. This justifies rescission.

Livermore v. Middlesborough Town Lands Co. 106 Ky. 140, 50 S. W. 6; *Edgington v. Fitzmaurice*, L. R. 29 Ch. Div. 459, 50 J. P. 52, 55 L. J. Ch. N. S. 650, 53 L. T. N. S. 369, 33 Week. Rep. 911; *Old Colony Trust Co. v. Dubuque Light & Traction Co.* 89 Fed. 794; 20 Cyc. 63b.

As to the covenant of seisin, it was broken as soon as it was made.

Wick v. Rea, 54 Wash. 424, 103 Pac.

Right to rely on representations.

In general.

Where the land is in another state, a person taking an encumbrance thereon has the right to rely upon positive statements of fact as to the title to the land and the priority of the security. *Hall v. Bank of Baldwin*, 143 Wis. 303, 127 N. W. 969.

If the purchaser of land has actual knowledge that the title is not as represented, and, notwithstanding, carries out the contract on his part, it cannot be said that he relied on the false representations in such a sense as to entitle him to damages. *Howerton v. Augustine*, 145 Iowa, 246, 121 N. W. 373.

Whether matter of opinion.

Whether a representation as to title to real property is but a matter of opinion, upon which a charge of deceit cannot be founded, and therefore the rule of *caveat emptor* applies, and requires the purchaser to exercise due diligence instead of relying upon the representations, depends upon the form of the representation. If the vendor assumes to represent his title as good when he knows it is bad, and the vendee is deceived thereby, he cannot escape liability for deceit by claiming that the representation is but a matter of opinion. *Carr v. Sanger*, 138 App. Div. 32, 122 N. Y. Supp. 593.

And in this connection see also the language used in *Snyder v. Stemmons*, 151 Mo. App. 156, 131 S. W. 724,—an action for fraud and deceit practised by the vendor of real estate in asserting ownership of and title to the property he sold, wherein the doctrine is asserted: "If the defendant had affirmed positive knowledge of his ownership when he had no positive knowledge, and the purchaser had relied upon the assertion, then responsibility would have been visited upon him; because in such case he would have been conscious that he was ignorant concerning the subject-matter of which he spoke, yet falsely asserting that it was within his own personal knowledge."

But in *Corbett v. McGregor*, — Tex. Civ. App. —, 131 S. W. 422, although the evi-

dence showed that the vendor of real estate, in an executed contract for the exchange thereof, represented that he had a good title to the land and that the abstract showed it; that the abstract had been examined by a certain lawyer and the title to the land pronounced good, it was nevertheless held that such representations constituted a mere matter of opinion, and hence did not constitute fraud, although the title of the vendor was defective; especially where the purchaser relied upon the opinion of the attorney to whom the vendor referred, rather than the opinion of the vendor. And this is true, although the vendor had previously been informed by a third person that he claimed the title to the property, and was about to bring an action against the vendor to test the same. The court said that the failure to inform the purchaser of this fact did not constitute fraud which would justify a rescission of the contract, since the purchaser acted upon the opinion of the attorney rather than that of the vendor. It was, however, conceded, that if the vendor had known of an outstanding title paramount to his own, and had not revealed that fact to the purchaser, and the purchaser had acted in the matter on his representations, it would form a ground for rescission; but it is said that it was not known then to anyone, nor is it known now, that any person had title to the land superior to that of the vendor. In this connection, and as bearing upon the question whether the mere fact that there is danger of litigation over the title to the land is not itself a sufficient defect to render the title unmarketable, see note in 38 L.R.A. (N.S.) 14.

Negligence of purchaser.

Where one party to an exchange of property relies on a warranty of title, such warranty amounts to a written representation of title; and he is not precluded by a mere lack of prudence in a preliminary investigation of the title from recovering damages if the title turns out not to be as represented. If he in fact relied upon the representations, he is not to be defeated in his action for deceit by proof that a reasonably pru-

482; *Thomas v. West & Wheeler*, 64 Wash. 344, 116 Pac. 1074; *Black v. Barto*, 65 Wash. 502, 118 Pac. 623.

Selling the land upon representations that the same is free and clear from liens and encumbrances, when it is not, entitles the vendee to rescind.

Moody v. Spokane Street R. Co. 5 Wash. 699, 32 Pac. 751; *Friday v. Parkhurst*, 13 Wash. 439, 43 Pac. 362; 2 *Warvelle, Vendors*, 2d ed. 996; *Shaw v. O'Neill*, 45 Wash. 103, 88 Pac. 111; *Davis v. Lee*, 52 Wash. 336, 132 Am. St. Rep. 973, 100 Pac. 752; *Morris v. Witcher*, 20 N. Y. 41; *Best v. Offield*, 59 Wash. 466, 30 L.R.A.(N.S.) 55, 110 Pac. 17; *Stelter v. Fowler*, 62 Wash. 345, 113 Pac. 1096, 114 Pac. 879; *Younge v. Harris*, 2 Ala. 108; *Smith v. Robertson*, 23 Ala. 312; *Lindsey v. Veasy*, 62 Ala. 421; *Crutchfield v. Danilly*, 16 Ga. 432; *Anderson v. Buck*, 66 Iowa, 490, 24 N. W. 10; *Breckinridge v. Moore*, 3 B. Mon. 629; *Parkam v. Randolph*, 4 How. (Miss.) 435, 35 Am. Dec. 403; *Shiffer v. Dietz*, 53 How. Pr. 372, 83 N. Y. 300; *Woods v. North*, 6 Humph. 309, 44 Am. Dec. 312; *Kenny v. Hoffman*, 31 Gratt. 442; *Bryant v. Boothe*, 30 Ala. 311, 68 Am. Dec. 117; *Hayes v. Nourse*, 8 N. Y. S. R. 397; *Napier v. Elam*, 6 Yerg. 108; *Ingram v. Morgan*, 4 Humph. 66, 40 Am. Dec. 626; *Topp v. White*, 12 Heisk. 165; *Fristoe v. Laytham*, 18 Ky. L. Rep. 157, 36 S. W. 920; *Mauk v. Lee*, 66 Wash. 184, 119 Pac. 185; *Blum v. Smith*, 66 Wash. 192, 119 Pac. 183; *Dickerson v. Spokane*, 26 Wash. 292, 66 Pac. 381; *Browder v. Phinney*, 30 Wash. 74, 70 Pac. 264; *Filley v. Murphy*, 30 Wash. 1, 70 Pac. 107; *Russner v. McMillan*, 37 Wash. 422, 79 Pac. 988; *State ex rel. Barto v. Drainage Comrs.* 46 Wash. 474, 90 Pac. 660; *Brown v. Baldwin*, 46 Wash. 114, 89 Pac. 483; *McMillen v. Hillman*, 66 Wash. 27, 118 Pac. 903.

Dunbar, Ch. J., delivered the opinion of the court:

These two actions were brought by the respondents severally and separately to rescind a contract for the purchase of lands,

and were afterwards, for convenience sake and for economy, joined and tried together. In what may be termed the *Fischer Case*, the complaint, after setting up the interest of Clarence D. Hillman and his relation to the C. D. Hillman's Snohomish Land & Railroad Company, matters concerning which there seems to be no real controversy, alleges: That Clarence D. Hillman represented and claimed that he owned and had a perfect title to certain lands described in the complaint. That said lands were free and clear of any and all liens and encumbrances. That there were no outstanding claims to them or interest therein. That Hillman also represented that he was going to cause to be constructed in close proximity to said lands an electric interurban railway, extending from Everett, in the county of Snohomish, to Bellingham, in the county of Whatcom; represented and promised that he would cause to be constructed a good wagon road from said lands to the town of English, in the county of Snohomish, and, in connection with such representations and promises, offered said lands for sale to plaintiff, and by and through said representations and promises sought to induce plaintiff to purchase the same, in addition thereto promising and agreeing that, if plaintiff would purchase said lands, Hillman would furnish to plaintiff an abstract showing such title as he claimed and represented that he had, and that he would at once proceed to do the various things which, it was represented by him, he was going to do, and which he promised to do. That there were situated upon the lands certain buildings, with certain furniture and fixtures therein, which the defendant Hillman claimed and represented that he owned and would sell with the land upon which they were located. That the defendant Hillman then represented that such lands were known as lots 2, 3, 4, 13, and 14, in block 109, and lots 5, 6, 7, and 8, in block 110, of C. D. Hillman's Birmingham water front addition to the city of Everett, division No. 3. That a plat of said division and addition

dent person would have acted otherwise, and would have ascertained the facts by an examination which the contract did not call for. *Howerton v. Augustine*, 145 Iowa, 246, 121 N. W. 373.

The doctrine has been asserted that in a contract for the sale of land, it is the duty of the purchaser to guard himself against defects of title; and if he fails to do so, it is his own folly, for the law will not afford him a remedy from the consequences of his own negligence. If, however, representations are made by the vendor which may reasonably be relied upon by the purchaser, and they constitute a material inducement to the contract, and are false within

the knowledge of the party making them, and cause loss and damage to the party relying on them, and he has acted with ordinary prudence in the matter, he is entitled to relief. *Shell v. Roseman*, 155 N. C. 90, 71 S. E. 86.

Waiver of right to rescind.

That a purchaser of real estate, before undertaking to rescind for defect in title, prosecuted proceedings to quiet the title he had acquired, which were unsuccessful, is not a waiver of or bar to his right to rescind for such defect. *Strothers v. Leigh*, 151 Iowa, 214, 130 N. W. 1019. A. G. S.

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was of record in the office of the auditor of Snohomish county. That Hillman offered the lands to plaintiff for the sum of \$1,600, and the buildings and furniture and fixtures therein for an additional \$100. That plaintiff, relying upon the representations and promises of Hillman, and believing the same to be true, and that Hillman would do all that he represented and promised that he would do, agreed to purchase the lands shown to him and represented to be technically known as hereinbefore stated, and on or about the 20th day of November, 1909, paid Hill the sum of \$1,700; and said Hillman caused to be executed and delivered to plaintiff a purported deed to the same (a copy of which deed is set forth in the complaint), and upon the delivery of said deed promised plaintiff that he would furnish the abstract theretofore promised within the course of a few days. That, relying upon the representations aforesaid, plaintiff entered upon said lands and commenced and made various improvements thereon, which were reasonably worth the sum of \$1,535.

The plaintiff alleges: That none of the representations made by Hillman as inducements to plaintiff to purchase the lands were true when made; nor have they since transpired. That neither the said Clarence D. Hillman nor the said C. D. Hillman's Snohomish Land & Railroad Company, at the time said representations were made, was the owner of said lands, free and clear of liens and encumbrances, or free and clear of outstanding claims and interests, nor were they the owners of the buildings upon the lands, nor the furniture or furnishings therein; but, on the contrary, they were owned by the Lake Godwin Lumber & Shingle Company, and are now owned by it. That neither said Hillman nor the C. D. Hillman's Snohomish County Land & Railroad Company owned or had a title to said lands, free and clear of liens and encumbrances or outstanding interests. That at no time was there, or is there now, of record in the office of the county auditor of the county of Snohomish, any plat showing or containing a third subdivision of C. D. Hillman's Birmingham water front addition to the city of Everett, and that the purported deed, hereinbefore set forth, given to this plaintiff upon his payment of said sum of \$1,700 in cash to said Hillman, does not describe any land in the county of Snohomish, or elsewhere, susceptible of identification, and has no value to this plaintiff as muniment of title. Alleges that neither said Hillman nor the said C. D. Hillman's Snohomish County Land & Railroad Company, nor anyone else, has built or caused to be built any electric railroad in close proximity to said lands, or built any road

from said lands to the town of English; nor have they made any improvements promised plaintiff by them that they would make; nor have they ever given or furnished to this plaintiff any abstract of title showing a good title in fee in said Hillman nor the said C. D. Hillman's Snohomish County Land & Railroad Company, free and clear of all encumbrances; nor have they given or furnished to this plaintiff any abstract of title whatsoever, although during the time since the said 20th day of November, 1909, they have often been requested so to do. And plaintiff alleges that, at the time Hillman made such representations and promises with respect to title and with regard to the intended and promised improvements, said representations and promises were false, and were known by the said Hillman to be false and untrue. The complaint alleges certain expenses incurred by plaintiff for the purpose of obtaining title to the land, and the discovery by the plaintiff that the representations made by Hillman as to the title were false and untrue. Alleged the discovery that there was no plat of the third addition of C. D. Hillman's Birmingham Water Front Addition to the city of Everett. That the lands had been located in another division than that described, and that they discovered that the defendants did not own the buildings or furniture which they represented to the plaintiff that they did own. That immediately upon making such discoveries plaintiff gave notice to the defendants of his rescission of the pretended purchase, and tendered to them a good and sufficient deed of reconveyance, containing an exact description of the land described in the deed which had been furnished him, and his surrender of the possession of said lands, together with the buildings thereon, furniture, and equipment, etc., and demanded of them the return to this plaintiff of the amount paid, together with the expenses incurred by the plaintiff; and plaintiff continued the tender and made it good in court, and prayed for a judgment for \$3,247 against the defendants Clarence D. Hillman and C. D. Hillman's Snohomish County Land & Railroad Company. Demurrer was interposed to this complaint, which was overruled by the court. The defendants interposed an answer, admitting certain things and denying others, and the cause went to trial. The court, after a view of the premises, decreed that the contract of purchase be rescinded and annulled, and that the plaintiff recover of the defendants \$2,281, together with the costs and expenses of this action.

What is said in relation to this case applies with equal force to the companion case

of *Staats v. Hillman*, so that we will not discuss them separately.

It is earnestly contended by appellants that the demurrers to these complaints should have been sustained; that the plaintiff was in a position to ascertain the truthfulness of the statements and representations made by the defendants; that there was no fiduciary relation existing; and that it was the plaintiff's duty to ascertain the truth or falsity of said statements; and many cases are cited to sustain this rule. It may be admitted that some of the earlier cases decided by this court, notably the case of *Newland v. Dobson*, 11 Wash. 90, 39 Pac. 240, laid down a rule that gives color, at least, to appellants' contention, and that the language used was broad enough to sustain such contention. But that rule has been mitigated by the later decisions of this court, and, as we view it now, was probably not fully justified by the authorities extant at the time it was announced. It has been supplanted by the more reasonable and humane rule that a party will not be allowed to shield himself, because the party with whom he was dealing was careless or too confiding; and that, while the state cannot stand *in loco parentis* to all its citizens, the crafty and designing will not be allowed, by cunning artifice tending to deceive the simple-minded, to rob them of what justly belongs to them.

This doctrine was announced in *Wooddy v. Benton Water Co.* 54 Wash. 124, 132 Am. St. Rep. 1102, 102 Pac. 1054, where it was said: "Nor can we agree with the court below that the doctrine of *caveat emptor* applies to the representations made by the respondents, to the effect that the entire tract was under the level of the canal and susceptible of irrigation therefrom. Strong language has been used by this and other courts in defining the duties of purchasers, from which it might be inferred that vendors have an unbridled license to lie and deceive; but such has never been the law, and the tendency of the more recent cases has been to restrict, rather than extend, the doctrine of *caveat emptor*." The court then quotes from *Strand v. Griffith*, 38 C. C. A. 444, 97 Fed. 854, where it was said: "There is no rule of law which requires men, in their business transactions, to act upon the presumption that all men are knaves and liars, and which declares them guilty of negligence, and refuses them redress, whenever they fail to act on that presumption. The fraudulent vendor cannot escape from liability by asking the law to applaud his fraud and condemn his victim for his credulity. 'No rogue should enjoy his ill-gotten plunder, for the simple reason that his victim is by chance a fool.'" And citing *Noyes* 39 L.R.A.(N.S.)

v. Belding, 5 S. D. 603, 59 N. W. 1069, where the court said: "The unmistakable drift is towards the just doctrine that the wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of his victim." [*Fargo Gas & Coke Co. v. Fargo Gas & Electric Co.* 4 N. D. 224, 37 L.R.A. 593, 59 N. W. 1066.] See also *Watson v. Molden*, 10 Idaho, 570, 79 Pac. 503. In 14 Am. & Eng. Enc. Law, 2d ed. pp. 120, 121, the rule is thus stated: "By the overwhelming weight of authority, ordinary prudence and diligence do not require a person to test the truth of representations made to him by another as of his own knowledge, and with the intention that they shall be acted upon, if the facts are peculiarly within the other party's knowledge or means of knowledge, though they are not exclusively so, and though the party to whom the representations are made may have an opportunity of ascertaining the truth for himself. By the weight of authority, and in reason, the rule that a person who is voluntarily blind as to facts concerning which false representations are made cannot complain if the same applies only where the parties have equal present opportunity and means to ascertain the truth at the time of the transaction; and does not apply merely because it is possible to ascertain the facts. Indeed, it has been held that a person is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth." The doctrine announced in this case has been reaffirmed many times since by this court. See also, as sustaining this rule: *McMullen v. Rousseau*, 40 Wash. 497, 82 Pac. 883; *Lindsay v. Davidson*, 57 Wash. 517, 107 Pac. 514; *Bailie v. Parker*, 56 Wash. 353, 105 Pac. 834; *Best v. Offield*, 59 Wash. 466, 30 L.R.A.(N.S.) 55, 110 Pac. 17; *West v. Carter*, 54 Wash. 236, 103 Pac. 21; *Godfrey v. Olson*, — Wash. —, 122 Pac. 1014.

It must be borne in mind that these were not simply the expressions of opinion made by the vendor, wherein another rule obtains, but were statements of fact which were relied upon as facts by the purchaser. The demurrers were properly overruled, and the trial of the cause upon its merits justified the decree rendered by the court. The defendants in this case were, to say the least, smooth, experienced real-estate men, who resorted to extreme measures to sell the lands offered. Excursions were promoted and clackers employed to harangue the credulous and unsuspecting, while the purchasers in these particular cases were men of simple habits and thought, seafaring men who had spent their lives at sea, and were

not mentally equipped to withstand the blandishments which were brought to bear upon them.

The judgment is affirmed.

Mount, Morris, Fullerton, and Ellis, JJ., concur.

NEW YORK COURT OF APPEALS.

ALBERT PETERSON, Admr., etc., of
Charles Peterson, Deceased, Resp't.,
v.

P. BALLANTINE & SONS, Appt.

(205 N. Y. 29, 98 N. E. 202.)

Highway — crossing street — negligence of pedestrian.

One who attempts to cross a street diagonally at a point other than a cross walk, having his ears covered and looking straight ahead, without heed to traffic on the street, is negligent, and cannot recover for injuries received by being run down by a passing team.

(March 19, 1912.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of the Trial Term, Part IV., for King's County, in plaintiff's favor, and from an order denying a motion for new trial in an action brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of defendant's servant. Reversed.

The facts are stated in the opinion.

Mr. Grant C. Fox, with Messrs. Ashbel P. Fitch, Mott & Grant, for appellant:

The plaintiff's intestate was guilty of contributory negligence as matter of law.

Perez v. Sandrowitz, 180 N. Y. 397, 73 N. E. 228; Baxter v. Auburn & S. Electric R. Co. 190 N. Y. 439, 83 N. E. 469; Weiss v. Metropolitan Street R. Co. 33 App. Div. 221, 53 N. Y. Supp. 449; Wecker v. Brooklyn, Q. C. & S. R. Co. 136 App. Div. 340 120 N. Y. Supp. 1020; Barker v. Savage, 45 N. Y. 191, 6 Am. Rep. 66; Dolfini v. Erie R. Co. 178 N. Y. 1, 70 N. E. 68; Smedis v. Brooklyn & R. B. R. Co. 88 N. Y. 14; Wieland v. Delaware & H. Canal Co. 167 N. Y. 19, 82 Am. St. Rep. 707, 60 N. E. 234; Belton v. Baxter, 54 N. Y. 245, 13 Am. Rep. 578; McClain v. Brooklyn City

R. Co. 116 N. Y. 465, 22 N. E. 1062; Harvey v. Nassau Electric R. Co. 35 App. Div. 307, 55 N. Y. Supp. 20; Wiwirowski v. Lake Shore & M. S. R. Co. 124 N. Y. 420, 26 N. E. 1023.

Mr. Martin T. Manton, for respondent: Plaintiff's intestate was free from contributory negligence.

Harrison v. New York C. & H. R. R. Co. 127 App. Div. 804, 111 N. Y. Supp. 812; Paulding v. New York C. & H. R. R. Co. 132 App. Div. 70, 116 N. Y. Supp. 518; Hickman v. William Schimper & Co. 125 App. Div. 217, 109 N. Y. Supp. 325; Kettle v. Turl, 162 N. Y. 258, 56 N. E. 626; Hodges v. Westcott Exp. Co. 39 App. Div. 346, 57 N. Y. Supp. 318.

Gray, J., delivered the opinion of the court:

The appellate division, by a divided court, has affirmed a judgment in favor of the plaintiff, upon the verdict of a jury, in an action brought to recover damages of the defendant upon a charge of negligence. The plaintiff alleged that the death of his intestate was caused by the negligent driving of the horses attached to a wagon belonging to the defendant, in one of the streets of the borough of Brooklyn, and that the deceased did not contribute to the result by any negligence on his part. The accident occurred in the daytime, while the deceased was crossing Forty-Second street, between Third and Second avenues. One of the defendant's brewery wagons, drawn by a pair of horses and driven by one of its men, was coming from Third avenue, at the time. The horses came into collision with the deceased, who fell and was run over by one of the front wheels of the wagon. While the way in which the accident happened was disputed, the evidence for the plaintiff warranted the jury in finding it to have been as stated. The testimony of plaintiff's chief witness of the occurrence justified the jurors in believing that the horses were being driven at a fast gait, and that the driver and a fellow servant occupying the seat with him were looking over their shoulders, in the direction of where an organ grinder was playing. Upon the question of the negligence of the defendant's servants, there is no serious contention. They were inattentive and failed in their duty, while driving through the public street, to be watchful lest they should cause injury to others having equal rights to be there.

But the plaintiff was wholly unable to support the allegation of his complaint by any evidence proving, or tending to show, that the deceased did not contribute to the accident. It was shown by the same witness to whom reference has been made, a Mrs.

Note. — As to duty of pedestrian crossing or traveling public street to avoid passing teams, see notes to Spokane Toilet Supply Co. 19 L.R.A.(N.S.) 161, and Mugge v. Bracken, ante, 481.
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McLoughlin, that she was at the window of her house when the deceased was leaving the sidewalk and started to cross the street. When he got to a point about the middle of the street, the horses were coming fast towards him, and she saw him struck down by them. She says that he had "a heavy overcoat turned up and a heavy earcap down." The witness narrated the occurrence, as she watched it from her window, from the time he left the sidewalk. From her account it appears that the deceased "did not go straight. He went . . . slanting, . . . more towards Third avenue," in "the direction from which the horses were coming." There was "a clear space" between him and them. There "was nothing to prevent him from seeing the brewery horses." He walked at "the same gait all the time, . . . until he was struck."

She was asked and answered the following questions:

Q. At that time did you see him look towards the brewery horses?

A. No, sir. I did not. He was going right straight across.

Q. Was he looking up, or looking down, that you could see?

A. He was looking right straight across ahead of him.

Q. Right in front of him?

A. Yes, sir; right ahead of him. He was going catercornered across the street.

Q. You did not see him do anything at the time but keep on walking?

A. No, sir. He did not move, only go right ahead.

Q. Did not go any faster?

A. No, sir.

That was all of the evidence upon the subject of the conduct of the deceased, from the one witness upon whom the plaintiff relied, and, so far from exonerating him from fault, it leads to the inference that, if in the position of the faculty of observation, he failed to exercise it at a moment when it was highly incumbent upon him to do so.

He had the right to cross the street between its regular crossings; but he was bound, when doing so, to be reasonably careful, and the plaintiff was not entitled to charge the defendant with liability for the accident, however negligent its servants, unless he could adduce evidence, which proved, or tended to prove, that the deceased was free from fault at the time. The difficulty with the case is in the plaintiff's failure in that respect.

Less evidence may be required to show freedom from fault where the injured party is dead; but, nevertheless, there must be some facts which, reasonably considered, 39 L.R.A.(N.S.)

permit of such an inference. The relaxation of the rule is not as to the burden of proof on the plaintiff, in such an event. It is as to the quantum of proof, and greater latitude is allowed in permitting the inference of an exercise of care. *Baxter v. Auburn & S. Electric R. Co.* 190 N. Y. 439, 83 N. E. 469. It was as essential to plaintiff's case to establish that by some evidence, as it was to show the negligence for which the defendant was responsible; for, where both parties concur in acts causing the injury, the blame cannot be placed exclusively upon the defendant. And where the evidence is as consistent with a neglect of duty or care on the part of the injured party, as it is with their exercise, upon what principle shall a jury be allowed to speculate upon the probabilities? On the evidence it is impossible to conclude whether the deceased was in some condition which rendered him indifferent to danger (as to which there was some evidence in the case), or whether he was reckless of the possible impediment to hearing or sight from the turned up overcoat and the turned down earcaps.

This case, in its material facts, is not to be distinguished from that of *Perez v. Sandrowitz*, 180 N. Y. 397, 73 N. E. 228, where we reversed a judgment recovered by the plaintiff, and the following quotation from the opinion in the latter case is apposite: "The deceased was going in the direction from which the horses were coming. The danger was apparent, and had he used his eyes, as he was bound to do, it must have been evident to him. However negligent the driver of the wagon, the plaintiff's evidence failed to meet the burden imposed by the law in such cases, of showing that the deceased was free from fault." Page 400 of 180 N. Y.

The defendant was entitled to the dismissal of the complaint upon its motion, and therefore the judgment should be reversed and a new trial ordered, with costs to abide the event.

Cullen, Ch. J., and Haight, Vann, Werner, Hiscock, and Collin, JJ., concur.

CONNECTICUT SUPREME COURT OF ERRORS.

GEORGE FRANK SMITH

v.

DAVID B. CROCKETT COMPANY, Appt.

(85 Conn. 282, 82 Atl. 569.)

Principal and agent — bribery of purchasing agents — effect.

1. No compensation can be recovered by

a salesman for services rendered under a contract which contained a provision for reimbursing him a certain sum to be allowed purchasing agents for turning business his way.

Evidence — bonus to sales agent — purpose.

2. In an action by a sales agent to recover compensation under a contract which contains a provision for reimbursing him for money paid unknown persons as bonuses, evidence is admissible that the bonuses were used to influence purchasing agents in order to secure their business.

(March 7, 1912.)

APPEAL by defendant from a judgment of the Superior Court for New Haven County in plaintiff's favor in an action brought to recover compensation for services rendered under a contract for salary and expenses. Reversed.

The facts are stated in the opinion.

Mr. James A. Marr for appellant.

Mr. William B. Stoddard for appellee.

Hall, Ch. J., delivered the opinion of the court:

Paragraph 1 of the complaint alleges that on the 6th of April, 1906, the plaintiff and the defendant entered into the following written agreement:

April 6, 1906.

Agreement made this day between the David B. Crockett Company of Bridgeport, party of the first part, and Mr. G. F. Smith of Milford, Connecticut, party of the second part. The party of the first part agrees to pay the party of the second part the sum of two thousand dollars (\$2,000) per annum, and if the sales of the said party of the second part reach the sum of thirteen thousand dollars (\$13,000) between the first day of May, 1906, and the first day of May, 1907, they agree to pay the further sum of five hundred dollars (\$500), and if the sales reach twenty thousand dollars (\$20,000)

the sum of one thousand dollars (\$1,000) will be paid in addition to the \$2,000. The party of the second part agrees on his part to use his best endeavors to sell the goods manufactured by the party of the first part to railroads, steam, trolley, etc.; the party of the first part agrees also on the first of every month to pay the party of the second part one hundred dollars (\$100) for expenses during the month following, also to allow the party of the second part to pay to persons unknown to the party of the first part a bonus amounting to not more than twenty-five cents (25 cts.) per gallon.

Paragraphs 2 and 3 allege that the plaintiff continued in the employ of the defendant under said contract, performing his duties, until October 1, 1909, when by mutual agreement said contract was abandoned, and that there remains due the plaintiff under the contract, for salary and expenses, the sum of \$2,500, for which a bill of particulars was filed by the plaintiff, showing the amount of his salary during said period to be \$7,000 the amount of his expenses incurred to be \$4,200, and the amount paid to him to be \$8,650. In its second defense the defendant alleges, in substance, that the agreement under which the plaintiff sues provides that, in order to make sales of the goods in question, the plaintiff was permitted to pay a bonus of not more than 25 cents per gallon to persons who were to be unknown to the defendant, and that it was so made for unlawful objects, and that it is void as being contrary to public policy.

The defendant attached to his answer a statement showing that, in rendering the services and incurring the expenses for which this suit is brought, the plaintiff paid bonuses to persons unknown to the defendant, and which have been repaid to the plaintiff, to the amount of \$547.95. The court found that the defendant had paid to the plaintiff the \$7,000 salary, the \$547.95 bonuses, and that there was due the plain-

Note. — Salesmen's right to recover compensation as affected by employment of improper methods to make sales.

This note is confined solely to the right of a salesman to recover compensation where, as in *SMITH v. DAVID B. CROCKETT Co.*, with knowledge of his employer the salesman uses improper methods to effect a sale, and which in no way prejudices his principal. Aside from *SMITH v. DAVID B. CROCKETT Co.*, but one other case has been found which has considered this question, and it is in accord with the latter case in holding that, such agreements being contrary to public policy, recovery cannot be had.

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Thus in *McDonell v. Rigney*, 108 Mich. 276, 66 N. W. 52, it was held that an agreement between a real estate agent receiving commissions for the sale of certain lots and the owner of those lots, that the agent should make colorable purchases of the lots for the purpose of inducing others to buy, is void as against public policy, and so a nonsuit was properly granted in an action to recover commissions on sale of lots made by those means.

For note on fraud and secret dealings or interest of real estate brokers as affecting their commissions, see note in 45 L.R.A. 1.

J. H. B.

tiff \$1,750 under the provision of the contract giving him \$100 a month for expenses, which sum with interest made up the judgment in favor of the plaintiff of \$1,927.33.

During the trial the defendant, in support of its claim that said agreement for the payment of bonuses was illegal, asked of the plaintiff as a witness various questions to show what was done in the payment of bonuses, and whether they were paid to the agents who purchased goods, and for the purpose of influencing such agents to purchase such goods for their principals. These questions were excluded by the trial court, apparently upon the grounds that the provision concerning the payment of bonuses, even though invalid, is separable from the other provisions of the agreement, and is not the provision of the contract sued upon or sought to be enforced by the plaintiff. That such was the view of the trial court is indicated by its statement in excluding the offered evidence that, if the plaintiff were seeking to recover the \$500 bonus which he had paid out, he would be "standing on quite a different basis."

We are of opinion that by the present action the plaintiff is in effect asking the court to enforce the objectionable provision of the contract concerning bonuses. While the finding shows that the plaintiff has been repaid the large sum, which in accordance with the items of the contract he paid as bonuses, he has not been fully paid, as the contract provided he should be, for his services in procuring such sales, and he is by this action asking for the payment of the remainder of the compensation which under the contract he was to receive for his services and expenses in making sales by the method providing by the contract. The duty of the plaintiff under the contract, and the real and only purpose for which he was employed, and for which he was to be paid, was to make sales of the goods manufactured by the defendant. What these goods were the contract does not indicate, any further than that they were goods to be sold by the gallon. The finding, however, states that they were varnishes. The plaintiff was to sell these goods to "railroads, steam, trolley," etc. The contract provided that in order to make such sales the plaintiff might pay bonuses to parties unknown to the defendant. It also contemplated the plaintiff would devote his time, wholly or in part, to the making of such sales, and would incur other expenses than the payment of the bonuses. For all such services and expenses, if the sales made between May, 1906, and May, 1907, did not reach \$13,000, the plain-

tiff was to receive \$2,000 per annum, the further sum of \$100 per month, and apparently such sum as he should pay in bonuses to unknown parties not exceeding 25 cents per gallon.

In accomplishing the sales which he has made, it appears that the plaintiff has paid between \$500 and \$600 as bonuses, in accordance with the provisions of the contract. If these bonuses were intended to be paid, and were paid, as bribes to purchasing agents of the railroads to induce such agents to purchase the defendant's varnishes for their principals, or to afford such agents the opportunity of graft, which is the receiving of personal gain without rendering compensatory services, by persons holding positions of trust and confidence, and is but a form of bribery (*State v. Sheridan*, 14 Idaho, 222, 15 L.R.A.(N.S.) 497, 93 Pac. 656; *Dixon v. Chappell*, 133 Ky. 663, 118 S. W. 929; *Quinn v. Review Pub. Co.* 55 Wash. 69, 133 Am. St. Rep. 1016, 104 Pac. 181, 19 Ann. Cas. 1077), if such, we repeat, were the purposes of these bonuses, this provision of the contract was intended to induce persons to violate the confidence reposed in them by their employers and principals. Such an agreement is opposed to honesty in business. It is contrary to public policy. It is illegal, and the time spent and the expense incurred by the plaintiff in so accomplishing or attempting to so accomplish sales were as much a part of the illegal transactions as was the actual payment of the bonus itself. If such was the real character of this provision, the plaintiff could neither recover for services rendered, nor for expenses incurred, nor for bonuses paid in making the sales.

The law will not compensate the plaintiff for such act, or for any act or service or expense whatever rendered or incurred in the accomplishment or attempt to accomplish sales by such methods. The promise to pay for such services would be based upon an illegal consideration. Every contract the consideration of which is illegal is void, and so is every engagement which has such illegal contract as its basis, or which may properly be considered part and parcel of such contract. *Sturges v. Bush*, 5 Day, 452, 460. "Contracts which are opposed to open, upright, and fair dealing are opposed to public policy. A contract by which one is placed under a direct inducement to violate the confidence reposed in him by another is of this character." *Rice v. Wood*, 113 Mass. 135, 18 Am. Rep. 459. "Courts not only redress fraud, but seek to prevent it by removing temptation." *McDonald v. Haugh-*

ton, 70 N. C. 399. "The law avoids contracts and promises made with a view to place one under wrong influences; those which offer him a temptation to do that which may affect injuriously the rights and interests of third persons." *Bollman v. Loomis*, 41 Conn. 581, 584. Neither courts of law nor equity are open to enforce such contracts. If both parties are *in pari delicto*, the courts will leave them where they find them.

This rule, however, permits either party to plead and prove by proper evidence the illegal character of the contract. *Funk v. Gallivan*, 49 Conn. 124, 128, 44 Am. Rep. 210.

We come, then, to the questions of whether the defendant should have been permitted to prove facts showing that, by the language used, the parties contemplated that the bonuses should be paid for corrupt and unlawful purposes.

An agreement to pay a bonus is not necessarily a corrupt and unlawful agreement. Generally a bonus is a sum given or paid beyond what is legally required to be paid to the recipient. The words "payment of a bonus" may also be used in the sense of payment of a bribe (*Century Dictionary*); of the payment of a sum to weaken or destroy the fidelity of a trusted agent.

The defendant had pleaded that the provision for the payment of bonuses to unknown persons was for unlawful purposes, and was void, as contrary to public policy.

If, when read in connection with the entire writing, the provision in question was "ambiguous or of doubtful import," the defendant was entitled under its answer to present evidence showing in what sense the parties used the word "bonus" (*Adams v. Turner*, 73 Conn. 38, 45, 46 Atl. 247; *Parker v. Selden*, 69 Conn. 552, 38 Atl. 212; *Re Curtis*, 64 Conn. 501, 514, 42 Am. St. Rep. 200, 30 Atl. 769) and that it was used with the intention of providing for the payment of bonuses for unlawful and corrupt purposes.

This rule does not permit either party to a contract to testify on direct examination what the intention of the parties was, or what his intention was, in using the words or terms of doubtful import, but only to prove facts and circumstances not inconsistent with the writing itself, tending to prove in what sense the parties used such words or terms. *Brown v. Slater*, 16 Conn. 192, 196, 41 Am. Dec. 136; *Fairfield v. Lawson*, 50 Conn. 501, 510, 47 Am. Rep. 669. Such was the apparent purpose of the ques-

tions asked the plaintiff which were excluded.

We think the defendant was entitled to prove to whom, and under what circumstances, and for what purposes, the bonuses were in fact paid by the plaintiff, and that the court erred in excluding the questions asked of the plaintiff for that purpose, and in holding that the provision respecting the payment of bonuses was separable from those regarding the payment of the \$2,000 a year, and the \$100 a month.

There is error, and a new trial is ordered.

In this opinion the other Judges concur.

WASHINGTON SUPREME COURT. (Department No. 2.)

ROBERT JOHNS, Doing Business under the Name of Standard Talking Machine Company, Appt.,

v.

OZIAS P. JAYCOX et al., Respts.

(67 Wash. 403, 121 Pac. 854.)

Principal and agent—warranty to effect sale — binding effect.

1. A traveling agent for the sale of talking machines, who carries printed order blanks, has no implied authority to warrant that one buying a large number of machines to be given away for advertising purposes will sell a certain number of records for each machine within a given time after it is given out, and the purchaser therefore has no right of action for breach

Note. — Extent of a commercial traveler's implied or ostensible authority to warrant goods.

The majority of the cases which have passed upon the implied authority of commercial travelers to warrant limit the authority as it is limited in *JOHNS v. JAYCOX*, to making such warranties as are usual or customary to the business in which such traveler is engaged.

Thus, in *Dingle v. Hare*, 7 C. B. N. S. 145, 29 L. J. C. P. N. S. 143, 6 Jur. N. S. 679, 1 L. T. N. S. 38, it was held that where it is usual for fertilizers to be sold with a warranty, that a traveling commercial agent has implied authority to warrant that the superphosphates in certain fertilizers sold by him contain a certain per cent of lime.

In *Pickert v. Marston*, 68 Wis. 465, 60 Am. Rep. 876, 32 N. W. 550, it was held that a traveling agent for a fish house has implied authority to make the usual war-

of such warranty, if authority to make it had not been actually conferred upon the agent.

Sale — waiver of warranty — necessity for goods.

2. That when a customer learns that the seller repudiates a guaranty made by his agent to effect the sale of his product, he has placed himself in a position where he must have the goods, does not affect the effect of his ordering them to be shipped with knowledge of the repudiation, as a waiver of the warranty.

(March 9, 1912.)

A PPEAL by plaintiff from a judgment of the Superior Court for Walla Walla County for less than the relief demanded in an action brought to recover a balance due on a written contract for goods alleged to have been sold and delivered to defendants. Reversed.

The facts are stated in the opinion.

ranties, and it is for the jury to say whether a warranty that fish intended to be shipped a long distance would reach the purchaser in good condition is such a usual one.

In *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4, a salesman of safes was held to have such implied authority to warrant as is customary in the sale of such articles, and if the jury should find that it was customary to warrant that the safe was made of a certain peculiar tough kind of iron, and would withstand any attempt by a burglar, armed with the best implements of his trade to enter it, for a certain period of time, such warranty would bind his principal, in the absence of an express prohibition brought to the notice of the purchaser. On a second appeal of this case, reported in 73 Ala. 446, it is stated that the custom of sellers of safes must be so well settled, notorious, and continuous as to raise a fair presumption that it was known to buyer and seller, and that the sales were made in reference to it.

In *Reynolds v. Mayor, L. & Co.* 39 App. Div. 218, 57 N. Y. Supp. 1145, the court lays down the same rule, and says that where it is shown that the salesman always assumed to warrant goods, and that it was the universal custom of dealers in plumbers' supplies so to warrant, the jury might find that a traveling salesman of a plumber's supply house had implied authority to warrant that a certain tank was as good as that of another make named by the purchaser.

So, it was held in *Waupaca Electric Light & R. Co. v. Milwaukee Electric R. & Light Co.* 112 Wis. 469, 88 N. W. 308, that a salesman of electrical machinery may make the usual and customary warranties.

So, where the warranty was usual or customary, it has been held that a salesman has implied authority to warrant, 39 L.R.A. (N.S.)

Messrs. W. B. Mitton and Brooks & Bartlett, for appellant:

If defendants had information and knowledge of facts which, in the exercise of common sense and ordinary prudence, were sufficient to put them upon inquiry and lead them to knowledge of the truth, they will be liable the same as if they had actual knowledge.

Estee, Pl. § 2732; *Hospes v. North Western Mfg. & Car Co.* 48 Minn. 174, 15 L.R.A. 470, 31 Am. St. Rep. 637, 50 N. W. 1117.

Mere representations by way of commendation, or which merely express the vendor's opinion, belief, judgment, or estimate, do not constitute warranties.

Sauerman v. Simmons, 74 Ark. 563, 86 S. W. 429; *Collins v. Tigner*, 5 Penn. (Del.) 345, 60 Atl. 978.

Where a party makes false representations of material facts which he believes to be true, and the other party has equal opportunity of ascertaining their truth or

—that automobile oil is noninflammable and safe. *Conkling v. Standard Oil Co.* 138 Iowa, 596, 116 N. W. 822;

—that a binder will do as good work as any other in the market. *Canham v. Plano Mfg. Co.* 3 N. D. 229, 55 N. W. 583;

—that a band cutter and feeder will do good work. *Parsons Band Cutter & Self Feeder Co. v. Haub*, 83 Minn. 180, 86 N. W. 14;

—that a pump is good. *Nelson v. Cowing*, 6 Hill, 336;

—that clocks will run and keep good time for twelve months with proper care. *Woodford v. McClenahan*, 9 Ill. 85.

So, a salesman has been held to have implied authority to warrant the goods sold by him generally. *Hunter v. Jameson*, 28 N. C. (6 Ired. L.) 252 (clocks); *Murray v. Brooks*, 41 Iowa, 45 (reapers).

In *Boothby v. Scales*, 27 Wis. 626, a salesman authorized to sell fanning mills was held to have implied authority to warrant the mill to clean grain for the market by running through once, and for seeding by running through twice; that it would clean a certain number of bushels per hour, and that it would separate oats from wheat, unless the purchaser knew that the salesman's authority was limited, and that he was exceeding his powers.

In the absence of a custom or usage so to warrant, the implied authority of a traveling salesman to warrant has been denied,

—where a salesman assumed to warrant that goods manufactured by his employers and known as "zebeline" were absolutely all wool. *Ellner v. Priestley*, 39 Misc. 535, 80 N. Y. Supp. 371;

—where a salesman assumed to warrant that oil sold by him would dry in twenty-four hours. *Pennsylvania & D. Oil Co. v. Spitelink*, 27 Misc. 557, 58 N. Y. Supp. 311;

—where a salesman assumed to warrant that flour sold by him would keep sweet

falsity, or has the means of informing himself by use of reasonable diligence, such statements do not furnish a ground for even equitable relief.

Brooks v. Hamilton, 15 Minn. 26, Gil. 10; *Buckner v. Street*, 5 McCrary, 59, 15 Fed. 365; *Seeley v. Reed*, 25 Fed. 361; *Manlock v. Fairbanks*, 46 Wis. 415, 32 Am. Rep. 716, 1 N. W. 167; *Parke v. Boston*, 175 Mass. 464, 56 N. E. 718; *Stimson v. Helps*, 9 Colo. 33, 10 Pac. 290; *Southern Development Co. v. Silva*, 125 U. S. 247, 31 L. ed. 678, 8 Sup. Ct. Rep. 881, 15 Mor. Min. Rep. 435.

Messrs. T. P. Gose and C. C. Gose for respondents.

ELLIS, J., delivered the opinion of the court:

Action to recover a balance due upon a written contract for 200 talking machines sold by the plaintiff to the defendants through an agent. The material facts are

during a long sea voyage. *Upton v. Suffolk County Mills*, 11 Cush. 586, 59 Am. Dec. 163. Compare with *Talmage v. Bierhausa*, *infra*;

—where a salesman for a manufacturer of felt cloth assumed to warrant that the goods would make an ulster, and that it "wears like buckskin." *Bierman v. City Mills Co.* 10 Misc. 140, 30 N. Y. Supp. 929. This case was reversed on other grounds in 151 N. Y. 482, 37 L.R.A. 799, 56 Am. St. Rep. 635, 45 N. E. 856.

In *Troy Grocery Co. v. Potter*, 139 Ala. 359, 36 So. 12, it was held that the mere fact that one is a traveling salesman for a fish packing house, with authority to take orders for fish, did not give him implied authority to bind his house by warranty that the fish would keep sound for twelve months.

The commercial traveler has implied authority to warrant that the goods sold by him will be equal to the sample. Thus, in *Loomis Mill Co. v. Vawter*, 8 Kan. App. 437, 57 Pac. 43, a general traveling agent for the sale of flour to be manufactured for the purchaser was held to have implied authority to warrant that it would be equal to certain brands made by another, and adopted as a sample for the purchase of such sale.

And in *Dreyfus v. Goss*, 67 Kan. 57, 72 Pac. 537, a traveling salesman for a liquor house was held to have implied authority to warrant that the goods would be of the character and quality of the sample carried by him.

Nothing is said as to implied authority to warrant in *Victor Sewing Mach. Co. v. Rheinschild*, 25 Kan. 534, but a sewing machine company was held bound by the warranty of one who represented himself as a general agent, that the machines were better than those of another company named by the dealer.

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nearly all admitted. The machines were purchased to give away to defendants' customers as an advertisement. When first approached, the defendants declined to make the purchase. The agent then proposed that, if the defendants would execute the printed form of contract which he produced, he would give them a written guaranty that the defendants would sell an average of twenty-five records to each customer to whom a machine was given. Thereupon the defendants and the plaintiff by his agent executed in duplicate and mutually delivered the printed contract for the purchase of 200 machines, with nine 7-inch records each, at a price of \$8.20 for each machine and its nine records. In the contract the plaintiff agreed to furnish to defendants any number of 7-inch disc records at 30 cents each net, with the understanding that they would be retailed by defendants at 50 cents each or given away without charge. The agent then executed in

In *Talmage v. Bierhausa*, 103 Ind. 270, 2 N. E. 716, an argument that it was necessary to prove that sales such as were under consideration were usually attended with warranties was disapproved, and it was held that a traveling salesman upon whom had been conferred general authority to sell rice would be presumed to have authority to warrant that the rice would keep all summer, if kept in a dry, cool place.

In *Haynor Mfg. Co. v. Davis*, 147 N. C. 267, 17 L.R.A. (N.S.) 193, 61 S. E. 54, nothing is said as to the necessity of proving that warranty is customary. An agent for the sale of what was claimed to be a non-alcoholic beverage was held to have implied authority to warrant the same to be such, and the company was bound by the agent's agreement with the customer to make good any sum such customer would be required to pay because of its alcoholic nature.

The implied authority of a commercial traveler to warrant the character of oil sold by him does not include the power to warrant as to subsequent sales made by his principals direct. *Wait v. Borne*, 123 N. Y. 592, 25 S. E. 1053.

The salesman has usually no implied authority to warrant as to matters other than those directly connected with the article he is selling. Thus, in *Lucile Min. Co. v. Fairbanks, M. & Co.* 27 Ky. L. Rep. 1100, 87 S. W. 1121, a salesman of pumps was held to have no implied authority to warrant that a boiler of the purchasers was of sufficient size to operate the pump at a certain rate.

And in *J. M. Case Mill Mfg. Co. v. Vickers*, — Ky. —, 144 S. W. 76, a salesman of flour milling machinery was held to have no implied authority to warrant that the power in the purchaser's mill was sufficient to operate a sifter system which the salesman had sold.

W. A. E.

the name of the plaintiff, and delivered to the defendants, the following guaranty:

Part of contract attached between Standard Talking Machine Company and O. P. Jaycox & Company. All machines and records not sold or given away four months from receipt of goods, and returned in good condition freight paid to Chicago, Illinois. Cost price of each machine and records will be refunded to A. P. Jaycox & Company. Guarantee sale of twenty-five records on average to each machine given away four months from date customer has received machine.

Standard Talking Machine Company,

[Signed] F. P. Howard, Salesman.

The memorandum delivered to the defendants was a carbon duplicate; but it was claimed by the plaintiff that the agent did not send to him the original nor any copy thereof, but only the plaintiff's duplicate of the printed contract. There being no evidence to the contrary, we must assume this as a fact. There was evidence that one of the defendants, Bridges, before payment for the first shipment of machines had been made, called upon the plaintiff's manager in Chicago, and was there informed that the plaintiff would not guarantee sales of records; that the agent had no authority to do so; that no more goods would be shipped until there was a definite understanding, and that an understanding was then reached that the plaintiff would not be held to guarantee the sales of records. The defendant Bridges claimed that he had no memory of such an agreement. It is unquestioned, however, that, after a part of the machines and records were delivered, and a further instalment was ordered, the plaintiff, being then informed of the memorandum, wrote to the defendants that he would not guarantee the sales of the records; that the agent had no such authority; that the order would be held up awaiting reply, "and if satisfactory to you, you can wire us upon receipt of this communication and we will make prompt shipment of the order." The defendants replied by wire, "Ship fifty machines and records as ordered at once." At that time the defendants were compelled to have the remaining number of the machines to supply to customers to whom tickets had already been issued. The remaining machines and records were then furnished. A part of the agreed purchase price remaining unpaid, action was commenced for its recovery. The defendants interposed a counterclaim for loss of profits upon sales of records which should have been made to meet the guaranty contained in the memorandum. The cause was tried to the court without a jury. The court found that the

guaranty was a part of the contract; that defendants' loss of profits was \$400; that there remained unpaid of the purchase price \$410. Judgment was rendered in favor of the plaintiff for \$10 and costs. The plaintiff has appealed.

The appellant contends that the memorandum of guaranty was never a part of the contract, because the agent had no authority to make it; that when he appeared with a printed form of contract he was without apparent authority to modify it, and the respondents were not warranted in believing that he had authority to make the memorandum of guaranty or warranty. While an agent's authority can hardly be limited by the form of blanks he carries, that circumstance and the nature of the business should put a purchaser on inquiry. The apparent scope of his authority was that of a sales agent, and it is upon the powers implied by that relation that any sound decision of this case must rest. There is much seeming confusion in the adjudicated cases upon this question. There are decisions which hold that an agent upon whom general authority to sell is conferred will be presumed to have authority to warrant unless the contrary appears. *Talmage v. Bierhaue*, 103 Ind. 270, 2 N. E. 716; *Woodford v. McClenahan*, 9 Ill. 85; *Alpha Mills v. Watertown Steam Engine Co.* 116 N. C. 797, 21 S. E. 917; *Dennis v. Ashley*, 15 Mo. 453; *Milburn v. Belloni*, 34 Barb. 607; *Manley v. Ackler*, 76 Hun, 540, 28 N. Y. Supp. 181; *Schuchardt v. Allen*, 1 Wall. 359, 17 L. ed. 642. But an examination of those cases shows that, while announcing a very broad rule, they in reality, when applied to the given facts, go only to the extent that the implied power of warranty by the agent, upon which a purchaser may rely, extends to those things necessary to consummate the contract and usually incident thereto and relating to the title, quality, or condition of the thing sold. In none of them was the rule actually applied as authorizing warranties so extraordinary as that here presented.

A careful consideration of the authorities cited in the briefs, as well as an independent search, leads us to the conclusion that the rule laid down in 31 Cyc., as the one supported by the more numerous and more recent decisions, is also the one in consonance with the better reason. It is as follows: "The rule which is supported by the more numerous and more recent decisions is that, if in the sale of that kind or class of goods which the agent is empowered to sell, it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale, and the law presumes that he has such authority; and that if an agent with express authority to sell has no

actual authority to warrant, no authority can be implied, where the property is of a description not usually sold with warranty. . . . The implied power of an agent to warrant title and quality rests upon the necessity and propriety of such warranties in the sale of goods. It is not therefore to be extended to other warranties of an extraordinary sort, however impossible the agent may find it to make a sale without giving such warranties." 31 Cyc. pp. 1353, 1355, 1356.

The correct principle, briefly stated, is that an agent under a general employment to make sales is impliedly authorized to employ only those means for the purpose usual to the business, and that the purchaser cannot safely assume that he has authority to make any extraordinary guaranty or warranty, or one beyond the usage of the business in which the agent is employed. *Upton v. Suffolk County Mills*, 11 Cush. 586, 59 Am. Dec. 163; *Wait v. Borne*, 123 N. Y. 592, 25 N. E. 1053; *Bierman v. City Mills Co.* 10 Misc. 140, 30 N. Y. Supp. 929; *Hayner v. Churchill*, 29 Mo. App. 676; *Palmer v. Hatch*, 46 Mo. 585; *Reese v. Bates*, 94 Va. 321, 26 S. E. 865; *Waupaca Electric Light & R. Co. v. Milwaukee Electric R. & Light Co.* 112 Wis. 469, 88 N. W. 308; *Troy Grocery Co. v. Potter*, 139 Ala. 359, 36 So. 12; *Anderson v. Bruner*, 112 Mass. 14.

The rule thus stated appeals to us the one best calculated to preserve that just balance which the law is intended to maintain, between a reasonable protection of the principal from the unauthorized acts of his agent, and a reasonable protection of the purchaser from an unwarranted repudiation by the principal of the acts of the agent. We have been cited to no authority, and a careful search has revealed none, in which it has ever been held that an agent employed to make sales at wholesale has an implied authority not only to warrant the quality of the thing sold, but also to guarantee that the purchaser will make sales thereof at retail in any particular amount or at any given profit. A more extraordinary guaranty can hardly be imagined. We can conceive of no sound principle upon which such a holding could rest. There was no evidence of any prevailing custom in the business of selling talking machines, which would warrant an assumption on the purchaser's part that the guaranty was authorized. The extraordinary nature of the guaranty made proof of such custom essential to a recovery upon the guaranty. In the absence of any showing of an express authority. So far as disclosed, there was no such custom.

As has been said in a similar case: 39 L.R.A. (N.S.)

"Usages of trade are not recognizable, unless they have the essential elements of certainty, notoriety, and continuity, bringing themselves home to the knowledge of those who are concerned in the trade or business to which they may pertain. The courts adhere strictly to this principle, as essential to a fair administration of justice. If it were departed from, uncertainty, insecurity in the transaction of business, and injustice would result. Parties could not know what were their rights or duties, if they were to be determined by loose evidence of some merely local, indefinite, and partial usage." *Herring v. Skaggs*, 73 Ala. 446, 454, 455; *Upton v. Suffolk County Mills*, 11 Cush. 586, 59 Am. Dec. 163.

The respondents argue that, since the guaranty induced the contract, there was no contract if the guaranty be held void. It is manifest that, since the respondents had no right to rely upon the guaranty made by the agent, they cannot be heard to say that they did so rely. In the absence of a ratification by the appellant, they can base no rights either of an attack or defense upon the guaranty. There is no question that, if a principal elect to ratify a contract which the agent was not authorized to make, he must ratify the whole of it. If he ratifies the contract, he ratifies the warranties. But in this case there was no such ratification. The record shows that the appellant pointedly repudiated the guaranty as soon as he learned of it, and refused to further proceed with the contract if the guaranty was insisted upon. The evidence shows an acquiescence by the respondents in that repudiation. They accepted the performance of the contract without an affirmation of the guaranty. When the appellant wrote them to the effect that no further shipment would be made so long as the guaranty was claimed, the respondents answered authorizing the shipment as requested by the letter, thus plainly waiving the guaranty and affirming the contract without it. It can make no difference that they then had made arrangements to give away the whole number of machines. That arrangement had been made by them, not in reliance upon any act of the appellant indicating a ratification of the guaranty, but in sole reliance upon the guaranty of the agent, which, as we have seen, was of so extraordinary a character that they had no right to assume his authority to make it. To hold, as contended by counsel, that the appellant without knowledge or ratification should be estopped to question the guaranty because the respondents had placed themselves in a position where they must have the machines, in reliance upon the guaranty, would be to hold that the principal would be bound

in almost every instance by the unauthorized acts of the agent, however palpably beyond the scope of his employment. It would be in effect to say that though in law the purchaser had no right to rely upon a guaranty on its face beyond the scope of the agent's employment, yet, if he does so rely to his injury, the principal will be bound. The paradox is too plain to require further comment.

The court was in error in sustaining the counterclaim. The finding that there was a balance of \$410 due upon the purchase price of the machines was not excepted to by either party. The cause is therefore remanded, with direction to modify the judgment in favor of the plaintiff, making it for the sum of \$410 and costs.

Dunbar, Ch. J., and Crow, Morris, and Chadwick, JJ., concur.

WASHINGTON SUPREME COURT. (Department No. 1.)

G. A. C. ROCHESTER, Admr., etc., of W.
C. Bell, Deceased, Appt.,
v.

SEATTLE, RENTON, & SOUTHERN
RAILWAY COMPANY, Respt.

(67 Wash. 545, 122 Pac. 23.)

Damages — wrongful death — minor heirs.

1. The damages to be recovered by a child for the wrongful death of its father are not limited to those suffered before attaining majority, under a statute giving heirs a right of action for death, and providing that if deceased leave no widow or issue, then his parents, sisters, or minor brothers who may be dependent upon him for support, may maintain the action, the jury to allow such damages as, under all the circumstances, may seem just.

Note. — Is minor's right to damages for the negligent killing of parent limited to the period of minority.

This note is supplementary to that to Butte Electric R. Co. v. Jones, 18 L.R.A. (N.S.) 1205.

No attempt has been made in this note to collect in general the cases in which an adult child has been allowed to recover, such as Baltimore & O. R. Co. v. State, 63 Md. 135; Demarest v. Little, 47 N. J. L. 28; Petrie v. Columbia & G. R. Co. 29 S. C. 303, 7 S. E. 515; Galveston, H. & S. A. R. Co. v. Kutac, 72 Tex. 643, 11 S. W. 127; Missouri, K. & T. R. Co. v. Butts, — Tex. Civ. App. —, 132 S. W. 88; Tuteur v. Chicago & N. W. R. Co. 77 Wis. 505, 46 N. W. 897. In principle, if an adult child may recover in such actions there is no reason 39 L.R.A. (N.S.)

Trial — instruction — measure of damages — wrongful death.

2. Whether or not the jury should be instructed to allow a minor such damages as they find he would suffer after majority, because of the wrongful killing of his father, will depend upon the character of the evidence, indicating the probability of such loss because of the character of the father.

(March 20, 1912.)

A PPEAL by plaintiff from an order of the Superior Court for King County, granting a new trial after verdict in his favor in an action brought to recover damages for the death of his intestate, which was alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Peters & Powell, for appellant:

Whether a minor child will suffer any damages after attaining majority is a question for the jury to determine under all the facts and circumstances of the case.

Redfield v. Oakland Consol. Street R. Co. 110 Cal. 277, 42 Pac. 822, 1063; Valente v. Sierra R. Co. 158 Cal. 412, 111 Pac. 95; Tuteur v. Chicago & N. W. R. Co. 77 Wis. 505, 46 N. W. 897; Tilley v. Hudson River R. Co. 29 N. Y. 252, 86 Am. Dec. 297; Galveston, H. & S. A. R. Co. v. Kutac, 72 Tex. 643, 11 S. W. 127; Demarest v. Little, 47 N. J. L. 28; Beaumont Traction Co. v. Dilworth, — Tex. Civ. App. —, 94 S. W. 352.

The damages sought to be recovered by a minor child cannot be limited to the period of minority.

Kansas City Southern R. Co. v. Frost, 93 Ark. 183, 124 S. W. 748; Paris & G. N. R. Co. v. Robinson, — Tex. Civ. App. —, 127 S. W. 294; Missouri, K. & T. R. Co. v. Butts, — Tex. Civ. App. —, 132 S. W. 88; Texas P. R. Co. v. Martin, 25 Tex. Civ. App. 204, 60 S. W. 803; Petrie v. Columbia & G. R. Co. 29 S. C. 303, 7 S. E. 516; Butte

why recovery by a minor child should be limited to the period of minority; but the note has been confined to cases in which the question annotated has been directly considered by the court.

In Kansas City Southern R. Co. v. Frost, 93 Ark. 183, 124 S. W. 749, it is held that recovery by a minor child is not limited to the period of his minority, the court stating that the right to recover damages in such cases is limited by the statute only to the damages suffered, and not to any period of life. It is held further in this case that the right to recover beyond minority depends upon the evidence; and that, on the whole, it is a question for the jury to say whether or not damages for a period beyond minority may be recovered.

So, in Paris & G. N. R. Co. v. Robinson, — Tex. Civ. App. —, 127 S. W. 294, it was

Electric R. Co. v. Jones, 18 L.R.A.(N.S.) 1205, 90 C. C. A. 240, 164 Fed. 308; Baltimore & O. R. Co. v. State, 60 Md. 449; Baltimore & O. R. Co. v. State, 63 Md. 135; Lazelle v. Newfane, 70 Vt. 440, 41 Atl. 511; Pennsylvania R. Co. v. Adams, 55 Pa. 499.

Mr. Morris B. Sachs for respondent.

Gose, J., delivered the opinion of the court:

This action is prosecuted by the administrator of the estate of W. C. Bell, deceased, for the recovery of damages sustained by his heirs in consequence of his death, which it is alleged was caused by the negligence of the defendant. There was a verdict for the plaintiff for \$17,500. The court granted a new trial upon the sole ground that he had erred in instructing the jury that, in estimating damages, they could include such pecuniary loss as they might find from the evidence the minor son of the deceased would suffer after attaining his majority by reason of his father's death. The motion for a new trial was denied in all other respects. The plaintiff has appealed from the order granting a new trial.

On April 30, 1910, the respondent was operating an electric railway in the city of Seattle, and between that city and the town of Renton. On the date stated the appellant's intestate lost his life in consequence of a collision between the respondent's pas-

senger car, upon which he was riding, and one of its freight cars. At the trial of the case the negligence of the respondent was conceded, and the single question submitted to the jury was the measure of damages. The decedent was forty-six years of age at the time of his death, and his sole heir is a son fourteen years of age, who is not of normal mentality. He was a lawyer, by profession, a resident of Harrodsburg, Kentucky, and had voluntarily retired from the circuit court bench of that state a few months before his untimely death, after having served a term of six years.

The single question presented by the appeal is whether the court erred in instructing the jury that they could allow such pecuniary loss as the evidence showed the son would sustain after his majority, from the father's death. The cause of action is based upon the statute. Rem. & Bal. Code, § 183. The applicable part of the statute is as follows: "When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. *If the deceased leave no widow or issue, then his parents, sisters, or minor brothers who may be dependent upon him for support, and who are resident within the United States at the time of his death, may maintain said action.* . . . In

held that the damages resulting to a child from the wrongful death of its father are not limited by statute to the period of the child's minority.

The holding in *Redfield v. Oakland Consol. Street R. Co.* 110 Cal. 277, 42 Pac. 822, 1063, cited in note in 18 L.R.A.(N.S.) 1205, is approved in *Simoneau v. Pacific Electric R. Co.* 159 Cal. 494, 115 Pac. 320, and *Valente v. Sierra R. Co.* 158 Cal. 412, 111 Pac. 95; and in *Peters v. Southern P. Co.* 160 Cal. 48, 116 Pac. 400, it is held, in accordance with the decision in the *Redfield Case*, that the damages recoverable by minor children are not confined to the period of minority.

As shown in the earlier note, there is some authority for limiting the recovery to the period of minority. The statement there made, however, that the weight of authority is to that effect, is hardly justified when it is noted that in the following cases,—*Baltimore & O. R. Co. v. State*, 33 Md. 542; *Baltimore & R. Turnp. Road v. State*, 71 Md. 573, 18 Atl. 884; *McPherson v. St. Louis, I. M. & S. R. Co.* 97 Mo. 253, 10 S. W. 846; *Delahunt v. United Teleph. & Teleg. Co.* 215 Pa. 241, 114 Am. St. Rep. 958, 64 Atl. 515; *Hoadley v. International Paper Co.* 72 Vt. 79, 47 Atl. 169,—which were cited in support of that statement, the instructions which did in form so limit the recovery were complained of, not by the plaintiff, but by the defendant,—on other 39 L.R.A.(N.S.)

grounds, of course,—and hence those cases, while certainly not authority against that statement, cannot properly be regarded as affirmative authority in its favor. It also is to be observed from the earlier note that some of the cases merely limit the recovery to the period of minority as to particular elements of damages.

In *Atlanta & W. P. R. Co. v. Venable*, 67 Ga. 697, where the trial court had allowed damages to be computed from the date of the injury to the parent, instead of from the death, the appellate court held that such damages should have been computed from the date of the death; and in computing the amount by which the verdict was reduced, the court recognized the fact that the damages were limited to the period of minority; but there is no discussion nor holding on this point. There is also a statement to the effect that recovery in such cases is limited to the period of minority, in *Davis v. Southwestern R. Co.* 41 Ga. 223, but it is not clear that this was necessary to the decision in this case. The reason for this limitation of the right of recovery of minor children, as recognized by the Georgia courts, doubtless arises from the statute which was held in the subsequent Georgia case of *Coleman v. Hyer*, 113 Ga. 420, 38 S. E. 962, to exclude adult children from the benefit of a recovery thereunder, the words "child or children" being limited in meaning to minor children. W. A. E.

every such action the jury may give such damages as, under all circumstances of the case, may to them seem just." The old statute (2 Ballinger's Anno. Codes & Statutes, § 4828) was amended by Laws of 1909, p. 425, by adding the words which we have italicized. We think the instruction is a correct interpretation of the statute, and that the court erred in granting a new trial. Indeed, we do not think the statute is susceptible of any other reasonable interpretation. To construe the statute in any other way would require us to read into the statute the word "minor" before both the words "heirs" and "issue." There is nothing in the language to indicate in the remotest way that the lawmaking branch of the government intended such interpolation. Indeed, such construction would be an entire emasculation of the statute. It would lead to the absurd result that, under certain contingencies, an adult dependent sister would have a cause of action, while an adult dependent daughter would not have a cause of action. It cannot be doubted, we think, that even under the statute prior to the 1909 amendment, the instruction would be correct. As amended, however, the statute is entirely free from doubt, unless we assume that the legislature intended a limitation which it did not express in words. The fact that it made provision for minor dependent brothers shows clearly that the preceding words were advisedly used. One of two views must obtain. It must be held either that the word "heirs," in the first part of the statute, embraces and defines the several classes, "widow," "issue," "parents," "sister," and "minor brothers," or that the words "heirs" and "widow or issue" are intended to be synonymous terms. In either case the instruction is correct.

The trial court granted the new trial because he was of the opinion that the construction put upon the old statute by this court enunciated a principle not in harmony with the instruction. The respondent takes a like view. The cases relied upon as announcing a view not in harmony with the instruction are *Dahl v. Tibbals*, 5 Wash. 259, 31 Pac. 868; *Noble v. Seattle*, 19 Wash. 133, 40 L.R.A. 822, 52 Pac. 1013; *Manning v. Tacoma R. & Power Co.* 34 Wash. 406, 75 Pac. 994. In the *Dahl* Case the action was prosecuted by the widow and minor children for the recovery of damages for wrongfully causing the death of the husband and father. The only question before the court was the capacity of the plaintiffs to maintain the action. The court, however, said: "The sole object of such statutes is to give a right of action for damages in favor of, or for the benefit of, those who may be deprived of support and maintenance

by death caused by the wrongful 'act or omission of another.'" In the *Noble* Case it was held that there was no right of action in the father and mother for the wrongful death of an adult bachelor son. In that case, also, the court said that the right of action only existed in favor of those heirs to whom the deceased while living owed the legal duty of support. In the *Manning* Case the mother, the father being dead, sought to recover damages arising from the death of her adult bachelor son, alleging that his death resulted from the wrongful act of the defendant. It was held, upon the authority of the *Noble* Case, that she had no right of action. The court, however, took occasion to intimate that it did not think the *Noble* Case correctly interpreted the statute, but that it would adhere to it on the ground of *stare decisis*. It is apparent that the quotation from the *Dahl* Case is only *dictum*, and that the statement of the same nature in the *Noble* Case was not called for by the facts before the court. It is also apparent that the court was not called upon to meet the precise question before us in any of these cases. If it may be said that they involved a similar principle, a sufficient answer is: (1) That we are not disposed to extend the rule of these cases beyond their letter, and (2) that we are here construing the law as amended. The instruction is supported by the following cases from other jurisdictions where the cause of action was predicated upon the allegation that death was caused by the negligence of the defendant: *Redfield v. Oakland Consol. Street R. Co.* 110 Cal. 277, 42 Pac. 822, 1063; *Valente v. Sierra R. Co.* 158 Cal. 412, 111 Pac. 95; *Tuteur v. Chicago & N. W. R. Co.* 77 Wis. 503, 46 N. W. 897; *Tilley v. Hudson River R. Co.* 29 N. Y. 252, 86 Am. Dec. 297; *Galveston, H. & S. A. R. Co. v. Kutac*, 72 Tex. 643, 11 S. W. 127; *Beaumont Traction Co. v. Dilworth*, — Tex. Civ. App. —, 94 S. W. 352; *Paris & G. N. R. Co. v. Robinson*, — Tex. Civ. App. —, 127 S. W. 294; *Missouri, K. & T. R. Co. v. Butts*, — Tex. Civ. App. —, 132 S. W. 88; *Demarest v. Little*, 47 N. J. L. 28; *Kansas City Southern R. Co. v. Frost*, 93 Ark. 183, 124 S. W. 749; *Petrie v. Columbia & G. R. Co.* 29 S. C. 303, 7 S. E. 515; *Baltimore & O. R. Co. v. State*, 63 Md. 135; *Lazelle v. Newfane*, 70 Vt. 440, 41 Atl. 511; *Duzan v. Myers*, 30 Ind. App. 227, 96 Am. St. Rep. 341, 65 N. E. 1046; *Butte Electric R. Co. v. Jones*, 90 C. C. A. 240, 18 L.R.A.(N.S.) 1205, 164 Fed. 308 (9th Ct.).

The *Redfield* Case was prosecuted by the husband and minor children for damages arising from the death of the wife and mother. The California statute (Code of Civil Procedure, § 377) upon which the

cause of action was rested gave a right of action in such cases to the "heirs or personal representatives" of the deceased. In that case the following instruction was approved: "The pecuniary interest of children in the lives of their parents does not necessarily end with their arrival at the age of majority; but you may allow for the probable loss of any benefit, if any, of a pecuniary value, which the child would probably receive from its mother after its arrival at majority." The court said, in commenting upon the instruction: "Besides, the statute does not limit the right to prosecute the action or to recover damages to minor children or minor heirs." In the *Valente Case* the California court again ruled that the statute does not limit the right of recovery to minor children, and approved an instruction similar to the one given in the *Redfield Case*. In the *Tuteur Case* a recovery was had for the pecuniary loss sustained by adult children for the death of their mother; their father being dead. The statute upon which that action rested gave a right of action to the personal representatives of the deceased person, and directed that the amount recovered should belong and be paid over to the "lineal descendants" of the "lineal ancestors" where neither a husband nor a widow survived the deceased. *Sanborn & B. Stat. (Wis.) 1898, § 4256*. In the *Tilley Case* an instruction was approved which directed the jury that, for the wrongful death of the parent, they were at liberty to allow damages to the children through the whole period of their probable lives. The court said: "Nor do I perceive any sufficient legal reason for limiting the damages to the minority of the children if the jury are legally persuaded they would continue after that age." The decision was based on a statute permitting a recovery for the benefit of the "widow and next of kin." *Laws of New York 1849, chap. 256*. In the *Kutac Case* the right of recovery was not limited to the period of the minority of the children. In speaking of the rights of the adult child of the deceased, the court said: "He was a surviving child of the deceased, and the statute makes no distinction upon this ground." The statute referred to authorizes a recovery for the benefit of the "husband, wife, children, and parents." *Revised Statutes (Tex.) 1895, art. 3021*. In the *Demarest Case* the beneficiaries of the recovery were the adult children of the deceased. The statute in that state permits a recovery to the extent of the pecuniary injury resulting to the "widow and next of kin." In the *Frost Case* the trial court refused to confine the recovery to the damages suffered by the children, in consequence to the death of the father, to the

period of their minority. The court said that the right to recover was limited only by the statute to the damages suffered, "and not to any period of life." The statute gave a right of recovery to the "widow and next of kin." *Arkansas Digest, Kirby, 1904, § 6290*. In the *Petrie Case* all of the children of the deceased were adults. The contention there made, that no damages could be recovered for their benefit unless they had some legal claim on the deceased, was held untenable. The statute permitted a recovery for the benefit of the "wife, husband, parent, and children" of the deceased. In the *Jones Case* the ruling of the trial court, extending the right of recovery on behalf of the son beyond the period of minority, was approved. The cause of action arose in the state of Montana. The court said that the *Redfield Case* (California) was based upon a statute "precisely similar" to the Montana Case, and that the *Tilley Case* (New York) was based upon a statute "similar in effect." The necessary deduction is that the court construed the words in the California statute, "heirs or personal representatives," and the words in the New York statute, "widow and next of kin," as practically synonymous.

The respondent has cited the following authorities: *Baltimore & R. Turnp. Road v. State, 71 Md. 573, 18 Atl. 884*; *Goss v. Missouri P. R. Co. 50 Mo. App. 615*; *Delahunt v. United Teleph. & Teleg. Co. 215 Pa. 241, 114 Am. St. Rep. 958, 64 Atl. 515*; *Baltimore & P. R. Co. v. Golway, 6 App. D. C. 143*; *Hoadley v. International Paper Co. 72 Vt. 79, 47 Atl. 109*; *Coleman v. Hyer, 113 Ga. 420, 38 S. E. 963 (Ga.)*; *Dueber v. Northern P. R. Co. (C. C.) 100 Fed. 425*. In the first case cited the trial court instructed the jury that the damages should be estimated to the time the children attained their majority. The defendant appealed. While the court said the instruction was correct, the question was not before it for decision. In the *Goss Case* it was held that the children are only entitled "by law to support of the father during minority." The language of the statute is not set out in the opinion. In the *Delahunt Case* there was a judgment for the plaintiff, and the defendant appealed. The statute is not set forth. The trial court limited the recovery to loss sustained by the children for support and education during their minority. In the *Golway Case* the court held that "prospective gifts" were not recoverable as an element of damages in behalf of adult sons. In the *Hoadley Case* the trial court instructed the jury that, in estimating the pecuniary loss sustained by minor children in the death of their father, the physical, moral, and intellectual in-

struction and training which they would have received from him had he lived were proper elements for their consideration. The defendant's contention that this was not a proper element of damages was rejected. The question presented in this case was not considered. The Coleman Case and other cases cited from the state of Georgia hold that the word "children" in a similar statute means minor children only. The Dueber Case is based upon the same facts as the Noble Case. The respondent has cited a number of Maryland cases which we need not consider, in view of the fact that the later case of Baltimore & O. R. Co. v. State, 63 Md. 135, in principle supports the instruction in the case at bar.

The evidence in this case justifies the instruction. It seems hardly necessary to say that, if the deceased had been an immoral and improvident man, or in bad health, so that it would have been mere guesswork for the jury to find that the minor son would suffer any pecuniary loss after his majority, then such an instruction would not be proper. In other words, the facts in the particular case must determine whether the instruction should be given. We think the instruction was correct, and that the court was in error in granting a new trial.

The judgment is reversed, with instructions to enter a judgment upon the verdict.

Dunbar, Ch. J., and Parker, Crow, and Chadwick, JJ., concur.

SOUTH CAROLINA SUPREME COURT.

M. D. ROUSE et al., Respts.,

v.

JIM BRANCH et al., Appts.,

(— S. C. —, 74 S. E. 133.)

Will — forfeiture for contesting — forgery.

Contesting a will upon probable cause for alleged forgery does not work a forfeiture

Note. — What amounts to a contest within forfeiture clause in will.

This is a continuation of the same subject discussed in the note to *Re Hite*, 21 L.R.A. (N.S.) 953.

As to the effect generally of a provision in a will that any beneficiary who contests the instrument shall forfeit his interest, see note to *Re Friend*, 68 L.R.A. 447.

Conditions for the forfeiture of vested interests once bestowed by will are not believed of the law. They must be strictly construed in favor of the threatened beneficiary, and the burden of proof as to the 39 L.R.A. (N.S.)

under a provision therein that if anyone mentioned in the will shall attempt to break it, he shall have only a nominal sum, and his share shall be divided amongst other persons mentioned.

(March 25, 1912.)

APPEAL by defendants from a judgment of the Common Pleas Circuit Court for Barnwell County in plaintiffs' favor in an action for the partition of certain real estate left by the will of W. H. Mears, deceased, and for the construction of said will. Affirmed.

The facts are stated in the opinion.

Messrs. Bates & Simms, for appellant executors:

Where there was *probabilis causa litigandi*, and there was no gift over of the legacy or devise, a legatee or devisee did not, by unsuccessfully contesting the validity of the will, forfeit the legacy or devise given to him.

Powell v. Morgan, 2 Vern. 90; *Morris v. Burroughs*, 1 Atk. 399; *Lloyd v. Spillet*, 3 P. Wms. 344, 2 Atk. 148.

But if there was a gift over of the legacy or devise, the breach of the condition would work a forfeiture.

Cleaver v. Spurling, 2 P. Wms. 528; *Smithsonian Inst. v. Meech*, 169 U. S. 398, 42 L. ed. 793, 18 Sup. Ct. Rep. 396; *Fifield v. Van Wyck*, 94 Va. 557, 64 Am. St. Rep. 745, 27 S. E. 446.

The condition in the will was not invalid as contrary to the policy of the law.

Cooke v. Turner, 15 Mees. & W. 727, 14 Sim. 493; *Evanturel v. Evanturel*, L. R. 6 P. C. 1, 43 L. J. P. C. N. S. 58, 31 L. T. N. S. 105, 23 Week. Rep. 32; *Donegan v. Wade*, 70 Ala. 501; *Hoit v. Hoit*, 42 N. J. Eq. 388, 59 Am. Rep. 43, 7 Atl. 856; *Thompson v. Gaut*, 14 Lea, 310; *Bradford v. Bradford*, 19 Ohio St. 546, 2 Am. Rep. 419; *Breithaupt v. Bauskett*, 1 Rich. Eq. 465; *Mallet v. Smith*, 6 Rich. Eq. 18, 60 Am. Dec. 107; *Chew's Appeal*, 45 Pa. 228; *Van Dyke's Appeal*, 60 Pa. 491; *Cochran v. Cochran*, 127 Pa. 486, 17 Atl. 981; *Friend's Estate*, 209 Pa. 442, 68 L.R.A. 447, 58

forfeiture is upon the party asserting it. *Re Wall*, 76 Misc. 106, 136 N. Y. Supp. 452.

"While 'contest,' as used in statutes, may be treated as a 'word of art,' it is hardly such in ordinary use and signification. The definition by Webster is 'to make a subject of dispute; to call in question; to dispute.' It is frequently used in the sense of, 'to litigate,' 'oppose,' 'to challenge,' 'to resist,' and, as applied to legal proceedings, it ordinarily implies a dispute between parties plaintiff and defendant before a court which is to decide the question put in issue. It is the contention of appellant that the words 'shall contest the same,' as em-

Atl. 853; Jackson v. Westerfield, 61 How. Pr. 399; Re Barandon, 41 Misc. 380, 84 N. Y. Supp. 937; Grote's Estate, 2 How. Pr. N. S. 140; Re Stewart, 1 Connolly, 412, 5 N. Y. Supp. 32; Magee v. O'Neill, 19 S. C. 170, 45 Am. Rep. 765; Re Hite, 155 Cal. 436, 21 L.R.A.(N.S.) 953, 101 Pac. 443, 17 Ann. Cas. 993.

Mr. W. B. DeLoach also for appellants.

Messrs. W. A. Holman and R. C. Holman for respondents.

Gary, Ch. J., delivered the opinion of the court:

The record contains this statement: "This is an action for partition between the plaintiffs and the defendants, other than the executors, of the real estate left by the

played by the testator in the will before us, ought to be construed as referring to a direct assault upon the entire instrument as a will, upon grounds which, if established, would render it void in all its parts. That such an attack would be a contest of the will is certain, but that an attack upon the validity of a material part of the will which, if successful, would destroy the integrity of the plan adopted by the testator for the distribution of the estate, is not also a contest within the fair meaning of the words, cannot be conceded." Moran v. Moran, 144 Iowa, 451, 30 L.R.A.(N.S.) 598, 123 N. W. 202.

It will thus be seen that the tendency of the courts is to look to the essence of the condition imposed upon a legacy, and give effect to the lawful intention of the testator, and they will therefore decline to put any strained or overtechnical construction upon the verbiage employed, to enable a legatee to occupy the position of one who affirms a will so far as it is to his own profit, and at the same time repudiates the validity of its provisions for the benefit of others. Such a position is inequitable. Ibid.

Rouse v. BRANCH holds that, under a will providing that if any of the beneficiaries shall enter a suit in law to break the will, such beneficiary shall have a mere nominal sum, instead of his legacy, and the remainder of his share shall be divided among others, a beneficiary does not forfeit his share by attempting to show upon probable cause that the will is a forgery. Public policy forbids that he should be thus coerced into partaking of the fruit of what he believes to be a crime.

In Kayhart v. Whitehead, 77 N. J. Eq. 12, 76 Atl. 241, the will provided that if any beneficiary should file a caveat against the same, or in any other manner assist in an attempt to prevent its probate, all the expenses of probating the will should be taken by the executor from the share of such beneficiary. In an action by the executor to recover or retain from certain legacies the expenses of the probate, after deciding that the above provision of the will was valid, the court held not only that the beneficiary

late W. H. Mears, of Hampton county, said state, under the terms of his last will and testament, and for the construction of the said will. The defendant executors in their answer likewise desired the instruction of the court as to the rights of the various parties under said will; and all the defendants denied the right of the plaintiffs to any interest in said estate, by reason of having required the will to be proven in due form of law, contending that the same was a forgery, and because of the proceeding thereunder taken, as contained in the printed record now on file in the supreme court in the case of Thomas v. Rouse, which record is likewise printed herein, as required by respondents."

The following provision appears in the

who filed the caveat was liable for his share of the expense, but that two others were also liable, because they conferred with the caveator and aided or assisted his solicitors of record in the matter of securing or seeing witnesses; one of these beneficiaries was held liable also because she assured the caveator in writing that if the executor did not pay his legacy, she would pay him the same amount; she was also present in the orphans' court when the probate contest was on, and heard without protest the statement by an attorney that he appeared to argue on her behalf against the admission of the will to probate; his appearance for her was made a matter of record, and in the decree granting the probate it was recited that he appeared and was heard for her, and an allowance was made to him as fees as her counsel. She also filed an appeal to the prerogative court from the decree of the orphans' court admitting the will to probate, and since, upon such appeal, the whole question of probate comes up *de novo*, this was held to be of itself an attempt to prevent the probate of the will.

The mere filing of a caveat, however, will not be construed as a contest of a will, within the meaning of a provision therein that any legatee contesting or attempting to contest the will shall lose his legacy. McCahan's Estate, 221 Pa. 188, 70 Atl. 711.

A beneficiary who opposes the probate of a will on the grounds of alleged incompetency to make the will, and undue influence alleged to have been exercised upon the testator, even though there be probable cause for such allegations, thereby makes a contest of the will sufficient to work a forfeiture, under a provision for forfeiture in case of contest. Re Miller, 156 Cal. 119, 23 L.R.A.(N.S.) 868, 103 Pac. 842.

Where a testator without right willed the separate property of his wife to his children, and provided that if any one of them should contest the will he should forfeit his share, it was held that each party was thus put upon an election, and that when one of the beneficiaries contested the will on the ground that the property was either the separate property of his mother, or the community

will: "If any of the parties above mentioned shall enter a suit in law to break my will, he shall have \$5 only, and his share shall be divided among them mentioned in the fourth division of my will." The appellants' attorneys in their argument, after discussing the authorities, say: "According to the weight of the foregoing authorities, the following principles seem to be established: (1) Conditions annexed to legacies and devises, providing a forfeiture in case the will is contested, are valid. (2) In case of a legacy, a breach of the condition will not work a forfeiture, unless there is a gift over of the subject-matter of the legacy. (3) If there is no gift over, and there was *probabilis causa litigandi*, a breach of the condition will not work a forfeiture, either as regards a legacy or devise. (4) Where the will is contested on behalf of an infant legatee or devisee, the forfeiture will not be decreed, irrespective of whether there was a gift over or not."

In the first place, let us turn to our own decisions to see to what extent this question is determined by them. In the case of *Mallet v. Smith*, 6 Rich. Eq. 12, 60 Am. Dec. 107, the testator by his will made certain provisions for some of his slaves, which were void under the statute. He be-

queathed to his sister, J. M., \$2,000, made her one of his residuary legatees, and then provided as follows: "Should any of the legatees under this my will complain, or express any dissatisfaction with my disposition of my estate herein made, I hereby direct and empower my executors, in their discretion, to revoke any and all legacies such complaining legatee or legatees might have been entitled to, and to dispose of the same between my other legatees, as to my executors may seem just and proper." The chancellor on circuit used the language in that case: "It is insisted on the part of the defendant that the complainant has forfeited her legacy of \$2,000, as well as her interest in the residue, by calling in question the validity of the provisions made in the fourth clause. The general proposition on this subject was established as early as *Powell v. Morgan*, 2 Vern. 91. That was a legacy upon condition that the legatee did not disturb or interrupt the will of the testatrix. The validity of the will was, however, unsuccessfully contested by the legatee. It was held that this was no forfeiture of the legacy, as there was *probabilis causa litigandi*, and such is now the well-settled doctrine, to wit, that such condition is considered in *terrorem* merely.

property of his father and mother, he elected to recover as heir of his mother, and thereby forfeited his right as devisee of his father; he could not recover in both capacities. *Massie v. Massie*, 54 Tex. Civ. App. 617, 118 S. W. 219.

Where testator left a widow and children by her, and children by two deceased wives, and provided in his will that if any of the beneficiaries should attempt to change or break the will, the property should go to his surviving wife and his children by her, it was held that a suit by children of the first marriage to try title to, and for partition of, the land, was a contest such as to work a forfeiture, and that the forfeiture was of the rights of all the devisees, whether they joined in the attack upon the will or not. *Perry v. Rogers*, 52 Tex. Civ. App. 594, 114 S. W. 897.

Under a provision in a will to the effect that if a legatee should in any way dispute the will or the validity thereof, his legacy should be of no effect, but should fall into the residuary estate, when a legatee joins with others in bringing an action to have the will declared invalid, he thereby works a breach of the condition, and the fact that the legacy has been paid over to him before the suit is brought against the will does not affect the result; the executor of the will may recover it back. *Kelley v. Winslow*, 73 Misc. 642, 131 N. Y. Supp. 65.

In *Re Wall*, 70 Misc. 106, 136 N. Y. Supp. 452, it was held that the condition in a will for forfeiture in case of contest was invalid, because there was no gift over in

case of forfeiture, and therefore the court did not decide whether the mere institution of an action to contest the validity of the will, which was discontinued after joinder of issue, was such a contest as to amount to a breach of the condition.

Under a provision of a will that in case any of the legatees shall contest the same, he shall forfeit his legacy, it was held, in *Moran v. Moran*, 144 Iowa 451, 30 L.R.A. (N.S.) 898, 123 N. W. 202, that a suit instituted and prosecuted by legatees asserting title in themselves independently of the will, to a large part of the estate which the testator had undertaken to dispose of by that instrument, was a breach of the condition.

Upon the probate of their father's will, either of three courses was open to the appellants. They could yield to its terms, and, by accepting the legacies, abandon all claims of right in hostility to the will; or they could by proper action in court seek to have the will decreed invalid in its entirety, upon allegation of proper grounds therefor; or, without asserting the invalidity of the instrument as a will, they could bring action to defeat its provisions by claiming ownership in themselves of the property of the estate independent of the will. They chose the latter course, denying the testator's title to the land, and impeaching the validity of the devise thereof by the will, and this election we think was a breach of the condition which the testator annexed to his gifts. *Ibid.*

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and does not operate a forfeiture of the legacy. But where there is not simply a declaration of forfeiture, but a valid bequest to a third person in case of breach of the condition, then if the legatee controvert the will, his interest will cease and vest in the other legatee. The exception is discussed by Sir William Grant in *Lloyd v. Branton*, 3 Meriv. 117. He says that different reasons have been assigned by different judges for the operation of a devise over; some holding that it was a clear manifestation of intention that the declaration of forfeiture was not merely in *terrorem*, and others that it was the interest of the devisee over which made the difference. But all agree that there must be a valid devise over, in order to defeat the legacy." He declared that the said clause of the will was null and void. There was an appeal to the court of appeals, in equity, and the case was heard by Chancellors Johnston, Dunkin, Dargan, and Wardlaw, the opinion of the court being delivered by Chancellor Wardlaw, who, after stating that said court was content with the chancellor's conclusion, and, in general, with his reasoning, although there was not entire concurrence of the members of the court in the same views, used the following language:

"Without intention or authority to commit the court to this extent, I express my own opinion, in which Chancellor Johnston fully concurs, that a condition subsequent of this description is void, whether there be a devise over or not, as trenching on the 'liberty of the law' 1 Shep. Touch. 132, and violating public policy. In *Morris v. Burroughs*, 1 Atk. 404, Lord Hardwicke held such a condition to be clearly in *terrorem*, and that no forfeiture could be incurred by contesting any disputable matter in a court of justice. In *Powell v. Morgan*, 2 Vern. 91, cited in the circuit decree, it was adjudged that breach of such condition involves no forfeiture, where there is *probabilis causa litigandi*. In one of the latest cases on this subject, *Cooke v. Turner*, 15 Mees. & W. 727, a condition was supported as valid that, if the devisee should dispute the sanity and competency of testator to make a will (although testator had been found by inquest to be a lunatic), or should refuse, when required by the executors, to confirm the will, the disposition in favor of such devisee should be revoked. In delivering the judgment of the exchequer, Lord Cranworth, now Lord Chancellor, then Sir R. M. Rolfe, admits that the policy of the state prevents a testator from making the continuance of an estate depend on the legatee's committing a crime, or refraining to do that which it is, or may be, the in-

terest of the state that he should do, such as that he should not marry, should not engage in commerce, should not plow his arable land, or should not do anything else, the performance of which partakes of the character of a duty of imperfect obligation: but he insists that there is no duty of perfect or imperfect obligation on an heir to contest his ancestor's sanity, and that it matters nothing to the state whether the land be enjoyed by devisee or heir. It seems to me that this is a very narrow view of public policy. It is the interest of the state that every legal owner should enjoy his estate, and that no citizen should be obstructed, by the risk of forfeiture, from ascertaining his rights by the law of the land. It may be politic to encourage parties in the adjustment of doubtful rights by arbitration or by private settlement; but it is against the fundamental principles of justice and policy to inhibit a party from ascertaining his rights by appeal to the tribunals established by the state to settle and determine conflicting claims. If there be any such thing as public policy, it must embrace the right of a citizen to have his claims determined by law. . . . But the doctrine of the validity of such a condition, where there is a devise over, is too firmly established to be overruled, except upon grave consideration in some case where the point is necessarily involved in the decision; and that is not the fact here." The decree was affirmed.

There is also another case in our reports which we will discuss later. Turning to the authorities elsewhere, we quote the following language from the case of *Cooke v. Turner*, supra: "The conditions said to be void, as trenching on the liberty of law, are those which restrain a party from doing some act which it is supposed the state has or may have an interest to have done. The state, for obvious causes, is interested that its subjects should marry, and therefore will not, in general, allow parties, by contracts or conditions in a will, to make the continuance of an estate depend on the owner not doing that which it either is or may be the interest of the state that he should be. So the state is interested in having its subjects embarked in trade or agriculture, and therefore will not allow a condition defeating an estate in case its owner should engage in commerce, or should plow his arable lands, or the like. The principle on which such conditions are void is analogous to that on which conditions defeating an estate, unless the owner commits a crime, are void. In the latter case, the condition has a tendency to the violation of a positive duty; in the former, to prevent the performance of what

partakes of the character of imperfect obligation. But in the case of a condition such as that before us, the state has no interest whatever, apart from the interest of the parties themselves. There is no duty [either perfect or imperfect] on the part of an heir . . . to contest his ancestor's sanity. It matters not to the state whether the land is enjoyed by the heir or the devisee; and we conceive, therefore, that the law leaves the parties to make just what contracts and what engagements they may think expedient as to raising or not raising questions of law or fact among one another, the sole result of which is to give the enjoyment of the property to one claimant, rather than another. . . . Where a condition is bad on grounds of public policy, it must obviously be bad whether it be precedent or subsequent. The law will no more allow anything contrary to public policy to be made the means whereby a party shall entitle himself to an estate, than [it will allow it to be a means] whereby he shall be made to lose that of which he is already in possession." See also *Smithsonian Inst. v. Meech*, 169 U. S. 398, 42 L. ed. 793, 18 Sup. Ct. Rep. 396; *Re Hite*, 155 Cal. 436, 101 Pac. 443, and notes to that case in 17 Ann. Cas. 993, and 21 L.R.A. (N.S.) 953.

Conceding that the four propositions hereinbefore mentioned, for which the appellants' attorneys contend, are sound as general statement of law, it does not follow that they are applicable to the facts of this case.

The cases of *Mallet v. Smith*, 6 Rich. Eq. 12, 60 Am. Dec. 107, and *Cooke v. Turner*, supra, show—in fact, the principle does not seem to be disputed—that a testator cannot provide that the continuance of an estate shall depend upon the condition that the devisee or legatee shall not marry, or engage in commerce, or sow his arable lands, or the like, as such condition would be against public policy. We thus see that all conditions in wills upon which an estate shall be allowed to continue in the devisee or legatee are not valid; and the question in this case is whether the right to contest a will on the ground that it is a forgery stands upon the same footing as the right to contest a will when there is a condition that the devisee or legatee shall not marry, or engage in commerce, or sow his arable land, and the like.

In the case of *Breithaupt v. Bauskett*, 1 Rich. Eq. 465, the court had before it the question whether a devise to a mistress or illegitimate children, under the statute, was absolutely void, or only voidable at the election of the wife or legitimate children, and used this language: "Chief Justice Spen-

cer, delivering the opinion of the court says that 'whenever the act done takes effect as to some purposes, and is void as to persons having an interest in impeaching it, the act is not a nullity; and therefore, in a legal sense, it is not utterly void, but merely voidable.' Another test of a void act or deed is that every stranger may take advantage of it, but not a voidable one. *Humphrestons's Case*, Leon. pt. 2, p. 218, Vin. Abr. title Void and Voidable A. pl. 11. Again, a thing may be void in several degrees: '1st. Void so as if never done, to all purposes, so as all persons may take advantage thereof; 2d. Void to some purposes only; 3d. So void by operation of law that he that will have the benefit of it may make it good.'"

A forged will certainly comes under the first head. No case has been cited, and we do not believe any can be found, sustaining the proposition that a devisee or legatee shall not have the right, upon probable cause, to show that a will is a forgery, without incurring the penalty of forfeiting the estate given to him by the will. The right of a contestant to institute judicial proceedings upon probable cause, to ascertain whether the will was ever executed by the apparent testator, is founded upon justice and morality. If a devisee should accept the fruits of the crime of forgery under the belief, and upon probable cause, that it was a forgery, he would thereby become morally a *particeps criminis*, and yet, if he is unwilling to commit this moral crime, be confronted with the alternative of doing so, or of taking the risk of losing all under the will, in case it should be found not to be a forgery. Public policy forbids that he should be tempted in such a manner. This is far more obnoxious to public policy than a condition in the will against marriage.

Judgment affirmed.

Woods and Hydrick, JJ., concur.

MAINE SUPREME JUDICIAL COURT.

MARY E. LEWIS

v.

FRED O. GRAY.

(— Me. —, 83 Atl. 1.)

Lien — storage of hay — right.

The owner of a farm who permits hay to

Note. — Right of one not in the storage business to a common-law lien for storage charge.

Obviously, this note does not purport to cover the cases of warehousemen, carriers,

be stored on it under an agreement for the payment of storage charges has not, unless the contract provides therefor, any lien upon the property to secure payment of the charges.

(April 22, 1912.)

EXCEPTIONS by plaintiff to rulings of the Supreme Judicial Court for Franklin County, made during the trial of an action brought to recover damages for the alleged conversion of a certain amount of pressed hay, which resulted in a verdict for defendant. Sustained.

The facts are stated in the opinion.

innkeepers, livery-stable keepers, garage owners, or artisans. Indeed, the question discussed is whether the considerations which govern the courts in giving a common-law lien to warehousemen and others in the business of storing goods require or permit a lien in favor of an ordinary owner of property who stores goods thereon.

The common-law lien given to warehousemen does not extend to cases of private storage. *Merritt v. Peirano*, 10 App. Div. 563, 42 N. Y. Supp. 97, affirmed without additional opinion in 167 N. Y. 541, 60 N. E. 1116 (pointing out that the statute gives a lien only to a warehouseman or a person lawfully engaged exclusively in the business of storing goods for hire). In *Alton v. New York Taxicab Co.* 66 Misc. 191, 121 N. Y. Supp. 271, decided upon the authority of the last case, it appeared that there was a failure to remove, after notice, goods stored for mutual benefit.

So, a private person who is under no legal obligations to receive and keep goods cannot claim a lien for storage upon property whose temporary custody he accepts. *Lyungstrandh v. William Haaker Co.* 16 Misc. 387, 38 N. Y. Supp. 129; *Rivara v. Ghio*, 3 E. D. Smith, 264.

Therefore, in the absence of an agreement, the common law does not give a lien to a landlord for storage charges on property left on his premises by an outgoing tenant (*Whitlock Mach. Co. v. Holway*, 92 Me. 414, 42 Atl. 799); and this, although he is entitled to compensation for the storage (*Preston v. Neale*, 12 Gray, 222).

A fortiori, a landlord cannot claim a lien upon the property, as against the tenant's mortgagee. *Whitlock Mach. Co. v. Holway*, supra; *Brunswick-Balke-Collender Co. v. Murphy*, 89 Miss. 264, 42 So. 288.

But it seems that leaving the goods on the landlord's premises after he has given notice that he will claim a lien if they are not removed constitutes an assent to the lien which will render it enforceable under the statute in relation to warehousemen. *Schneider v. Dayton*, 111 Mich. 396, 69 N. W. 829 (declaring that while the landlord was not a warehouseman within the meaning of the statute, yet, as between himself and the tenant, he had asserted his rights as such).

There are cases which, while denying a 39 L.R.A.(N.S.)

Mr. Frank W. Butler, for plaintiff:

Defendant had no lien for storage at common law.

Grinnell v. Cook, 3 Hill, 491, 38 Am. Dec. 663; *Healey v. Gray*, 68 Me. 489, 28 Am. Rep. 80; *Ingallsbee v. Wood*, 33 N. Y. 577, 88 Am. Dec. 409; *Jones, Liens*, § 968; *Rivara v. Ghio*, 3 E. D. Smith, 268; *Alt v. Weidenberg*, 6 Bosw. 176; *Merritt v. Peirano*, 10 App. Div. 563, 42 N. Y. Supp. 97; *Re Kelly*, 18 Fed. 528; *Trust v. Pirsson*, 1 Hilt. 292; *Taylor v. Dexter Engine Co.* 146 Mass. 613, 16 N. E. 462; *Whitlock Mach. Co. v. Holway*, 92 Me. 414, 42 Atl.

lien, do not hold that there cannot be a lien in any event, but are governed by special circumstances which would probably forbid a lien in favor of even a warehouseman. Thus, it is held that where it is expressly agreed that payments of storage charges are to be made at specified times, but there is no agreement that the goods shall remain until that time, there is no implied understanding that payment is to be made before delivery of the goods, and there is therefore no lien. *Webster v. Keck*, 64 Neb. 1, 89 N. W. 410 (agreement by a tenant, who left property on the landlord's premises, that he would pay a certain amount monthly until the goods were removed, there being no agreement that the property should remain that long, or that payment should be made when the property was removed).

So, no lien exists in favor of the owner of a store, who grants to another the right to store, repair and sell pianos therein for a specified amount, payable at the expiration of each month, it being agreed that the contract should not be regarded as a lease. This was held to differ very much from an agreement with a warehouseman; but it was declared that even if it could be so regarded, the agreement for the payment at the expiration of each month was wholly inconsistent with the retention of a lien. *Trust v. Pirsson*, 1 Hilt. 292. Upon the authority of this case it was held in *Re Kelly*, 18 Fed. 528, that in New York a person who is neither a warehouseman nor in the business of storing goods has no lien for compensation upon articles privately stored by him.

Generally as to innkeepers' liens, see the note in 21 L.R.A. 229; and as to the lien of an innkeeper on property of a third person, in possession of a guest, see the note in 24 L.R.A.(N.S.) 958.

As to the right of a garage owner to a lien, see subdivision X. of the note in 1 L.R.A.(N.S.) 240.

As to the right of a carrier to a lien for demurrage, see the note in 3 L.R.A.(N.S.) 327.

As to whether the improvement of personal property at the request of the bailee creates a liability against the bailor or the property, see the note in 38 L.R.A.(N.S.) 97.

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799; *Preston v. Neale*, 12 Gray, 222; *Stoddard v. Crocker*, 100 Me. 450, 62 Atl. 241.

Mr. Elmer E. Richards for defendant.

King, J., delivered the opinion of the court:

Action of trover for the value of a certain quantity of pressed hay. It appears from the exceptions that the plaintiff was the owner in 1907 of an undivided half of a farm; that the hay in question was cut that year on the farm, pressed, and stored on the premises; that in 1908 the plaintiff sold and conveyed her half of the farm to her cotenant, and thereafter the cotenant sold and conveyed the farm to the defendant, the pressed hay still being stored thereon; that, after the defendant came into possession of the premises, he notified the plaintiff to remove the hay; and that, if it remained there, storage would be claimed, and there was some evidence introduced tending to show an agreement to pay storage. The question was whether the defendant had lien on the hay for storage after his notice that storage would be claimed.

The presiding justice gave the jury explicit instructions relating to the question whether there was a contract on the plaintiff's part to pay storage, and then said:

"If they did come to an understanding, if a proposition was made, and assented to by her, that storage should be paid from that time, then I give you this rule, as it lies in my mind at present, that the defendant would be entitled to retain possession of that hay until a fair reasonable price for the storage was made or tendered. We have a class of cases on the subject of liens where things are put into the possession of another to do something to them, to mend them, or repair them, or do work upon them, in which case the one who does the work is entitled to retain them until pay for the work is made to him. And I think, and so rule to you, and it will be your guide in this case, that where one places a thing to be kept, to be stored for pay, under an agreement or an understanding that it is to be paid for, that he is entitled to keep it until he is paid."

It is not claimed that the defendant had any statutory lien, nor that he had any lien on the hay by virtue of any express contract therefore in the nature of a pledge. Did he have a common-law lien, so called,—a lien arising under the rules of the common law? We think not. It is quite impossible to find uniform rules by which it may always be determined when a common-law lien results. "Derived from the civil law, and founded on considerations of equity and justice, the rules by which they are governed vary with the grounds on

which such rights are given." *White v. Smith*, 44 N. J. L. 105, 106, 43 Am. Rep. 347.

Particular liens have always been admitted by the common law in favor of those persons, such as innkeepers, carriers, common carriers, and warehousemen, who are bound by law to serve the public in their trades and occupations. And the privilege of a particular lien—the privilege to detain and hold the possession of some particular property of another as security for some debt or obligation—has been extended to other persons, in a variety of cases, where such persons by their labor and skill have imparted an additional value to the goods. This includes artisans, tradesmen, mechanics, and laborers who receive property (although not obliged to receive it) for the purpose of mending, repairing, and improving its condition for hire; and they have, by the common law, a lien on such property until the reasonable charges for their labor and expenses thereon are paid.

But the defendant, under the facts in this case, cannot be classed with those persons who are allowed liens because they are bound by law to receive and care for the goods of others. He was under no obligation to permit the hay to remain on his premises. He was not a warehouseman, nor in the business of storing goods. He was, at most, a voluntary bailee of the hay, under an agreement with the owner that he was to be paid reasonable compensation for its storage. Nor can he be reasonably classed with those persons who are given liens on specific property which has been enhanced in its intrinsic value by their skill and labor bestowed upon it. True, the storage of the hay may properly be regarded as beneficial to its owner, for it may have preserved it from deterioration and destruction; but we do not think it can be held that, by the mere storage of the hay, the defendant has added to its intrinsic value, and thereby become entitled to a lien on it, under the application of this rule of the common law.

As suggested above, any effort to subject common-law liens to uniform rules is necessarily unsatisfactory; and therefore it becomes most important, in the determination of whether or not a lien should be admitted in any given case, to examine and consider judicial precedents.

Our attention has not been directed to any case, and we have found none, in any jurisdiction, which decisively admits a lien under facts and circumstances like those in the case at bar. Mr. Lummus, in his recent work on Liens, cited by defendant, says: "There seems to be no good reason for limiting the lien to persons making a business

of acting as warehousemen. It seems that any person having possession of the goods and a valid claim for storing them ought to have a lien." Section 73. No authorities, however, are cited which directly support that proposition. In § 76 he, cites *Schneider v. Dayton*, 111 Mich. 396, 69 N. W. 829, as an authority for a lien where notice was given that storage would be charged, and the owner of the goods made no reply. But we find, upon examination of the report of that case, that the notice to the owner of the goods was that the landlord "would insist upon a lien for storage," and the court held that inasmuch as a lien for the storage was claimed in the notice, and the owner did not remove the goods, the lien was assented to.

In *Whitlock Mach. Co. v. Holway*, 92 Me. 414, 42 Atl. 799, cited by the plaintiff, this court said: "But, in the absence of any agreement, the common law does not give to a person, not an innkeeper or warehouseman, a lien on personal property for its storage." It is suggested that the above-quoted statement is only a *dictum*, as the case did not really involve that question. There may be merit in that suggestion, for that was a case where a tenant left on the premises a machine the title to which was in the plaintiff, and the question was whether, under those circumstances, the landlord had a lien on the machine for its storage. But, if that statement be only a *dictum*, it is, we think, a correct statement of the law as understood and applied by this court, and also in accordance with judicial precedent elsewhere.

In *Allen v. Ham*, 63 Me. 532, it was held that a livery-stable keeper, who had a horse in his possession which he had been keeping under an express contract with the owner of the horse to pay \$1 per day for its care and keeping, had no lien at common law on the horse for any care and keeping furnished prior to the passage of act 1872, chap. 27, which provided a statutory lien for pasturing, feeding, and sheltering animals. The court there said: "Not being an innkeeper, or farrier, or trainer, he has no such lien by the common law. *Miller v. Marston*, 35 Me. 153, 56 Am. Dec. 694. He has none by any agreement with the respondent amounting to a pledge."

This court having thus held that a stable keeper had no lien at common law for stabling and feeding a horse under an express agreement to pay therefor, *a fortiori* must it be held that a person who is not a warehouseman, nor in the business of storing goods, but who permits the property of another to remain on his premises, under an agreement that storage is to be paid, has no lien therefor at common law. *Stoddard* 39 L.R.A. (N.S.)

v. Crocker, 100 Me. 450, 62 Atl. 241, may be cited as holding by implication that only warehousemen have a lien at common law for storage.

In *Jones on Liens*, § 968, it is said: "In some states a person not a warehouseman, and not in the business of storing goods, has no lien on goods for his compensation for storing them, unless there be an express agreement for a lien, or it is the legal duty of one to receive and hold the goods. A mere volunteer, under no such obligation, who accepts the temporary custody of goods without any agreement for a lien, can claim none for his compensation."

In *Re Kelly*, 18 Fed. 528 (D. C. S. D. N. Y.), it is said: "The authorities in this state hold that a person not being a warehouseman, nor in the business of storing goods, who has articles on private storage, has no lien upon them for his compensation any more than a landlord has on his tenant's goods for rent." See also *Grinnell v. Cook*, 3 Hill, 485, 38 Am. Dec. 663; *Rivara v. Ghio*, 3 E. D. Smith, 267, 268; *Merritt v. Peirano*, 10 App. Div. 563, 42 N. Y. Supp. 97; *White v. Smith*, 44 N. J. L. 105, 109, 43 Am. Rep. 347; *Preston v. Neale*, 12 Gray, 222.

If it be said that considerations of equity and justice seem to require that there should be a lien wherever a valid claim for storage exists, the answer may be made that such a lien can always be provided for by contract between the parties, and it may be created by legislative enactment.

It is therefore the opinion of the court that the ruling at *nisi prius*, that the defendant was entitled to a lien for the storage of the hay if there was an understanding or agreement between the parties that the storage was to be paid for, was erroneous, and accordingly the entry must be: Exceptions sustained.

NEW YORK COURT OF APPEALS.

MARIANNE DUPONT, Resp.,
v.

VILLAGE OF PORT CHESTER, Appt.

(204 N. Y. 351, 97 N. E. 735.)

Highway — duty to remove snow from cross walk.

1. Under a charter duty to remove ob-

Note. — Duty to remove snow or ice from cross walks.

An exhaustive note to *Elam v. Mt. Sterling*, 20 L.R.A. (N.S.) 513, covers all phases of the question as to liability of municipal corporations for defects or obstructions in streets, and beginning at page 656, the particular question of snow and ice is con-

structions and encroachments from cross walks, a village is not bound to keep its cross walks free from accumulations of snow and ice, unless dangerous formations or obstacles have been created.

Municipal corporation — leaving snow on cross walks — negligence.

2. A village which is not required to remove the snow from its streets is not negligent in leaving the snow as it falls upon cross walks to facilitate driving in the street, unless there is something in the way in which it falls or the form which it subsequently takes which creates an encumbrance, obstruction, or special danger.

Appeal — presumption of sufficiency of evidence — absence of certificate.

3. Absence of a certificate that the printed case contains all the evidence in an attempt to review exceptions taken at the trial does not entitle the appellate court to assume that there was evidence at the trial sufficient to sustain the verdict, when the record does not disclose it, since such certificate is not necessary to raise such question.

(February 2, 1912.)

A PPEAL by defendant from an order of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a trial term for Westchester County in plaintiff's favor, and from an

order denying a new trial, in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. Jerome Alvord Peck, for appellant:

The defendant discharged its full duty to the plaintiff when it caused this cross walk to be cleaned between 2:30 and 4:30 o'clock on the day she was injured.

Ballard v. Hamburg, 143 App. Div. 719, 128 N. Y. Supp. 325; Lichtenstein v. New York, 159 N. Y. 500, 54 N. E. 67; Kortlang v. Mt. Vernon, 129 App. Div. 535, 114 N. Y. Supp. 252; Winckler v. New York, 129 App. Div. 45, 113 N. Y. Supp. 412; Taylor v. Yonkers, 105 N. Y. 202, 59 Am. Rep. 492, 11 N. E. 642; Schneider v. New York, 143 App. Div. 216, 128 N. Y. Supp. 45.

Mr. Michael J. Tierney, with Mr. De Witt H. Lyon, for respondent:

The negligence of the defendant was clearly established, and justified the jury in finding that it not only allowed the dangerous condition of the cross walk to remain after notice of its existence, but had, in fact, actually created it by the embankments of snow on both sides of the cross walk.

Kopper v. Yonkers, 110 App. Div. 748, 97

sidered. The purpose of the present note is to set out the decisions upon this point rendered subsequent to that note, holding to the limitation of duty as to cross walks, and not including cases generally upon duty as to sidewalks.

As to liability of townships generally for defects in highways, see note to James v. Wellington Twp. 13 L.R.A. (N.S.) 1219.

In *DUPONT v. PORT CHESTER*, a distinction is drawn between the duty of a municipality in regard to the care of sidewalks and its duty in regard to cross walks, the court saying that, in the absence of express provision of statute, the obligation to keep sidewalks free from snow and ice does not apply to the same extent to cross walks. The removal of all snow and ice at every crossing would materially interfere with the convenient and practical use of the street for driving, and, moreover, because ordinary travel necessarily carries more or less snow upon the cross walks, it would be impossible, except by continuous effort, to keep such cross walks entirely clear.

The duty of a municipality, particularly a village, as to cross walks, is performed when they are kept free from dangerous formations or obstacles, and a temporary covering of snow from curb to curb, left to facilitate the use of the street for driving, does not of itself create a dangerous condition such as to require removal by the municipality, unless by some particular formation it constitutes a special obstruction. *DUPONT v. PORT CHESTER*. 39 L.R.A. (N.S.)

In reversing a judgment for plaintiff, who fell upon an icy cross walk at the foot of a steep descent, just after a freeze following a period of thawing and raining, at a time when all the streets were covered with ice, the court said that it is not every ridge or lump of ice which will render a municipality liable in damages to one injured thereby, especially such ridges and lumps as are necessarily formed in variable weather upon cross walks where horses, sleighs, and people pass and repass; in such cases the municipality is bound to use reasonable care only. *Comstock v. Schuylerville*, 139 App. Div. 378, 124 N. Y. Supp. 92.

In *Brennan v. New York*, 130 App. Div. 267, 114 N. Y. Supp. 578, which is discussed in *DUPONT v. PORT CHESTER*, the facts showed that for nearly two days a storm had continued with alternating freezing and thawing, and this, together with the ordinary travel in the streets, was deemed the cause of the presence of the ice upon the cross walk. It is manifest, says the court, that the cross walk could not be kept free from snow and slush during the period in question, if the city had any such duty; the locality was a busy one, and the streets covered with snow, which every passing vehicle carried along and dropped everywhere. No such impossible task belongs to the city. There must be reason in all things, even in an action for damages against a city. This decision was affirmed in 197 N. Y. 544, 91 N. E. 1110.

Actionable negligence by the municipality

N. Y. Supp. 425, affirmed in 188 N. Y. 592, 81 N. E. 1168; *Brennan v. New York*, 130 App. Div. 267, 114 N. Y. Supp. 578.

Chase, J., delivered the opinion of the court:

The plaintiff at about 11 o'clock on the night of December 23, 1904, fell, while crossing over the brick pavement at the intersection of North Main and Adee streets in the defendant village, and received the injuries for which this action is brought. The sidewalks along the streets used by her were clear of snow and ice.

The plaintiff testified that in crossing the street she first stepped in water, then took three more steps, when her feet went out from under her, and she fell. She further testified that, so far as she observed, the condition of the street between the curbs was all the same; that she did not see the ice before she fell, although after she was down she saw ice all around her, and that it was very rough. The brick pavement was covered with an accumulation of snow and ice from 3 to 6 inches deep, and it had been in that condition for several days. There was a slight grade toward North Main street. There had been a week or more of snowstorms and cold weather, and on the day of the accident, and, perhaps on

the day preceding, it had moderated. In the line of the sidewalk, on the west side of North Main street, where people cross Adee street at the intersection of said streets, there was some depression in the snow and ice, which was from 2 to 4 feet wide. It was caused by people treading upon the snow as it fell, and as so packed down it was in some places smooth and in some places rough. The condition of such crossing extended from curb to curb, and was not confined to a particular place. The cross walks of the village were all in practically the same condition. There had been severe weather and frequent storms, and there were great quantities of snow and ice in the village, and sleighs drawn by horses were used upon the streets. It appears from the record that three persons had fallen while crossing at the intersection of said streets during the day or the day preceding the accident to the plaintiff, and one of the persons so falling had called the attention of a trustee of the village to the fact of his fall, and he testified that he told the trustee that the walk was in a dangerous condition and should be cleaned. The particular place where the plaintiff and the others mentioned slipped and fell does not appear. It may in each case have been within the bounds of the

cannot be predicated of its allowing a gutter 10½ inches wide between the sidewalk and the cross walk to become filled with snow, ice, water, and dirt which, not being sufficiently frozen to bear the weight of a pedestrian who steps upon it, instead of across the gutter, causes her to fall; a municipality in the latitude of Dunkirk cannot be expected to keep its streets and gutters free from such material in March, nor can it be expected to keep such material packed down and solid. *O'Connor v. Dunkirk*, 143 App. Div. 696, 128 N. Y. Supp. 358, motion for reargument, and for leave to appeal to court of appeals, denied in 145 App. Div. 908, 129 N. Y. S. 1137, judgment reaffirmed without opinion in 136 N. Y. Supp. 1142.

But if a city fails to keep its sidewalks in a reasonably safe condition, so that pedestrians are forced to walk in the streets, and if it negligently allows water to escape from broken mains into the streets and freeze there in gullies, such city is liable for injuries sustained by one slipping upon ice thus formed. *Bellevue v. England*, — Ky. —, 118 S. W. 994.

Where a wooden approach from a sidewalk to a crossing is built on a slant, without cleats, and becomes coated with ice by reason of a storm, thereby giving rise to personal injury to a pedestrian, the municipality is not liable simply on account of the slippery condition of the approach, unless, after actual or implied notice, it allows the dangerous condition to remain; 39 L.R.A. (N.S.)

but the law requires a corporation so to construct its walks that they will be reasonably safe under all ordinary climatic conditions incident to that locality, and with reference to the topography of the place, and if the slipperiness of the walk, when combined with a defect in its construction, causes an accident, the city will be liable. Although the icy condition is a cause of the accident over which the municipality has no control, yet it may be a cause which it should have anticipated, and should have guarded against. *Smith v. Yankton*, 23 S. D. 352, 121 N. W. 848.

Where contractors, under a permit from a municipality, were working upon a street, and in their operations were drawing water from a hydrant and pouring it upon the surface of the street at the rate of 17 or 18 gallons per minute, sixteen hours per day for over two weeks, and this water froze in consecutive layers until the street was a mass of ice from curb to curb, and where a horse bring driven along the street slipped upon a ridge of this ice and received injuries such that it had to be killed, this ice was deemed a defect in the street. The city under its permit, and by work done under its supervision, suffered its contractor to place an obstacle to travel in its public street. The court expressly calls attention, moreover, to the fact that this case is not in the category of the so-called "snow and ice cases," in that the cause of this accumulation was not natural, but artificial. *Loretz v. New York*, 132 N. Y. Supp. 988. H. C. Sh.

depression or upon the sides thereof, upon level and smooth, or rough, uneven, or slightly sloping, ice formations. The exact place where they slipped may have been and probably was different in each case.

There is a difference in the duty of a municipality regarding the care of sidewalks used wholly by pedestrians, and cross walks, or places where people cross over streets, which are used in winter with teams attached to sleighs. Where a street in a village is traveled by the public with sleighs in the usual way, when there is an accumulation of snow thereon, particularly in streets without specially formed cross walks, the removal of all snow and ice at every crossing would materially interfere with the convenient and practical use of the street for trucking and driving. Even if the entire removal of snow from a cross walk is desirable for its use by pedestrians, the ordinary travel upon a street necessarily carries more or less snow upon the cross walk, and when it thaws and freezes with the varying temperature it would be quite impossible, except by continuous effort, to keep cross walks or crossings wholly free from snow and ice. We repeat that the obligation resting upon a municipality to keep its sidewalks free from snow and ice does not, in the absence of express provision of statute, apply to the same extent to a cross walk or crossing on a public street.

By the charter of the village of Port Chester, it is provided that the trustees shall have power, and it shall be their duty: "To prevent and remove all encumbrances, obstructions, and encroachments, from any cause whatever, upon the public streets, alleys, bridges, docks, public squares or grounds, sidewalks, or cross walks of said village, and to cause the same to be removed, and the streets to be cleansed and unobstructed. . . ." Laws of 1868, chap. 818, title 3, § 1, subd. 7. "To compel all persons to keep clean and remove from the sidewalks and gutters in front of the premises owned or occupied by them, all snow, ice, and dirt, and to keep the said sidewalks and gutters and streets clean." Subdivision 8.

The charter does not expressly provide that the village shall keep the cross walks of the village free from snow and ice. The duty resting upon municipal corporations to remove accumulations of snow and ice becomes imperative only when dangerous formations or obstacles have been created. *Harrington v. Buffalo*, 121 N. Y. 147, 24 N. E. 186; *Taylor v. Yonkers*, 105 N. Y. 202, 209, 59 Am. Rep. 492, 11 N. E. 642; *Kinney v. Troy*, 108 N. Y. 567, 15 N. E. 39 L.R.A. (N.S.)

728; *O'Shaughnessey v. Middleport*, 93 App. Div. 93, 86 N. Y. Supp. 944; *Owen v. New York*, 141 App. Div. 217, 126 N. Y. Supp. 38.

In a municipality, particularly a village, where it is not required by charter that snow and ice be removed from the entire street, the duty as to cross walks and crossings is performed when they are kept free from dangerous formations or obstacles. A temporary condition caused by storms that, for the time being, cover the roadway with snow from curb to curb, does not of itself create a dangerous condition of the street, and if it is left to facilitate the use of the street for driving or otherwise it is not negligence on the part of the municipality, unless there is something in the way in which the snow is left, or the form which it subsequently takes, as to thereby create an encumbrance, obstruction, or special danger.

In this case, where there was no structural defect in the crossing itself, and its temporary condition was the same from curb to curb and as at all the other crossings in the village, and it does not appear that the plaintiff slipped by reason of any particular formation of snow or ice or obstruction or dangerous formation upon the crossing or street, the municipality is not liable.

In *Brennan v. New York*, 130 App. Div. 267, 268, 114 N. Y. Supp. 578, 580, the court, referring to an appeal from a judgment obtained in an action for personal injuries incurred by a fall upon a cross walk, say: "The claim is that the plaintiff slipped on hard or packed snow or ice on the cross walk. It is not enough to show snow or ice to show that the city was negligent. In this variable winter climate of ours, falls of snow, followed by rain or by thawing, and then by freezing, and so alternating from day to day, are common. The city is in no way responsible for such conditions; nor is the impracticable duty put upon it of keeping the streets free of such snow and slush. This general condition all over the city is the work of nature, and cannot be guarded against. But if the city should negligently suffer snow and ice to remain and accumulate in a particular place until it became of a permanent nature, and a dangerous obstruction to pedestrians, then it would be liable, and this is the measure of its liability." The judgment of reversal entered in the *Brennan Case* was affirmed in this court. *Brennan v. New York*, 197 N. Y. 544, 91, N. E. 1110.

The evidence disclosed by the record in this case is not sufficient to sustain the judgment against the defendant.

The respondent asserts that the certificate to the printed case does not show that such case contains all the evidence received upon the trial, and that therefore the appellate division had, and this court has, the right to assume that evidence was given upon the trial to sustain the verdict. Such a certificate is necessary for the appellant when he seeks to show that the judgment is contrary to the evidence or against the weight of evidence; but it is not necessary to enable him to review the exceptions taken at the trial, including an exception to a motion for a nonsuit or dismissal of the complaint. *Halpin v. Phenix Ins. Co.* 118 N. Y. 165, 23 N. E. 482; *Brayton v. Sherman*, 119 N. Y. 623, 23 N. E. 471; *Rosenstein v. Fox*, 150 N. Y. 354, 44 N. E. 1027. An exception to a nonsuit or dismissal of the complaint on the ground that the evidence does not show a cause of action raises a question of law that can be reviewed in this court, unless the decision of the appellate division is unanimous.

The judgment should be reversed, and a new trial granted, costs to abide the event.

Cullen, Ch. J., and Gray, Haight, Vann, Willard Bartlett, and Hiscock, JJ., concur.

FLORIDA SUPREME COURT.

S. T. SHAYLOR, Exr., etc., of John N. D. Cloud, Deceased, et al., Appts.,
v.

J. L. CLOUD.

(— Fla. —, 57 So. 666.)

Vendor and purchaser — lien — origin.

1. A vendor's lien upon land conveyed by him does not result from agreement, but it

Headnotes by WHITFIELD, J.

Note. — *Effect of statutory bar of action for purchase money upon right to enforce vendor's lien.*

As to effect of bar of principal debt on right to foreclose mortgage or deed of trust, see note to *Kulp v. Kulp*, 21 L.R.A. 550.

As to effect of bar of other remedies to prevent a sale under power in trust deed or mortgage, see note to *Foot v. Burr*, 13 L.R.A.(N.S.) 1210.

The authorities are in conflict upon the question as to the effect of statutory bar of action for purchase money upon the right to enforce the vendor's lien.

Rule in case of mere equitable lien raised by implication of law.

In some jurisdictions it is held, in accord with *SHAYLOR v. CLOUD*, that the vendor's

is a right given by implication of law and enforceable in equity where the vendor is entitled to it.

Same — enforcement — time.

2. Where land is conveyed and a note is taken for the purchase price without any collateral security or contract mortgage upon the property to secure the payment of the purchase price, the law by implication gives to the vendors a right in the nature of a lien upon the property for the purchase price, which right, if not waived or abandoned, may be enforced in equity at any time before the remedy by action on the note is barred by the statute of limitations.

Same — loss — expiration of legal right.

3. A vendor's lien is a right created by law as an incident to the debt, and ceases to be available in equity when the debt is not enforceable at law.

Pleading — vendor's lien — limitation — demurrer.

4. Where, in a suit to enforce a vendor's implied lien, it clearly appears by the specific allegations of the bill of complaint, admitted by the demurrer, that the remedy for recovery of the debt for the purchase price of land conveyed is barred by the statute of limitations, the vendor's implied lien will not be enforced; and, in the absence of other equities to sustain the bill of complaint, it is subject to appropriate demurrer.

(February 5, 1912.)

APPEAL by complainants from an order of the Circuit Court for Alachua County sustaining a demurrer to a bill filed to enforce a vendor's lien upon certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. T. B. Ellis, Jr., and George U. Walker & Son for appellants.

Mr. F. Y. Smith for appellee.

Whitfield, Ch. J., delivered the opinion of the court:

It appears that in March, 1903, John N. D. Cloud conveyed certain land to J. L.

Cloud's lien raised by implication of law and enforceable in equity is a mere remedy or security, an incident to the debt, and ceases to be available in equity when an action to enforce the debt is barred by the statute of limitations. *Waddell v. Carlock*, 41 Ark. 523; *Ilett v. Collins*, 103 Ill. 74; *Cassell v. Lowry*, 164 Ind. 1, 72 N. E. 640; *Day v. Baldwin*, 34 Iowa, 380; *Yeates v. Weeden*, 6 Bush, 438; *Littlejohn v. Gordon*, 32 Miss. 235; *Madison County v. Powell*, 71 Miss. 618, 15 So. 109; *Borst v. Corey*, 15 N. Y. 505; *Callender v. Basquin*, 26 Ohio C. C. 540; *Fisher v. Fisher*, 9 Baxt. 71; *Thompson v. Thompson*, 3 Lea, 126; *Pitschki v. Anderson*, 49 Tex. 1; *Rindge v. Oliphint*, 62 Tex. 682; *Johnson v. Dyer*, 19 Tex. Civ. App. 602, 47 S. W. 727; *Laird v. Murray*, — Tex. Civ. App. —, 111 S. W. 780.

In *Fisher v. Fisher*, 9 Baxt. 71, where the

Cloud, the consideration being \$1,100, for which a note was given by J. L. Cloud to John N. D. Cloud payable January 1, 1905. John N. D. Cloud died in 1904. By will he bequeathed the land and the note to his mother, Nancy J. Cloud, who being a resident of Georgia and *non compos mentis*, B. F. Langford was there appointed guardian of her person and property. S. T. Shaylor qualified in August, 1904, as executor of the will of John N. D. Cloud. The note for the purchase price not having been paid, this suit was instituted March 23, 1911, by S. T. Shaylor as executor,

Nancy J. Cloud, by her next friend, and B. F. Langford, as her guardian, against J. L. Cloud to enforce a vendor's implied lien upon the land for the unpaid purchase price of it, represented by the note given by the vendee to the vendor at the time of the conveyance.

A demurrer to the bill of complaint upon the specific grounds of laches, and that the note was barred by the statute of limitations, and the vendor's lien, being merely an incident to the debt, is also barred, was sustained with leave to amend, and the

legal title passed to the vendee by an absolute conveyance, without any reservation of a lien, the court said: "The vendor in such a case has lost his right to recover the purchase money, and cannot have an implied lien to secure that which he has no right to recover." And it was pointed out that the sale by title bond or a lien retained upon the face of the deed stand on a different footing.

In *Cassell v. Lowry*, 164 Ind. 1, 72 N. E. 640, it was held that a court of equity will employ a limitation statute to aid a vendee in removing from his title a cloud upon it by his confessed failure to pay for the property as he has agreed to do, where under the system of procedure there is but one form of action, and the statute of limitations applies alike to actions at law and suits in equity.

On the other hand, it is held that the vendor's lien is enforceable, though the debt is barred by the statute of limitations. *Relfe v. Relfe*, 34 Ala. 500, 73 Am. Dec. 467; *Bizzell v. Nix*, 60 Ala. 281, 31 Am. Rep. 38; *Flinn v. Barber*, 61 Ala. 530; *Shorter v. Frazer*, 64 Ala. 74; *Chapman v. Lee*, 64 Ala. 483; *Ware v. Curry*, 67 Ala. 274; *Lingan v. Henderson*, 1 Bland, Ch. 236; *Moreton v. Harrison*, 1 Bland, Ch. 491; *Baltimore & O. R. Co. v. Trimble*, 51 Md. 99 (owely awarded in partition proceedings, which was held to be in the nature of a vendor's lien and governed by the same principles); *Lewis v. McDowell*, 88 N. C. 261; *Smith v. O'Connor*, 6 Ohio Dec. Reprint, 934.

In Maryland the courts put a vendor's lien, so far as the applicability of limitations is concerned, upon the same ground with a lien by mortgage. It is said that the lien of the mortgage "continues for twenty years, not because of the seal attached to the mortgage, for sealed instruments in this state are barred by twelve years, but because it is a deed of conveyance, the rights under which are not barred except by the lapse of twenty years, by analogy to the time of limitations under the statute of James, which saves the right of entry for that period." *Baltimore & O. R. Co. v. Trimble*, 51 Md. 112.

And in *Moreton v. Harrison*, 1 Bland, Ch. 491, it was said: "An equitable lien is founded upon the principle that the legal title has not been parted with, or ought not to be 39 L.R.A. (N.S.)

considered as completely vested in the vendee, until the whole purchase money has been paid. . . . If the whole legal title remains in the vendor, he may bring an ejectment, to which a limitation of not less than twenty years is a bar; but if the formal legal title has been parted with by the vendor before payment, then his having so ceded it gives him an equitable right to enforce payment here [in chancery] with all the advantages he had as the actual holder of the legal title, that is, as a mortgagee coming here [in chancery] to foreclose; in which case, by analogy to the statute of limitations, no time short of the lapse of twenty years is ever deemed sufficient to raise a presumption of satisfaction." To the same effect is *Lingan v. Henderson*, 1 Bland, Ch. 236.

In *Relfe v. Relfe*, 34 Ala. 500, 73 Am. Dec. 467, it was held that the lien for the payment of the purchase money under an executory contract for the sale of land could not be regarded as a stale demand within less than twenty years after the sale, when the presumption of payment arises. It was said by the court: "The principle which preserves liens, notwithstanding the bar of the debt, is neither confined to those secured by a conveyance, as for example a mortgage, nor to those secured by a sealed instrument, nor even to those provided by an express contract. . . . The principle is that the statute of limitations does not extinguish the debt, but merely bars the remedy by action at law; and there is no inconsistency in the prosecution of another remedy after the action at law is barred."

In *School Directors v. Anderson*, 28 La. Ann. 739, it was held that an action to dissolve a sale of land on the ground that the purchase price was not paid was not barred because an action on the notes given therefor was barred by the statute of limitations.

—applicability of limitation statutes other than those affecting the debt.

In Missouri it is held that the mere equitable lien of the vendor not reserved by express contract is in the nature of an implied trust, and as such the provision of the statute of limitations concerning trusts growing out of realty, which limits the

complainants appealed from such order, which is assigned and argued as error.

By § 1725 of the General Statutes (§ 1294, Revised Statutes), an action upon any contract, obligation, or liability founded upon an instrument of writing not under seal must be commenced within five years. This suit is to enforce a vendor's lien upon land, that is raised only by implication of law, and the suit was not commenced within five years from the date of the conveyance of the land, or from the date of the maturity of the note not under seal given for the purchase price.

right to enforce the same to ten years, is applicable. *Zoll v. Carnahan*, 83 Mo. 35; *Hockaday v. Lawther*, 17 Mo. App. 636.

It has been held that the equitable lien of a vendor who has conveyed the land by deed is barred by seven years' possession by the vendee after the maturity of the debt, by the provisions of a statute which declares that no suit at law or in equity shall be prosecuted to enforce any claim to lands but within seven years next after the cause of action accrued. *Sheratz v. Nicodemus*, 7 Yerg. 9; *Thompson v. Thompson*, 3 Lea, 126. But see *infra*, *Gudger v. Barnes*, 4 Heisk. 570, as to the application of the statute where the conveyance is by title bond; and also *Wood v. Neely*, 7 Baxt. 586, as to the application of the statute where the vendor retains a lien on the face of the deed.

So a vendor's lien is extinguished by the statutory bar of action for the purchase money, under the provisions of the California Civil Code, § 3046, giving one who sells real property a vendor's lien thereon, independent of possession, for the remaining unpaid and unsecured purchase price, otherwise than by the personal obligation of the buyer; and under § 2911, which provides that a lien is extinguished by the lapse of time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation. *California Sav. Bank v. Parrish*, 116 Cal. 254, 48 Pac. 73.

In *Washington v. Soria*, 73 Miss. 665, 55 Am. St. Rep. 555, 19 So. 485, it was held that since a vendor of land might have brought an action at law against the vendee to recover the unpaid purchase money, his proceeding in equity to subject the land to the satisfaction thereof cannot be said to rest upon the "existence of a trust not cognizable by the courts of common law," within the meaning of the provisions of § 2763 of the Code, which limits to ten years the period in which suit may be brought, but is governed by § 2762, which declares that "whenever there be a concurrent jurisdiction in the courts of the common law and in the courts of equity, of any cause of action, the provisions of this chapter limiting a time for the commencement of a suit for such cause of action in a court of common law shall apply to all suits to 39 L.R.A. (N.S.)

A vendor's lien upon land conveyed by him does not result from agreement, but it is a right given by implication of law and enforceable in equity while the vendor is entitled to it. See *Johnson v. McKinnon*, 45 Fla. 388, 34 So. 272; *McKinnon v. Johnson*, 54 Fla. 538, 45 So. 451.

Where land is conveyed and a note is taken for the purchase price, without any collateral security or contract mortgage upon the property to secure the payment of the purchase price, the law by implication gives to the vendors a right in the nature of a lien upon the property for the pur-

be brought for the same cause of action in a court of equity."

A bill to enforce against the land a note given by a married woman for the purchase money thereof is subject to the statute of limitations applicable to that form of indebtedness, notwithstanding that the note of a married woman is not enforceable as a personal obligation. *McNair v. Stanton*, 57 Miss. 298.

It was held in the above case that while the note of a married woman was not enforceable as a personal obligation, she will be compelled by a court of chancery to pay it or surrender the property acquired by its execution, and because of this it was contended that, inasmuch as the obligation to surrender the land is a trust raised and imposed upon her by a court of equity, it becomes barred only after the period of limitation prescribed by the Code in cases of trusts not cognizable in courts of law.

Failure to present a claim for unpaid purchase money to the administrator of vendee's estate within two years from the grant of his letters, as provided by statute requiring all claims against a decedent's estate, to be presented to the personal representative within a given time, or be forever barred, is a bar to a bill to foreclose a vendor's lien for the purchase money for certain lands for which a note had been given. *Linthicum v. Tapscott*, 28 Ark. 267. The court said: "A vendor's lien is a remedy or security,—not a right of property, and does not vary the nature of the debt or take it out of the operation of the statute of limitations, and cannot be enforced after the bar of the statute has attached to the debt."

But the failure of the vendor, who afterwards becomes the administrator of the vendee's estate, to bring his claim for the unpaid purchase money into the administration, does not preclude the subsequent enforcement of his equitable lien as a vendor, notwithstanding the statute of nonclaim, especially where the estate was in fact insolvent, and the entire assets required to pay the debts of the estate that were presented and allowed. *Flinn v. Barber*, 61 Ala. 530.

And in *Hood v. Hammond*, 128 Ala. 569, 86 Am. St. Rep. 159, 30 So. 540, it was expressly held that the failure of the vendor to present his lien notes to the administra-

chase price, which right, if not waived or abandoned, may be enforced in equity at any time before the remedy by action on the note is barred by the statute of limitations. But, where the remedy by action at law on the note is barred by the statute of limitations, the vendor's lien given by implication of law will not be enforced in equity. The lien is a right created by law as an incident to the debt, and ceases to be available in equity when the debt is not enforceable at law. A vendor can ordinarily have no greater right by implication of law than he has by contract, when the implied right is an incident to the contract right.

for within the time required by the statute of nonclaim, or to file them in the probate court within nine months after the declaration of insolvency of the estate, as provided by statute, will not cut off the vendor's lien and remedy for its enforcement. "Such failures," it was said in the above case, "would only operate to bar the right of the vendor to participate in the distribution of the estate."

The question whether the statute of nonclaim is equivalent of limitations within the rule that the running of the latter against the debt secured will bar the remedy on the mortgage is treated in the note in 31 L.R.A. (N.S.) 1013.

Rule where vendor retains the legal title.

It has been held that where the contract for the sale of land provides that the vendor shall retain the legal title until the purchase money is paid, it is competent for the vendor to enforce specific execution of the contract, and to subject the land to sale for the purchase money in arrears, at any time short of the period sufficient to raise the presumption of payment, notwithstanding the bar of the statute of limitations to an action at law to recover the purchase money. *Hanna v. Wilson*, 3 Gratt. 243, 46 Am. Dec. 190; *Phillips v. Adams*, 78 Ala. 225.

To the same effect are the following cases, where vendor gave bond for title: *Erskine v. North*, 14 Gratt. 60; *Coles v. Withers*, 33 Gratt. 186; *Paxton v. Rich*, 85 Va. 378, 1 L.R.A. 639, 7 S. E. 531; *Hull v. Hull*, 35 W. Va. 155, 29 Am. St. Rep. 800, 13 S. E. 49; *Evans v. Johnson*, 39 W. Va. 299, 23 L.R.A. 737, 45 Am. St. Rep. 912, 19 S. E. 623; and *Tunstall v. Withers*, 86 Va. 892, 11 S. E. 505; *Magruder v. Peter*, 11 Gill & J. 217 (which held that only lapse of time from which the presumption of payment arises will cut off vendor's lien, even though he has parted with the legal title reserved in the deed); *Randall v. Jaques*, Fed. Cas. No. 11,553 (where vendor took purchase money mortgage).

In *Phillips v. Adams*, 78 Ala. 225, it was held that the lien of a vendor of land, when no conveyance is executed, is regarded in the nature of a mortgage, and is not im-

In this case no collateral security or mortgage was taken, and the note given for the purchase price was not renewed or put in judgment so as to continue the right to recover the debt.

Where, in a suit to enforce a vendor's implied lien, it clearly appears by the specific allegations of the bill of complaint, admitted by the demurrer, that the remedy for recovery of the debt for the purchase price of land conveyed is barred by the statute of limitations, the vendor's implied lien will not be enforced; and, in the absence of other equities to sustain the bill

paired or destroyed because an action at law for the purchase money may be barred by the statute of limitations; that it does not become a stale demand, if a bill in equity to enforce the lien is filed within less than twenty years after the sale.

And in *McGehee v. Blackwell*, 28 Ark. 27, where the vendor retained the legal title, giving a bond for title to the vendee, it was pointed out that he had three remedies, *viz.*, an action of law upon the note, an action at law for possession of the land, and an action in equity to enforce his lien and subject the land to the payment of the debt, which under the statute were subject to different periods of limitation; and that though one remedy may be barred, he might pursue another that was not barred.

Accordingly, in *Coldcleugh v. Johnson*, 34 Ark. 312, it was held that only the bar of adverse possession of the land for such time as would bar an action at law for its recovery can prevent the vendor by title bond from proceeding *in rem* in a court of equity to enforce his specific lien upon the land itself. To the same effect are *Hall v. Denckla*, 28 Ark. 510; *Butler v. Douglass*, 1 McCrary, 630, 3 Fed. 612; which followed *Hall v. Denckla*; *Hardin v. Boyd*, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771, which followed *Coldcleugh v. Johnson*; *Lewis v. Hawkins*, 23 Wall. 119, 23 L. ed. 113, and *Butler v. Douglass*, 1 McCrary, 630, 3 Fed. 612, which also involved conveyances made in Arkansas, and followed the law of that jurisdiction.

In *Williams v. Young*, 71 Ark. 164, 71 S. W. 669, it is held that a trust relation arises where land is sold and notes given for the purchase price, and a bond for title to be made by the vendor upon the payment of the notes; and that the statute of limitations will not begin to run until there is a termination of the trust relation.

And in *Adair v. Adair*, 78 Mo. 630, it was held that where the vendor reserves the legal title as security for the unpaid purchase money, the possession of the vendee is consistent with the contract, and cannot be deemed adverse, and the statute of limitations will not begin to run until there is an express repudiation of the contract.

Driver v. Hudspeth, 16 Ala. 348, was a proceeding under a statute, at the instance

of complaint, it is subject to appropriate demurrer. See 2 Jones, Liens, 2d ed. § 1099; 2 Warvelle, Vendors, § 709; 29 Am. & Eng. Enc. Law, 2d ed. 759; Trotter v. Erwin, 27 Miss. 772; Stephens v. Shannon, 43 Ark. 464; Borst v. Corey, 15 N. Y. 505; Howard v. Windom, 86 Tex. 560, 26 S. W. 483.

A contrary rule in Maryland seems to be based on analogy to the English statute of limitations as to the right of entry. See Baltimore & O. R. Co. v. Trimble, 51 Md. 99. The Alabama cases and possibly others do not accord with the decided weight of authority. In Browne v. Browne, 17 Fla.

607, 35 Am. Rep. 96, and Jordan v. Sayre, 24 Fla. 1, 3 So. 329, the lien was created by a mortgage under seal, and the court held that, there being in the mortgage an express promise to pay the debt, the statute of limitations respecting instruments under seal is applicable where the contract mortgage is being foreclosed, even though the note evidencing the debt is barred by the five-year statute of limitation.

The order is affirmed.

Taylor, Shackelford, Cockrell, and Hocker, JJ., concur.

of a vendee holding a bond for title, to compel the personal representatives of the vendor, who had died, to make him title. The purchase money had not been paid, but an action at law on the notes given for it was barred by the statute of limitations. It was held that a vendor retaining the legal title, and entering into bond for its conveyance only on payment of the purchase money, had a lien in the nature of a mortgage; that this lien the court would not divest until the purchase money was paid, and that it was not impaired because an action at law for the recovery of the purchase money was barred by the statute of limitations. The court said: "The fact that the notes were barred by the statute of limitations does not destroy the lien, which is regarded in the nature of a mortgage. If the vendor, whose notes are barred, or his heirs after his death, should bring ejectment to recover the land, and thus drive the purchaser into a court of equity to enjoin the action, it is very clear to my mind that the court of chancery would not interfere until he had paid up the purchase money, the remedy to recover which at law had been barred by the statute of limitations. The court of equity would not decree a specific performance in favor of one who withholds the compensation he stipulated to pay, upon the ground that the legal remedy to recover it is barred. The vendor is not bound to sue upon his note, but may rest upon the security furnished by his lien."

In Gudger v. Barnes, 4 Heisk. 570, it was held in the case of contract for conveyance by title bond, the legal title being retained as security for the purchase money, that the lien thus retained was not a claim for land within the provision of a statute limiting suits at law or in equity to enforce any claim to lands, to seven years, and was not barred by the fact that the purchaser held possession of the land under his contract for seven years, for the reason that the vendor held his lien in pursuance of the contract of the parties, and the vendee held his land likewise in pursuance of the same contract, and not adversely to the right of the vendor, and therefore the statute of limitations could not operate to perfect a right in him, or to defeat the right of the vendor against which there had been no adverse

holding or antagonism asserted. The court said that this "applies with perfect accuracy to the lien of the vendor, whether retained on the face of the deed, or created by contract by retention of the legal title for the payment of the purchase money." To the same effect is White v. Blackmore, 8 Lea, 49. Ray v. Goodman, 1 Sneed, 587, was expressly overruled by the court in Gudger v. Barnes.

But in Trotter v. Erwin, 27 Miss. 772, it was held that the foreclosure of the vendor's lien was barred when the debt was barred by the statute of limitations, though it appeared that the vendor never conveyed, but gave merely bond for title, and offered to convey upon the payment of the purchase money. The court said in effect that a vendor's lien is not a mortgage, that it has merely the incident of a mortgage of being enforceable in equity against the property subject to the vendor's equitable claim; but consists solely in debt, and must be subject to all the incidents of the debt, and cannot be enforced when the debt could not be, and consequently it cannot be enforced when the debt is barred by the statute of limitations.

Rule where vendor retains lien on the face of the deed.

It has been held that a lien reserved on the face of the deed is but an incident to the debt thereby secured, and that an action to foreclose the lien is barred when the debt is barred by limitation: Chase v. Cartright, 53 Ark. 358, 22 Am. St. Rep. 207, 14 S. W. 90; Stephens v. Shannon, 43 Ark. 464; Benedict v. Griffith, 92 Ark. 195, 122 S. W. 479; Hemingway v. Long, 23 Ky. L. Rep. 1757, 66 S. W. 278; Hale v. Baker, 60 Tex. 217; Stephens v. Mathews, 69 Tex. 341, 6 S. W. 567; Brown v. Cates, 99 Tex. 133, 87 S. W. 1149; Dupree v. Mansur, 214 U. S. 161, 53 L. ed. 950, 29 Sup. Ct. Rep. 548, reversing 80 C. C. A. 213, 150 Fed. 329. *Contra*, Buckner v. Street, 5 McCrary, 59, 15 Fed. 365 (C. C. E. D. Ark.), holding a plea of statute of limitations to note given for purchase money unavailing to preclude to foreclose a vendor's lien reserved in the deed by which the lands were conveyed.

In Hale v. Baker, 60 Tex. 217, the court

pointed out that when the debt is barred by limitations, a vendor who has reserved a lien must rely for his remedy upon the assertion of such rights only as his superior title to the land confers upon him as its owner, such as an action to recover possession.

Thus, it is held in Texas that a vendor who has reserved a lien upon the face of the deed, to secure the unpaid purchase money, is entitled, upon default of payment by the vendee, to reclaim the land in an action for the possession, notwithstanding the right of action for the recovery of the purchase money is barred by limitation. *Baker v. Ramey*, 27 Tex. 52; *White v. Cole*, 87 Tex. 500, 29 S. W. 759; *McPherson v. Johnson*, 69 Tex. 484, 6 S. W. 798; *Johnson v. Lockhart*, 16 Tex. Civ. App. 32, 40 S. W. 640; *Dittman v. Iselt*, — Tex. Civ. App. —, 52 S. W. 96; *Farmers' Loan & T. Co. v. Beckley*, 93 Tex. 267, 54 S. W. 1027; *Lumpkin v. Story*, — Tex. Civ. App. —, 134 S. W. 298; *Shotwell v. McCardell*, 19 Tex. Civ. App. 174, 47 S. W. 39 (applying same rule in case of judicial sale of land by administrator made under order of court).

This is upon the theory that the reservation in the deed to secure the unpaid purchase money renders the contract executory, and the superior title remains in the vendor until the purchase money is paid. *Ibid*.

So, if the vendor acquires possession after the vendee has made default, he cannot be turned out by an action of trespass to try title, although the purchase money, as a debt, be barred by the statute of limitation. *Dunlap v. Wright*, 11 Tex. 597, 62 Am. Dec. 506; *Burgess v. Millican*, 50 Tex. 397; *McPherson v. Johnson*, 69 Tex. 484, 6 S. W. 798.

And a conveyance in consideration of an annuity to be paid to the grantors during their lives, which reserved a lien on the land to secure the payment thereof, entitles the heirs of the grantors to recover the land, though the debt due by the grantee to the grantors was barred by limitations. *McRae v. Poor*, — Tex. Civ. App. —, 48 S. W. 47.

In *Wood v. Neely*, 7 Baxt. 586, it was held that the enforcement of a lien retained by the vendor on the face of the deed was not a claim for land, within the meaning of the statute limiting suits at law or in equity to enforce any claim to lands to seven years, notwithstanding the fact that the purchaser held possession of the land under his contract for seven years, for the reason that the vendor held his lien in pursuance of the contract of the parties, and the vendee held the land likewise in pursuance of the same contract, and not adversely to the right of the vendor, and therefore the statute of limitations could not operate to perfect a right to him, or to defeat the right of the vendor, against which there had been no adverse holding or antagonism asserted.

Rule where notes given for the purchase money contain stipulation that a lien should exist upon the land.

In *Waddell v. Carlock*, 41 Ark. 523, it 39 L.R.A. (N.S.)

was held that a note which recited that it was given for the purchase money of the lands, describing them, and adding: "This note is to stand as a lien on said land until fully paid," was not thereby made a lien to any greater extent or with any other legal effect than that which attaches in equity to all notes of like character given for the purchase money of land. The court said: "It was not a mortgage, for it conveyed nothing. Nor was it like a title bond, leaving the legal title in the hands of the vendor."

In Texas it is held that a stipulation that a lien should exist upon the land to secure the payment of the purchase money contained in the notes given for the purchase price, which are executed simultaneously with the deed, is equally effective as though the lien had been reserved in the face of the deed, and that the lien may be enforced by a recovery of the land though the notes are barred by the statute of limitations, as shown in the subdivision "Rule where vendor retains lien on the face of the deed." *Barber v. Hoffman*, — Tex. Civ. App. —, 37 S. W. 769; *Ellis v. Hannay*, — Tex. Civ. App. —, 64 S. W. 684; *Miller v. Linquist*, — Tex. Civ. App. —, 141 S. W. 170; *Buckley v. Runge*, — Tex. Civ. App. —, 136 S. W. 533.

While it is held that a mere assignee of a note given to secure the purchase money of land, for which an express lien is reserved by the vendor, may have the land sold and its proceeds applied to the satisfaction of the purchase money note held by him, he must do this before the note is barred by the statute of limitations, since the mere assignment of the note does not carry with it the superior title to the land, which is vested in the vendor until the purchase money is paid. *Stephens v. Mathews*, 69 Tex. 341, 6 S. W. 567; *Farmers' Loan & T. Co. v. Beckley*, 93 Tex. 267, 54 S. W. 1027.

Yet after the note has been barred by limitation, the original vendor may assign his superior legal title to the holder of the note, who, as assignee of the note and the legal title, may, in case the statute of limitation has been pleaded, recover the land in like manner as the vendor could in case he retained the notes. *Abernathy v. Bass*, 9 Tex. Civ. App. 239, 29 S. W. 398; *White v. Cole*, 87 Tex. 500, 29 S. W. 759; *Dittman v. Iselt*, — Tex. Civ. App. —, 52 S. W. 96; *Jackson v. Bradshaw*, 24 Tex. Civ. App. 30, 57 S. W. 878; *Ellis v. Hannay*, — Tex. Civ. App. —, 64 S. W. 684; *Finks v. Abeel*, 33 Tex. Civ. App. 567, 77 S. W. 650; *Rutherford v. Mothershed*, 42 Tex. Civ. App. 360, 92 S. W. 1021; *Atteberry v. Burnett*, 52 Tex. Civ. App. 617, 114 S. W. 159.

Rule where vendor takes mortgage which shows that it is given for the purchase money.

The rule in Texas, which permits a recovery of the land after an action to enforce payment of the purchase money is barred by limitation, where a lien is re-

served on the face of the deed, is applicable, though the conveyance is by an absolute deed, where the vendor takes a mortgage executed simultaneously with the deed, which shows that it is given for the unpaid purchase money. *Dunlap v. Wright*, 11 Tex. 597, 62 Am. Dec. 506; *Jackson v. Palmer*, 52 Tex. 427; *Burgess v. Millican*, 50 Tex. 397 (applying rule in case of judicial sale of land by administrator made under order of court).

Effect of new promise or acknowledgment of the debt to remove bar of statute of limitations to enforce vendor's lien.

A renewal of a purchase money note given for land, or a new promise, will not only extend the vendee's legal responsibility for the debt, but also prolong the life of the vendor's lien, and put the statute of limitation in operation against it only from the maturity of the renewal, or from the date of the new promise. *Poindexter v. Rawlings*, 106 Tenn. 97, 82 Am. St. Rep. 889, 59 S. W. 766; *Moreton v. Harrison*, 1 Bland, Ch. 491; *Howard v. Windom*, 86 Tex. 560, 26 S. W. 483; *Moran v. Wheeler*, — Tex. Civ. App. —, 26 S. W. 297.

But as against a subsequent grantee of the land, the lien cannot be enforced beyond the statutory limitation which would bar an action upon the notes given for the purchase money, and the first grantee cannot extend the lien by recognition and payments on the debt. *Tate v. Hawkins*, 81 Ky. 577, 50 Am. Rep. 181; *McElwee v. McElwee*, 97 Tenn. 649, 37 S. W. 560.

However, in *Beck v. Tarrant*, 61 Tex. 402, it was held that the revival of a personal judgment rendered against the maker of a note given for the purchase money of land operated to preserve the vendor's lien after limitation would have barred a recovery upon the note and furnished a foundation for proceedings against a purchaser of the land from the original vendee, to foreclose the vendor's lien.

Effect of vendee's discharge in bankruptcy.

The vendor's right to enforce the equitable lien for the unpaid purchase money against the land is not affected by the vendee's discharge in bankruptcy, where it does not appear that the bankrupt court, by any proceeding, had sold the land for creditors, or that it had ever been listed as a part of his assets. *Barnett v. Salyers*, 11 Ky. L. Rep. 465, 12 S. W. 303.

And in *Lewis v. Hawkins*, 23 Wall. 119, 23 L. ed. 113, it was held that the discharge in bankruptcy released the vendee from personal liability for his debt, but the statute of limitations cannot avail to protect the land in the hands of the purchaser of it from the vendee, from the vendor's lien upon it for the purchase money, upon the theory that the execution of notes for the purchase money and the title bond between the vendor and vendee established an express trust in the vendor for the legal title, and the vendee for the purchase money, and 39 L.R.A.(N.S.)

that, as between trustee and *cestui que trust* in the case of an express trust, the statute of limitations has no application.
A. L. R.

MISSOURI SUPREME COURT. (Division No. 1.)

LIZZIE VANTINE

v.

MARY BUTLER et al., Appts.

(— Mo. —, 144 S. W. 807.)

Evidence — to support declarations of pedigree — necessity.

1. Preliminary proof of relationship is necessary to support declarations tending to establish pedigree.

Same — sufficiency.

2. Sufficient extrinsic proof of relationship to support declarations of a woman since deceased, that a child was the daughter of a man to whose estate she was attempting to establish heirship, exists where it is shown that the woman, who was the wife of the man, was driven from home pregnant, and shortly after bore a daughter, and that, after staying in the neighborhood of her former home for several years, disappeared with the announced intention of going to a certain place, and was never again seen in that community; that shortly afterwards a woman with her physical characteristics, habits, and beliefs appeared with a child corresponding to the one which had disappeared, arrived at a town near where the woman announced she was going, and made the declarations in controversy, while the father and members of his family recognized that the missing child was living in the locality to which the woman went.

(February 29, 1912.)

APPPEAL by defendants from a judgment of the Circuit Court for Boone County in plaintiff's favor in an action brought to establish her right as a pretermitted heir in the estate of her alleged father. Affirmed.

Statement by Woodson, J.:

Counsel for appellants make the following brief and clear statement of the issues, which I adopt as a partial statement of the case, *viz.*:

"This cause is in this court by appeal on the part of the defendant, Mary Butler, Loutitia Phelan, and Mary Butler, the younger, and Vincent D. Phelan, executors of the last will and testament of John Butler, deceased, defendants in the above-entitled

Note. — As to admissibility of declarations of relatives of claimant upon the issue of his relationship or heirship to decedent, see note to *Re Hartman*, 36 L.R.A.(N.S.) 530.

cause, from a decree and judgment of the circuit court of Boone county, Missouri, in favor of the plaintiff establishing her right as a pretermitted heir.

"The petition is in ordinary form, and alleges that John Butler died testate on October —, 1906, as to all his heirs except this plaintiff, and that, by his last will and testament, he devised to his present widow, Mary Butler, all his real estate to hold during her natural life, and, after her death, disposed of it in fee to his children and grandchildren as provided in said will, not mentioning the plaintiff in his will in any way; that said John Butler possessed at the time of his death about 2,000 acres of land and personal property of about \$10,000; that said land is fully set out and described in the said petition; that plaintiff is an heir at law in said estates and entitled to a one-sixth undivided interest therein, both in the realty and the personality thereof, after the marital rights of the widow have been assigned and set off to her; that said will of said John Butler, deceased, has been duly probated, and that by the terms of said will Mary Butler and Vincent D. Phelan are named as executors, and have duly qualified as such and taken possession of both the personal and real estate of the said deceased. Wherefore plaintiff prays that issues be framed to determine the facts aforesaid, and that she be adjudged a daughter and a lawful heir of said John Butler, and entitled to a one-sixth interest in his estate, both real and personal, and a tenant in common with the defendants in all of said real estate, and that an accounting be had between her and said executors, heirs, and devisees, and for all such other and further relief as to the court may seem just in the premises. The petition in this case was filed on the 11th day of January, 1908. On June 1, 1908, these defendants filed an answer denying each and every allegation in said petition. The record discloses that the question of the heirship of the plaintiff was the only vital issue in controversy between the parties to this proceeding."

The evidence in the case is quite voluminous. Some sixty witnesses testified in the case on behalf of the plaintiff, none for defendants, and their testimony covers over 200 pages of closely printed matter. For that reason, it will be impractical to set out even a summary of the testimony of each. We will, however, state generally what the evidence tended to show, which is as follows:

John Butler, the alleged father of the plaintiff, died testate in Boone county in the fall of 1906, owning about 1,800 acres of land, described in the pleadings, and about \$15,000 worth of personal property. The will

was duly probated, and he devised the lands to his widow, Mary Butler, for life, with the remainder in specific portions to the other defendants. John Butler and his first wife, Jane Butler, whom it is claimed was the mother of the plaintiff, were Irish Catholics, who came from New York to this state about the year 1857. They then had two children, Harry and William. Butler was a carpenter, and lived at or near Sturgeon, in said county, until August, 1857, when he moved to a farm near there. On the 16th day of that month a third child was born unto them, whom they named Annie Butler. Some time later they moved to another farm near by, where he resided until his death, and where he accumulated his property. He farmed, engaged in the mercantile business, and operated a grist and a saw mill. He and his wife did not live happily together, but there is no suggestion that she was unfaithful to him. He was high-tempered, exacting, and dictatorial, believing that the wife is the servant of the husband, or, at any rate, he acted on the theory that he had the right to inflict corporal punishment upon her whenever he saw fit to do so. In a fit of temper, about the year 1859, he beat her up badly, and drove her from home, she carrying the visible marks of his brutality with her. She was pregnant at the time, and, when driven from home, she started afoot to Sturgeon, some miles away, and was found by the wayside in a hazel thicket, about to be confined. W. T. Mathis and others discovered her, and carried her to a new hotel he was building in Sturgeon. He put up a bed for her, and placed her upon it, whereat the first night thereafter she gave birth to a baby girl claimed to be the plaintiff in this case. She remained there only three or four days, until she could walk, when she took the child back to the neighborhood of the home from which she had been driven. The exact date of the birth is not stated, except it was "in plum or hazelnut time," which, of course, was in midsummer or early fall.

Shortly after the separation, Butler sent the three older children back to New York, and he joined the Union army at the outbreak of the war, and served throughout that entire period. He never returned to Missouri until 1865, when he came back to his old home, near Sturgeon.

During the first two or three years of Butler's absence, his wife and child, according to the testimony of many witnesses, lived with various neighbors near her old home, working when she could, but depending largely upon charity. At one time she lived in the county poorhouse, and subsequently she went to Columbia, Missouri, and worked there for a while, and in 1862 she

returned to Sturgeon, where she worked for John Moyhian and others. In 1863 she and her baby left Sturgeon and went to Mexico, Missouri, some 15 or 20 miles east. That was the last time they were ever seen in Boone county. Butler never questioned the legitimacy of the child, but frequently after his return from the war, and after her departure from the country, he spoke of the child, and upon several occasions expressed to the neighbors a desire to locate her; but as a rule he was very reticent about his wife and this child.

Annie Butler, a daughter of the deceased, John Butler, knew she had a sister, and some two or three months prior to her marriage she told the witness, W. T. Mathis, in the presence of Laura Hawkins, a neighbor girl, that she had a sister living in Monroe county, near Paris.

The following facts are practically undisputed, *viz.*: Mrs. Butler's given name was Jane, and her maiden name was Jane Gorden. At the date of the separation, she was about thirty years of age, of rather fair complexion, dark brown hair, blue eyes, dark eyelashes, medium height, and inclined to be fleshy. Mrs. Butler was at times intemperate, and prior to the separation she became intoxicated, fell in an open fire, and burnt one of her arms very seriously, resulting in a permanent disfigurement. The child was first called Caledonia by her mother, but prior to leaving Boone county she changed her name, and called her Lizzie. The first thing heard of Mrs. Butler and the child after they left Sturgeon for Mexico was in the month of October, 1863. One evening in that month a woman with a child came from the direction of Mexico on a foraging wagon of a company of Union soldiers bivouacked on the highway leading from Mexico to Paris. Some of these soldiers testified that the child was four or five years old with dark hair. They remained in the camp overnight, and in the morning Colonel Forbes, commander of the company, turned the child over to Dan Wyman, who was running a hack from Mexico to Paris. The latter departed with the child in the hack for Paris. The soldiers subsequently in November saw the child in Paris, and still later they saw her there at the home of Mr. Wetmore. After living with the latter six or seven months, Mr. and Mrs. Wetmore adopted the child, and reared and educated her, where she lived as a daughter until she was married. Shortly after the child arrived at Wyman's, this same woman appeared at Paris, who had a badly burned arm. She said her name was Jane Butler, and that the child was hers, and its name was Lizzie. Each of them were known in that community by their respective names. 39 L.R.A. (N.S.)

Mrs. Butler stated to various persons in and about Paris that she was the wife of John Butler, of Boone county, and that he was the father of the child; also, that she had by him three other children living in Boone county. There was some evidence which also tended to show that the child was the daughter of Jane Gorden, the maiden name of Mrs. Butler. This woman who claimed to be Mrs. Butler sympathized with the Union cause, and was a Catholic, and objected to Mrs. Wetmore raising the child, because she was not a Catholic, and did not sympathize with the Union cause. When Mrs. Wetmore refused to give up the child, the mother called upon the Union soldiers for assistance in procuring its custody. This trouble, which assumed an ugly form at first, was, however, compromised, and Mrs. Wetmore gave the mother a photograph of the child and she left Paris, and has never been heard of since, except in a general way that she had long since died. John Butler subsequently remarried, and they separated, and he again married. There are some additional detail facts which will be noticed in the opinion.

The court found the issues for the plaintiff, and rendered judgment accordingly. In due time, and in proper form, some of the defendants appealed to this court.

Messrs. Whitecotton & Wight for appellants.

Messrs. Gillespy & Conley, for respondent:

The declarant must be related to the person by blood or marriage, as to whose pedigree his declarations are offered; he may be related to the plaintiff, in which case his declarations tend to prove the pedigree of the plaintiff, or to the deceased, in which case his declarations tend to prove the pedigree of the deceased.

Wigmore, Ev. § 1491, note 2; Re Hartman, 157 Cal. 206, 36 L.R.A. (N.S.) 530, 107 Pac. 105, 21 Ann. Cas. 1302; Re Clark, 13 Cal. App. 786, 110 Pac. 828; Overby v. Johnston, 42 Tex. Civ. App. 348, 94 S. W. 131; Fowler v. Simpson, 79 Tex. 614, 23 Am. St. Rep. 370, 15 S. W. 682; Sitler v. Gehr, 105 Pa. 577, 51 Am. Rep. 207; Smith v. Smith, 140 Wis. 599, 123 N. W. 146; Hubatha v. Meyerhofer, 79 N. J. L. 264, 75 Atl. 454; Mann v. Cavanaugh, 110 Ky. 776, 62 S. W. 854.

The statements made by Mrs. Butler as to her name and the name by which she was known in Paris, and the statements of witnesses that the child in Paris was called Lizzie Butler, is not hearsay, but primary evidence. It is relied on as a source of knowledge.

Willis v. Quimby, 31 N. H. 485; Harris v.

Martin, 150 N. C. 367, 21 L.R.A. (N.S.) 531, 64 S. E. 120, 17 Ann. Cas. 685; Gillian v. State, 3 Tex. App. 132; Berniaud v. Beecher, 71 Cal. 38, 11 Pac. 802; 1 Wigmore, Ev. § 667; Koth v. Pallachucola Club, 79 S. C. 514, 61 S. E. 78; People ex rel. Yates v. Ferguson, 26 Cow. 102; Rich v. Mayer, 26 N. Y. S. R. 107, 7 N. Y. Supp. 69; People v. Leong Quong, 60 Cal. 107, 4 Am. Crim. Rep. 334; Lafin & R. Powder Co. v. Steytler, 146 Pa. 434, 14 L.R.A. 690, 23 Atl. 215; 6 Enc. Ev. 922; Howard v. Russell, 75 Tex. 171, 12 S. W. 525; McNeil v. O'Connor, 79 Tex. 227, 14 S. W. 1058; Nehring v. McMurrin, 94 Tex. 45, 57 S. W. 943, — Tex. Civ. App. —, 45 S. W. 1032; 15 Am. & Eng. Enc. Law, 2d ed. p. 918; Mullery v. Hamilton, 71 Ga. 720, 51 Am. Rep. 288; La Riviere v. La Riviere, 77 Mo. 512; Long v. McDow, 87 Mo. 197; State v. Ellwood, 17 R. I. 763, 24 Atl. 782; Schott v. Pellerim, — Tex. Civ. App. —, 43 S. W. 944.

Woodson, J., delivered the opinion of the court:

1. The sole ground assigned by counsel for appellants for a reversal of the judgment is thus stated: "The court committed error in admitting the testimony of certain witnesses as to the identity of Jane Butler by Jane Butler's own declaration with no other proof, and also as to her relation to John Butler for the same reason."

"The fact of the relationship of the declarant must be established by evidence other than her own declaration before the declaration became admissible." Or, to put it another way: "Not only is it necessary, in order that the declaration of a person afterwards deceased should be admissible in cases of pedigree, that the declarant should have been related to the family in question, or connected with the same by marriage, but this relationship must be established by some proof other than the declaration itself." Or, further, the rules of evidence governing statements of this kind are: "(1) The statement must be made *ante litem motam*. (2) The declarant must be dead. (3) A prior condition to both of these is, that it should be proved by some source of evidence independent of the statement itself, that the person making the statement is related to the family of whom she speaks." In support of that proposition, we are cited to the following authorities: 1 Wharton, Ev. p. 209; Elliott, Ev. §§ 380, 381; Wigmore, Ev. § 1490; 16 Cyc. p. 1229; Kennedy, Trial Ev. p. 22; 2 Jones, Ev. p. 712. In brief, the position of counsel for appellants is this: That there is no evidence whatever preserved in this record which shows or warranted the trial court in finding that the woman and child who appeared in Paris in October, 39 L.R.A. (N.S.)

1863, and known as Jane Butler and Lizzie Butler, were the wife and child of John Butler, late of Sturgeon, Boone county, Missouri, or that Jane and Lizzie were their true names, save and except the declarations of the former to the effect that such were their names, and that they bore those relations to him.

Under the authorities cited, counsel insist that those declarations were inadmissible in evidence for the reasons previously stated, and that they should be stricken out by this court, the judgment reversed, and the bill dismissed, for the reason that, when so stricken out, there would remain no sufficient evidence to support the findings of the court. The clearest and soundest statement of the rule governing the admission of declarations of persons as to pedigree and relationship is stated in 16 Cyc. p. 1229, as follows: "Notwithstanding an early tendency to regard intimate acquaintance with the family as a sufficient basis for knowledge as to facts of pedigree, and so to receive the declarations of family physicians, intimate friends, persons living in the family, or servants and other persons having adequate knowledge of facts of family genealogy or opportunities for acquiring it, the rule is now settled that, both in cases of reputation and of direct statements, the only competent declarants are those related to the family; and that consequently the declarations as to pedigree made by intimate friends, neighbors, or even by persons living in the family, or by servants, however trustworthy or long employed in the family, are incompetent. A second condition of relevancy is that the declarant should be disinterested to the extent of having no motive which can fairly be assumed to be such as would induce him to state the fact otherwise than as he understood it. The statement, therefore, must be shown to have been made *ante litem motam*; *a fortiori*, before commencement of a suit involving the issue to which the declaration relates. It is not material, however, that a controversy has arisen regarding a cognate matter, unless indeed it clearly foreshadows one on the precise subject-matter of the declaration; that a controversy, since entirely abated, once existed; or that a state of affairs is known to exist out of which a controversy may at any time arise. On the other hand, the declaration is inadmissible if a controversy in fact exists, although the declarant be ignorant of it, or it has not reached the stage of litigation. A declaration made expressly with a view to a probable future contest is admissible *quantum valeat*; but declarations made in the process of collecting evidence to substantiate the claim involved in a subsequent *lis* are incompetent. It is

universally held that declarations in pedigree cases are not admissible unless the declarant is dead."

Some of the states announce a more liberal rule; for instance, the court of appeal of California in the case of *Re Clark*, 13 Cal. App. 786, 110 Pac. 828, held that the declarations of the deceased father of claimants to the estate of an intestate, that the intestate was his sister, made in the lifetime of the intestate, were admissible without extrinsic preliminary proof of the relationship of the father to the intestate. This same general principle seems to be supported by the following authorities: 2 Wigmore, Ev. § 1491; *Re Hartman*, 157 Cal. 206, 36 L.R.A. (N.S.) 530, 107 Pac. 105, 21 Ann. Cas. 1302; *Overby v. Johnson*, 42 Tex. Civ. App. 348, 94 S. W. 131; *Fowler v. Simpson*, 79 Tex. 614, 23 Am. St. Rep. 370, 15 S. W. 682; *Sitler v. Gehr*, 105 Pa. 577, 51 Am. Rep. 207; *Smith v. Smith*, 140 Wis. 599, 123 N. W. 146; *Hubatka v. Meyerhofer*, 79 N. J. L. 264, 75 Atl. 454; *Mann v. Cavanaugh*, 110 Ky. 776, 62 S. W. 854. In our opinion, the former rule is the wiser and more sound of the two for the reason that, if the preliminary proof of relationship is not required, great injustice might be done, or a gross fraud perpetrated by a designing person, by simply declaring that he or some member of his family was related to a deceased person, who has no opportunity to contradict the statement or disprove the fact. It should be borne in mind that such evidence is purely hearsay, unsanctioned by any form of oath; therefore no punishment could be inflicted upon the declarant while living for his prevarication, nor successfully combated in many cases after death. For this reason it seems to us that a reasonable weight of preliminary proof of relationship should be required before receiving the declarations of such witnesses. In other words, all reasonable precautions should be used to protect the fountain source of such evidence, which at best is very unsatisfactory, from fraud and pollution. The degree of such proof must of necessity depend largely upon the facts and circumstances of each particular case, and no hard and fast or unbending iron rule can be laid down and enforced alike in all cases. The following cases will somewhat illustrate the degree of such proof that is required in a case: *Fulkerson v. Holmes*, 117 U. S. 389, loc. cit. 397, 29 L. ed. 915, 918, 6 Sup. Ct. Rep. 780; *Vowles v. Young*, 13 Ves. Jr. 147, 9 Revised Rep. 154; *Monkton v. Atty. Gen.* 2 Russ. & M. 157; *Young v. Schulenberg*, 165 N. Y. 385, 80 Am. St. Rep. 730, 59 N. E. 135; *Re Robb*, 37 S. C. 19, 16 S. E. 241; *Brown v. Lazarus*, 5 Tex. Civ. App. 81, 25 S. W. 71; *Fowler v. Simpson*, 79 Tex. 614, 23 Am. St. 39 L.R.A. (N.S.)

Rep. 370, 15 S. W. 682; *Louder v. Schluter*, 78 Tex. 105, 14 S. W. 205, 207; 22 Am. & Eng. Enc. Law, 2d ed. 644, and cases cited; *Layton v. Kraft*, 111 App. Div. 842, 98 N. Y. Supp. 72.

So considering this case under the rule of the law thus enunciated, were the declarations of Mrs. Jane Butler regarding the relationship she and Lizzie Butler, the respondent in this case, bore to John Butler, of Sturgeon, Missouri, admissible in evidence? In our opinion that question should be answered in the affirmative, for the reason that in our judgment this record abounds with such preliminary proof, and is ample to satisfy even a more stringent rule than that announced by the authorities before mentioned.

Briefly stated, the proof is as follows (for convenience, we will use the name, "Paris Butler," when referring to the Jane Butler, who appeared in Paris with the child Lizzie in the fall of 1863): Independent of the means by which the fact was brought about, Paris Butler was known for a year or more up to her death in and about Paris as Jane Butler, presumably from her declarations; that was also the name of the wife of John Butler, who disappeared in 1863. The latter was about thirty years of age when she was driven from her home, and the former, according to the opinion of the witnesses, appeared to be about thirty-five when she appeared in Paris in the fall of 1863. Both had blue eyes, dark eyebrows, and dark auburn hair. Jane Butler had rather a fair complexion, while Paris Butler was of rather a dark complexion. This, however, might be accounted for, as suggested by counsel for respondent, by the fact that she was five or six years older at the latter date, and may have been tanned by exposure during her wanderings. Each of them were about the same height and weight, and both "chubby;" Paris Butler being probably a little heavier. Both were nervous, excitable, and of a roving disposition,—more marked in Paris. Both were sad and sombre in disposition. Each was poor, and had to toil with her hands for a living. Jane Butler was at times addicted to drink. The record, as to Paris, in that regard is silent. Both were Catholics and sympathized with the Union cause. This appears more from the conduct of Paris than from her words. Jane Butler was the mother of four children, the youngest a girl named Lizzie, born in the fall of 1859, and had dark hair. The last time Jane Butler and Lizzie, her daughter, were ever seen on this earth, so far as the evidence shows, was when they left Sturgeon for Mexico in the year of 1863; and the first time Paris Butler and Lizzie, her daughter, were ever seen

or heard of on this earth, was when they mounted the foraging wagon of the Union soldiers, a few miles from Mexico, and rode thereon to the camp, near Paris. The exact period which expired between the time the former departed for Mexico and the time when the latter appeared at the camp is not disclosed by the evidence, but it could not have exceeded a few months. The latter child was four or five years of age when first seen at the camp, in October, 1863. Her hair was dark and her eyes were blue. Both women had a badly burnt arm, amounting to a disfigurement. The husband of Jane Butler was a Catholic, and served in the Union army. The conduct of Paris Butler, emphasizing her words in her appeal to the soldiers for aid in recovering the custody of her child, tends to show that her husband was also a Union soldier and a Catholic in religion. John Butler, the husband of Jane Butler, and father of Lizzie Butler, knew that the two latter had disappeared from Boone county, and upon several occasions expressed a desire to find the latter. And Annie Butler, the daughter of Jane and John Butler, and sister of Lizzie Butler, knew that the two latter had disappeared, and she told Mr. Mathis and others that her sister Lizzie lived in Monroe county, near Paris.

When we further consider the fact, that Boone, Audrain, and Monroe counties all adjoin each other, and were connected by railroads, with a somewhat sparse population, and where all must have had more or less acquaintance with each other, it seems to me as almost inconceivable that Jane Butler and her daughter Lizzie could all at once disappear from the face of the earth while going from Sturgeon to Mexico; and that almost immediately thereafter her daughter Lizzie could, unknown to the whole world, spring into existence a few miles north of Mexico, and both go to Paris, the former remaining there about a year, and the latter until she reached womanhood, without exciting word of comment, or calling forth an investigation of any kind, except upon the reasonable theory that Jane Butler and her daughter Lizzie of Sturgeon were none other than Jane Butler, whom we have been calling "Paris Butler," and her daughter Lizzie. Even in the absence of the declarations of Paris Butler as to the relationship she and her daughter bore to the deceased, John Butler, the evidence disclosed by this record is ample to establish the fact that Jane and Lizzie Butler of Sturgeon were the same persons as Jane and Lizzie Butler of Paris. And, when we corroborate that evidence with the declarations of Paris Butler, then their identity is established almost beyond a reasonable 39 L.R.A. (N.S.)

doubt. No four persons could have so many qualities in common with each other. Moreover, the same names and ages, pedigrees and family history point with an unerring finger to the fact that they are the same persons. In our opinion the evidence was ample to support the findings and judgment of the court.

We therefore affirm the judgment.

All concur.

OKLAHOMA SUPREME COURT. (Division No. 2.)

SPRINGFIELD FIRE & MARINE INSURANCE COMPANY, Plff. in Err.,

v.

HARRY HOMEWOOD.

(— Okla. —, 122 Pac. 196.)

Insurance — statutory valuation — Liability.

1. Where a fire insurance policy was written and the loss occurred while § 3199 of Wilson's Rev. & Anno. Stat. 1903 (which provided that "all insurance companies issuing policies in this territory shall be required to pay in case of total loss the full amount, and in case of partial loss, shall be required to pay the amount of loss so sustained for which the property is insured; provided, however, that no policy shall be issued which shall contain a sum greater than 75 per cent of the value of the property so insured") and § 3204 of Wilson's Rev. & Anno. Stat. 1903 (which provided that, "if there is no valuation in the policy, the measure of indemnity in an insurance against fire is the full amount stated in the policy; but the effect of a valuation in a policy of fire insurance is the same as in policy of marine insurance"), were in force, the company was liable, in case of total loss, for the full amount of the policy.

Headnotes by ROSSETT, C.

Note. — Constructive total loss of insured building.

This is a continuation of the same subject treated in the note to Monteleone v. Royal Ins. Co. 56 L.R.A. 784.

In that note, it is stated that two rules have been adopted: The earlier one, that the loss is total whenever the building has been so injured as to lose its identity and specific character as such; and the other, that it is not totally destroyed so long as a substantial remnant remains which a prudent, uninsured person would use in rebuilding.

In one recent case, both rules seem to apply and it is held that where a jury upon substantial evidence finds that the building has lost its identity and specific character as a building, and that it has become so far

Same — total loss.

2. When all combustible material in a railroad car is destroyed by fire, leaving only the trucks and steel used in its construction, and that is so injured by the fire as not to be of use in rebuilding the car, there is a total loss, within the meaning of the fire insurance policy, although the trucks and steel may be worth a small per cent of the original value of the car as old irons or scraps.

Same — appraisal — necessity.

3. Where there was a total loss of property covered by a fire insurance policy, governed by the provisions of §§ 3199 and 3204 of Wilson's Rev. & Anno. Stat. 1903, no appraisal was necessary, though the policy provided for appraisal as a condition precedent to bringing suit thereon.

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disintegrated that it cannot be properly designated as a building, even though a portion thereof remains standing, and when the jury finds as well that the portion which remains standing is not such as a reasonably prudent man without insurance, desiring a building like the one insured prior to the fire, would use as a basis on which to rebuild or restore the same to its prior condition, it is thereby conclusively settled that the loss is total. *Stevens v. Norwich Union F. Ins. Co.* 120 Mo. App. 88, 96 S. W. 684.

Most of the recent cases, however, follow the latter rule as laid down above, and apply the test of a substantial, usable remnant remaining.

In applying that rule and that test, the courts have held the loss to be total under the following circumstances:

—where an engine and dynamo insured as component parts of a manufactory were badly damaged, but not entirely destroyed, the court saying that the issue as to the amount of loss was not whether in its damaged state the machinery might have some value for other purposes, but whether it had any value left in it for the purposes of the factory in case the latter should be restored and operated; and that, if the machinery could not be repaired and replacements be restored to its intended use as an integral part of the factory, the fact that it might be sold for junk or even repaired in a way to make it useful for other purposes, and therefore of some value, did not alter its status as property totally destroyed. *Rogers v. Connecticut F. Ins. Co.* 157 Mo. App. 671, 139 S. W. 265;

—where barroom fixtures and furniture were blackened and charred by fire, but not entirely destroyed; the principle there stated being that, if property or any part of it is so damaged by fire as to render it useless for the purposes for which it has been used, such damage amounts to total loss within the meaning of the law. *Manchester F. Assur. Co. v. Feibelman*, 118 Ala. 308, 23 So. 759;

—where the walls and other portions of

ERROR to the District Court for Pottawatomie County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a fire insurance policy. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Burwell Crockett & Johnson, for plaintiff in error:

There was some considerable property of value, such as the steel and iron, left as salvage from the car after the fire. Under these circumstances the insurance company was entitled to have the damages appraised.

Carroll v. Girard F. Ins. Co. 72 Cal. 297, 13 Pac. 863; *Zalesky v. Home Ins. Co.* 102 Iowa, 613, 71 N. W. 566; *Chippewa Lumber Co. v. Phenix Ins. Co.* 80 Mich. 110, 44 N. W. 1055; *Gauche v. London & L. Ins. Co.*

the building left by the fire were of no value in rebuilding. *Eureka F. & M. Ins. Co. v. Gray*, 24 Ohio C. C. 268;

—where a building was entirely destroyed, and the stone foundation on which it rested was rendered valueless for any purpose. *Aetna Ins. Co. v. Glasgow Electric Light & P. Co.* 107 Ky. 77, 52 S. W. 975;

—where a dwelling house was entirely burned except a glass front door, which was crushed after removal. *American Cent. Ins. Co. v. Noe*, 75 Ark. 406, 88 S. W. 572;

—where a part of a building was burned and the roof over that part fell in, the rest being left charred and damaged, and the sides burned through in places, so that experienced builders testified that the building was left a mere shell worthless for repair, and not usable as a basis for repair; the court remarking that to make the loss total it is not necessary that the fire should entirely destroy and work an extinction of the house. *Hinkle v. North River Ins. Co.* — W. Va. —, 75 S. E. 54;

—where three walls of a building were entirely destroyed, although a small portion of the fourth was used in rebuilding, but so used over the protest of the superintending architect, and where no joists or flooring were left fit for use, and where only a small part of the foundation wall could be reused. *American Cent. Ins. Co. v. Murphy*, — Tex. Civ. App. —, 61 S. W. 956;

—where a courthouse of three stories was so burned that the basement, the walls and floors of the first story, the floors and part of the walls of the second story, and part of the floors and part of the walls of the third story, remained, but the walls were so sprung, cracked, and impaired by water and heat that they were unsafe for use in rebuilding, and must needs be torn down, at least to the top of the first story, even though there was some evidence that portions could have been retained and the building reconstructed. *Hartford F. Ins. Co. v. Bourbon County Ct.* 115 Ky. 109, 72 S. W. 739;

—where a private car was destroyed by fire as completely as a fire could destroy,

4 Woods, 102, 10 Fed. 347; Kahnweiler v. Phoenix Ins. Co. 57 Fed. 562; Fowble v. Phoenix Ins. Co. 106 Mo. App. 527, 81 S. W. 485; Stevens v. Norwich Union F. Ins. Co. 120 Mo. App. 88, 96 S. W. 684; Phoenix Ins. Co. v. Carnahan, 63 Ohio St. 258, 58 N. E. 805; Graham v. German American Ins. Co. 75 Ohio St. 374, 15 L.R.A. (N.S.) 1055, 79 N. E. 931, 9 Ann. Cas. 79; Hood v. Hartshorn, 100 Mass. 117, 1 Am. Rep. 89; United States v. Robeson, 9 Pet. 319, 9 L. ed. 142; Fisher v. Merchants' Ins. Co. 95 Me. 486, 85 Am. St. Rep. 428, 50 Atl. 282; United States v. Ellis, 2 Ariz. 253, 14 Pac. 300; Adams v. South British & Nat. F. & M. Ins. Co. 70 Cal. 198, 11 Pac. 627; Carroll v. Gerard, F. Ins. Co. 72 Cal. 297, 13 Pac. 863; Old Saucelito Land & Dry Dock Co. v. Commercial Union Assur. Co. 66 Cal. 253, 5 Pac. 232; Delaware & H. Canal Co. v. Pennsylvania Coal Co. 50 N. Y. 250.

Under an open policy it is incumbent on the insured to show the value of the property destroyed in an action to recover for a loss.

4 Cooley, Briefs on Insurance, p. 3078; Williams v. Continental Ins. Co. 24 Fed.

767; Hanover F. Ins. Co. v. Lewis, 23 Fla. 193, 1 So. 863; German F. Ins. Co. v. Von Gunten, 13 Ill. App. 593; Millaudon v. Western Marine & F. Ins. Co. 9 La. 27, 29 Am. Dec. 433; Germier v. Springfield F. & M. Ins. Co. 109 La. 341, 33 So. 361; Home Ins. Co. v. Stone River Nat. Bank, 88 Tenn. 360, 12 S. W. 915.

The measure of the amount insured is entitled to recover is the fair cash value of the property at the time and place of the loss, not exceeding the amount of the insurance.

Mack v. Lancashire Ins. Co. 2 McCrary, 211, 4 Fed. 59; Perry v. Mechanics' Mut. Ins. Co. 11 Fed. 485; State Ins. Co. v. Taylor, 14 Colo. 499, 20 Am. St. Rep. 281, 24 Pac. 333; Holter Lumber Co. v. Fireman's Fund Ins. Co. 18 Mont. 282, 45 Pac. 207; Huckins v. People's Mut. F. Ins. Co. 31 N. H. 238; Fowler v. Old North State Ins. Co. 74 N. C. 89; Grubbs v. North Carolina Home Ins. Co. 108 N. C. 472, 23 Am. St. Rep. 62, 13 S. E. 236; Boyd v. Royal Ins. Co. 111 N. C. 372, 16 S. E. 389; Ellmaker v. Franklin F. Ins. Co. 5 Pa. 183.

Appraisers must give notice of the time and place of hearing or meeting, and each

although the iron and steel left might have a small value as scraps, but could not be used in rebuilding the car. *SPRINGFIELD F. & M. Ins. Co. v. HOMEWOOD.*

Under a contract whereby a company was to equip the property of another with fire extinguishers, and was to be indemnified by the other for any loss or damage by fire which might occur to the materials and equipment while on the premises of that other, where a fire destroyed certain materials, but left unharmed other materials that had been placed underground according to the contract, it was held that, since the latter became useless for the purposes of the contract when the plant was destroyed, the loss was total in the sense of the contract, and liability therefor was not dependent upon actual destruction by fire of the materials in the structure; and since the contract imposed no duty upon the company to recover such materials, it was not chargeable with their value as wreckage. *Schaeffer Piano Mfg. Co. v. National Fire Extinguisher Co.* 78 C. C. A. 293, 148 Fed. 159.

As stated in the former note, the result is sometimes affected by laws or ordinances prohibiting repair of the building in its original character. In such cases the loss will be considered total, even though portions of the structure may be left unharmed.

So where the loss by fire is partial, but the injury by the fire has rendered the building unfit for use for the purpose for which it was constructed, and where there are ordinances or laws prohibiting its reconstruction, the loss is total. In this case the building was a frame structure, and its 39 L.R.A. (N.S.)

reconstruction as such within the fire limits was prohibited by city ordinances. *Palatine Ins. Co. v. Nunn*, — Miss. —, 55 So. 44.

Where walls only are left standing after the fire, and these may possibly be utilized in rebuilding, yet, if they are condemned by city authorities and ordered removed, the loss is total; and this result is not affected by the question whether the authorities are right or wrong in their judgment that the walls are unsafe. *New Orleans Real Estate Mortg. & Secur. Co. v. Teutonia Ins. Co.* 128 La. 45, 54 So. 466.

The fact that it would cost more to use the materials left than to use new materials goes to show that the loss is total. *Hinkle v. North River Ins. Co.* supra.

Fire insurance upon a vessel to lie moored in a river for use as a hospital for two years is not maritime, but is governed by the rules of ordinary fire insurance, and it is therefore incorrect to charge a jury that if, in their judgment, the cost of repairs after a fire would be more than the vessel would be worth when repaired, they should bring in a verdict as for total loss. *Detroit v. Grummond*, 58 C. C. A. 301, 121 Fed. 963.

Where a lessee of a hotel took out a policy on the "use and occupancy" of the building, and it was so far destroyed by fire that the business connected with it could not be carried on until repairs had been made, there was held to be a total loss of the use and occupancy within the meaning of the policy, although some of the rooms were not materially damaged. *Chatfield v. Aetna Ins. Co.* 71 App. Div. 164, 75 N. Y. Supp. 620. H. C. Sh.

party must be afforded an opportunity to introduce evidence in support of his contention.

Ostrander, *Fire Ins.* 2d ed. § 292, p. 642; Schoenich v. American Ins. Co. 109 Minn. 388, 124 N. W. 5; 2 Am. & Eng. Enc. Law, 650; 1 Clement, *Fire Ins.* p. 167, rule 50; Slater v. La Grande Light & P. Co. 43 Or. 131, 72 Pac. 738; Shively v. Knoblock, 8 Ind. App. 433, 35 N. E. 1028; Continental Ins. Co. v. Garrett, 60 C. C. A. 395, 125 Fed. 589; Schreiber v. German-American Hail Ins. Co. 43 Minn. 367, 45 N. W. 708; Mason v. Fire Asso. of Philadelphia, 23 S. D. 431, 122 N. W. 423; Curtis v. Sacramento, 64 Cal. 102, 28 Pac. 108; Graham v. Woodall, 86 Ala. 313, 5 So. 687; Dormoy v. Knower, 55 Iowa, 722, 8 N. W. 670; Tiffany v. Coffey, 142 Mo. App. 210, 125 S. W. 1178; Warren v. Tinsley, 3 C. C. A. 613, 2 U. S. App. 507, 53 Fed. 689; Elmendorf v. Harris, 23 Wend. 628, 35 Am. Dec. 293; McFarland v. Mathis, 10 Ark. 560; McMahon v. New York & E. R. Co. 20 N. Y. 468; Day v. Hammond, 57 N. Y. 479, 15 Am. Rep. 522; Crowell v. Davis, 12 Met. 293; Billings v. Billings, 110 Mass. 225; Hills v. Home Ins. Co. 129 Mass. 345; Williams v. Schmidt, 54 Ill. 209, 2 Mor. Min. Rep. 23; Ingraham v. Whitmore, 75 Ill. 24; Alexander v. Cunningham, 111 Ill. 511; Lincoln v. Taunton Copper Mfg. Co. 8 Cush. 415.

Messrs. Blakeney & Maxey for defendant in error.

Rosser, C., filed the following opinion:

This was an action on a fire insurance policy by Harry Homewood, hereinafter called plaintiff, against the Springfield Fire & Marine Insurance Company, hereinafter called defendant, to recover for the burning of a certain private car, known as "Gertrude," the property of the plaintiff. The policy was issued September 10, 1907, for one year, and the loss occurred on the 27th of November, 1907, at Tecumseh, in this state.

There are only two questions raised by defendant's brief: First. That the loss was not appraised before suit was brought, as provided by the policy. It was stipulated in the policy that, in case of a disagreement between the insurer and the insured, the amount of loss should be determined by appraisal, the insured to select one appraiser, the company another, and the two appraisers thus selected to choose the third, and the three to appraise the property. At the time the policy was written, and when the loss occurred, § 3199 of Wilson's Rev. & Anno. Stat. was in force. That section was as follows: "All insurance companies issuing policies in this territory shall be required to pay in case of total loss the full

amount, and in case of partial loss, shall be required to pay the amount of loss so sustained for which the property is insured; provided, however, that no policy shall be issued which shall contain a sum greater than 75 per cent of the value of the property so insured." This section is quoted in Farmers' & M. Ins. Co. v. Cuff, 29 Okla. 106, 35 L.R.A. (N.S.) 892, 116 Pac. 435, in the discussion of the necessity of appraising property destroyed by fire. Section 3204 of Wilson's Rev. & Anno. Stat. was also in force, both at the time the policy was written and when the loss occurred. That section provided that, "if there is no valuation in the policy, the measure of indemnity in an insurance against fire is the full amount stated in the policy; but the effect of a valuation in a policy of fire insurance is the same as in policy of marine insurance." This section was construed in the case of Oklahoma Farmers' Mut. Indemnity Asso. v. McCorkle, 21 Okla. 606, 97 Pac. 270. In that case it was held, under that section, that, "in the event of total loss the amount of insurance mentioned in the policy was payable absolutely, without further evidence as to the actual loss." See also Word v. Southern Mut. Ins. Co. 112 Ga. 585, 37 S. E. 897; Havens v. Germania F. Ins. Co. 123 Mo. 403, 26 L.R.A. 107, 45 Am. St. Rep. 570, 27 S. W. 718; Lancashire Ins. Co. v. Bush, 60 Neb. 116, 82 N. W. 313; Oshkosh Gaslight Co. v. Germania F. Ins. Co. 71 Wis. 454, 5 Am. St. Rep. 233, 37 N. W. 819; Reilly v. Franklin Ins. Co. 43 Wis. 449, 28 Am. Rep. 552. Both these sections were repealed by the act of March 25, 1909 (Laws 1909, chap. 21, art. 2).

Two questions then arise. The first is, Was there a total loss? And the second, If the loss was total, was appraisal necessary? It appears from the evidence that everything combustible in and about the car was burned, and all of the car that could burn was burned, and all of the contents that could be burned were burned. All that was left was the iron and steel work of the car, and that, according to the testimony, was so injured and changed by the fire as to make it incapable of use in another car, and had no value except as scrap iron or rubbish. It was then a total loss, so far as it was possible for fire to make it a total loss.

In the case of Seyk v. Millers' Nat. Ins. Co. 74 Wis. 67, 3 L.R.A. 523, 41 N. W. 443, where a similar question was involved, the court said: "Were the insured buildings wholly destroyed, within the meaning of § 1943? The evidence is that all the combustible material in the structures was destroyed, and, although portions of the brick walls were left standing, yet they were use-

less as walls, and many, perhaps most, of the bricks therein, were spoiled by the heat. It cannot be doubted that the identity and specific character of the insured buildings were destroyed by the fire, although there was not an absolute extinction of all the parts thereof. This was an entire destruction of the buildings, within the meaning of the statute."

In *Palatine Ins. Co. v. Weiss*, 109 Ky. 464, 59 S. W. 509, the court said: "It is unnecessary to multiply citations from authorities bearing upon this question. It is the opinion of the court that the words 'total loss,' when applied to a building, do not mean that the materials of which the building was composed were all totally destroyed and obliterated. It is not necessary that all of the parts and materials composing the building should be absolutely and physically destroyed; but the inquiry always is: Does the insured building, after the fire, still exist, preserving substantially its identity, or has it become so broken and disintegrated that it cannot be designated as the structure which was insured? There may be a total loss, within the meaning of the statute, even though some parts of the building may remain standing after the fire. See *Wood*, Ins. § 107; *May*, Ins. § 420a; *Ostrander*, Ins. 2d ed. § 610; *Biddle*, Ins. § 1375; *Joyce*, Ins. §§ 3025, 3030; *Beach*, Ins. § 890; *Black*, Law Dict. 'Total Loss'; *Judah v. Randal*, 2 Cal. Cas. 324; *Harriman v. Queen Ins. Co.* 49 Wis. 71, 5 N. W. 12." See also *Murphy v. American Cent. Ins. Co.* 25 Tex. Civ. App. 241, 54 S. W. 407; *Havens v. Germania F. Ins. Co.* 123 Mo. 403, 26 L.R.A. 107, 45 Am. St. Rep. 570, 27 S. W. 718; *O'Keefe v. Liverpool, L. & G. Ins. Co.* 140 Mo. 558, 39 L.R.A. 819, 41 S. W. 922; *Hamburg-Bremen F. Ins. Co. v. Garlington*, 66 Tex. 103, 59 Am. Rep. 613, 18 S. W. 337; *Williams v. Hartford Ins. Co.* 54 Cal. 442, 35 Am. Rep. 77.

In *Liverpool & L. & G. Ins. Co. v. Heckman*, 64 Kan. 388, 67 Pac. 879, the court said: "The phrase 'total loss,' or its equivalent, 'wholly destroyed,' as used when applied to the subject of insurance, does not contemplate the entire annihilation or extinction of the property insured. Nor does it require that any portion of the property remaining after loss shall have no value for any purpose whatever; but it means only destruction of the property insured to such extent as to deprive it of the character in which it was insured."

When the car was burned, nothing remained but the *débris* or scraps. Although they may have had some value, 3 or 3½ per cent of the total value, still it was destroyed as a car; and fire had done all the damages it was possible for fire to do it. Destruction

by fire, so far as fire could destroy, was the thought that was in the parties' minds at the time the policy was written. Total loss occurred, within the meaning of the policy, when everything was destroyed that fire could destroy.

It is obvious that if the total amount of the policy was payable in the event of total loss, no appraisal was necessary. The amount of the policy was the amount payable, and there was nothing to appraise. While the exact point was not decided in either case, the reasoning of both *Oklahoma Farmers' Mut. Indemnity Asso. v. McOrkle*, 21 Okla. 606, 97 Pac. 270, and the *Farmers' & M. Ins. Co. v. Cuff*, 29 Okla. 106, 35 L.R.A.(N.S.) 892, 116 Pac. 435, leads to this conclusion. In the case of *Oshkosh Gaslight Co. v. Germania F. Ins. Co.* 71 Wis. 454, 5 Am. St. Rep. 233, 37 N. W. 819, the court, speaking of a similar statute to the one in force at the time the policy in this suit was written and the loss occurred, said: "The statute must be regarded as a part of the contract of insurance, and the amount written in the policy as liquidated damages agreed upon by the parties conclusively in such contract." In *Lancashire Ins. Co. v. Bush*, 60 Neb. 116, 82 N. W. 313, the court said: "The statute, which is to be regarded as part of the contract, fixes conclusively the worth of the building which is the subject of insurance. If the property is wholly destroyed, its actual value is not to be determined by evidence, agreement, or arbitration. The damages are liquidated, and the measure of recovery already ascertained." A large number of cases, among which are *German Ins. Co. v. Eddy*, 36 Neb. 461, 19 L.R.A. 707, 54 N. W. 856; *O'Keefe v. Liverpool, L. & G. Ins. Co.* 140 Mo. 558, 39 L.R.A. 819, 41 S. W. 922; *Baker v. Phoenix Assur. Co.* 57 Mo. App. 559; *Hartford F. Ins. Co. v. Bourbon County*, 115 Ky. 109, 72 S. W. 739; *American Cent. Ins. Co. v. Noe*, 75 Ark. 406, 88 S. W. 572; *Marshall v. American Guarantee Mut. F. Ins. Co.* 80 Mo. App. 18, and *Ætna Ins. Co. v. Shacklett*, — Tex. Civ. App. —, 57 S. W. 583, sustain the doctrine that, under statutes similar to the one governing this case, no appraisal is necessary, although stipulated for in the policy; and it was held in *Pennsylvania F. Ins. Co. v. Drackett*, 62 Ohio St. 41, 81 Am. St. Rep. 608, 57 N. E. 962; and *Seyk v. Millers' Nat. Ins. Co.* 74 Wis. 67, 3 L.R.A. 523, 41 N. W. 443, that a voluntary submission to arbitration did not preclude the insured from recovering the face of the policy, where there was a total loss, though the award was for a less amount.

Defendant's second contention is that the court erred in permitting Gertrude Homewood, the wife of plaintiff, to testify in the

case. The execution of the policy is admitted, and the destruction of the property by fire was amply proved by several witnesses, both for the plaintiff and the defendant. Mrs. Homewood's testimony was entirely immaterial. It was not necessary to prove the value of the property. *Marshall v. American Guarantee Mut. F. Ins. Co.* 80 Mo. App. 18, when the execution of the policy was shown, and the destruction proven to be a total loss, the liability of the company was established. These facts were practically admitted by the company, and were proven by the other witnesses. Whether Mrs. Homewood's evidence was competent or not cannot affect the decision of the case. However, she testified that she had full control of the car and the contents in the absence of her husband, and her testimony was confined to conditions and transactions existing and occurring in his absence. Her testimony appears to have been competent. The judgment should be affirmed.

Per Curiam:

Adopted in whole.

Petition for rehearing denied.

ARIZONA SUPREME COURT.

W. G. DUMONT, Appt.,

v.

HARRY E. HEIGHTON, Admr., etc., of
Charles H. Ferry, Deceased.

(— Ariz. —, 123 Pac. 306.)

Master and servant — death of employer — termination of contract.

1. The death of the employer within the year will not terminate a contract for the services, for a year, of one to do the annual assessment work on mining claims and take care of the camp and other property of the employer, the services not to be rendered under the direction of the employer.

Same — statutory direction — effect.

2. A statute requiring the personal representative to take into possession all the property of the decedent does not terminate a contract for the care, for a year, of the decedent's mining camp and other proper-

Note. — *Termination of contract of employment by death of one of the parties.*

The cases upon this question are collected in a note appended to *Mendenhall v. Davis*, 21 L.R.A.(N.S.) 914.

Apparently the only case upon the question, decided since the publication of that 39 L.R.A.(N.S.)

ty, and the doing of the assessment work on the mining claims.

(May 2, 1912.)

APPEAL by plaintiff from a judgment of the District Court for Pima County holding that the contract of employment for the care for a year of a mining claim and for assessment work on certain mining claims terminated with the death of plaintiff's employer and that the plaintiff recover from the estate the sum of \$93. Reversed.

The facts are stated in the opinion.

Messrs. Mark A. Smith and Leslie C. Hardy, for appellant:

The contract of employment, as a matter of law, did not terminate with the death of the master, Chas. H. Ferry.

2 *Parsons*, Contr. 5th ed. pp. 530, 533; *Chamberlain v. Dunlop*, 126 N. Y. 45, 22 Am. St. Rep. 811, 26 N. E. 966; *Kernochan v. Murray*, 111 N. Y. 306, 2 L.R.A. 183, 7 Am. St. Rep. 744, 18 N. E. 808; *Janin v. Browne*, 59 Cal. 44; *Harrison v. Conlan*, 10 Allen, 85; *Billings's Appeal*, 106 Pa. 558.

Mr. Selim M. Franklin, for appellee:

If the contract was for such personal service that it would terminate with the death of the servant; so, on the other hand, and as corollary thereto, it must terminate with the death of the master.

Lacy v. Getman, 119 N. Y. 116, 6 L.R.A. 728, 16 Am. St. Rep. 800, 23 N. E. 452; *Babcock v. Goodrich*, 3 How. Pr. N. S. 53; 20 Am. & Eng. Enc. Law, 45; *Castro v. Murray*, 47 Or. 57, 81 Pac. 388, 883; *Harris v. Johnson*, 98 Ga. 434, 25 S. E. 525; *Zinnell v. Bergdoll*, 19 Pa. Super. Ct. 508; *Howe Sewing Mach. Co. v. Rosensteel*, 24 Fed. 583; *Yerrington v. Greene*, 7 R. I. 589, 84 Am. Dec. 578.

Ross, J., delivered the opinion of the court:

The plaintiff in this case instituted this suit against the defendant, administrator of the estate of Chas. H. Ferry, deceased, on a contract for wages after the term of the contract had expired, alleging a breach thereof by the administrator. The contract was for one year's services by the plaintiff doing assessment work on twelve mining claims, and taking the proper care of camp

note, is *Re McPhee*, 156 Cal. 335, 104 Pac. 455, in which it is held that men employed to fell trees and make them into ties at a certain price per tie, without any specific number of trees being contracted for, had no interest in the timber, and the employment was ended by the death of the employer.

R. L. S.

and other property belonging to deceased Ferry, for which services the plaintiff was to receive \$150 per month, beginning January 1, 1910, and ending January 1, 1911. Ferry was to furnish all camp tools and explosives within reason. On the 2d day of May, 1910, Chas. H. Ferry died. The plaintiff was discharged by the administrator and dispossessed of the mines and improvements of the deceased on the 23d day of May, 1910. He sues for ten months' salary, alleging his damages at the stipulated wages of \$150 per month or \$1,500. A jury was impaneled in the lower court, and the plaintiff and defendant introduced their evidence, but the jury was discharged, without rendering any verdict, upon the following stipulation:

It is hereby stipulated by the respective parties in the above-entitled action that the jury be discharged, and that the cause be submitted to the court for its determination; that if the court find that the contract of employment alleged in plaintiff's complaint terminated with the death of the defendant Ferry, that the plaintiff recover from the estate of the said Ferry the sum of ninety-three (\$93) dollars; and that if said contract survived the death of the said Ferry that he recover from the estate the sum of twelve hundred thirty-eight (\$1,238) dollars, together with his costs, and the interest upon the respective amounts recovered.

Dated this 12th day of June, 1911.

Mark A. Smith,
Leslie C. Hardy,
Attorneys for Plaintiff.
Selim M. Franklin,
Attorney for Defendant.

The lower court, agreeable to such stipulation, thereafter "reached the conclusion that as a matter of law the contract terminated by the death of Ferry, or rather by the demand made by the administrator upon Mr. Dumont for the possession of the property," and rendered judgment in favor of the plaintiff for \$93. The appellant (the plaintiff below) assigns nine errors in the court below. We set forth two of such assignments, which present the only question to be decided by us; the other matters, as we conceive them, being concluded by the above stipulation. Those two errors are, first, that "the court erred in finding and holding that the contract of employment terminated, as a matter of law, by the death of the master, Chas. H. Ferry, for the reason that as a matter of law the said contract did not terminate with the death of the master;" and, second, in "holding that the contract of employment terminated

by the demand made by the special administrator upon the appellant."

The stipulation entered into by the parties in the course of the trial leaves but one question to be decided, and that is as to whether this was a personal contract that terminated with the master's death. The contract in *hæc verba* is as follows: "Apropos of our conversations and previous letters, I now, after consultation with Mr. Ferry, am able to state to you here what will be expected of you in way of work and care of camp and salary to be paid. There are twelve (12) outlying claims in which Mr. Ferry and I are equal owners. These claims he agreed to do the location and assessment work for his interest, being that I discovered them. You will be expected to do the assessment work on these twelve claims, and take proper care of camp and other property belonging to Mr. C. H. Ferry, for which he is willing to pay you one hundred and fifty (\$150) per month, beginning Jan. 1st, 1910, to Jan. 1, 1911. You can use camp tools, and Mr. Ferry is willing to furnish all explosives within reason. The law requires \$100 worth of work on each and every claim, and whether it is done on one or for a group there must be \$100 worth of work done for every claim. This work will require your affidavit. You can begin your assessment work now or any time during the year, but you ought to begin in time." The plaintiff, in his complaint, alleges that under the contract it became his duty to take "possession of all the property herein mentioned and described, and care for or cause to be cared for the same, and to prevent injury or waste thereof, . . . to do or cause to be done within the year beginning January 1st, 1910, the annual assessment work on twelve of said mining claims, said Ferry to furnish all tools, powder, caps, fuse, and things necessary to perform such work." And further alleges that he did thereafter take possession of such property. Freeman in his notes to Hawkins v. Ball, 68 Am. Dec. 755, says: "The law presumes that the parties to a contract bind not only themselves, but their personal representatives. A personal representative is therefore liable on all the contracts of the decedent which were broken in his lifetime, and, except those contracts whose performance requires his personal skill and taste, on all those that are broken after his death." Sustaining his statement of the law, he further quotes from 2 Chitty, Contr. 11th Am. ed. 1406: "An executor or administrator is liable, in general, to the extent of the assets which come to his hands to be administered upon all the contracts of the deceased remaining undischarged at his death. Ac-

cordingly, the executor or administrator is liable, so far as he has assets, for debts of every description due from the deceased, either debts of record, as judgments, statutes, or recognizances, or debts on special contract, as for rent, or on bonds, covenants, or the like, under seal, or debts on simple contracts as notes unsealed and promises not in writing, either expressed or implied.' In this all the authorities agree"—citing many cases. The author also says in the same note: "Contracts strictly personal in their nature determine upon death of the party by whom the personal service is to be performed. In such cases the personal representatives of the deceased contractor are not liable for the performance of his contracts. This is the only exception to the rule that the personal representative of a decedent is bound to perform his contracts. The exception itself is very generally admitted, but the difficulty arises in determining what contracts come within it"—citing authorities. "The question, after all, is one to be determined by ascertaining the intention of the parties. And if from the construction of the contract it appears that the intention of the parties is that the contractor alone in person is to perform it, and that it is not to be performed by any other person, then the contract is to be regarded as personal within the meaning of the exception."

In this case Ferry owned some mining claims upon which he wanted the assessment work done for the year 1910. He also owned some houses and improvements either on or adjacent to these twelve claims of which plaintiff was to be caretaker. In one of the houses there was a small stock of goods, and the evidence shows that the plaintiff was to look after that also. Ferry himself lived in New York, and was on the ground only occasionally, and then for the general purpose of consulting his superintendent and taking a general survey of his properties. His purpose in making this contract with the plaintiff, of course, was to have the assessment work done so as to preserve his rights and to have the improvements cared for and protected. The contract for services was let in full view of these circumstances. It was a matter of little concern to Ferry as to who should do the assessment work, providing it was done under the terms of the contract. The part of the contract with reference to looking after and caring for the property did not necessarily call for a person with peculiar skill, ability, or taste. It seems to us that it must have been the intention of Ferry, when he entered into this contract with plaintiff, to bind himself and his estate to the complete fulfilment of its terms. 39 L.R.A.(N.S.)

We do not think that the conclusion at which we have arrived in this case is at variance with the decision of the court in the case of *Lacy v. Getman*, 119 N. Y. 109, 6 L.R.A. 728, 16 Am. St. Rep. 806, 23 N. E. 452, cited by appellee as the leading case on this subject. In the *Lacy-Getman* Case the testator, who had employed Lacy to do appropriate and ordinary work for a period of one year on his farm, in his will bequeathed a life estate in the farm to his widow, and the house and control of all his personal property whatsoever in the house and on the farm during the term of her natural life. The court in that case made this observation: "It is obvious at once that an element has come into the case as now presented which was not there when the general term first held that the contract survived. It now appears that the executrix could not have performed her side of the contract at all after the death of McMahan by force of her official authority, because she had neither the possession of the farm or personal property upon it, and no right to such possession during the life of the widow. She had no power to put her servant upon the land, or employ him about it, and in her representative character she had not the slightest interest in his service, and could derive no possible benefit from it. . . . We have, then, the peculiar case of a contract made to work for McMahan, and under his direction and control, which could not be performed because of his death, transmuted into a contract to work for Mrs. Getman upon a farm which she did not possess, and had no right to enter." And the court further on states: "And so it must be conceded that the death of the servant, employed to render personal services under the master's daily direction, dissolves the contract." As stated, the services to be rendered by the plaintiff in this case were not to be under the personal directions or supervision of Ferry. Indeed, it may be said that the plaintiff was placed in absolute charge and control to do the assessment work in any manner he chose within the time limited, and to look after and care for the improvements without any directions or instructions of a daily or personal nature from Ferry. In the case of *Zinnell v. Bergdoll*, 19 Pa. Super. Ct. 508, cited by appellee, after discussing the facts in relation to the employment and services of the plaintiff by the deceased, the court said: "There being no evidence from which a contract to render services upon the one hand, and pay for them, upon the other, for a longer period than each current month upon which the parties entered could have been implied, it was error to submit the case to the jury in this manner." Thus it

will be seen that in this case there was a lack of contract.

The appellee also insists that the contract sued on in this case was terminated by the death of Ferry, for the reason that our statute (Civ. Code 1901, § 1825) provides that "the executor or administrator must take into his possession all the estate of the decedent, real and personal, and collect all debts due to the decedent or to the estate." The possession of the plaintiff was the possession of Ferry, and, upon the death of Ferry and the appointment of an administrator, by operation of law, the possession was transferred to the administrator, and therefore the possession of the plaintiff was, in fact, the possession of the administrator. The administrator doubtless would have had the right to discharge plaintiff from the performance of his contract for any neglect of duty or any wilful conduct injurious to the interests he represented, or for dishonesty, or for refusal to permit the administrator to exercise his powers and duties as administrator in any manner not in conflict with the terms of his contract.

We think the lower court committed error in not giving judgment to the appellant for the sum of \$1,238, together with his costs and interest.

The case is remanded to the superior court in and for Pima county, with directions that judgment be entered for appellant for said sum of \$1,238, together with costs and interest, the judgment to be paid in the due course of the administration of said estate.

Franklin, Ch. J., and Cunningham, J., concur.

Petition for rehearing denied.

ILLINOIS SUPREME COURT.

PEOPLE OF THE STATE OF ILLINOIS
v.
REGNERUS Y. DANTUMA, Plff. in Err.

(252 Ill. 561, 96 N. E. 1087.)

Trademark — union label — registration.

1. The legislature may provide for the registration of a union label, and make the unauthorized use thereof a misdemeanor.

Pleading — variance — ownership of label.

2. An allegation of infringement of a label of a local trades council is not supported by proof of infringement of a label of an international union.

39 L.R.A.(N.S.)

Trademark — union label — unlawful use — subcontractor.

3. One not entitled to use a union label, who contracts to do a job of printing, is not subject to a penalty for use of the label on the work if it is placed there by a subcontractor who has a right to use it, and to whom the job was sublet in good faith with nothing in the contract to prevent it.

(December 21, 1911.)

ERROR to the Municipal Court of Chicago to review a judgment convicting defendant of unlawfully using a union label. Reversed.

The facts are stated in the opinion.

Mr. Jesse Holdom, with Mr. Thomas F. Monahan, for plaintiff in error.

Mr. Zach Hofheimer, with Messrs. W. H. Stead, Attorney General, John E. W. Wayman, and W. Edgar Sampson, for the People.

Hand, J., delivered the opinion of the court:

This was a criminal prosecution commenced in the municipal court of Chicago, against Regnerus Y. Dantuma and Gean Forget, doing business as the Galbraith Press, for violating § 5 of chapter 140 of Hurd's Statutes of 1909, by unlawfully using and displaying the union label of the Allied Printing Trades Council of Chicago, on 120,000 cards which they printed upon the order of J. L. Clark, for St. Vincent's Infant Asylum. A jury was waived and the case was tried by the court, and at the close of all the evidence Forget was discharged, and a fine of \$100 was imposed upon Dantuma, and he was ordered to stand

Note. — Law as to union labels.

I. Protection as trademark, 1191.

II. Protection on ground of unfair competition.

a. In general, 1194.

b. Who entitled to use, 1197.

c. Right to relief against manufacturers of imitative label, 1198.

d. Right to relief as affected by wording of label, 1198.

III. Rights and remedy of person asserting right to use label where denied by union, 1199.

IV. Constitutionality of statutes for protection of union labels, 1199.

V. Civil suit based upon statute.

a. In general, 1200.

b. Relief as affected by extent of use, 1201.

c. Miscellaneous, 1201.

VI. Criminal prosecutions.

a. In general, 1202.

b. Form of indictment, 1202.

c. Matters of evidence, 1202.

committed until the fine and costs were paid. He has sued out a writ of error from this court to review said judgment, and has assigned as error, first, that the statute under which he was prosecuted and convicted is unconstitutional; and, secondly, conceding said statute to be constitutional, that the evidence was not sufficient to support the conviction.

Sections 1, 3, and 5 of the statute under consideration read as follows:

"Section 1. Whenever any person or any association or union of workmen has heretofore adopted or used, or shall hereafter adopt or use, any label, trademark, term, design, device, or form of advertisement, for the purpose of designating, making known, or distinguishing any goods,

wares, merchandise, or other product of labor as having been made, manufactured, produced, prepared, packed, or put on sale by such person or association or union of workmen, or by a member or members of such association or union, it shall be unlawful to counterfeit or imitate such label, trademark, term, design, device, or form of advertisement, or to use, sell, offer for sale, or in any way utter or circulate any counterfeit or imitation of any such labels, trademark, term, design, device, or form of advertisement."

"Sec. 3. Every such person, association, or union that has heretofore adopted or used, or shall hereafter adopt or use, a label, trademark, term, design, device, or form of advertisement, as provided in section one

I. Protection as trademark.

The courts are not agreed on the question whether a union label in the absence of statute, constitutes a technical trademark. In some jurisdictions it is held that a union label does not constitute a technical trademark, for the reason that it is not affixed to any article to which the union adopting the label or any of its members have any proprietary right, and for the further reason that it does not denote the origin of the article or its quality.

Thus, a label adopted by a union of workmen to indicate that the article to which it is affixed was manufactured by their labor has been said not to be a trademark, for the reason that the members of the union had not applied it to any vendible commodity placed upon the market, in which they deal or of which they are the owners or manufacturers, and also because it wants every essential element of a trademark in that it does not indicate by what person the articles to which it is affixed were made, but only membership in a certain association; that there is no exclusive use of it, but many persons not connected in business and unknown to each other may lawfully use it, and its rightful use is not connected with any business; that it cannot be transferred with any business and its use is dependent only on membership in the association. *Weener v. Brayton*, 152 Mass. 101, 8 L.R.A. 640, 25 N. E. 46.

But in *Tracy v. Banker*, 170 Mass. 266, 39 L.R.A. 508, 49 N. E. 308, it is said: Such a label "is part of the well-known machinery of trade unions, and the use of it is found, if a finding be necessary, to be of value to the union and its members. It would not be traveling too far from the record, perhaps, if we should assume that the use of the label is in fact, as certainly it might be, of far more economic importance to the union than are many or most of the trademarks, strictly so called, which are protected by the courts. Nevertheless, technical difficulties, which would have been hard to escape from without 39 L.R.A.(N.S.)

some subtlety or a statute, prevented the plaintiff from recovering in a case like this."

And it has been held that, since an association of workmen is neither a manufacturer nor dealer, and has no trade in which the trademark can be used, a mark adopted to distinguish articles produced by them, as the labor of any of their members, is not a trademark. *Com. v. Norton*, 16 Pa. Super. Ct. 423.

In denying that a label adopted by a trades union constituted a legal trademark, in *Cigar Makers' Protective Union No. 98 v. Conhaim*, 40 Minn. 243, 3 L.R.A. 125, 12 Am. St. Rep. 726, 41 N. W. 943, the court based its decisions upon the ground that the union was not a business corporation, association, or partnership engaged in the manufacture or sale of the article to which the label was affixed; that anyone joining any of the local unions acquires the right to use the label, and his right continues so long as he remains a member; and a manufacturer acquires the right to use it only by employing members of the union, and loses the right to use it when he ceases to employ such members. It is said that when affixed the symbol does not indicate the kind or quality, nor by whom made; that anyone seeing it affixed to an article cannot tell who of the many thousands of individuals authorized to use it had made, or caused to be made, the article to which it is affixed. All that he can learn from it is that the article was made by some one of the many thousands entitled to use the symbol; that the right in trademarks, or the exclusive right to use certain symbols or devices placed upon goods offered for sale, is property, and hence the law affords a remedy to the owner against one who violates the right. The court defines a trademark as a word, mark, or device adopted by a manufacturer or vendor to distinguish his productions from other productions of the same article; hence it is said to be essential that the symbol or device shall be adopted to distinguish the productions of the manufacturer or vendor from those of others, and it must so dis-

(1) of this act, shall file the same for record in the office of the secretary of state, by leaving two (2) copies, counterparts, or facsimiles thereof with said secretary, and by filing therewith a sworn statement specifying the name or names of the person, association, or union on whose behalf such label, trademark, term, design, device, or form of advertisement shall be filed, the class of merchandise, and a particular description of the goods to which it has been or is intended to be appropriated; that the party so filing, or on whose behalf such label, trademark, term, design, device, or form of advertisement shall be filed, has the right to the use of the same, and that no other person, firm, association, union, or corporation has the right to such use,

either in the identical form or in any such near resemblance thereto as may be calculated to deceive, and that the facsimile copies or counterparts filed therewith are true and correct. There shall be paid for such filing and recording a fee of one (1) dollar. Any person who shall for himself, or on behalf of any other person, association, or union, procure the filing of any label, trademark, term, design, device, or form of advertisement in the office of the secretary of state, under the provisions of this act, by making any false or fraudulent representations or declarations, verbally or in writing, or by any fraudulent means, shall be liable to pay any damages sustained in consequence of any such filing, to be recovered by or on behalf of the party injured

to distinguish them. There is a very strong dissenting opinion by Judge Mitchell, concurred in by Vanderburgh, Judge.

Although not necessary to the decision in *Carsons v. Ury*, 5 L.R.A. 614, 39 Fed. 777, it is conceded that a label by a trade union or association does not answer to the definition ordinarily given of a technical trademark, because it does not indicate with any degree of certainty by what particular person or firm the article to which it is affixed is manufactured, nor does it serve to distinguish the goods of one manufacturer from another, and the user has no vendible interest in the label, but merely a right to use it on articles of his own make so long as he remains a member of the union. Hence the court cannot interfere to protect such a label as ordinary trademark cases, on the ground that one person is appropriating a mark, symbol, device or word which has become the exclusive property of another, when used by him to distinguish goods of a certain class.

In other jurisdictions a more liberal view is taken, and it is said that a trademark is calculated to distinguish the article to which it is attached from those of other makers or vendors, and it need not indicate any particular person as maker, manufacturer, or vendor, or give the name, or address of either. When the mark has become recognized by purchasers as a distinctive designation, it will be sufficient indication of the origin or ownership within the rule requisite to its protection as such, although purchasers may not, from the label or otherwise, be able to tell the particular maker or seller of the article. *Godillot v. Harris*, 81 N. Y. 263.

And it has been said that, apart from its application and use, a trademark has no recognized ownership; its value is in its employment in marking the goods upon which it is placed; this gives to it the character of property. It is then a symbol of reputation and good will. *State v. Bishop*, 128 Mo. 373, 29 L.R.A. 200, 49 Am. St. Rep. 569, 31 S. W. 9.

The reasoning against the right of a labor 39 L.R.A. (N.S.)

union to acquire a property right in a label, as urged in *Weener v. Brayton and Cigar Makers' Protective Union No. 98 v. Conhaim*, supra, — that the label did not indicate by what persons the articles labeled were made, but only indicated that they were made by one of many persons who were not connected with each other in any business,—is answered in *Schmalz v. Woolley*, 57 N. J. Eq. 303, 43 L.R.A. 86, 73 Am. St. Rep. 637, 41 Atl. 939, wherein it is said that this objection unduly restricts the law of trademarks as everywhere recognized, for it is established that whatever be the quality indicated by a trademark, the mark need not point out the particular person from whom that quality is derived. The law has placed no limit upon the number of persons who may unite for business purposes and jointly acquire property in the trademark, and yet it is evident that if there be many, some of them may have no personal share in producing the article identified by the mark.

Following the same line of reasoning, in denying the rule that a union label does not constitute a technical trademark, it has been asserted that the fact that goods are produced by the work of one person in the service of another to whom they belong, and that a label cannot be placed upon them without the consent of the owner, is not a bar to the right of the workman, through the means of a trademark which he has affixed to the product of his labor, to acquire a right of property in such trademark, since the good will in the result of his work in his department of business, in the production of articles of merchandise, may be essentially valuable to him; and what may be available to one may in like manner be accomplished by an association of workmen engaged in the same business and the production of similar articles of merchandise for the market. *People v. Fisher*, 50 Hun, 552, 3 N. Y. Supp. 786.

Hence, members of a trade union may adopt as a trademark a label to designate the result of their labor, and for that purpose it is entitled to protection in its relation to such products as a proprietary

thereby in any court having jurisdiction, and shall be punished by a fine not exceeding two hundred (200) dollars; or by imprisonment not exceeding one year, or both such fine and imprisonment. The secretary of state shall deliver to such person, association, or union so filing or causing to be filed any such label, trademark, term, design, device, or form of advertisement so many duly attested certificates of the recording of the same as such person, association, or union may apply for, for each of which certificates said secretary shall receive a fee of one (1) dollar. Any such certificate of record shall, in all suits and prosecutions under this act, be sufficient proof of the adoption of such label, trademark, term, design, device, or form of

advertisement. Said secretary of state shall not record for any person, union, or association any label, trademark, term, design, device, or form of advertisement that would reasonably be mistaken for any label, trademark, term, design, device, or form of advertisement theretofore filed by or on behalf of any other person, union, or association."

"Sec. 5. Every person who shall use or display the genuine label, trademark, or form of advertisement of any such person, association, or union, in any manner not authorized by such person, union, or association, shall be deemed guilty of a misdemeanor, and shall be punished by imprisonment in the county jail not less than three months nor more than one year, or by a

right for their benefit. The fact that their work is not performed under a single employment, but under many different employers in as many widely separated shops, goes to the value of the mark in its application to the articles made by them, rather than to the right to its protection as such. *Ibid.*

The contention that ownership of the article to which a trademark is affixed is necessary to the acquisition of a property right in the mark is denied in *Schmalz v. Wooley*, 57 N. J. Eq. 303, 43 L.R.A. 86, 73 Am. St. Rep. 637, 41 Atl. 939, and it is said that this personal element is not important; that "the public object sought in the protection of trademarks is to bring upon the market a better class of commodities, and the means for attaining that object is by securing to those who are instrumental in supplying the market whatever reputation they gain by their efforts toward that end. The workman by whose handicraft the commodity is made is one of these instruments, just as is his employer who furnishes the raw material and owns and sells the finished product; and if the former is permitted by the owner to place upon the commodity a mark to indicate whose workmanship it is, and thereby commend his workmanship to other employers, this license from the owner should be deemed a right against everybody else. His aptitude in his trade is his property, and if by a mark he can have it identified as his in the market, he may enhance its salable value, and thus secure the same sort of advantage as his employer by similar means. No reason exists why this advantage should not be protected by the courts in the same manner and to the same extent as is the like advantage of the employer. The mere fact that one rather than the other of these persons has placed the product upon the market has no rational bearing upon the matter, for both alike have had the market in view in the efforts they have made, and through those efforts the market is supplied."

And in opposition to the doctrine that a union label does not constitute a valid 39 L.R.A. (N.S.)

trademark, it has been asserted that identity of proprietorship in a trademark and the article to which it is affixed is not necessary to sustain a trademark. It is sufficient if the mark is designed as a symbol to distinguish an article produced by the labor of the members of the union, and as indicative of the quality of the article only so far as it is incident to or dependent upon workmanship. In this respect such a trademark represents a valuable property right in the workman, and is entitled to protection as such. *People v. Fisher*, supra.

This view is well stated in *Hetterman Bros. v. Powers*, 102 Ky. 133, 39 L.R.A. 211, 80 Am. St. Rep. 348, 43 S. W. 180, wherein the court says: "The known reputation of a particular kind of skilled labor employed in the development of a particular product or class of products determines, to a large degree, the value or price of such products when put on the markets. To stamp or label a commodity as the product of a particular kind or class of skilled labor determines the demand for and the price of such product or commodity. The marketable price of a commodity influences the scale of wages paid for its manufacture. The higher the price, the higher the wages paid; hence it is indisputable that the employee whose skilled labor in the production of a particular commodity creates a demand for the same, that secures for him higher remunerative wages, has as definite a property right to the exclusive use of a particular label, sign, symbol, brand, or device adopted by him to distinguish and characterize said commodity as the product of his skilled labor, as the merchant or owner has to the exclusive use of his adopted trademark on his goods."

Although refusing to commit itself on this question, in *State v. Hagen*, 6 Ind. App. 167, 33 N. E. 223, the court said that it may be urged with considerable force that where a label indicates the origin of the goods so far as the workmanship is concerned, guarantying that they have been made by one of a large association which has acquired a high reputation for the skill of all its members, this is a sufficient indi-

fine of not less than \$100 nor more than \$200, or both. In all cases where such association or union is not incorporated, suits under this act may be commenced and prosecuted by any officer or member of such association or union, on behalf of and for the use of such association or union."

The facts, in brief, are as follows: In June, 1911, Clark called up Dantuma on the phone at the place of business of the Galbraith Press, and said to him he wanted to have 120,000 cards printed for "field day," for the benefit of St. Vincent's Infant Asylum, and that he wanted the union label thereon. Dantuma replied he could print the cards, but he did not have the right to use the union label. Clark then asked him if he could not have the printing done with

the union label on, and he replied he could. Dantuma thereupon caused a proof of the card to be set up in the Galbraith Press office, with the exception of the union label, and arranged with one F. W. Colwell, who had the right to use the union label, to place thereon the union label, and to have the plate as then completed electrotyped; and the cards were then printed and delivered to Clark, or to the St. Vincent's Infant Asylum. The evidence was conflicting as to whether the printing was done at the office of the Galbraith Press, or at the office of Colwell.

The information charged the defendants with wrongfully using the union label of the Allied Printing Trades Council of Chicago, and, to prove the charge, introduced

evidence of origin, without its pointing out the particular individual from whom it emanated, and hence the association may acquire such a general reputation for the high character of its workmanship that its mark will be such assurance of the worth of the goods as to make it a property right in the association or membership in general.

Since the employment and wages of a workman depend somewhat upon his reputation as such, he has a valuable interest in the good will of his workmanship, and hence he may have a proprietary right in the result of his labor. *People v. Fisher*, supra.

II. Protection on ground of unfair competition.

a. In general.

The weight of authority sustains the jurisdiction of equity to protect union labels against unfair competition by the unauthorized use of labels imitative of the union label, with the evident purpose of thereby deceiving the public as to the origin of the goods to which the imitation label is affixed, at least as regards workmanship, and thus unfairly gain whatever advantage there may be in inducing the public to believe that the article is the product of union labor. In some jurisdictions, however, notably Connecticut and Massachusetts, the power of equity to protect a union label against counterfeiting or simulating by persons not authorized to use the genuine label is denied.

Thus, in *Lawlor v. Merritt*, 78 Conn. 630, 63 Atl. 639, a complaint alleging the adoption by an association of workmen of a label to designate the product of the labor of the members thereof, and that the defendants, for the purpose of obtaining advantage of the market for articles bearing said label, and of palming off their product as the product manufactured by the members of said association, and of defrauding and deceiving the public and of injuring the association, have adopted and used, with-

out authority or right, labels made in imitation and counterfeit of the association's label, was held not to state a case for equitable interposition, since, said the court, "neither at common law nor by the general principles of equity, is a man entitled, at least in the absence of actual fraud, to protection in the exclusive use of a label for goods, unless it is one he is using to distinguish some visible commodity owned or traded in by him." On the question whether intent to defraud is a necessary element in granting relief against unfair competition, see note in 4 L.R.A.(N.S.) 960. The cases in that note fully support the doctrine that actual fraud is shown under such circumstances as is alleged in the complaint which the court in the *Lawlor* Case found to be insufficient. This case was subsequently before the court in 79 Conn. 399, 65 Atl. 295, and it is there held that the failure of the label itself to show that the article to which it is attached was the product of the labor of members of the association cannot be remedied by parol proof of this fact, and that, since the label does not announce that the hats to which it was attached were manufactured by members of the association, but rather imports that the hats were owned, manufactured, or sold by the association itself, which is not true, it is radically defective, and entitled to no protection against fraudulent use or simulation by others.

In *Weener v. Brayton*, 152 Mass. 101, 9 L.R.A. 640, 25 N. E. 46, it was alleged that articles made by members of a trade union, upon which was affixed a label adopted by the union, had acquired a valuable reputation, and that, in consequence, the right to the exclusive use of such label was of great value, and it was charged that the defendant had used imitations of such label on boxes containing inferior articles of the same character, and not made by members of the union, the counterfeit label so closely resembling the union label as to deceive purchasers, and that, for the purpose of deceiving purchasers and of obtaining higher prices, he had sold boxes on which were pasted such counterfeit

in evidence a certificate of the secretary of state, showing a union label registered by the International Typographical Union of North America, of Indianapolis, Indiana. When the proof was in, leave was granted the state to amend the information by striking out the words "Allied Printing Trades Council of Chicago," and inserting in lieu thereof the words "International Typographical Union of North America, of Indianapolis, Indiana," but the information was not amended.

It is urged by the plaintiff in error that the union label involved in this case, or any union label, for that matter, is not a trademark, in this: That it does not show origin or ownership, within the meaning of those terms as the same are used in the

law pertaining to trademarks (*Kidd v. Johnson*, 100 U. S. 617, 25 L. ed. 769; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, 25 L. ed. 993; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. ed. 1144, 14 Sup. Ct. Rep. 151), and that, a registered union label not being a trademark, it cannot be protected, and its use by others prohibited by law. We think it may be conceded that a union label like the one here sought to be protected does not fall within the meaning of a trademark, in the broad sense in which that term is used at common law. *Cigar Makers' Protective Union No. 98 v. Conhaim*, 40 Minn. 243, 3 L.R.A. 125, 12 Am. St. Rep. 726, 41 N. W. 943. Still, we think the legislature may lawfully provide for the registration of a

labels, well knowing the articles contained therein were not made by members of the union, and were inferior in workmanship and quality to those rightfully sold under the union label. Nevertheless, the court held that no relief in equity could be granted, since the complainant was not a manufacturer, dealer in, or owner of the articles which were fraudulently represented by the counterfeit label or advertisement to be his. And it is said that, "however disreputable and dishonest it may be falsely to represent goods made by other persons to have been made by members of the union, upon which subject there can be but one opinion, those who do not carry on any business to which the use of the label is incident, who have not applied it to any vendible commodity which has been placed upon the market, in which they deal, or of which they are the owners or manufacturers, cannot maintain a bill to restrain the use by the defendant of the label as a trademark."

In the foregoing case the court cites as authority *Schneider v. Williams*, 44 N. J. Eq. 391, which will be hereafter referred to, and which, as will also hereafter be shown, was in part at least disapproved in a later New Jersey decision, which also disapproves in part *Weener v. Brayton*.

In the New Jersey case referred to (*Schneider v. Williams*, 44 N. J. Eq. 39, 14 Atl. 812) it is asserted that a trade union is not entitled to equitable relief to restrain the imitation or counterfeit of a label adopted by it, although it is alleged that the label is a guaranty that cigars contained in the boxes to which it is attached have been manufactured by skillful workmen, and are not coolie, prison, or tenement house work, and that the sale of cigars thus marked has, since the adoption of the label, largely increased, and they now command a higher price in the market than cigars not thus distinguished; and hence the exclusive right to use the label is a valuable one; and it is also alleged that the defendant has obtained possession of counterfeit labels and placed the same on cigars not made by members of the association. (N.S.)

tion, and is putting them on the market in violation of the rights of the complainants and to the great injury of the public. The court, while conceding that the defendant was conducting his business in such a manner as to deceive and cheat all who deal with him, by representing that to be true which he knew to be false, and that he was seeking to get gain by the use of counterfeit tokens, nevertheless held that it was powerless to correct such delinquencies, and that the complainants could have no relief because they had not shown a clear property right and the invasion of that right by the defendant, for they had no property in the label or mark imitated, since there can be no such thing as a trademark distinguished from or unconnected with a vendible commodity; it can have no existence as property or a thing distinct from and wholly unconnected with the article of traffic. And it is asserted that no person can acquire a right to a trademark except he put merchandise or a vendible commodity on the market, marked and distinguished by his particular mark.

Compare with the language of the court in *Schmalz v. Wooley*, 57 N. J. Eq. 303, 43 L.R.A. 86, 73 Am. St. Rep. 637, 41 Atl. 939, wherein it is said that the language used in the foregoing case is unwarranted, since the purpose of such an association is the profit to be derived from their skill in the trade and their mutual assistance in profiting by its practice; that "this connection is as clearly one for business purposes as is that of members in a partnership or of stockholders in a corporation. Although it is a comparatively novel species of relationship, it has become an established one, and therefore calls for the application of those general principles of law and equity which are applied to other species of business associations. According to these principles, we think a workman or a number of workmen engaged in the same branch of industry and banded together for their mutual profit in the pursuit of their common vocation, may acquire a right of property in a trademark designed to distinguish their workmanship from that of other persons, and

union label similar to the one herein involved, and protect its use, and such is the holding of the courts of last resort in Massachusetts and Kentucky. *Tracy v. Banker*, 170 Mass. 266, 39 L.R.A. 508, 49 N. E. 308; *Hetterman Bros. v. Powers*, 102 Ky. 133, 39 L.R.A. 211, 80 Am. St. Rep. 348, 43 S. W. 180. See also *State v. Bishop*, 128 Mo. 373, 29 L.R.A. 200, 49 Am. St. Rep. 569, 31 S. W. 9; *Schmalz v. Wooley*, 57 N. J. Eq. 303, 43 L.R.A. 86, 73 Am. St. Rep. 637, 41 Atl. 939; *People v. Luhrs*, 195 N. Y. 377, 25 L.R.A. (N.S.) 473, 89 N. E. 171. And this court is, we think, committed to that view in *Cohn v. People*, 149 Ill. 486, 23 L.R.A. 821, 41 Am. St. Rep. 304, 37 N. E. 60.

We see no valid reason, and none has

been suggested by counsel, why those engaged in skilled employment may not so designate the result of their labor by a union label as to enable them to secure to themselves the fruit of their skill. The skilled workman by his labor creates wealth, and, if the employer of labor can, by a registered trademark, secure to himself the wealth which he has created by his industry, there can in law or justice be no reason why the man who labors, and who by his skill and industry has created a demand for a particular commodity that secures for him more remuneration, may not be equally protected by a registered label which notifies the public that the commodity offered for sale, and upon which skilled labor has been expended, was manu-

that a trademark so owned is entitled to the same protection as other trademarks."

On this point, in *Carsons v. Ury*, 5 L.R.A. 614, 39 Fed. 777, it is said no valid reason can be pointed out why the principle which underlies the decisions protecting a user of labels against unfair competition, even though the label does not constitute a technical trademark, does not entitle a union label to protection, since the right of the court to grant relief on the ground of unfair competition is predicated on the ground that the conduct of the parties proceeded against, in intentionally marking, labeling, wrapping, or advertising their wares so that they would be mistaken for the goods of some other manufacturer, is fraudulent. "That and the fact that the fraud complained of had a natural tendency to injure the business of a person whose marks, labels, etc., had been simulated, by lessening his sales or injuring the reputation of his goods."

In *Strasser v. Moonelis*, 23 Jones & S. 197, 11 N. Y. S. R. 270, the court takes the view that the right to such a label is a valuable one, since it appears that boxes of cigars to which the label is affixed sell in the market for a higher price than do the same cigars when in boxes upon which the label does not appear. Hence, it is said that the natural result of the use of a fraudulent simulation of a label is such an injury as entitles the members of the union to protection by the court.

On this point, in *Hetterman Bros. v. Powers*, 102 Ky. 133, 39 L.R.A. 211, 80 Am. St. Rep. 348, 43 S. W. 180, the court, while conceding that a union label did not constitute a trademark in the ordinary sense of the word, in that it was not a brand put on the goods of the owner to separate or distinguish them from the goods of others, said that they could not agree on that account that the label does not represent a valuable right which may be the subject of legal protection, and the court reasons thus: "Why may not those engaged in skillful employment so designate the result of their labor as to entitle them to the fruits of their skill, when it is admittedly

a source of pecuniary profit to them? And this, though they may not own the property itself? They are not, it is true, 'in business' for themselves in the ordinary sense, but they have property rights nevertheless. They may not select a label and be protected in its use apart from its connection with some commodity; but they not only select it in this instance; they apply it to property, and it does not at all matter that the tangible property is that of another. In order to get the benefit of the superior reputation of cigars made by them, the appellees select and apply this label as a distinguishing brand or mark. And it would be strange if this thing of value, this certificate of good workmanship, and which makes the goods made by them sell, and thus increases demand for their work, be entitled to no protection, because those making the selection and application are not business men engaged in selling cigars of their own. The man who is employed for wages is as much a business man as his employer, in that larger sense in which the word 'business' has come to be used by statement and legislators."

And it has been asserted that a laborer has the same valuable interests in the good will of his labor as a manufacturer has in the good will of his trade. Every man has a property right to the result of his labor, and that he has sold his right by a contract for wages is no reason why he should be deprived of the right to designate the origin of the result of his work. That it is impossible to attach to this result any badge or label indicative of origin or interest, unless with the consent of the owner of the physical property itself, does not affect the principle applicable. If certain laborers, through a union, have increased a demand for their labor, and the union designates the labor of the members by a particular symbol, label, or sign descriptive of the origin or ownership of the labor, such a device is entitled to the protection of a court of equity from fraudulent simulation. *Strasser v. Moonelis*, supra.

In *McVey v. Brendel*, 114 Pa. 235, 13 L.R.A. 377, 27 Am. St. Rep. 625, 22 Atl.

factured or created by skilled labor. We are therefore of the opinion the act providing for the registration and the protection from use by others of a union label is a valid, constitutional enactment.

The information alleged that the label infringed was the registered union label of the Allied Printing Trades Council of Chicago, while the evidence showed the label used in printing the cards delivered to Clark or the St. Vincent's Infant Asylum by the defendants was the registered label of the International Typographical Union of North America, of Indianapolis, Indiana. There was here, therefore, a fatal variance between the information and the proof. This variance was sought to be obviated by an amendment to the information, but no

amendment was made. The variance was therefore not cured. It is said, however, in the brief filed by the people, that there was no variance, as the Allied Printing Trades Council of Chicago was a subordinate branch of the International Typographical Union of North America, of Indianapolis, Indiana, and had the right to use and control said label. This may be true, but the evidence does not show that fact, and upon the face of the record the variance is fatal to a conviction.

It also appears from the testimony of Colwell that the contract for the printing of the 120,000 cards, which is the basis of this prosecution, was sublet to him, and that he did the printing of said cards at his office, and used the union label in so

912, it is apparently assumed that a proper label would be given equitable protection if the complainant came into court for such protection with clean hands, but if the label contains improper language, then complainant does not come into court with clean hands, and equitable relief will be denied. This doctrine is well settled. It may be doubted; however, whether it was properly applied in this case, since the bad conduct charged to the complainant was the use in the label of language similar to that used in *Carsons v. Ury*, 5 L.R.A. 614, 39 Fed. 777; *Cohn v. People*, 149 Ill. 486, 23 L.R.A. 821, 41 Am. St. Rep. 304, 37 N. E. 60; *State v. Hagen*, 6 Ind. App. 169, 33 N. E. 223; *Hetterman Bros. v. Powers*, 102 Ky. 133, 39 L.R.A. 211, 80 Am. St. Rep. 348, 43 S. W. 180; *Cigar Makers' Protective Union No. 4 v. Lindner*, 2 Ohio N. P. 114, 3 Ohio S. & C. P. Dec. 244. As will be hereafter seen, in these cases a different construction is placed upon this language. See *infra*, d.

In asserting the right to have a union label protected in equity against unfair and dishonest competition, in *State v. Bishop*, 128 Mo. 373, 29 L.R.A. 200, 49 Am. St. Rep. 569, 31 S. W. 9, the court reasoned that the law not only protects the owner in the use of a technical trademark, but it protects him in the use of other insignia by label, symbol, or otherwise, which he may attach to merchandise to distinguish it from all other articles of merchandise in the market. This protection may be had by injunctive proceedings on the theory of unfair competition in the unauthorized use of an imitative label for the purpose of deception.

Hence, where it is alleged and admitted by demurrer that the defendant, with intent to defraud the plaintiff and impose on the public, has sold and continues to sell cigars not made by the members of the plaintiff's union, packed in boxes bearing a label falsely purporting to be issued by such union, and imitating the said label so closely as to be calculated to deceive the public and lead them to believe that such cigars were manufactured by this union, to the irreparable 39 L.R.A. (N.S.)

damage of the plaintiff, a good cause of action is stated. *Bloete v. Simon*, 19 Abb. N. C. 88.

For other cases supporting the doctrine that on the ground of unfair competition, equity will protect a union label against counterfeiting or imitation for the purpose of deceiving the public as to the workmanship of the article to which the label is affixed, see cases immediately following.

b. Who entitled to use.

Anyone having a lawful right to use a union label, who is especially damaged by a third person using it fraudulently and without right, is entitled to the equitable protection of the law against such wrongdoer. *State v. Hagen*, 6 Ind. App. 167, 33 N. E. 223.

Hence, members of a trade union have in a label adopted by them, indicative of the fact that the article to which it is attached is produced by the labor of members of their association, a right which in equity the law will protect against frauds and counterfeits. *Ibid*.

Members of an association of employees, who adopt a label to distinguish the product of their labor, have an interest in the proper use of the label which may be sufficient grounds to entitle them to invoke equitable aid to protect, by injunction, such label against inequitable use by another. *Strasser v. Moonelis*, 23 Jones & S. 197, 11 N. Y. S. R. 270, affirmed without opinion in 108 N. Y. 611, 15 N. E. 730.

Although a label authorized by a trade union or association may not be entitled to protection as a trademark, it will be protected in a court of equity by the issuance in that court of an injunction against the unauthorized use of such label, or a counterfeit thereof, with the evident design to deceive the public by concealing the true origin of the goods, as well as injuring a complainant who has a clear right to use the label. *Carsons v. Ury*, 5 L.R.A. 614, 39 Fed. 777 (action by manufacturer).

On the theory of unfair competition, an unlawful use of a union label may be re-

doing, as he had the right to do. While his testimony was contradicted by that of A. Bartels, we do not think the uncorroborated testimony of Bartels upon that subject sufficient to sustain a conviction. He was a discharged employee of the defendants, and his testimony in many particulars was very uncertain and unsatisfactory. There was nothing in the contract between the defendants and Clark which prevented the defendants from subletting

their contract with Clark to Colwell, and if they had sublet such contract in good faith, and without the intention, by subterfuge or otherwise, of using or displaying unlawfully the union label upon said cards, they, or either of them, would not be liable to a prosecution under the statute.

The judgment of the Municipal Court of Chicago will be reversed, and the case remanded.

strained by injunctive proceedings instituted by a member of a union against a competitor in business using the label without authority. *State v. Bishop*, 128 Mo 373, 29 L.R.A. 200, 49 Am. St. Rep. 569, 31 S. W. 9.

By an equally divided court in *Allen v. McCarthy*, 37 Minn. 349, 34 N. W. 416, a judgment was affirmed, holding that individuals, as officers and members of a designated trade union, were entitled to maintain suit to restrain a third person from putting up, selling, labeling, or offering for sale any boxes containing a particular article having thereon a label or trademark in imitation of plaintiff's label.

Under a statute providing in part that those who are united in interest must be joined as plaintiffs or defendants, except as otherwise prescribed, and where the question is one of common or general interest to many, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all,—the members of a union, may invoke the aid of equity, to protect a label of the union. *Bloete v. Simon*, 19 Abb. N. C. 88.

But it has been asserted that "it is necessary for those who claim that their right of property in a trademark has been invaded, to show that they are in some way by themselves, or with others, the owners thereof, by reason of some business which they are transacting together, and to which its use is incident, and that it is not merely a personal privilege which they possess as members of a particular association of wide extent and embracing many persons of varied interest, to advertise, or have advertised by those by whom they are employed, the articles made by them as being made by members of such association." *Weener v. Brayton*, 152 Mass. 101, 8 L.R.A. 640, 25 N. E. 46.

c. Right to relief against manufacturers of imitative label.

The conduct of a person in manufacturing and selling labels imitative of those used by a trade union is equally as culpable as that of the manufacturer of articles who buys and uses the spurious labels, and the loss which the manufacturer of similar articles, authorized to use the genuine labels, sustains by the use of the spurious labels on a competing article, is as directly attributable to persons who make and sell counterfeit labels as to the dealer who buys 39 L.R.A. (N.S.)

and uses them. Hence, to be entitled to relief on the ground of unfair competition, it is not necessary to allege that the defendants have affixed any of the spurious labels to articles of their own manufacture, or that they have sold any articles bearing the counterfeit certificates or labels, but it is sufficient if it appears that they have made and sold spurious labels and advertised them for sale, since from these facts the court will presume that the defendants intended that they should be used by the persons who purchased them, and that they manufacture and sell them for that purpose. *Carsons v. Ury*, 5 L.R.A. 614, 39 Fed. 777.

d. Right to relief as affected by wording of label.

A label reciting, among other things, that the article to which it is attached is produced by a designated trade union, "an organization opposed to inferior, rat shop, coolie, prison, or filthy tenement house workmanship," is not an open attack on the products of all other laborers, nor does it characterize their products as unfit for use. *State v. Hagen*, 6 Ind. App. 167, 33 N. E. 223.

Referring to the same language in *Cohn v. People*, 149 Ill. 486, 23 L.R.A. 821, 41 Am. St. Rep. 304, 37 N. E. 60, the court reasoned: This language "says, simply, in effect, these cigars are not the product of inferior, rat shop, coolie, prison, or filthy tenement house workmanship. Can it be said that one may not, without condemning or aspersing the product of other manufacturers, commend the article he has for sale? If he may do so himself, may he not procure the certificate of others as to the quality of the article he puts upon the market? If one is engaged in the manufacture of wine, is it an aspersion upon the product of other manufacturers that a wine growers' association certifies that his wine is the pure juice of the grape, free from adulteration? Certainly not. This label does not say, or purport to say, that cigars made by nonunion men are of the inferior class mentioned, or that cigars made by nonunion men are not free from the impurity or taint to which they might be subjected by such workmanship. It does, in effect, say that cigars are upon the market which are the product of rat shops, filthy basements, of Chinese establishments, of prisons and tenement houses, and proposes to assure

customers that cigars sold under this label are not the product of such establishments. This and nothing more. And can it be doubted that public policy would be best served if all manufacturers of cigars would truthfully make the like assurance to the public?" Similar language is used as to the same label in *State v. Hagen*, 6 Ind. App. 169, 33 N. E. 223; *Carsons v. Ury*, 5 L.R.A. 614, 39 Fed. 777; *Hetterman Bros. v. Powers*, 102 Ky. 133, 39 L.R.A. 211, 80 Am. St. Rep. 348, 43 S. W. 180; *Cigar Makers' Protective Union No. 4 v. Lindner*, 2 Ohio N. P. 114, 3 Ohio S. & C. P. Dec. 244.

This label received entirely different construction in *McVey v. Brendel*, 144 Pa. 235, 13 L.R.A. 377, 27 Am. St. Rep. 625, 22 Atl. 912, wherein the court says: "It says to the public in spirit and in effect: 'Buy the cigars that bear this label, because they were made by a member of this union. Do not buy those not bearing it, because they were made by workmen who do not belong to us. Such cigars are the product of "inferior, rat shop, coolie, prison, or filthy tenement house workmanship." It is the request of a powerful labor organization to 'all smokers throughout the world' to take sides with it in its contest with those who are outside of its membership, by refusing to buy the work of such persons. It is an attempt to use the public as a means of coercion upon them, compelling them to unite with the union in order to find a market for their goods or their labor."

The real question now before us is whether the international organization of workmen shall have the help of a court of equity in making war upon all cigar makers who do not belong to it, and in driving their work out of the market by representing it as coming from inferior rat shops, from coolies, prisons, or filthy tenement houses. A 'first class workman' is one who does first class work, whether his name is on the rolls of any given society or not. Filthiness and criminality of character depend on conduct, not on membership of the union. Legitimate competition rests on superiority of workmanship and business methods, not in the use of vulgar epithets and personal denunciation. When the Cigar Makers' International Union of America stigmatizes those who do not belong to it, and seeks to induce the public to discriminate against them and their work by covering them with opprobrious epithets, it is not engaged in 'promoting the mental, moral, and physical welfare of its members,' but in trying to hurt and destroy those who do not choose to become members. While the courts would aid the former purpose in all ways within their power, they cannot help the latter."

III. Rights and remedy of person asserting right to use label where denied by union.

Although an employer of union labor is permitted to use a stamp adopted by the 39 L.R.A. (N.S.)

union, such stamp nevertheless belongs to the union, since it is the sign by which the business world is advised that the goods manufactured were union made, and the employer so using it has no right to its use except when his goods are made by union labor. It cannot lawfully be used by him except on goods made by him by union labor, and he has no cause for action if, at the termination of their contract, the members of the union quit his employ and refuse longer to permit his use of the stamp. *Saulsberry v. Coopers' International Union*, post, 1203.

Before a person claiming to have been unlawfully deprived of the right to use a union label, by the action of the organization controlling the same, can appeal to the courts for redress, he must exhaust all the remedies provided for him by the organization. *Raych v. Hadida*, 72 Misc. 469, 130 N. Y. Supp. 346.

Where the final right and authority to close a shop to the use of a union label rests with an executive board of the main organization, and all the preliminary proceedings before a branch union or its members are simply for the purpose of placing the facts before the executive committee of the main organization for final action, in an action against a local union, the court cannot restore to a person his right to the use of the union label if he has been wrongfully deprived thereof by the executive committee of the main organization. *Ibid*.

An action for breach by a trade union of an agreement to furnish union labels to a manufacturer cannot be brought against a few members of a particular union making the contract, "individually and for themselves and others, officers and members," of the designated union. *Ehrlich v. Willenski*, 138 Fed. 425.

IV. Constitutionality of statutes for protection of union labels.

The state by appropriate legislation may protect the use of a union label, and may prohibit its use by persons other than members of the union or persons who employ members thereof in the manufacture and sale of articles to which the label is affixed. No personal rights or principles of public policy are violated by such legislation, and this is true even though the legislature has used the term "trademark" in a sense that is ordinarily understood and used by text writers and defined by judicial decisions. *State v. Bishop*, 128 Mo. 373, 29 L.R.A. 200, 49 Am. St. Rep. 569, 31 S. W. 9.

The law for the protection of union labels is not invalid as violative of the provision of the Constitution against granting exclusive privileges to private associations or individuals by any special laws, since such act, including as it does every locality in the entire state and embracing every association of union workmen or women existing or that may thereafter organize, is in no sense local or private, but is in every sense a general law. *Perkins v. Heert*, 153 N. Y.

306, 43 L.R.A. 858, 70 Am. St. Rep. 483, 53 N. E. 18.

A statute the purpose of which is to protect trademarks when adopted by associations or unions of workmen to designate or distinguish goods, wares, and merchandise manufactured or prepared by them, is not class legislation within the inhibition of the Constitution against granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity, since the law does not relate to particular persons or things of a class, but embraces within its provisions all associations or unions of workmen. *State v. Bishop*, 128 Mo. 373, 29 L.R.A. 200, 49 Am. St. Rep. 569, 31 S. W. 9, disapproving *State v. Berlinsheimer*, 62 Mo. App. 188, and followed in *State v. St. Clair*, 137 Mo. App. 188, 117 S. W. 648.

A statute for the purpose of permitting the adoption of labels by any person, association, or union of workmen is not void as being obnoxious to the constitutional inhibition against any local or special laws granting any incorporation, association, or individual any special privilege, immunity, or franchise. *Cohn v. People*, 149 Ill. 486, 23 L.R.A. 821, 41 Am. St. Rep. 304, 37 N. E. 60.

An act protecting labels adopted by associations of workmen to designate the articles produced through their labor is not unconstitutional as class or special legislation; neither does such a law violate the 14th Amendment of the Federal Constitution by depriving, without process of law, persons of their property, or by denying to them the equal protection of the laws, since the Federal Constitution cannot be invoked against any consequences arising from the use of spurious and untruthful labels. *Com. v. Morton*, 23 Pa. Co. Ct. 386.

Neither is a law providing for the protection of labels or trademarks adopted by unions of laboring men unconstitutional and void as being violative of public policy in that it unjustly authorizes discrimination in favor of the members of associations or unions as against that of nonunion workmen. *Perkins v. Heert*, supra.

A statute for the protection of union labels is unconstitutional where it provides for the recovery of a penalty in addition to full compensation for the injury done, in an amount not designated except by a maximum and minimum sum, since such a law confers on the plaintiff the power of fixing, within the limits prescribed, the amount of penalty to be recovered by him, thus taking the property of another without due process of law. *Cigarmakers' International Union v. Goldberg*, 72 N. J. L. 214, 70 L.R.A. 156, 111 Am. St. Rep. 662, 61 Atl. 457.

The title of an act in reality an act to protect associations, unions of workmen, and persons in their labels, trademarks, and forms of advertising, does not violate the constitutional provision that no act shall embrace more than one subject, which shall be expressed in the title, because it con-

tains provisions relative to the punishment of imitators or counterfeiters and those using such imitation and counterfeits, since such provisions are merely means for the accomplishment of the general purpose of the act. *Cohn v. People and Perkins v. Heert*, supra; *Com. v. Meads*, 29 Pa. Super. Ct. 321.

V. Civil suit based upon statute.

a. In general.

The effect of the law in New York for the protection of labels adopted by labor organizations is to give to such labels a greater privilege than could have been obtained under the common-law trademark decisions. Under the latter the use of a similar design or device will be enjoined only when the public are likely to be deceived thereby, and the resemblance is such as to deceive a purchaser of ordinary caution. But by the law as to union labels, the use of a colorable imitation of the label is prohibited, even though by the use of other words or names the public would not be deceived in believing that the products are union made. *Myrup v. Friedman*, 58 Misc. 323, 110 N. Y. Supp. 1106, affirmed without opinion in 128 App. Div. 888, 112 N. Y. Supp. 1138.

A statute in part providing that every person, association, or union adopting a label, trademark, or form of advertisement, may proceed by action to enjoin the manufacture, use, display, or sale of any counterfeit or imitations thereof, confers a right of action, without reference to the good faith of the defendant or whether, in the use of an imitation label, he acted knowingly. *Beebe v. Tolerton & S. Co.* 117 Iowa, 593, 91 N. W. 905.

Where a statute does not make knowledge or intent an ingredient of the offense of selling or offering for sale goods with the label simulating that adopted and used by an association of workmen to designate articles made through the labor of the members of the association, it is not necessary to allege or prove knowledge or intent of the accused in order to be entitled to a conviction. And this is true although in the pleadings knowledge and intent of the accused are alleged, since such allegations may be treated as surplusage. *Bulena v. Newman*, 10 Misc. 460, 31 N. Y. Supp. 449.

In an action by a member of a trade union against a third person to recover the statutory penalty for keeping, selling, or offering for sale goods with a label affixed thereto simulative of a union label, or for the unauthorized use of such a label, the plaintiff must establish that the defendant himself has clearly violated the statute, where the latter did not deliver the goods, although he made the contract for their sale; and where the purchaser knew that he was not purchasing of the defendant, the mere fact that the goods when delivered had affixed to them a label imitative of a union label, is not sufficient to authorize

conviction. *Higgins v. Dakin*, 86 Hun, 461, 33 N. Y. Supp. 890.

Under a statute for the protection of union labels, such labels are entitled to protection against one form of swindling as well as another, and against the use of real labels in a fraudulent way as well as against the use of counterfeits. *Tracy v. Banker*, 170 Mass. 266, 39 L.R.A. 508, 49 N. E. 308.

In Connecticut there is a statute providing that whenever any person, association, or union of workmen have adopted for his or its protection any label, trademark, or form of advertisement announcing that the goods to which such label, trademark, or form of advertisement shall be attached were manufactured by such a person, or by a member or members of such association or union, it shall be unlawful to counterfeit such label, trademark, or form of advertisement. There is also a provision against the use of any counterfeit or imitation of such label, etc., and for the recovery of damages for such use, etc. In an action by the secretary of an unincorporated association of workmen, named the United Hatters of North America, for the use of such association, the court refused to protect a label reading "The United Hatters of North America, Union Made, Registered," even as against the action of a third person who, without authority or right, was using labels in imitation or counterfeit of this label, and for the purpose of obtaining the advantage of the market for hats bearing the genuine label, and of palming off their hats as hats manufactured under the rules of such association, and thereby defrauding and deceiving the public. This conclusion was reached on the theory that this label did not show that the hats to which it was attached were made by the members of the United Hatters Association, although it was conceded that the label sufficiently announced that the hat to which it was attached was union made, and that it was a union label. This the court said naturally imported that it was made by a union, whereas in fact, according to the complaint, it is not the United Hatters of North America that makes hats bearing the label, but some manufacturer for whom its members work. And the rule is asserted that under this statute a label may become the proper subject of equitable protection, and any member of the association owning it, although neither he nor the association may be a manufacturer or owner of, nor dealer in, the goods to which it is attached, may be invested with a right of action for the protection of the label; but it is said that the label on which the plaintiff relies is one of very different character; that instead of announcing that the hat to which it is affixed has been manufactured by a member or members of the United Hatters of North America, if it announces anything as to its origin, it is that it was manufactured by the association itself. In this connection reference is made to the complaint, which states that the plaintiff is an

unincorporated association of workmen formed to promote the welfare of its members, to assist them in obtaining remunerative wages and permanent employment, and to maintain a high standard of workmanship in the making and finishing of hats; that it has adopted for its protection certain labels to be applied to hats made by its members, for the purpose of announcing to the public that hats bearing said label were made by them. *Lawlor v. Merritt*, 78 Conn. 630, 63 Atl. 639.

b. Relief as affected by extent of use.

Although but one violation of the right of a union to their label is shown, nevertheless, at the suit of the union, the court will enjoin against further violations. *United Garment Workers v. Davis*. — N. J. Eq. —, 74 Atl. 306.

c. Miscellaneous.

Where the statute expressly creates or recognizes the right of trade unions to be protected in the use of labels for trade union purposes, the defense cannot be made that such a union or association is unlawful. *Tracy v. Banker*, 170 Mass. 266, 39 L.R.A. 508, 49 N. E. 308.

Where the application is verified by the officer of the main organization, and the trademark is registered for the use of a branch organization connected therewith, this is a sufficient interest in common to entitle the mark to be registered. *State v. Montgomery*, 57 Wash. 192, 106 Pac. 771.

A statute entitled, "An Act to Protect Manufacturers from the Use of Counterfeit Labels and Stamps," includes unincorporated associations or unions of workmen where, by express provision, reference is made to any person, association, or union, and it applies to them as they ordinarily are, that is as associations of workmen, not as manufacturers or vendors of goods. It contemplates that the labels will be applied to merchandise, as, of course, they must be, and as these labels are. *Tracy v. Banker*, 170 Mass. 266, 39 L.R.A. 508, 49 N. E. 308.

A label of a trade union which may be used by any manufacturer of certain articles who employs union labor, and who is authorized by the union in that regard, is not within the provisions of a state statute providing that any person, etc., who is a citizen of the state and entitled to the exclusive use of any lawful trademark, label, brand, etc., may obtain protection therefor by complying with certain requirements. *State v. Hagen*, 6 Ind. App. 167, 33 N. E. 223.

Under a statute permitting a union or association of employees to adopt a device in the form of a label for the purpose of designating the products of the labor of the members, the right to use a label adopted by an international union may be assigned to different branches thereof, and their use limited to certain territory; and under such

circumstances both the international union and the branch union may join in an action against a third person to restrain the imitation of such label or its unauthorized use. *Lynch v. John Single Paper Co.* 115 App. Div. 911, 101 N. Y. Supp. 824.

Although a statute for the protection of persons, associations, unions of workmen, and others in their labels, trademarks, and forms of advertising, authorizes the court to require a defendant to pay to a person bringing an action under the statute the profits derived from the wrongful use of the forged label, no allowance may be made in the absence of proof as to the amount of the profits. There must also be proof that the defendant acted in bad faith. *Beebe v. Tolerton & S. Co.* 117 Iowa, 593, 91 N. W. 905.

VI. Criminal prosecutions.

a. In general.

Under a statute making it an offense for any person to manufacture, use, or display, or keep for sale, any counterfeit or colorable imitation of a label adopted by a trade union, a wholesale dealer is guilty of violating the statute when he purchased the goods to which the false label was affixed in good faith, believing it to be genuine, and offered the same for sale, under such belief. *Bulena v. Newman*, 10 Misc. 460, 31 N. Y. Supp. 449.

Where the purpose of the statute is to protect associations or unions of workmen in any label, advertisement, or symbol they may adopt as their trademark, the act not only embraces technical trademarks, but it includes any label, symbol, or advertisement which may be or has been adopted by any association or union of workmen as a trademark, in accordance with its provisions; and a person is guilty of a misdemeanor under this statute if he knowingly places a counterfeit of a label adopted by such an association on articles sold by him. *State v. Bishop*, 128 Mo. 373, 29 L.R.A. 200, 49 Am. St. Rep. 569, 31 S. W. 9.

A statute against counterfeiting or imitating any trademark, label, or device adopted or used by any person or any association or union of workmen, or against knowingly selling or disposing of or keeping in his possession with intent to sell, etc., any goods, wares, merchandise, or other product of labor, covers labels or trademarks on bottles. *Vincendeau v. People*, 219 Ill. 474, 76 N. E. 675.

Where it is not alleged in an indictment, and it does not appear, that the labels the accused is charged with imitating or counterfeiting are those of any association or union of workmen, or that any person connected with the latter has any connection with a company whose union labels were counterfeited or imitated, it is insufficient to support a conviction. *Comer v. State*, 103 Ga. 69, 29 S. E. 501, approved in *Butler v. State*, 127 Ga. 700, 56 S. E. 1000.
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b. Form of indictment.

In a prosecution for unlawfully imitating or counterfeiting a duly registered union label, it is sufficient if the charging part of the complaint is in substantially the words of the statute relating thereto. *State v. Montgomery*, 57 Wash. 192, 106 Pac. 771.

An indictment for counterfeiting a label in violation of a statute protecting the same is not defective because the label itself is pasted therein as the means of informing the defendant of the instrument an imitation or counterfeit of which he is charged with using. *State v. Niesman*, 101 Mo. App. 507, 74 S. W. 638.

An indictment is not defective because failing specifically to aver the filing of an affidavit with the label as required by statute, where the indictment contains the allegation that the labels so adopted and used were duly filed for record, etc., as by law provided, since the averment that the labels were duly filed for record as by law provided means that the copies, counterparts, or facsimiles were left with the secretary, and that they were accompanied by the necessary sworn statement, and that both were by the secretary filed for record. *Vincendeau v. People*, 219 Ill. 474, 76 N. E. 675.

Where a statute to protect union labels creates three distinct offenses, and the evidence to sustain the prosecution or maintain a defense differs widely as to each, the defendant cannot be informed against as to one offense and arrested and held for trial as to another. *People v. Streep*, 126 N. Y. Supp. 172.

c. Matters of evidence.

Where it is shown that the labels counterfeited were issued by an association of workmen, and proof of the adoption of the label by such association is made by introducing in evidence the certificate of the secretary of state of the filing of the label, as required by law to entitle the certificate to be received as sufficient proof of the adoption of the label and the right to adopt the same, and it is shown that such association is an association of workmen, and that the labels upon the articles purchased from the accused were counterfeit labels, the evidence is sufficient to warrant a verdict of guilty. *Cohn v. People*, 149 Ill. 486, 23 L.R.A. 821, 41 Am. St. Rep. 304, 37 N. E. 60.

A conviction cannot be sustained unless it is proved that the label was recorded as required by the statute under which the prosecution is had, although it is shown that the label had been adopted or used by its owner prior to the time of the alleged offense. The prosecution cannot be successfully maintained under such a statute, except for action done after the copies of the label or other mark or device, with the accompanying affidavit, has been filed with the secretary of state for record, since the only method provided for establishing the fact that the label has been adopted or used by any person, association, or union, is by

the certificate of the secretary of state. *Vincendeau v. People*, 219 Ill. 474, 76 N. E. 675.

A certified copy made by the secretary of state of the application for registration of a union label is competent evidence to prove the adoption of the label and its filing, etc., and the fact that the secretary received and filed the application is sufficient prima facie proof that all necessary acts, including the filing of the necessary copies of the label, were performed to entitle the label to registration. *State v. Montgomery*, 57 Wash. 192, 106 Pac. 771.

The fact that the label offered in evidence in the trial of a prosecution for imitating or counterfeiting it had the autograph signature of the president of the trade union, while in the copy of the label presented to the secretary of state as a trademark of the union, the autograph signature of the president of the association was erased, and the space was marked at the end of the label in brackets, "For autograph signature of the president," does not constitute a fatal variance. *State v. Niesman*, 101 Mo. App. 507, 74 S. W. 638.

Where the defendant merely contracted as agent for the sale of goods to which a counterfeit label was affixed, and he did not personally deliver the goods, evidence of the purchaser that at the time he made the purchase he understood he was buying goods with a union label affixed thereto is incompetent. *Higgins v. Dakin*, 86 Hun. 461, 33 N. Y. Supp. 890. A. G. S.

KENTUCKY COURT OF APPEALS.

E. G. SAULSBERRY, Appt.,
v.

COOPERS' INTERNATIONAL UNION
et al.

(147 Ky. 170, 143 S. W. 1018.)

Conspiracy — labor union — refusal to renew contract — ruining business.

1. A manufacturer is entitled to no equitable relief to compel a labor union to renew a contract for the continued services of its members in his business on the same terms accorded his competitors, although its refusal to do so is the result of a conspiracy between the union and his competitors to ruin his business, and his employees are willing to continue work on the basis of the old contract.

Note. — As to the law of union labels, see note appended to *People v. Dantuma*, ante, 1190.

As to civil liability for inducing servant to quit his employment, see note in 5 L.R.A.(N.S.) 1091.

As to lawfulness of strike or of threat to cause or so to act as to induce strike, when there is no dispute between the strikers and their own employers, see note in 6 L.R.A.(N.S.) 1067.
39 L.R.A.(N.S.)

Injunction — against removal of union stamp.

2. A manufacturer cannot enjoin a labor union from removing its stamp from his shop on failure to renew a contract for labor, although the result of the removal will be to prevent a sale of his product, and the failure to renew the contract is the result of a conspiracy between the union and his competitors to ruin his business.

(February 27, 1912.)

APPEAL by plaintiff from a judgment of the Circuit Court for Kenton County in defendants' favor in an action brought to compel defendants to renew a contract with plaintiff, or to return to him its union stamp. Affirmed.

The facts are stated in the opinion.

Messrs. Myers & Howard, for appellant:

A conspiracy or combination to cause a strike for the purpose of injuring and destroying the business and property of another, or of depriving another of his liberty or property without just cause, is unlawful and criminal.

State v. Stockford, 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769; *Reynolds v. Davis*, 198 Mass. 294, 17 L.R.A.(N.S.) 162, 84 N. E. 457; *Owens v. State*, 16 Lea, 1; *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570; *United States v. Wootten*, 29 Fed. 702; *United States v. Lancaster*, 10 L.R.A. 333, 44 Fed. 896; *People v. Petheram*, 64 Mich. 252, 31 N. W. 188; *McKee v. State*, 111 Ind. 378, 12 N. E. 510; *Arner v. State*, 106 Ind. 426, 7 N. E. 225; 2 Wharton, Crim. Law, 1398.

A combination is a conspiracy in law whenever the act to be done has a necessary tendency to prejudice the public or oppress individuals, by unjustly subjecting them to the power of the confederates, giving effect to the purpose of the latter, whether of extortion or mischief.

1 Hawk. P. C. chap. 27, § 2; 2 Russell, Crim. Law, 674; 2 Wharton, Crim. Law, § 2322; 2 Bishop, Crim. Law, § 172; Deaty, Crim. Law, 1138; Archbold, Crim. Pr. & Pl. 1830.

Conspiracy to do an illegal thing is actionable if injury proceeds from it; and

As to controversy over open or closed shop as justification for means employed to aid strike, see note in 17 L.R.A.(N.S.) 162.

As to system of work as justification for strike, see note in 37 L.R.A.(N.S.) 179.

As to the right of a labor union to impose a fine on members as a means of inducing them to join strike, see note in 23 L.R.A.(N.S.) 1236.

where the illegal purpose has been executed, it is false and malicious wherever the motive for the conspiracy to execute it was false and malicious.

Smith v. Nippert, 76 Wis. 86, 20 Am. St. Rep. 26, 44 N. W. 846; *Haldeman v. Martin*, 10 Pa. 370.

Everyone who enters into a common purpose or design is generally, in law, a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any of the others in furtherance of such common designs.

Card v. State, 109 Ind. 415, 9 N. E. 591; *McKee v. State*, 111 Ind. 378, 12 N. E. 510; *Williams v. State*, 47 Ind. 568; *Jones v. State*, 64 Ind. 473; *Walton v. State*, 88 Ind. 9; *Archer v. State*, 106 Ind. 426, 7 N. E. 225; 1 Greenl. Ev. § 111; *Newman v. Com.* 8 Sadler (Pa.) 127, 7 Atl. 132.

It is sufficient that the means used was threatening, and intended to overcome the will of others,—to prevent customers from dealing with and laborers from working for the complainant.

Arthur v. Oakes, 25 L.R.A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 321, 9 Am. Crim. Rep. 169; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 42 L.R.A. 417, 74 Am. St. Rep. 421, 77 N. W. 13; *Casey v. Cincinnati Typographical Union No. 3*, 12 L.R.A. 193, 45 Fed. 135; *Thomas v. Cincinnati, N. O. & T. P. R. Co.* 4 Inters. Com. Rep. 788, 62 Fed. 803; *Oxley Stave Co. v. Coopers' International Union*, 72 Fed. 695; *Martin, Modern Law Labor Unions*, 94; *Pickett v. Walsh*, 192 Mass. 572, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. 48; *Plant v. Wood*, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Coons v. Chrystie*, 24 Misc. 296, 53 N. Y. Supp. 668; *Erdman v. Mitchell*, 207 Pa. 79, 63 L.R.A. 543, 99 Am. St. Rep. 783, 56 Atl. 327; *Purvis v. Local No. 500*, U. B. C. & J. 214 Pa. 348, 12 L.R.A. (N.S.) 642, 112 Am. St. Rep. 757, 63 Atl. 585, 6 Ann. Cas. 275; *Underhill v. Murphy*, 117 Ky. 640, 111 Am. St. Rep. 262, 78 S. W. 482, 4 Ann. Cas. 780.

Messrs. Cogan & Williams and Howard N. Ragland for appellees.

Lassing, J., delivered the opinion of the court:

E. G. Saulsberry is a manufacturer of beer cooperage in Covington, Kentucky. In March, 1910, he entered into a contract with the Coopers' International Union No. 159, Cincinnati, Ohio, by the terms of which said union was to furnish him union labor to run his business for one year at the 39 L.R.A. (N.S.)

stipulated price of 35 cents per hour for a day's work consisting of nine hours. The union supplied his shop with a stamp marked "C. I. U. No. 52," which was to be used on all the cooperage manufactured at his factory. This stamp was under the control of a member of said union in his employ, known as a "monitor." Under this agreement, the business was conducted during the life of the contract. About the time it terminated,—just before or just after,—representatives of the union notified him that they would not work longer under the terms of the old agreement, and that, if he wanted to continue his business as a union shop, he would have to pay an advance in wages, and accept shorter hours for a day's work. The new agreement sought by the representatives of the union provided for an eight-hour day at 40 cents per hour. Saulsberry refused to accede to this demand, on the ground that other cooperage plants in that locality had made contracts with the union under more favorable terms, and so notified the representatives of the union. They thereupon took possession of the stamp, and notified the employees that they were "out of a job." It is a rule of the union that none of its members can work in a shop not supplied with a stamp, and hence the removal of the stamp effectually closed this shop to union labor. Conceiving that he was being unjustly discriminated against to his damage, Saulsberry instituted a suit, in which he sought either to compel the union to return to him the stamp for use in his business, or else to compel it to make a contract with him on the same terms upon which it was furnishing labor to his competitors in that vicinity. Two of the representatives of the union, termed "walking delegates" were made parties to the suit. No defense was made for the union; but the two defendants, Lineback and McManus, answered, and, in addition to specifically denying the charge that they had conspired with any of plaintiff's competitors to injure him in his business, pleaded affirmatively that, as the representatives of the union, they had simply demanded better pay and shorter hours for the men before they would enter into any further contractual relation with plaintiff, and, that this demand having been refused, they took the stamp from the shop, and notified all of the employees who were members of the union that they could no longer work, as the factory was not entitled to the use of the stamp. They further pleaded that the stamp was the individual property of the union. The affirmative matter in the answer was traversed in the reply. Upon the issues joined and proof taken the case was submitted for judgment.

The chancellor was of opinion that plaintiff had failed to make out a case, and dismissed the petition. Plaintiff appeals.

The evidence shows that at the time the dispute arose the contract between plaintiff and the union had expired; and, while some of the men in plaintiff's employ were willing to continue to work under the old contract, the union withheld its consent for them to do so; and because of plaintiff's inability to make a new contract with the union he was compelled to close his shop, and it had, up to the date of the submission of the case, remained closed. He has a large amount of money invested in his business, and, as it appears he cannot dispose of his output unless it bears the stamp of the union, he has and must necessarily sustain a serious loss. It likewise appears that others of his competitors have contracts more favorable than that which the union was exacting of him. On this state of facts, what are the rights of the parties?

A man's labor is his own, and he has the right to dispose of it upon the best terms he can secure. If one to whom it is offered or by whom it is desired is unable or unwilling to pay the price demanded for it, we have presented simply a case where the parties to a proposed contract cannot agree as to terms. So, too, when one has been in the employ of another under a contract, and that contract has expired, neither party is under any obligation to continue in the employment except upon terms satisfactory to him, and no ground of complaint is afforded either employer or employee for refusing to continue longer the contractual obligations. This principle is universally recognized. The influences which actuate the employer in discharging the servant, or the servant in quitting the employ of the master, are not a proper subject of inquiry. If they possess the right to terminate the employment, they may exercise it, although the one so doing may know it works inconvenience, if not a positive injury, to the other. The exercise of a legal right by one in a proper manner will not be denied, although damage or loss may result to another as a necessary consequence thereof. If, instead of a labor union, this was a controversy between plaintiff and an individual employee, and there was no contractual relation requiring him to continue in plaintiff's employ, he could refuse to work longer except upon such terms as were acceptable to him, and plaintiff would be powerless to compel him to work, and would have no just cause of complaint because he quit. If the same principle applies to a union, which is but an organization of men for mutual benefit and protection, the plain-

tiff is remediless, even though his business is ruined.

The right of laborers to organize for protection, in the way of securing better wages, shorter hours, and improved facilities whereby their condition is bettered, has been many times before the courts of this country, and such right has been uniformly upheld. In the case of *Hopkins v. Oxley Stave Co.* 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912, this right is thus stated for the court by Judge Thayer: "The courts have invariably upheld the right of individuals to form labor organizations for the protection of the interests of the laboring classes, and have denied the power to enjoin the members of such associations from withdrawing peaceably from any service, either singly or in a body, even where such withdrawal involves a breach of contract."

Such right is not disputed by counsel for appellant, but it is argued that the men did not want to cease working. They were satisfied with the old contract, and wanted to continue under it. Undoubtedly some were, but, being members of the union, they were bound by it and its rulings and judgment so long as they remained members thereof. The old contract had been made by the union. The union alone was clothed with power to contract for its members, and the contract, if made at all, had to be made by the union. Hence the wish or will of individual members cannot be considered in determining the rights of the parties to this controversy. If the union had a right, through its representatives, to contract, which is not denied, then the desire of individual members cannot be taken into consideration at all; and it is immaterial whether they were satisfied or dissatisfied with the proposed arrangement. The union was willing to make a contract, but it demanded one more favorable in terms for the men than the old contract. Should it be enjoined from doing so because some of the members of the union were satisfied with the old contract? Undoubtedly, if the officers of the union are clothed with power to represent and speak for it, this right cannot be taken from them or abridged, except by the union itself. It is not a matter for judicial determination at the instance of anyone save the union. It is not denied that Lineback and McManus spoke for and represented the union, and, as said by Judge Taft in *Thomas v. Cincinnati, N. O. & T. P. R. Co.* (C. C.) 4 Inters. Com. Rep. 788, 62 Fed. 803, in dealing with the rights and powers of officers and representatives of unions to advise and direct the men: "They have the right to appoint officers who shall advise them as to the course to be taken by them in their rela-

tions with their employer. They may unite with other unions. The officers they appoint, or any other persons to whom they choose to listen, may advise them as to the proper course to be taken by them in regard to their employment, or, if they choose to repose such authority in anyone, may order them, on pain of expulsion, from their union, peaceably to leave the employ of their employer, because any of the terms of their employment are unsatisfactory." We take it that Lineback and McManus were acting clearly within their right in attempting to procure for the union a better contract than it theretofore had, and in refusing to permit or sanction the men to continue longer in plaintiff's employ under the old contract. They were guilty of no act of violence, but simply, in effect, declared a strike because they could not secure for the union such a desirable contract. The result of their action was that all of the union men in plaintiff's employ quit work. It was a concerted action. Had they the right to do so?

This precise question was raised in the suit of Union P. R. Co. v. Ruef (C. C.) 120 Fed. 114, the court there saying: "The defendants acted within their right when they went out on a strike. Whether with good cause, or without any cause or reason, they had the right to quit work for the Union Pacific Railway Company, and their reasons for quitting work were reasons they need not give to anyone. And that they all went out in a body by agreement or preconcerted arrangement does not militate against them or affect this case in any way. Such rights are reciprocal, and the company had the right to discharge any or all of the defendants, with or without cause, and it cannot be inquired into as to what the cause was." As the union at that time had no contract with the plaintiff, he had the undoubted right to discharge all the men in his employ at once, without notice or warning; and so the men had the right to quit; and, when they did so, they were not required or called upon to give or assign any reason therefor.

The stamp belonged to the union, and they took it away when they quit plaintiff's employ. It was the sign by which the business world was advised that the goods manufactured were union made, and plaintiff had no right to its use except when his goods were made by union labor. The stamp could not lawfully be used by him except upon goods made by union labor. So his real complaint is not that the stamp was removed, but that the union refused to contract with him upon terms which he was willing to make. To grant the relief sought would be to compel the union to contract

with him upon the same terms it had with other manufacturing concerns engaged in like business in that locality. We have been unable to find any authority supporting such contention. In effect, it would be the substitution of the judgment of the court, exercised through its mandatory processes, for the will of the union. It would take away from the union the right to contract for itself, and open the door for needless litigation between employer and employee, and make of the court an arbiter in advance of all questions of wages or compensation for labor. If the employer could compel the employee to contract with him upon terms acceptable to him, the employee could, with equal propriety, compel the prospective employer to hire him upon terms agreeable to him, and as favorable and as high as other employers were paying for like services. The proposition falls from its own weight. The relief sought cannot be granted.

No ground for injunctive relief is presented. The sum and substance of appellee's offense is that Lineback and McManus, being unable to agree with plaintiff on a scale of wages for the members of the union, ordered a strike, and took from plaintiff's shop the stamp,—the property of the union. They offered no violence whatever. They threatened the destruction of no property. They did not do anything in any way, shape, or form calculated to interfere with plaintiff in procuring other labor; but simply stood upon their rights and refused to labor upon terms not acceptable to them. The inability of plaintiff to make a contract for this union labor has undoubtedly worked a hardship upon him; but this is his misfortune rather than appellees' fault. When he first built and occupied his plant, if he had been unable to make a contract with the union at that time, he would likewise have sustained a loss, but such loss could not justly be charged to the union. And appellant has no better right now to complain of the union than he would have if he had been unable to affect an agreement with them as to the scale of wages the year before.

There is an intimation in the pleading, if not a positive charge, that the failure of appellees to contract with appellant was the result of a conspiracy entered into between the walking delegates, Lineback and McManus, and appellant's competitors, for the purpose of destroying his business. We find no substantial evidence in the record to justify or support this charge. But, even if it were true, it would be of no avail; for, since appellees had the right to cease laboring for appellant, it is immaterial what moved them to exercise this right. Appel-

lant is furnished no ground of complaint because the members of the union ceased to work for him. If appellant was seeking to recover damages from his competitors, a different question would be presented. If it was shown that they had conspired to destroy his business, and, as a result of such conspiracy, deprived him of the benefit of the labor of his employees, they might be answerable in damages for such injury. But that question is not here. The simple question presented by this record is, Can a labor organization be required to enter into a contract with one desiring the services of its men upon terms not acceptable to it? The lower court held that it could not: In that conclusion we concur.

Judgment affirmed.

INDIANA SUPREME COURT.

WILLIAM G. JOHNSON et al., Appts.,

v.

WILLIAM H. HARRISON.

(— Ind. —, 97 N. E. 930.)

Pleading — complaint — anticipating defense.

1. A complaint in an action to recover on a negotiable instrument may set out facts tending to show plaintiff to be a bona fide holder, for the purpose of anticipating a defense of fraudulent inception of the instrument.

Checks — diversion — bona fide purchaser — risk of loss.

2. One who draws a check and places it in possession of another assumes, as against a bona fide purchaser, the risk of its being diverted from the purpose for which it was executed.

Same — absence of funds — effect of knowledge.

3. The bona fides of one purchasing a check is not destroyed by the fact that he knows there are no funds on deposit to meet it.

Same — staleness — effect.

4. That one takes an overdue check from the payee does not, in the absence of other suspicious circumstances, subject him to equitable defenses in an action against the drawer.

Note. — Bona fides of purchaser of check as affected by his knowledge that there are no funds to meet it.

Besides JOHNSON v. HARRISON, and Matlock v. Scheuerman, 51 Or. 49, 17 L.R.A. (N.S.) 747, 93 Pac. 823, which is sufficiently set out in the former case, there appears to be but one additional case on the point here annotated.

In Spero v. Holoschutz, 36 Misc. 764, 74 N. Y. Supp. 852, it was held that parties 39 L.R.A. (N.S.)

Pleading — bona fides of purchase — check — note — payment.

5. Failure to allege that a note given for a check was negotiable does not show absence of value, so as to destroy the bona fides of the purchase, if it is alleged that the note was paid.

Check — indorsee — first holder.

6. One who takes from a payee, who indorses the instrument, a check with the understanding that he is to lend money to the drawer, with the check as security, is a first holder, and not entitled to the rights of a bona fide indorsee, and cannot use any part of the proceeds in satisfaction of his claim against the indorser.

Same — duty of inquiry — representations of agents.

7. That the one attempting to raise a loan on a check for the benefit of its maker is willing to have a material portion of the proceeds applied on his own debt to the one to whom the paper is offered charges the latter with the duty of inquiring from the maker as to the facts of the transaction, and he can gain no rights in excess of the authority actually conferred on the agent.

(March 12, 1912.)

APPEAL by defendants from a judgment of the Superior Court for Howard County in plaintiff's favor in an action brought to recover the amount due on a check. Reversed.

The facts are stated in the opinion.

Messrs. B. F. Harness, B. C. Moon, and W. R. Voorhis for appellants.

Messrs. James L. Overson, Arthur G. Manning, James F. Morrison, and Joseph C. Herron for appellee.

Cox, J., delivered the opinion of the court:

This is an action brought by the appellee against the appellants as parties doing business under the firm name of Kokomo Trunk Company. The complaint is based on two checks, one of which was given in renewal of the other. It was answered by five paragraphs, one of which was the general denial. Appellants, in this appeal, claim that the judgment against them resulted from alleged errors of the trial court in sustaining appellee's demurrer to their fifth paragraph

who accept a check bearing indorsements showing that it has passed through a bank and been marked "N.G." on its face, in payment of merchandise purchased some two months prior thereto, will not, from all the facts and circumstances disclosed, be considered bona fide purchasers in good faith and for value, and thus permitted to recover thereon, where the drawer has paid the check, but they will be held to have taken the check subject to the equities existing between the drawer and the payee.

of answer, and in overruling their motion for a new trial.

The fifth paragraph of appellee's complaint makes the following allegations: "That defendants were, on or about the 10th or 12th day of January, 1907, and still are, doing business as partners in the city of Kokomo, under the name of the Kokomo Trunk Company. That on or about said 10th or 12th day of January, 1907, the defendants by their check, a copy of which this plaintiff is unable at this time to file and make a part of this paragraph, for reasons hereinafter set out, requested the Howard National Bank of Kokomo, Indiana, to pay W. B. Hendricks or order (\$200) two hundred dollars, and delivered the same to W. B. Hendricks. That on the 16th day of January, plaintiff, William H. Harrison, for good and valuable consideration, purchased and obtained said check from said Hendricks, and said check was properly indorsed to plaintiff, and that said check was purchased and received by the plaintiff in good faith before the same had been presented to the Howard National Bank or any other bank for payment, and before the maturity of said check. That said plaintiff obtained said check for a valuable consideration, in due course of business, and without any knowledge or notice of any defense or equities on the part of the makers at the time said valuable consideration was paid by plaintiff, and gave possession of same to him. That on several occasions previous to said 16th day of January, 1907, plaintiff had cashed for said W. B. Hendricks checks in various amounts drawn on the Howard National Bank of Kokomo, Indiana. The exact amount or face of these checks is to this plaintiff at this time unknown, also the dates of their issue. That they were regularly signed by the said Kokomo Trunk Company, per Almira Reed. That at the time said checks were indorsed to plaintiff and a valuable consideration paid for them, plaintiff was requested by said W. B. Hendricks, at the instance of said Kokomo Trunk Company, to defer cashing the same at the Howard National Bank until a period of time had elapsed after receiving the same (the exact length of time is to this plaintiff unknown at this time). That plaintiff was notified at the time of receiving said checks, and at the time of the request to delay before the presentment of same to said Howard National Bank, that said Kokomo Trunk Company had no money in said bank belonging to said Kokomo Trunk Company, but would have at the time indicated by said Hendricks, when said checks were to be presented at the various times

chosen and payments were promptly made by said bank. That afterwards, to wit, on the 10th or 12th day of January, 1907, said W. B. Hendricks personally appeared before plaintiff and requested that he buy a check drawn on the Howard National Bank for the sum of \$200, payable to W. B. Hendricks or order, and regularly signed by said Kokomo Trunk Company, per Almira Reed, with the request of said Kokomo Trunk Company, through its lawfully authorized agent, W. B. Hendricks, that the said check be not presented to said bank for a period of sixty days, as said Kokomo Trunk Company had no funds in said bank at that time, but would have at the time stipulated. That plaintiff gave for said check his personal promissory note, at the Citizens' National Bank, Kokomo, Indiana, due sixty days after date in the sum of \$150. Further, that upon the ——— day of ———, 1907, plaintiff paid off said note, \$150 in amount, to said Citizens' National Bank. Plaintiff further released, and as additional consideration of having said check assigned to him, a claim and account he then held against said Hendricks for medical services rendered said Hendricks, in amount, to wit, \$50. That all of said acts were done in the city of Kokomo, where said check was issued. That said plaintiff, on or about the 10th day of March, 1907, indorsed and presented said check to said bank and demanded payment, which was refused. That on many occasions after the 10th day of March said check was presented to said bank and to defendants and payment demanded, and plaintiff all times was met with a refusal from said parties. That on or about the 6th day of August, 1907, a new check, a copy of which is filed herewith, marked 'Exhibit A,' and made a part of this complaint, was made out by the defendants and substituted for the check heretofore described (check drawn on or about the 12th to 16th day of January, 1907). That said check drawn on or about said date was destroyed when 'Exhibit A' was received in its place. That plaintiff, on or about said 6th day of August, 1907, accepted and obtained possession of said check from defendants, marked 'Exhibit A' in this paragraph, presented at once the same to the Howard National Bank, of Kokomo, Indiana, and also to defendants, and demanded payment, which was refused. That said check marked 'Exhibit A' is now due and unpaid. Wherefore plaintiff demands judgment in the sum of \$200, together with interest to date, and all other just and proper relief."

Copy of check (Exhibit A):

Howard National Bank of Kokomo, Ind.
Kokomo, Ind., Aug. 6, 1907.

Pay to W. B. Hendricks or order \$200.00
two hundred ⁰⁰/₁₀₀ dollars.

Kokomo Trunk Co.
Per Almira Reed.

Indorsed on back: "W. B. Hendricks."

The fifth paragraph of answer contained the following allegations: "For answer to all the paragraphs of complaint based upon the check dated August 6, 1907, the defendants say: The check sued upon in this action was executed under the following circumstances and conditions, to wit: on the 10th day of January, 1907, the defendants Johnson and Cain were and still are partners doing business in the city of Kokomo under the name of the Kokomo Trunk Company, and on said day said Johnson and Cain and William B. Hendricks, the payee of the check in suit, executed to the Kokomo National Bank of the city of Kokomo their promissory note dated January 10, 1907, for the sum of \$200, due in ninety days after date. That said note was executed for the purpose of borrowing money to pay a partnership debt of said Johnson and Cain, as the Kokomo Trunk Company, and the proceeds of said note, to wit, \$196, was used in the payment of a debt then and theretofore owing by said Kokomo Trunk Company, to the Boston Artificial Leather Company. That William B. Hendricks signed said note upon the first line and was in form the principal in said note, but was in fact surety thereon for the reason that the whole of the proceeds of said note were used in the payment of said debt of said Kokomo Trunk Company. That on or about the 10th or 12th day of January, 1907, the said William B. Hendricks procured the defendants Johnson and Cain, as the Kokomo Trunk Company, through Almira Reed, their bookkeeper, in the name of the Kokomo Trunk Company, to execute to William B. Hendricks at said city of Kokomo, a check dated on or about the 10th or 12th day of January, 1907, for the sum of \$200. That he represented to defendants that it was proper and necessary for said check to be issued to him to indemnify him against the payment of the note for \$200 which he had so executed to said Kokomo National Bank with said Johnson and Cain as aforesaid. That said William B. Hendricks represented to said defendants, and agreed with them, that said check was not to be paid and would not be cashed or used by said Hendricks in any way until the maturity of said note to the Kokomo National Bank, and would then be cashed and used by him only in the

event that he (the said Hendricks) should be compelled to pay said note for \$200 to the Kokomo National Bank. That said Almira Reed, as the bookkeeper of the defendants, in the name of the Kokomo Trunk Company, executed to said William B. Hendricks said check under said circumstances and under said representations and said promises, and for no other or different consideration than for the purpose of indemnifying said Hendricks against the payment of the \$200 note to said Kokomo National Bank. That said defendants Johnson and Cain have paid said note, as they were in duty bound to do, to the Kokomo National Bank, and said William B. Hendricks had not paid any part thereof, and has been fully relieved from such payment of said note by the defendants Johnson and Cain. That said William B. Hendricks, on or about the 16th day of January, 1907, and four days or more after the date of said check, sold said check to the plaintiff, William Harrison, at said city of Kokomo, where said check was issued, and said plaintiff, William Harrison, at the time he so purchased the same, knew that said check was four days old, and knew that there was no money in the bank at the time to pay the same, but that he purchased said check at a large discount with full knowledge that the same was not issued and in circulation in the ordinary course of business. That the plaintiff, William Harrison, held said check, issued as aforesaid and indorsed to him as aforesaid, until on or about the 6th day of August, 1907, when he surrendered said check to said William B. Hendricks and received from said Hendricks in lieu thereof the check in suit in this action, which was executed and delivered to the plaintiff as a renewal of said check of January 10 or 12, 1907, and without any new or other additional consideration whatever, except the surrender to William B. Hendricks of the said first check issued in January, 1907. Wherefore the defendants say that plaintiff is not entitled to recover in this action."

The contention that the court erred in sustaining the demurrer to the fifth paragraph of answer is involved with objections to the unusual character of the allegations of the fifth paragraph of the complaint, and the question presented is whether the answer was good as to it.

It is true, as contended by counsel for appellants, that it is not commendable pleading for a plaintiff, in his complaint as the indorsee or holder of a check or other negotiable instrument, to recover on it against the drawer or maker, to anticipate and avoid a defense of fraud between the drawer or maker and the payee. The formal and proper practice in such case is for the plaintiff

to state his cause of action on the instrument. If to the complaint the defendant sets up by answer fraud which would be a defense between him and the payee, the plaintiff may then reply the facts constituting him a bona fide purchaser and thereby avoid the answer. *Uhl v. Harvey*, 78 Ind. 26, 30; *First Nat. Bank v. Ruhl*, 122 Ind. 279, 23 N. E. 766; *Shirk v. Neible*, 156 Ind. 66, 72, 83 Am. St. Rep. 150, 59 N. E. 281; *Ray v. Baker*, 165 Ind. 74, 90, 74 N. E. 619; *Zink v. Dick*, 1 Ind. App. 269, 27 N. E. 622.

And where a plaintiff states in his complaint, together with facts constituting a cause of action, other material and relevant facts which are a defense to the cause of action, and does not allege facts avoiding such defense, his complaint will not withstand a demurrer. *Behrley v. Behrley*, 93 Ind. 255; *Knopf v. Morel*, 111 Ind. 570, 13 N. E. 51; *Latta v. Miller*, 109 Ind. 302, 10 N. E. 100; *Western U. Teleg. Co. v. Yopst*, 118 Ind. 248, 3 L.R.A. 224, 20 N. E. 222; *Morgan v. Lake Shore & M. S. R. Co.* 130 Ind. 101, 28 N. E. 548; *Bowlus v. Phenix Ins. Co.* 133 Ind. 106, 20 L.R.A. 400, 32 N. E. 319; *Karr v. Putnam County*, 170 Ind. 571, 85 N. E. 1; *Jessup v. Jessup*, 7 Ind. App. 573, 34 N. E. 1017; *Andrews v. Sellers*, 11 Ind. App. 301, 38 N. E. 1101.

But the mere fact that a complaint, otherwise good, sets up also a defense to the cause of action pleaded, does not make the pleading bad where matter avoiding the defense is also pleaded. *Latta v. Miller*, 109 Ind. 302, 10 N. E. 100; *Bowlus v. Phenix Ins. Co.* 133 Ind. 106, 20 L.R.A. 400, 32 N. E. 319; *Chicago, C. & L. R. Co. v. West*, 37 Ind. 211; *Hunt v. State*, 93 Ind. 311, 316; *Lake Erie & W. R. Co. v. Holland*, 162 Ind. 406, 63 L.R.A. 948, 69 N. E. 138; *Bunting v. Mick*, 5 Ind. App. 289, 31 N. E. 378, 1055; *Bradley, H. & Co. v. Whicker*, 23 Ind. App. 380, 55 N. E. 490.

It has also been decided that it is not anticipating a defense, and that it is not improper to allege facts not ordinarily necessary, but which in the particular instance strengthen the plaintiff's case, or bring it within an exception to a general rule, or merely incidentally disclose a possible defense. *Hunt v. State*, 93 Ind. 311, 316; *Lake Erie & W. R. Co. v. Holland*, 162 Ind. 406, 63 L.R.A. 948, 69 N. E. 138; *Cleveland, C. C. & St. L. R. Co. v. Moore*, 170 Ind. 328, 354, 82 N. E. 52, 84 N. E. 540.

That the indorsee and holder suing on a check or other negotiable instrument obtained or put into circulation fraudulently has the burden of proving that he became a holder before maturity, without notice of the fraud, and for a valuable consideration,

is firmly settled. *Giberson v. Jolley*, 120 Ind. 301, 22 N. E. 306; *First Nat. Bank v. Ruhl*, 122 Ind. 279, 23 N. E. 766; *Shirk v. Neible*, 156 Ind. 66, 72, 83 Am. St. Rep. 150, 59 N. E. 281; *Ray v. Baker*, 165 Ind. 74, 90, 74 N. E. 619.

We know of no reason or rule of pleading which would prevent a plaintiff in such case assuming such burden in the first instance by making proper allegations in his complaint of facts showing him to be a bona fide holder. It could deprive the defendant of no right that would otherwise be his, and the practice has been recognized and permitted. *Bunting v. Mick*, 5 Ind. App. 289, 31 N. E. 378, 1055; *Bradley, H. & Co. v. Whicker*, 23 Ind. App. 380, 55 N. E. 490; *Kimble v. Christie*, 55 Ind. 140; *Cooper v. Merchants' & M. Nat. Bank*, 25 Ind. App. 341, 57 N. E. 569.

The question then arises whether the facts alleged in the fifth paragraph of the complaint for the purpose of showing that appellee was a bona fide holder were sufficient for that purpose, and therefore sufficient to avoid the defense of fraud pleaded in the fifth paragraph of answer. Or whether, if these facts had not been first pleaded in the complaint, but had been pleaded as a reply to the answer of fraud, they would have been sufficient as such.

The charge of fraud injected into the issue by the fifth paragraph of answer, as will be seen by a look at his allegations, is that Hendricks fraudulently put into circulation, by indorsement to appellee, a check which appellants' firm had drawn in his favor to indemnify him as a surety on their note, which note was afterwards paid by them; that he had sold and indorsed the check to appellee four days after it was drawn and delivered to him, in violation of his collateral agreement with appellants not to cash or use it until the maturity of the note, and then only in the event that he should be compelled to pay the note. The allegations relating to this fraud are supplemented with others that appellee took it knowing it was four days old, that there was no money to appellants' credit at the time with which to pay it, and that the second check was merely executed and delivered to appellee as a renewal of the first, without new consideration therefor, except the surrender of the first.

That negotiable paper was diverted from the purpose for which it was drawn, made, accepted, or indorsed, or that the person intrusted with it for a specific purpose misapplied or misappropriated it, or its proceeds, in fraud of the maker or indorser, is not available as a defense in an action upon the instrument by a bona fide holder for value without notice. *Stoner v. Brown*, 18

Ind. 464; Wells v. Sutton, 85 Ind. 70; Galvin v. Syfers, 22 Ind. App. 43, 52 N. E. 96; 8 Cyc. 44; Joyce, Defenses to Com. Paper, §§ 380 et seq.

The holder of a negotiable instrument is not bound by a private agreement between the maker and indorser unless he had notice of the agreement, and took the bill subject to the condition. Hence it is no defense against an innocent holder that by such an agreement the maker was not to be held liable on the instrument except upon a condition or contingency. Deardorff v. Foreman, 24 Ind. 481; Whitcomb v. Miller, 90 Ind. 384; Galvin v. Syfers, 22 Ind. App. 43, 52 N. E. 96; 8 Cyc. 56, 57.

This is in accordance with the well-settled rule of law that when two innocent persons are harmed by the act of another, one of the two must bear the loss who has put it into the power of the wrongdoer to harm the other. So, if appellee was a bona fide purchaser, appellants, according to the allegations of their pleadings, having drawn the check to Hendricks as the payee, and put him in possession of it, must suffer the loss, and not appellee.

It is, however, insisted that appellee is not an innocent holder, for the reason that, as he knew there was no money in the bank to meet the check at the time he took it, knowledge is to be imputed to him that there was such irregularity about it as to destroy the bona fides of his purchase. The position is not tenable. We are not unaware of the fact that checks are not infrequently drawn and delivered to the payee, not to be immediately presented for payment, when the drawer has not funds, but intends to have at the time the check is presented.

It is true, as stated by counsel in their brief, that the issuance of a check implies, ordinarily, that there is money in the hands of the drawee belonging to the drawer to pay it, and that it is a fraud to put a check into circulation when there is not money to pay it. But this, obviously, is not fraud on the drawer, but on the payee, or one to whom it is indorsed who has no knowledge of the lack of funds. Where such knowledge is imparted to the payee and by him to the indorsee, and the check nevertheless is taken, to be presented at the time when it is represented funds will be available, there can be no fraud involved. The taking of the check, under such circumstances, imparts notice that it cannot be cashed at once, but it is not calculated to carry notice of any fraudulent infirmity in the contract. Matlock v. Scheuerman, 51 Or. 49, 17 L.R.A. (N.S.) 747, 93 Pac. 823. And this is par-

ticularly true where, as alleged in the complaint in this case, the drawers had, at the hands of Hendricks, previously procured appellee to cash similar checks drawn by them when they were out of funds, with a similar request that they be not presented until a time designated, when appellants would have the money to meet them, which checks were afterwards paid as agreed.

We cannot see that the transaction carries a more distinct warning of fraud to a possible purchaser than would a postdated check; or a memorandum check which is, between the drawer and payee, an evidence of indebtedness, and may carry an agreement between them that it shall not be presented for payment at the bank on which it is drawn. Neither a postdated check or memorandum check in themselves are notice of fraud in putting them in circulation sufficient to destroy the bona fides of a purchaser for value. Symonds v. Riley, 188 Mass. 470, 74 N. E. 926; Dykers v. Leather Mfrs. Bank, 11 Paige, 612; Morse, Banks and Bkg. 4th ed. §§ 388, 389; Dan. Neg. Inst. 4th ed. §§ 1578, 1583; 7 Cyc. 954.

Nor can the contention of appellants be sustained that the check, having been taken by appellee four days after its date, was overdue and stale, and was therefore subject to defenses which might exist between the original parties. Such is not the law. It is true that where one takes a check from the payee after a reasonable time for demanding payment for the drawee has elapsed, and during the delay loss occurs to the drawer by the failure of the bank, he may defend against the holder. The holder of a check, who gets it after a reasonable time has passed for demanding payment, takes it with the risk of the failure of the bank, so far as the drawer is concerned. But it is no defense that the check was not presented at once, or in a reasonable time, where no contingency such as the failure of the bank has intervened and caused loss to the drawer by the delay. Morse, Banks & Bkg. 4th ed. § 421; Dan. Neg. Inst. 5th ed. §§ 1586 et seq.; Van Schaack, Checks, chap. 4.

But aside from this, the rule is that the fact that the holder has taken a check from the payee four days or even more after its date, unconnected with other suspicious circumstances, does not subject him to equitable defenses in an action by him against the drawer. Dan. Neg. Inst. 5th ed. § 1634; Morse, Banks & Bkg. 4th ed. § 442; Tiedeman, Com. Paper, § 446; Estes v. Lovering Shoe Co. 59 Minn. 504, 50 Am. St. Rep. 424, 61 N. W. 674; Fealey v. Bull, 163 N. Y. 397, 57 N. E. 631; Citizens' State Bank v.

Cowles, 89 App. Div. 281, 86 N. Y. Supp. 38; Ames v. Meriam, 98 Mass. 294; First Nat. Bank v. Harris, 108 Mass. 514; Re Brown, 2 Story, 502, Fed. Cas. No. 1,985; Bull v. First Nat. Bank, 123 U. S. 105, 31 L. ed. 97, 8 Sup. Ct. Rep. 62; Matlock v. Scheuerman, 51 Or. 49, 17 L.R.A. (N.S.) 747, 93 Pac. 823.

Again, it is contended that it does not appear from the complaint that appellee was a bona fide indorsee, in that it is not alleged that the note he gave in exchange for the check was payable to order or bearer at a bank in this state, so as to make it negotiable under our statute as an inland bill of exchange, and that therefore no payment of the consideration for the assignment of the check was shown. It is, however, alleged that appellee subsequently, at the bank at which it was given, paid the note, and this sufficiently makes it appear that he paid the consideration for the assignment. It also appears that, as additional consideration, he released a debt he held against the payee, and a check as well as any other negotiable instrument may be transferred in payment of an antecedent debt. Dan. Neg. Inst. 5th ed. §§ 184, 780; Walker v. Geisse, 33 Am. Dec. 60, note. See also note to Matlock v. Scheuerman, 17 L.R.A. (N.S.) 747.

The court did not err in sustaining the demurrer to the fifth paragraph of answer to the fifth paragraph of complaint. As to its sufficiency as an answer to the other paragraphs of complaint on which appellee had judgment we express no opinion, as the question is not presented.

By the fifth paragraph of the complaint and the other paragraphs on which the appellee had his verdict and judgment, he sued as a bona fide indorsee of the check, for value. The court gave a series of instructions applicable to this theory. It is contended that the evidence does not sustain the verdict on the issue presented. It appears from the testimony of the appellee and Hendricks that the latter presented the check to appellee, not as his own, to be sold for his own benefit, but, as Hendricks claimed in behalf of appellants, to secure a loan of money for sixty days, to use in their business; that appellee understood that he was making a loan to the appellants, and that he was taking the check as the evidence of it. This evidence fixes his relation to the check, and it is not that of an indorsee. He became the first holder,—in effect, the payee,—and manifestly cannot protect himself with the shield of a bona fide indorsee, but must meet such defenses as may be open to a drawer or maker against a payee. As the owner of the check, 39 L.R.A. (N.S.)

Hendricks could have sold it to appellee for cash, could have exchanged it for anything else he pleased of whatever value, or could have paid with it an antecedent debt he owed appellee. Appellee would become a bona fide holder for value. On the other hand, if he took it to appellee merely as the agent of appellants, as the evidence of a loan which he was to secure for appellants from appellee, he could not use it or any part of the proceeds for his own profit in paying his debt to appellee, and make appellants liable to appellee therefor, for appellee would take it as payee, direct from appellants. Stainback v. Bank of Virginia, 11 Gratt. 269; Dowden v. Cryder, 55 N. J. L. 330, 26 Atl. 941; Merchants' & M. Nat. Bank v. Ohio Valley Furniture Co. 57 W. Va. 625, 70 L.R.A. 312, 50 S. E. 880; Stainer v. Tysen, 3 Hill, 279.

But the reason for disallowing defenses in such case is that there is privity of contract, and it may be said that there was not actual privity between appellee and appellants, so as to give him knowledge of the fraud involved. It may justly be answered that the circumstances were such as to charge him with constructive notice of it,—to require him to inquire into the transaction. That Hendricks was so anxious to raise money on the check for the appellants that he was willing to take a release and discharge of his own debt to appellee in a sum equal to one fourth of the amount of the check, without apparent authority from the drawers, was sufficient to require him to ascertain from them the facts. Their place of business was in the same city, where he could have readily reached them. If the agency of Hendricks existed, it was only to raise money on the check for his principals. It carried no implication of authority to deal with the check for his own profit. And the rule is that, if the agency of the party is made to appear, the principal will not be bound beyond the authority given. And where, as in this case, the party dealt with has notice that the other party is acting as agent in the transaction, he is bound to inquire into his authority. 1 Randolph. Com. Paper, 388. Having sued as an indorsee of the check, appellee cannot recover on evidence showing him to be the payee. Bixel v. Bixel, 107 Ind. 534, 8 N. E. 614; Smelser v. Wayne & U. Straight Line Twp. Co. 82 Ind. 417.

Questions are raised on instructions given and refused and on rulings on evidence which may not arise again, and they are not, therefore, considered.

Judgment reversed, with instructions to grant appellants a new trial.

NORTH CAROLINA SUPREME COURT.

LENOIR COUNTY, Appt.,

v.

C. W. CRABTREE.

(158 N. C. 357, 74 S. E. 105.)

Estoppel — county commissioners — tolerating building.

1. Permitting a building to stand below high-water mark so as to interfere with the operation of a drawbridge for a period of fourteen months does not estop the county commissioners from requiring its removal.

Riparian rights — building below high-water mark — interference with bridge.

2. A riparian owner having a qualified title to the land between high and low water mark of a navigable river cannot place a building thereon in such a manner as to interfere with the free operation of a public drawbridge over the stream.

Bridge — action to prevent interference with — private instigation — effect.

3. That a rival merchant instigated the action of county commissioners to require the removal of a building which interferes with the free operation of a public drawbridge is no ground for interfering with such removal.

Action — party — county — removal of obstruction to bridge.

4. An action to compel removal of an obstruction to the operation of a county drawbridge is within a statute permitting actions to be brought in the name of the county.

(March 20, 1912.)

A PPEAL by plaintiff from a judgment of the Superior Court for Lenoir County in defendant's favor in a proceeding for a mandatory injunction to restrain defendant from maintaining a certain building alleged to interfere with the free operation of a public drawbridge. Reversed.

The facts are stated in the opinion.

Mr. G. V. Cowper, for appellant:

The state has delegated to the commissioners the power and authority to build and maintain bridges, provided they comply with certain United States regulations, and this delegation of authority must necessari-

ly carry the easements and rights vested in the state in lands between high and low water mark for the benefit of the public.

Gibson v. United States, 166 U. S. 271, 41 L. ed. 998, 17 Sup. Ct. Rep. 578; Sands v. Manistee River Improv. Co. 123 U. S. 288, 31 L. ed. 152, 8 Sup. Ct. Rep. 117; Hutton v. Webb. 124 N. C. 755, 59 L.R.A. 33, 33 S. E. 169; Hilger v. Chrisp, 98 Ark. 490, 136 S. W. 660; Champlain Stone & Sand Co. v. State, 66 Misc. 434, 123 N. Y. Supp. 546; Burke County v. Catawba Lumber Co. 115 N. C. 597, 20 S. E. 707, 847; Greenleaf v. Pasquotank County, 123 N. C. 34, 31 S. E. 264; Chilton v. Metcalf, 234 Mo. 27, 136 S. W. 701; Shreveport Cottonwood Co. v. Missouri Valley Bridge & I. Co. 90 Ark. 608, 117 S. W. 750; Gulf, C. & S. F. R. Co. v. Meadows, 56 Tex. Civ. App. 131, 120 S. W. 521; Ward v. Willis, 51 N. C. (6 Jones, L.) 183, 72 Am. Dec. 570; Shepard's Point Land Co. v. Atlantic Hotel, 132 N. C. 522, 61 L.R.A. 937, 44 S. E. 39; State v. Twiford, 136 N. C. 603, 48 S. E. 586; Escambia Land & Mfg. Co. v. Ferry Pass. Inspectors & Shippers Asso. 59 Fla. 239, 138 Am. St. Rep. 121, 52 So. 715.

The maintenance and operation of the bridge is a matter within the sound discretion of the board of commissioners, provided they do not oppress anyone, and they act in good faith.

Greenleaf v. Pasquotank County. 123 N. C. 34, 31 S. E. 264; Brodnax v. Groom, 64 N. C. 244; Harrington v. King, 117 N. C. 117, 23 S. E. 92; Mathis v. Duplin County, 122 N. C. 416, 30 S. E. 23; Burke County v. Catawba Lumber Co. 115 N. C. 597, 20 S. E. 707, 847; 11 Cyc. 388, 404; Atlantic Coast Line R. Co. v. Goldsboro, 155 N. C. 356, 71 S. E. 514; State v. Parrott, 71 N. C. 311, 17 Am. Rep. 5; Gathman v. Chicago, 15 A. & E. Ann. Cas. 842, note.

Mr. E. R. Wooten, for appellee:

Defendant owns the land to the low-water mark at the place where his building is situated, and, until there is condemnation proceedings instituted, and the proper procedure had under the law, his property cannot be taken for public purposes.

State v. Eason, 114 N. C. 787, 23 L.R.A. 520, 41 Am. St. Rep. 811, 19 S. E. 88;

Note. — Interference by riparian owner with bridge.

No other case directly in point has been found. But in East Montpelier v. Wheelock, 70 Vt. 391, 41 Atl. 432, it is declared that when the lowering of the water in a dam is necessary to enable a town to perform its duty to repair a bridge, the town may, during proper operations, require the owner of the dam to cease obstructing the

flow, and to allow the water to flow substantially as it was accustomed to flow at the time the owner's grantors obtained their grant from the state and acquired riparian rights. And from this it was held to follow that the owner was not entitled to recover for the consequent damage which he suffered.

As to the liability for damming back water of stream by bridge, see the note in 28 L.R.A.(N.S.) 156. L. A. W.

Broadnax v. Baker, 94 N. C. 675, 55 Am. Rep. 633; *Phillips v. Postal Teleg. Cable Co.* 130 N. C. 513, 89 Am. St. Rep. 868, 41 S. E. 1022; *State v. Wolf*, 112 N. C. 894, 17 S. E. 528; *Stewart v. Frink*, 94 N. C. 487, 55 Am. Rep. 618.

Clark, Ch. J., delivered the opinion of the court:

This is a proceeding for mandatory injunction to prohibit the defendant from further maintaining or adding to a building which is built so near to a public bridge over the Neuse river as to prevent the draw therein from being operated except in one direction. For something over 100 years the county of Lenoir maintained a bridge across Neuse river, a navigable stream at that point. In 1884 the present bridge was built by the county about 15 feet from where the old bridge stood, and it was furnished with a modern drawbridge, which was constructed for the purpose of turning up or down stream as necessity might arise. There was a draw in the former bridge, but it does not appear whether or not it could be operated in both directions, nor is it material.

Revisal, § 1318(8), among other duties, imposed upon the county commissioners that of "providing draws in bridges where same may be necessary for the convenient passage of vessels," etc., and Revisal, § 2698, provides that the counties may erect bridges, and "shall by their board of commissioners provide and keep draws in all such bridges."

It is a matter which rests in the discretion of the county commissioners should they establish draws that turn both ways, certainly unless it were a clear abuse of their powers. *Brodnax v. Groom*, 64 N. C. 244. On the contrary, it is common knowledge that a draw should open both up and down stream, as on high water an emergency may require such to be done in safety to the navigation. The bridge or vessels might at times be endangered, or navigation seriously interfered with, if the draw could not be freely turned in either direction, especially in high water.

Though it is not expressly found by the judge, it appears from the admission in the defendant's brief, and is not denied in the evidence, that the building is partly at least, if not altogether, built on land between high and low water mark. The judge finds that it was put there within fourteen months before this action begun, and is so close to the bridge that the draw cannot be opened downstream. Indeed, the evidence shows, without contradiction, that the building extends within 2 feet of the bridge on the down side thereof.

By act of Congress the state can authorize bridges to be built over navigable

streams wholly within the state, provided the plans are submitted to and approved by the War Department. As the plan of this bridge, built in 1884, provided a draw which opened both ways, it must have been so approved, and an obstruction making it less convenient for navigation without the approval of the War Department is doubtless indictable in the Federal court. Nor can its usefulness be impaired by obstructing its operation in any way without the consent also of the board of county commissioners. It might be inferred from his Honor's judgment that he was of opinion that the fact that the building has stood at that point for fourteen months without objection from the county commissioners was an estoppel upon the county. If so, this view is erroneous. In the recent case of *Shelby v. Cleveland Mill & Power Co.* 155 N. C. 196, 35 L.R.A.(N.S.) 488, 71 S. E. 218, *Brown, J.*, says: "It is well settled that, unless by legislative enactment, no title can be acquired against the public by use alone, nor loss to the public by nonuser. *Com. v. Moorehead*, 118 Pa. 344, 4 Am. St. Rep. 601, 12 Atl. 424, and cases cited; 22 Am. & Eng. Enc. Law, p. 1190. Public rights are never destroyed by long-continued encroachments or permissive trespasses."

The county commissioners, in many cases, might not have their attention called to an encroachment of this kind upon the public rights, or they might not be properly advised as to the injurious effect. Certainly the public cannot lose their rights by the want of vigilance in the temporary occupations of their office. There is no statute of limitations against the public from which a right can be presumed to have been granted by the county commissioners to the defendant to interfere with the use of the public property for his own use, which is the basis of a statute of limitations. Indeed, the statute expressly prohibits the application of the statute of limitations against the public by reason of such encroachment. Revisal, § 389.

The land between high and low water mark belongs to an individual only *sub modo* and subject to the superior right of the public to use it for all purposes incident to navigation. The erection of a bridge across a navigable stream with a draw of the most modern construction, opening both ways, is an incident of navigation which cannot be defeated by the erection of a building or other obstruction on such strip of land between high and low water mark, or so near to the bridge as to interfere with the free operation of the draw. *Gould, Waters*, § 151, and cases there cited. Land lying between low and high water mark is not subject to entry. *Ward v. Willis*, 51 N. C. (6 Jones,

L.) 183, 72 Am. Dec. 570; Shepards' Point Land Co. v. Atlantic Hotel, 132 N. C. 522, 61 L.R.A. 937, 44 S. E. 39; State v. Twiford, 136 N. C. 609, 48 S. E. 586. At most, the occupant can have only an easement therein subject to the superior right of the public to the use of the stream for navigation, and, as here, for the incidental purpose of a bridge so constructed as to interfere the least with navigation.

The judge below dismissed the action upon the ground, as we understand it, that he knew of no law which required that a draw over a navigable stream should open both ways, that the building had been there for fourteen months without objection by the county commissioners, and because he was "firmly of the opinion that the owner of an opposition store inspired this action." The first two propositions we have discussed. As to the last, the action is brought in behalf of the county by its county commissioners, and it is immaterial whether an opposition storekeeper influenced the commissioners or not. They were discharging their duty in objecting to a longer interference with the free use of the bridge, which was provided with a double draw by their authority when the bridge was erected, and which had been approved, and was probably required, by the War Department. Nor is it a matter for consideration that to require the defendant to remove his house so as to allow the draw to be operated freely would be an expense to him. He placed his building there without authority of law and in derogation of the public right, and must suffer the consequences of an order to remove it.

This action is brought by "Lenoir county, who sues through the commissioners for the county of Lenoir." His Honor seems to have been of opinion that this was defective in that the action should have been brought by the board of commissioners, and expresses a doubt whether the defect was cured because no objection was taken by demurrer. Revisal, § 1309, constitutes every county a "body politic and corporate," and Revisal, § 1310, authorizes a county "to sue and be sued in the name of the county." We see no reason, therefore, why the action might not be brought simply in the name of "Lenoir county," as other actions have been brought to this court without objection. It is true that there are decisions that a county should be sued through its commissioners, but Judge Pell, in his notes to Revisal, § 1310, justly calls attention to the fact that the statute had since been amended. Even if it had not been, the designation of the plaintiff would have been sufficient in the absence of a demurrer raising objection thereto. The action was properly brought 39 L.R.A.(N.S.)

on behalf of the county. Burke County v. Catawba Lumber Co. 115 N. C. 590, 20 S. E. 707, 847.

The order dismissing the action is set aside, and upon the facts found judgment should be entered requiring the defendant to remove the building within such reasonable time, and to such reasonable distance, as may be found just, upon investigation by the court below.

Reversed.

NORTH CAROLINA SUPREME COURT.

CECIL C. WILKERSON
v.

O. F. WILKERSON, Appt.

(— N. C. —, 74 S. E. 740.)

Malicious prosecution — nolle prosequi with leave — effect.

1. A *nolle prosequi*, with leave, after which the prosecution is never renewed, is sufficient termination of the proceeding to support an action for malicious prosecution.

Trial — malicious prosecution — probable cause — question for the court.

2. The question of what is probable cause

Note. — When is an action sufficiently at an end to support a suit for malicious prosecution.

The earlier cases upon this question are collected in a note to Graves v. Scott, 2 L.R.A.(N.S.) 927.

It has been held that a termination of the prosecution so as to support an action for malicious prosecution was effected:

—by dismissal by the prosecuting officer on the ground that defendant was a minor, acting under directions of her mother in committing the trespass charged. *Rutherford v. Dyer*, 146 Ala. 665, 40 So. 974;

—by a discharge of plaintiff upon the solicitor's motion to *nolle prosequi* the case. *Snead v. Jones*, 169 Ala. 143, 53 So. 188;

—by a discharge by the committing magistrate, it being unnecessary to show further an investigation and failure to indict by the grand jury. *Stewart v. Blair*, 171 Ala. 147, 54 So. 506;

—by a discharge of plaintiff by the justice of the peace on the ground that he had been arrested and paid a fine for the same offense before another justice. *Donati v. Righetti*, 9 Cal. App. 45, 97 Pac. 1128;

—by dismissal of the warrant by the court having jurisdiction on motion of the solicitor, in the absence of any showing that defendant had attempted to renew the prosecution. *Josey v. Cochran*, 9 Ga. App. 656, 72 S. E. 42;

—by dismissal of the prosecution on the same day that the suit for malicious prosecution was commenced, there being no presumption from this fact that the suit was

in an action for malicious prosecution being one of law, the court must, in instructing the jury, point out what facts which the evidence tends to support would, if found to exist, constitute probable cause.

(April 24, 1912.)

APPEAL by defendant from a judgment of the Superior Court for Durham County in plaintiff's favor in an action brought to recover damages for malicious prosecution. Reversed.

The facts are stated in the opinion.

Messrs. J. Crawford Biggs and Bramham & Brawley, for appellant:

A *not pros.* may be a sufficient determination.

Hatch v. Cohen, 84 N. C. 602, 37 Am. Rep. 630.

What is probable cause is a question of law for the court, and it was error for the court to leave the question to the jury under a general charge.

Jones v. Wilmington & W. R. Co. 125 N. C. 230, 34 S. E. 398; Vickers v. Logan, 44 N. C. (Busbee, L.) 394; Moore v. First Nat. Bank, 140 N. C. 303, 52 S. E. 944.

Messrs. Manning & Everett and Bryant & Brogden, for appellee:

The criminal action had been terminated, Marcus v. Bernstein, 117 N. C. 33, 23 S. E. 38.

There was not probable cause for the prosecution. 19 Am. & Eng. Enc. Law. 2d ed. 607; Moore v. First Nat. Bank, 140 N. C. 303, 52 S. E. 944; Cabiness v. Martin, 14 N. C. (3 Dev. L.) 455; Beale v. Roberson, 29 N. C. (7 Ired. L.) 284; Smith v. Deaver, 49 N. C. (4 Jones, L.) 513.

Walker, J., delivered the opinion of the court:

This is an action for malicious prosecution. The defendant had caused the arrest and prosecution of the plaintiff, who was not related to him, upon the charge of having feloniously stolen certain admission tickets belonging to him as proprietor of the Arcade Theater in Durham.

The criminal proceedings were brought before the recorder, and when the solicitor stated that he had not been able to examine the case, and the defendant insisted upon an immediate trial, a *not pros.*, with leave, was entered at the suggestion of the recorder, in order to preserve the rights of the state, but the prosecution of the case was never renewed. It is now contended that this was not a sufficient determination of the proceeding to authorize the bringing of this suit. It was held, though, in Hatch v. Cohen, 84 N. C. 602, 37 Am. Rep. 630, and Marcus v. Bernstein, 117 N. C. 31, 23 S. E. 1.

commenced before the prosecution was terminated. Enright v. Gibson, 119 Ill. App. 411;

—by the discharge upon habeas corpus proceedings of one bound over to the grand jury by a magistrate. Millar v. Sollitt, 131 Ill. App. 196;

—by dismissal of the prosecution by the prosecuting attorney without any trial. Sasse v. Rogers, 40 Ind. App. 197, 81 N. E. 590;

—by a dismissal of the case and taxation of costs against the county. White v. International Text-Book Co. — Iowa, —, 136 N. W. 121;

—by discharge by the magistrate upon the merits, though the costs were paid by plaintiff upon being told that unless he did so he would have to go back to jail. Cascarella v. National Grocer Co. 151 Mich. 15, 114 N. W. 857;

—when the prosecution is terminated by procurement of defendant or agreement of the parties. Wickstrom v. Swanson, 107 Minn. 482, 120 N. W. 1090;

—by dismissal by the county attorney after an appeal to the district court, though no enforceable judgment was ever pronounced in the justice court, so that the statute of limitations ran from the date of such dismissal. Hackler v. Miller, 79 Neb. 209, 112 N. W. 303, 114 N. W. 274;

—by the charge against plaintiff being presented to the grand jury and being ignored by it. Weisner v. Hansen, 81 N. J. L. 601, 80 Atl. 455; 39 L.R.A.(N.S.)

—where plaintiff was arrested and arraigned and held in bail before a magistrate, and then discharged after one or two adjournments. McDonald v. National Art Co. 69 Misc. 325, 125 N. Y. Supp. 708;

—by refusal of the grand jury to indict plaintiff. Equitable Life Assur. Soc. v. Lester, — Tex. Civ. App. —, 110 S. W. 499;

—by dismissal, after several continuations, of an appeal to the county court from a conviction before a justice of the peace. Evans v. Atlantic Coast Line R. Co. 105 Va. 72, 53 S. E. 3;

—by a discontinuance by defendants of the injunction suit alleged to have been commenced by them maliciously. Powell v. Woodbury, — Vt. —, 83 Atl. 541;

—by withdrawal of the charge in open court by the Crown attorney. Fancourt v. Heaven, 18 Ont. L. Rep. 492, 15 Ann. Cas. 153;

—where neither the witnesses, accused, nor constable appeared at place of hearing, in consequence of prosecutrix hearing of facts tending to exonerate the plaintiff: the costs being paid by the prosecutrix. Beemer v. Beemer, 9 Ont. L. Rep. 69, 4 Ont. Week. Rep. 540;

—by an abandonment of one charge and acquittal upon the other, of one charged with breaking and entering a house, and therein committing an indictable offense. Seary v. Saxton, 28 N. S. 278.

In McSwain v. Edge, 6 Ga. App. 9, 64 S. E. 116, the petition showed that a land-

38, that a *nolle prosequi* is a legal determination of the original suit within the meaning of the law concerning malicious prosecution. But defendant contends that this rule does not apply to a *nol. pros.* with leave, as in the latter case the prosecution is kept on foot, or, in other words, is not ended. This, we think, is a misapprehension of the true reason upon which those cases were decided.

A *nol. pros.* in criminal proceedings is nothing but a declaration on the part of the solicitor that he will not at that time prosecute the suit farther. Its effect is to put the defendant without day; that is, he is discharged and permitted to go whithersoever he will, without entering into a recognizance to appear at any other time. It is not an acquittal, it is true, for he may afterwards be again indicted for the same offense, or fresh process may be issued against him upon the same indictment, and he be tried upon it. To prevent abuse the power of the solicitor to issue new process upon the same bill is checked and restrained by the fact that a *capias*, after a *nol. pros.*, does not issue as a matter of course upon the mere will and pleasure of the officer, but only upon permission of the court, which will always see that its process is not abused to the oppression of the citizen. This was

laid down as fully as we have stated it in *State v. Thornton*, 35 N. C. (13 Ired. L.) 256, and ever since has been considered to be the settled practice. The only difference between a general or unqualified *nol. pros.* and one "with leave" is that in the latter case the leave to issue a *capias* upon the same bill is given by the court in advance, instead of upon a special application made afterwards, *State v. Smith*, 129 N. C. 546, 40 S. E. 1. Referring to this kind of *nol. pros.*, the court in *State v. Smith*, supra, said: "While we recognize the fact that the courts should control its process and see that it is not used to the oppression of the citizens of the state, it is also necessary to so use it as to bring offenders to trial and justice. If the court thinks proper to grant such leave at the time the *nol. pros.* is entered we do not see why it may not do so; and we do not feel like reversing a practice so universally adopted in the state." The suit is terminated as much by one form of entry as by the other, because in both the prisoner is discharged without day, and that seems to be the true test. In both he can be taken upon a fresh *capias*, in one by special order, and in the other under the general leave to issue. Our opinion is therefore against the defendant on this point.

lord maliciously took out a dispossessionary warrant and evicted his tenant, whose term had not expired, for the purpose of injuring and damaging the tenant; and it was held that upon the eviction being completed the dispossessionary action was ended so that an action for malicious prosecution thereof could be commenced.

And in *Smith v. Clark*, 37 Utah, 116, 26 L.R.A.(N.S.) 953, 106 Pac. 653, Ann. Cas. 1912 B, 1366, it is held that evidence of the discharge and dismissal of plaintiff by a magistrate without hearing is competent for the purpose of showing an unsuccessful termination of the prosecution.

However, in *Halberstadt v. New York L. Ins. Co.* 194 N. Y. 1, 21 L.R.A.(N.S.) 293, 86 N. E. 801, 16 Ann. Cas. 1102, affirming 125 App. Div. 830, 110 N. Y. Supp. 188, it was held there was no such termination of the prosecution as would support the action, where the prosecution was dismissed because accused fled from the jurisdiction before process could be served upon him, and remained away so that the prosecution could not be carried on.

In *Gaiser v. Hurlleman*, 74 Ohio St. 271, 113 Am. St. Rep. 953, 78 N. E. 372, where, on affidavit of defendant charging blackmailing, plaintiff was brought before a justice and held to answer the charge, and upon the evidence presented the grand jury returned an indictment for that offense and also returned an indictment for assault with intent to rob, based on the same transaction, it was held that quashing of the in-
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dictment for blackmailing did not amount to such a termination of the proceeding as would support an action for malicious prosecution, the indictment for assault with intent to rob being deemed a continuation of the proceeding commenced before the justice.

In *Hales v. Raines*, 162 Mo. App. 46, 141 S. W. 917, where an involuntary nonsuit was taken in a civil action and another action subsequently commenced for the same cause, it was held that the second was such a continuation of the first as would prevent an action for malicious prosecution for the first suit.

In *Baxter v. Gordon*, I. & F. Co. 9 Ont. Week. Rep. 194, it is held that a mere release as a result of a compromise or agreement is not such a favorable termination of a prosecution as will support an action for malicious prosecution.

And a termination which will support an action for malicious prosecution is not shown by dismissal of the prosecution before a justice of the peace, for the purpose of recommencing it in the district court, and commencing it there the same day. *Schipel v. Norton*, 38 Kan. 567, 16 Pac. 804.

Nor is a release on habeas corpus a sufficient termination. *McKinnon v. McLaughlin Carriage Co.* 37 N. B. 3.

And a civil action will not be considered as determined so as to allow an action to be brought for its malicious prosecution while an appeal is pending. *Griffith v. Ward*, 20 U. C. Q. B. 31.

R. L. S.

But we think there is error in the charge of the court upon the question of probable cause. The court charged the jury as follows: "If you find from the evidence in this case, and by the greater weight thereof, that the defendant procured the arrest of the plaintiff on a charge of stealing tickets, and at the time the facts and circumstances were not such as would lead a man of ordinary caution and prudence reasonably to believe that such offense had been committed, and that the plaintiff was guilty of committing the offense, then there was not probable cause for the prosecution." The decisions of this and many other courts are to the effect that the judge must instruct the jury as to what facts, if found by them, will show that there was or was not probable cause. We have followed the ruling in the celebrated case of *Johnstone v. Sutton*, 1 T. R. 510, 545, 1 Bro. P. C. 76, 1 Revised Rep. 269, 1 Eng. Rul. Cas. 766, where it was held that the question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to show the cause to be probable or not probable are true and existed is a matter of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law, and upon this distinction, Lord Mansfield said, proceeded the case of *Reynolds v. Kennedy*, 1 Wils. K. B. 232. This case was approved in *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. ed. 116.

Following the rule of *Johnstone v. Sutton*, supra, this court decided, in *Plummer v. Gheen*, 10 N. C. (3 Hawks) 66, 14 Am. Dec. 572, that the parties are entitled to the opinion of the court upon the facts as they may be found by the jury, as to whether there was probable cause or not; and Chief Justice Taylor said: "As the question of probable cause is compounded of law and fact, the defendant had a right to the opinion of the court distinctly on the law, on the supposition that he had established, to the satisfaction of the jury, certain facts. Whether the circumstances were true was a question for the jury. Whether, being true, they amounted to probable cause, is a question of law." In the later case of *Beale v. Roberson*, 29 N. C. (7 Ired. L.) 280, the court said: "This case brings up again the question whether probable cause is a matter of law, so as to make it the duty of the court to direct the jury that if they find certain facts upon the evidence, or draw from them certain other inferences of fact, there is or is not probable cause; thus leaving the questions of fact to the jury, and keeping their effect, in point of reason, for the decision of the court, as a matter of law. Upon that question, the opinion of the court is in the affirmative, and therefore this judg-

ment must be reversed." The court then reviewed the authorities, and thus commented upon them, and established the rule as we have stated it: "Such a series of decisions in our own courts the same way would protect the doctrine laid down in them from being drawn into debate now, even if we entertained doubts of its correctness originally. But, independent of authority, our reflections satisfy us that the principle is perfectly sound. It is a question of reason whether certain ascertained facts and circumstances constitute a probable and rational ground for charging a particular person with crime." And after remarking that it is not the prosecutor's belief of the other's guilt which will excuse him, for he must take care that he acts only on a reasonable belief, a just suspicion, the court further said: "Now our inquiry is whether for the determination of the question as to the sufficiency or the insufficiency of the grounds of suspicion, supposing them to exist in fact, the court or the jury be the more competent; and we think, very clearly, that the court is, because it is a question of general and legal reasoning, and can best be performed by those whose professional province and habit it is to discuss, weigh, and decide on legal presumptions. The only argument against that is the difficulty in cases of many and complicated facts, and contradictory evidence, as in *Plummer v. Gheen*, of properly separating, to the comprehension of the jury and to the satisfaction of the judge, the matters of law and fact. But that only proves the difficulty of deciding such cases, whether by the court or jury, and does not at all help us in saying whether this or that point should be decided by the one or the other." The court, therefore, held upon the added authority of *Panton v. Williams*, 2 Q. B. 169, that "in an action of this sort . . . the judge must determine whether the facts, if proved, or any of them, constitute such cause, leaving it to the jury to decide only whether the facts or those inferred from them exist: and as that is so when the facts are few and the case simple, it cannot be otherwise when the facts are numerous and complicated. It would seem, then, that making a question on this subject must be regarded as an attempt to move fixed things, and cannot be successful either in England or here. As the case goes back to another trial, on which the facts may appear differently, we think it unnecessary to consider those that came out on the former trial, in reference to the question of probable cause, further than to remark that few cases perhaps could better illustrate the danger of leaving that question to the discretion of a jury, whose decision of it is not susceptible of re-

view in another court." This has been considered as the leading case upon the subject, and has been followed in all subsequent cases, as stating the law correctly. The instruction in *Beale v. Robertson* was substantially like that given in this case, and was held to be erroneous.

The following more recent cases assert the same doctrine, and approve *Beale v. Robertson*; *Swain v. Stafford*, 26 N. C. (4 Ired. L.) 392; *Vickers v. Logan*, 44 N. C. (Busbee, L.) 393; *Bradley v. Morris*, 44 N. C. (Busbee, L.) 395, and *Jones v. Wilmington & W. R. Co.* 125 N. C. 227, 34 S. E. 398, which is directly in point. In *Smith v. Deaver*, 49 N. C. (4 Jones, L.) 514, Judge Battle thus sums up the matter: "What is probable cause is a question of law, to be decided by the court upon the facts, as they may be found by the jury. *Beale v. Robertson*, 29 N. C. (7 Ired. L.) 280; *Vickers v. Logan*, 44 N. C. (Busbee, L.) 393. As a guide to the court, it is defined to be 'the existence of circumstances and facts sufficiently strong to excite, in a reasonable mind, suspicion that the person charged with having been guilty was guilty.' It is a case of apparent guilt as contradistinguished from real guilt. It is not essential that there should be positive evidence at the time the action is commenced, but the guilt should be so apparent at the time as would be sufficient ground to induce a rational and prudent man who duly regards the rights of others as well as his own to institute a prosecution; not that he knows the facts necessary to insure a conviction, but that there are known to him sufficient grounds to suspect that the person he charges was guilty of the offense." The cases of *Brooks v. Jones*, 33 N. C. (11 Ired. L.) 261; *Kelly v. Durnham*, *Traction Co.* 132 N. C. 372, 43 S. E. 923, and *Downing v. Stone*, 152 N. C. 527, 136 Am. St. Rep. 841, 63 S. E. 9, 21 Ann. Cas. 753, cited by plaintiff's counsel, do not sustain the instruction. The court in those cases was dealing with a question of malice. In *Downing v. Stone*, supra, Justice Hoke applies the rule as we have stated it when he says: "Where it is proven that legal advice was taken by a prosecutor, this, too, is a relevant circumstance in connection with other facts, admitted or established, to be considered by the court in determining the question of probable cause. *Morgan v. Stewart*, 144 N. C. 424, 57 S. E. 149; *Pittsburg, J. E. & E. R. Co. v. Wakefield Hardware Co.* 143 N. C. 58, 55 S. E. 422." He expressly adopts the rule in *Morgan v. Stewart*, supra, in the following words, citing the cases: "It is accepted doctrine with us that on facts admitted or established the question of probable cause is one of law for the 39 L.R.A. (N.S.)

court. *Jones v. Wilmington & W. R. Co.* 125 N. C. 229, 34 S. E. 398; *Bradley v. Morris*, 44 N. C. (Busbee, L.) 395; *Swain v. Stafford*, 26 N. C. (4 Ired. L.) 392. See also *Newell Malicious Prosecution*, §§ 276, 277; 16 Am. & Eng. Enc. Law 2d ed. p. 689. Unless we overrule the many cases which have been decided by us and have settled the rule, we must hold that the judge's instruction was insufficient, and left to the jury to decide what he should have decided for them; that is, whether upon any given state of facts, which may have been found by the jury, there was or was not probable cause. As it is, the jury were only required to apply a definition of probable cause to the facts, without any opinion of the court to guide them, as to how the law considered the different phases of the evidence. This was a clear violation of the rule, if we are to adhere to it. We think there was evidence for the jury to consider as to whether there was probable cause or not. The facts are not complicated, but simple, and it should not be difficult to arrange them so as to inform the jury clearly upon the law. This error of the court requires us to remand the case for a new trial. We will add that, in our opinion, there was no positive error in the charge upon the question of damages, although it was not as full and explicit as it might have been. We do not understand the charge to mean that plaintiff can recover punitive damages upon proof of general malice, such as would be sufficient to establish liability, but only upon proof of particular or actual malice, as defined in the cases. See *Stanford v. A. F. Messick Grocery Co.* 143 N. C. 419, 55 S. E. 815, where this question is discussed.

New trial.

OHIO SUPREME COURT.

CLEVELAND TERMINAL & VALLEY
RAILROAD COMPANY et al., Plffs. in
Err.,

v.

STATE OF OHIO EX REL WADE H. EL-
LIS, Attorney General.

(85 Ohio St. 251, 97 N. E. 967.)

State — grant — revocation.

1. In conducting transactions with respect to its lands, the state acts in a proprietary, and not in a sovereign, capacity, and, being

Headnotes by SHAUCK, J.

Note. — No other cases have been found passing upon the right of the state to revoke a grant of land made for a consideration, in the absence of mistake or fraud or

amenable to all the rules of justice which it prescribes for the conduct of its citizens, it will not be permitted to revoke a grant of lands made upon a valuable consideration which it retains.

Vendor and purchaser — municipality — use — revocation.

2. When land is granted to a city upon a valuable consideration, to be used for streets and other purposes, the title will not, in the absence of an express stipulation to that end, revert in the grantor because the land is subsequently used for street and railroad purposes.

Municipal corporation — lease of lands — railroad purposes.

3. When the governor, in the exercise of authority expressly conferred upon him by statute, grants to a municipality "all the interest of the state" in lands which it owns in fee to be used for streets and other purposes, the municipality, reserving the right to use the same for street purposes without compensation, may execute a valid lease of such lands to a railroad company for its general purposes.

(Spear, J., dissents.)

(January 16, 1912.)

ERROR to the Circuit Court for Franklin County to review a judgment ousting defendants from the further exercise of their alleged right of occupation for railroad purposes of certain lands which had formerly been a part of the canal system of the state. Reversed.

Statement by Shauck, J.:

The state, on relation of the attorney general, filed its petition in quo warranto on September 12, 1908, in the circuit court of Franklin county, to oust the plaintiffs in error from the further exercise of the alleged right to maintain their tracks, etc., on certain lands in the city of Cleveland, which had formerly been a part of the canal system of the state.

The petition alleged the corporate character of the two railway companies. That on and prior to the 29th day of April, 1872, the state was the owner in fee and in possession of the premises described, being a strip of land averaging about 100 feet in width, and being about $2\frac{1}{2}$ miles in length in the city of Cleveland. That on that day the general assembly passed an act (69 Ohio Laws, p. 182) entitled, "An Act to Authorize the City of Cleveland to Enter upon and Occupy a Part of the Ohio Canal." In sub-

stance the 1st section enacts that the city shall be authorized "to take, enter upon, improve, and occupy as a public highway, or for other purposes, and for laying therein gas and water pipes, and for sewerage purposes, as the city council of said city may determine," the strip described, "but said grant shall be made subject to all outstanding rights or claims, if any, with which it may be in conflict."

The 2d section provides: "Sec. 2. That said city of Cleveland shall be liable for all damages that may accrue from the vacation and abandonment of so much of said canal as shall be taken by said city; but nothing herein shall relieve the lessees of said canal, or their assigns, from any responsibilities imposed upon them by law, or in any way arising from the instrument or instruments of lease held by them and executed pursuant to any law of the state of Ohio, except as and to the extent of so much of said canal as shall be by said city taken and occupied under the grant herein authorized. Any person, persons, or corporation, including the lessees of said canal, who may claim damages by reason of the vacation or abandonment of any part of said canal, shall file their claim therefor in writing with the clerk of said city of Cleveland, within one year after the expiration of the time required for the publication of the notice hereinafter required, and for the purpose of ascertaining whether any of the claims so filed are valid against the state, and if so, for the purpose of ascertaining the amount thereof; the lessees of said canal, or any other person or party filing such claim, are hereby authorized and empowered to bring an action in the court of common pleas of Cuyahoga, Portage, or Franklin county, Ohio, against said city of Cleveland, and said action shall be conducted in all respects to final judgment, as other civil actions in cases between private individuals, and either party shall have the right to second trial, and appeal from the judgment and order of the said court of common pleas, and prosecute writs of error as provided for in suits between individuals under the act to establish a Code of Civil Procedure, passed March 11, 1853, or any act supplementary thereto.

"Whenever the city council of said city, by a vote of not less than two thirds of the whole number of members thereof, shall decide to take and use so much of said canal as is herein authorized, the said council

failure to take some step necessary to complete title to the land.

The rule concerning suits by states, however, is that when a state voluntarily comes into court and invokes its aid in a matter not touching its sovereignty, it is bound by 39 L.R.A. (N.S.)

the same rules concerning the administration of justice as a private person, with the exception that it cannot be made defendant to a cross action concerning a matter not connected with that involved in the principal suit. 36 Cyc. 907, 910. R. L. S.

shall publish notice thereof, as required by § 563 of the act to provide for the organization and government of municipal corporations, passed May 7, 1869, and shall also make known their said decision to the governor of the state, and shall deposit with the governor a written release executed by the lessees of the public works, relinquishing any rights they may have in that part of said canal proposed to be taken and occupied by said city, or a bond duly executed and to the satisfaction of the governor, indemnifying the state from all liabilities and damages which may result from said vacation, and shall in like manner deposit a bond securing the performance of an agreement on the part of said city, to be also filed with the governor; that before said city shall take possession of said part of said canal; or disturb the use thereof, for canal purposes, the said city shall, at its expense and under the direction of the board of public works, connect said canal with the Cuyahoga river at or near the southerly terminus of that portion to be occupied by said city, procure the right of way, unless the same shall be owned by the state, at the desired locality, make the necessary excavations, embankments, walls, gates, and locks, needed to connect said canal with said river at the point aforesaid, and remove the present weightlock to such place as shall be determined by the board of public works; said city shall have the power, and shall provide by ordinance, to regulate and prescribe the rate to be charged by tugboats for towing boats and floats navigating the Ohio canal, to and from the locks at the intersection with the Cuyahoga river, to the wharves, docks, or any point on said river, where said boats or floats may desire to discharge or receive freight, which rate shall be graduated according to distance, and shall in no case exceed \$2.50 for each trip; said city having the right to appropriate to its own use the gates, locks, and material taken from that portion of the canal taken by said city; provided, the said city of Cleveland shall forever, or so long as the Ohio canal shall be used for the purpose of navigation, keep the channel of the Cuyahoga river, by dredging or otherwise, in good navigable order, for any boats that may now or hereafter be employed in navigating said canal, from the point of intersection to Lake Erie, and thereupon the governor, on behalf of the state, being satisfied that said connection has so been made and approved and accepted by the board of public works, shall execute and deliver to the city of Cleveland a grant of all the interest of the state in that part of said Ohio canal herein described, to be forever
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used and occupied by said city, as its counsel shall determine, for any or all of the purposes before mentioned. The attorney general shall prepare the form of said grant, also the form of the release, bonds, and agreement herein named.

"Sec. 4. This act shall take effect on its passage."

That pursuant to the provisions of said act, the governor of the state did, on the 31st of October, 1879, execute and deliver to the city of Cleveland a deed granting to it the right to use and occupy said lands, as its council should determine, for any and all of the purposes mentioned, upon the terms and conditions of said act. The petition exhibits the deed, in which the governor recites that, by virtue of authority vested in him by the act of April 29, 1872, to authorize the city of Cleveland to enter upon and occupy a part of the Ohio canal, he did, for "divers good and sufficient causes and considerations hereinafter named, give, grant, and forever quitclaim unto the city of Cleveland, and its assigns, all the right, title, and interest in the state of Ohio, in all that part of the Ohio canal," etc., describing the strip in controversy. This release upon the part of the state is made for and in consideration of the faithful and entire performance on the part of said city of all and singular the conditions and stipulations of said act of the general assembly, and of the directions and requirements of the board of public works and of the state of Ohio as set forth in the minutes of said board, accepting and approving of said work agreeably to the provisions of said act; said property as herein transferred to be held and forever used and occupied or disposed of by said city in whatever way the council of said city have determined or may hereafter determine.

The petition further alleges the acceptance of said grant by the city of Cleveland, and that on the 26th of October, 1875, the city entered into a contract with the Valley Railway Company, a corporation organized under the laws of the state of Ohio, for the purpose of constructing and operating a railroad with its northern terminus in the city of Cleveland and its other terminus at Bowerstown, Harrison county, Ohio, by which contract said city agreed that it would execute to said company a lease of all the lands granted to it by the said act of April 29, 1872, as soon as title to said lands should be conveyed to the city by the state; that on the 24th of March, 1879, the city authorized its mayor and city solicitor to obtain title to said lands and to arrange for the lease thereof to the Valley Railway Company, stipulating that, upon the requirement of said title and the preparation

of said lease, the mayor should notify the railway company that the city is ready to execute the lease upon the delivery by said company to the city of \$265,000 gold-bearing bonds in accordance with the original contract, provided further that said Valley Railway Company should agree, subject to forfeiture of said lease if not complied with, that said railroad shall be completed from the city of Cleveland to the city of Canton not later than September 1, 1879. It further alleged the actual execution of said lease pursuant to the direction of the city, and upon compliance with the general terms of the preceding arrangement, upon the condition that the said lessee should perform all the stipulations incumbent upon the city; the city also reserving the right to construct a bridge across the canal bed to Canal street and the ground necessary therefor.

It was further stipulated that the lessee should use said lands for its railway purposes, and upon failure to so continue, the lease should become void at the option of the city. By the terms of said lease the city also reserves to itself the right to lay in or under said land all gas, water, or other pipes used in any city improvement, construct sewers upon said land or across the same whenever in its judgment it should be necessary, and the right to open or extend streets across said lands and tracks thereon of such width as it might determine without making any compensation therefor, and it was further stipulated that the lessee should pay all state, county, and city taxes, and all special assessments levied upon said land, and that a failure to do so should operate as a forfeiture of the lease. It also contained the following stipulation: "And it is hereby expressly understood and agreed that in case there is hereafter any failure in said title to the lands hereby leased, or in the authority of said city to lease the same for the purposes herein stated, the said city shall not be liable to said company for any damages caused by said failure." Through said lease the Valley Railway Company took possession of said lands and occupied the same throughout its entire length by means of tracks, side tracks, switches, depots, etc., in the operation of its road.

The petition further alleges that by a judicial sale the property of said Valley Railway Company, including the premises aforesaid, was conveyed to trustees by whom it was subsequently conveyed to the plaintiff in error the Cleveland Terminal & Valley Railway Company, by which latter company the aforesaid occupation of said premises continues until the filing of the petition. The petition also alleges that the Baltimore & Ohio Railroad Company, plaintiff 39 L.R.A.(N.S.)

in error, owns a majority of the common and preferred stock in the Terminal Valley Railway Company; that the city of Cleveland has never occupied as public highways any portion of said premises, except two strips 20 feet in width; that the city of Cleveland by reason of its failure to use said lands, and by reason of said pretended lease to the Valley Railway Company, has forfeited all rights under said act and the governor's deed in pursuance thereto. It further alleges that the city was without authority to grant any of said rights or privileges to the Valley Railway Company, and that the said railway company, by reason of its exercise of the same, is now, and has been since 1895, usurping and unlawfully exercising and using rights, privileges, and franchises in violation of the rights of the state of Ohio, and in contravention of law, and that the said Baltimore & Ohio Railroad Company, by reason of the facts aforesaid, is guilty of a like usurpation.

To this petition plaintiffs in error demurred specially because of want of jurisdiction of the subject-matter by the court; because of the defect of parties defendant, it appearing from the petition that the city of Cleveland should be made a party; because the franchises challenged have been exercised for more than twenty years before the action was brought, and generally because the petition did not state a cause of action. The circuit court overruled the demurrer. Thereupon the defendants filed separate answers containing substantially like averments. They admitted the passage of the act of April 29, 1872, the execution of the deed by the governor, the contract between the city of Cleveland and the Valley Railway Company, the passage of the various resolutions by the city, and the alleged action of the mayor with respect to the execution of the lease to the Valley Railway Company; that the lease was in terms as set out in the petition, the erection of its railroad tracks, etc., upon the premises described, the succession of the defendant railways to the rights of the Valley Railway Company as alleged in the petition, and their continued occupancy of the premises, and denying all other allegations of the petition.

The answers then allege numerous acts out of which it is alleged estoppels arise against the prosecution of this suit by the state. The first of these is contained in the second defense, and it is a legal estoppel arising out of the passage by the general assembly of the act of April 29, 1872, and the governor's deed executed in pursuance thereof, whereby it is alleged the fee simple title in the land described was conveyed to the city of Cleveland and its assigns, and thence

by it to the railway company, whereof the state is estopped to maintain the action. In the remaining defense are alleged numerous acts out of which equitable estoppels are alleged to arise against the prosecution of this action by the state. Stated in a somewhat condensed form, they are: The contemporaneous interpretation of the said act of April 29, 1872, by all of the parties, whereby the state, with knowledge, acquiesced in the interpretation thereof put upon the act by the city of Cleveland and the railway companies; the city at its own expense, upon that construction, expended large sums of money under the direction of the board of public works, and paying all claims presented for damages by reason of the vacation and abandonment of that portion of the canal land described in the petition connecting the Ohio canal with the Cuyahoga river, and in making necessary excavations, embankments, walls, gates, and locks in connecting said canal with the river at the designated point further south; the removing of the weighlocks then standing to the place determined by the board of public works, and performing all and singular the conditions imposed upon the city by said act; and that the state by its acquiescence therein, with knowledge thereof, and its acceptance of, and its constant use from that date to this of, the substituted connection with the Cuyahoga river, being the benefits resulting to the state from said act so performed, is also estopped. Further that the state, with full knowledge, acquiesced in the expenditure of large sums of money by the railway company, and that the city of Cleveland and the railway companies were in all respects acting upon the assumption and understanding that said deed conveyed to the city a title in fee to said premises; that possession was taken under said instruments, large sums of money were expended in construction, the Valley Railway Company executing to the city of Cleveland its mortgage gold bonds in the sum of \$265,000, which bonds were afterward paid by the railway company. Further, by way of equitable estoppel, it is alleged that disputes having arisen as to the precise boundaries of the said premises, the general assembly, with full knowledge thereof, and with full knowledge that all of the adversary parties were in good faith acting upon the belief that a title in fee had been conveyed to the city, passed an act entitled, "An Act to provide for the Boundaries of the Bed of the Part of the Ohio Canal which has been Abandoned and Conveyed to the City of Cleveland;" the act being as follows:

"Section 1. Be it enacted by the general assembly of the state of Ohio, that the court 39 L.R.A. (N.S.)

of common pleas of the county of Cuyahoga shall, upon application of the city solicitor of Cleveland, appoint a commission consisting of not less than three nor more than five suitable persons, who shall at once proceed to survey and determine the boundaries of the land formerly owned by the state for the purpose of said canal before its abandonment; and to mark the same by proper monuments, and to make maps and plats of the said land, with necessary descriptions, to be preserved as hereinafter provided.

"Sec. 2. Said commissioners, in the performance of their duties as such, shall be governed in all respects in accordance with law describing the duties of country surveyors, as laid down in §§ 1187-1189 of the Revised Statutes of Ohio, and upon the completion of their work they shall deliver their report, with all the evidence taken, to the country surveyor, who shall forthwith dispose thereof as directed in cases of surveys made and evidence taken by law under the requirements of 1190 of said statutes, as amended April 20, 1881, and the legal effect and use of such plat, survey, and deposition shall be governed as the effect and use of the plat, survey, and depositions are governed by the provisions of § 1191 of said statutes, as amended April 20, 1881.

"Sec. 3. All costs and expenses of these proceedings, including the compensation of said commissioners, shall, after allowance by said court of common pleas, be paid by the person or persons or corporation at whose instance or request said proceedings were instituted by the said city solicitor, and the payment of the same shall be secured by a good and sufficient bond to said city by such person, persons, or corporation, to the acceptance of the city council of said city; provided, however, that all costs made by the taking of said case or proceedings, or any part thereof, to the district or supreme courts, shall be taxed and paid as the court may direct.

"Sec. 4. This act shall take effect and be in force from and after its passage." 79 Ohio Laws, p. 105.

This act was passed with full knowledge on the part of the state of the execution of the lease aforesaid, and that possession had been taken by the railway company thereunder, and it had constructed thereon its railroad tracks, switches, and depots, and in the belief that the city had full authority to execute the lease therefor; that pursuant to the passage of the last-mentioned act, and for the purpose of settling the boundaries of said strip, the city solicitor of the city of Cleveland, the railroad company having indemnified it as the act required, applied to the court of common pleas for the exercise of power conferred by said act, and expended

large sums of money; and that that act was an assurance to the city of Cleveland and the railway company that the state claimed no title to, or interest in, said land, but admitted that they were adversely held by title in fee; that thereafter general taxes and excise were paid by the original defendants to the state, county, township, and city, upon the basis of the ownership thereof in fee; and that the state, with like knowledge, acquiesce in the payment of large sums of money by the railway companies in the improvement of their said properties, in the purchase, transfer of title by judicial decree through trustees aforesaid, under the statutes of the state, to the Terminal Valley Railway Company; that upon the execution of said deed in conformity with the understanding between said state and the city and the plaintiff in error, the state immediately abandoned that portion of its canal. The answer further alleges that on the 30th of March, 1896, the general assembly passed the following joint resolution: "Joint resolution. Concerning the appointment of a joint committee to investigate the ownership of certain property. Whereas, the Ohio Canal Commission, in their last annual report, make the claim that the Valley Railway Company is illegally in possession of valuable state property in the city of Cleveland, Ohio, therefore, be it resolved by the general assembly of the state of Ohio, that a select committee of three members on the part of the house, and three on the part of the senate, be appointed, to thoroughly investigate the claims of the state, and report at their earliest convenience all the facts pertaining thereto, together with such recommendation as will in their judgment enable the state to secure said property, should it be found that the state has any interest therein."

That, pursuant to said joint resolution, a select committee was appointed, which upon investigation reported that the railway company was not occupying any land in the city of Cleveland which belongs to the state; that it occupied that portion of the Ohio canal which was granted to the city of Cleveland under an act passed April 29, 1872, entitled, "An Act to Authorize the City of Cleveland to Enter upon," etc.; that the Cleveland Terminal & Valley Railway Company since that date had occupied, and is now in the possession of, said land; that at the time of the passage of said act, it was understood and contemplated by the city that said lands were to be leased by said city to the Valley Railway Company, and that said act was designed and intended to, and in fact did, authorize the conveyance to said city of the entire interest of

the state of Ohio therein, upon the performance by said city of certain conditions named in said act, which said city fully performed prior to October 31, 1879, expending in so doing upwards of the sum of \$280,000. The committee further reported that the governor had executed a deed to the city of Cleveland in pursuance of the authority conferred upon him by said act. That the city had leased the lands to the Valley Railway Company for a period of ninety-nine years, receiving as a consideration therefor \$265,000, first mortgage bonds, principal and interest of which have been fully paid, and concluding: "Your committee therefore finds that the state of Ohio has no interest whatsoever in said lands; that the absolute fee therefore is vested in the city of Cleveland, and that the occupation of the same by the Valley Railway Company, as tenants of said city, was and is lawful, and not in contravention of any right or interest of the state of Ohio. Your committee therefore respectively recommends the adoption of a joint resolution for the purpose of forever quieting the title of the city of Cleveland in and to said lands." Thereupon, on the 23d day of April, 1896, the general assembly passed the following joint resolution: "Joint Resolution. Ratifying deed given by Ex-Governor Bishop to the city of Cleveland for certain canal land. Be it resolved by the general assembly of the state of Ohio, that the deed from Richard M. Bishop, governor of the state of Ohio, to the city of Cleveland, dated October 31, 1879, executed in pursuance of an act of the general assembly of the state of Ohio, passed April 29, 1872, entitled, 'An Act to Authorize the City of Cleveland to Enter upon and Occupy a Part of the Ohio Canal,' be and the same is hereby ratified, confirmed, and approved as a deed in fee simple conveying all the interests of the state of Ohio in and to said lands. And the state of Ohio hereby disclaims any interests whatsoever in said lands."

The answer further alleges that, after the passage of said joint resolution, the Baltimore & Ohio Railroad Company purchased a large amount of the stock of the Cleveland Terminal & Valley Railway Company, and advanced large sums of money to that company by way of loans, which was used in the construction of tracks, etc., adapting said premises more fully to railroad purposes; and in like reliance citizens of Cleveland and corporations operating in the city had made improvements on land adjacent to said real estate, as aforesaid, in contemplation of its use for railroad purposes, and upon reliance of the acquiescence of said state therein; that by the passage of

said joint resolution, the state of Ohio elected to waive, and did waive, irrevocably any and all right which it might theretofore have had to object to the execution by the governor of his deed of October 31, 1879, as well as to the execution by the city of Cleveland of the lease, and to the exercise of the railway companies of the things of which complaint is made in the petition. The answer further pleads that the action is barred by § 6789, Revised Statutes, and that the construction of the act of the legislature prayed for in the petition would result in the impairment of contracts and in taking of property of the defendant companies without due process of law.

To these answers demurrers were interposed in the circuit court. The demurrers were sustained, and a judgment of ouster entered in conformity with the prayer of the original petition. The railway companies prosecute the petition in error here for the reversal of said judgment.

Messrs. Kline, Tolles, & Morley, F. A. Durban, and Robert J. King for plaintiffs in error.

Messrs. John A. Alburn, Frank Davis, Jr., and David K. Watson, with Mr. Timothy S. Hogan, Attorney General, for defendant in error:

Since it is admitted that the state was the owner in fee of those lands on April 29, 1872, it must be presumed that the state continues as owner in fee, unless the state has clearly and unequivocally parted with all its title to such lands.

1 Cooley, Const. Lim. 7th ed. 565; Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 28 Sup. Ct. Rep. 427; Cleveland Electric R. Co. v. Cleveland, 204 U. S. 116, 51 L. ed. 399, 27 Sup. Ct. Rep. 202; Perrine v. Chesapeake & D. Canal Co. 9 How. 172, 13 L. ed. 92; Pennsylvania R. Co. v. Canal Comrs. 21 Pa. 22; New Orleans & C. R. Co. v. New Orleans, 34 La. Ann. 429.

The act of 1872 granted only a privilege, permit, or license to the city of Cleveland, giving the city authority to use these lands, but not a title in the lands.

State ex rel. Richards v. Pittsburgh, C. C. & St. L. R. Co. 53 Ohio St. 189, 41 N. E. 205; Morrill v. Mackman, 24 Mich. 282, 9 Am. Rep. 124; Stewart v. Cincinnati, W. & M. R. Co. 89 Mich. 315, 17 L.R.A. 539, 50 N. W. 852; Smith v. Cheyenne, 3 Wyo. 513, 31 Am. St. Rep. 122, 27 Pac. 807; Cook v. Stearns, 11 Mass. 533; Wolfe v. Frost, 4 Sandf. Ch. 72; Clark v. Glidden, 60 Vt. 702, 15 Atl. 358; 1 Washb. Real Prop. 398; Rodefer v. Pittsburg, O. V. & C. R. Co. 72 Ohio St. 281, 70 L.R.A. 844, 74 N. E. 183; Yeager v. Tuning, 79 Ohio St. 39 L.R.A. (N.S.)

124, 19 L.R.A. (N.S.) 700, 128 Am. St. Rep. 679, 86 N. E. 657; 25 Cyc. 640; Fowler v. Delaplain, 79 Ohio St. 286, 21 L.R.A. (N.S.) 100, 87 N. E. 280; Malone v. Toledo, 28 Ohio St. 655, 34 Ohio St. 541; State v. Snook, 53 Ohio St. 521, 42 N. E. 544; State v. Griffner, 61 Ohio St. 201, 55 N. E. 612; Miller v. Wisenberger, 61 Ohio St. 583, 56 N. E. 454.

When the city of Cleveland transferred the land to the railroad company to be used for the purpose of a railroad, it permitted the use of the land for a purpose which thwarted and defeated the purpose for which the land was conveyed to the city of Cleveland.

Amos v. State, 73 Ala. 501; Spier v. Baker, 120 Cal. 370, 41 L.R.A. 196, 32 Pac. 659; Shepherd v. Helmers, 23 Kan. 508; Ryerson v. Utley, 16 Mich. 277.

Shauck, J., delivered the opinion of the court:

Notwithstanding obvious and important differences between the case here presented, and that which was presented in State ex rel. Richards v. Pittsburgh, C. C. & St. L. R. Co. 53 Ohio St. 189, 41 N. E. 205, some propositions which are material here, and which might otherwise be regarded as doubtful, are determined in that case. Conclusions material to this case which are settled in that and in other cases, and statutory provisions cited in the briefs of counsel, may be stated without argument as being no longer open for discussion. Their statement will conduct us to the points in the present case entitled to further consideration. The propositions to be taken as established are: The state became the owner in fee of all the lands, which it originally used in the construction of its canal system, including the lands in controversy. Quo warranto will lie to protect the interest of the state in lands so acquired. The circuit court of Franklin county had jurisdiction of the subject of the action. No limitation bars the action, since it does not seek the forfeiture of a charter, or to prevent the exercise of a power or franchise under its charter. The statutes of the state empower the attorney general to make this relation without further authorization. To test the rights asserted by the railway companies under the lease from the city of Cleveland, it is not necessary that the city be joined as a party, and the deed of the governor to the city of Cleveland is valid and effective only so far as it is authorized by the act of April 29, 1872 (69 Ohio Laws, p. 182), or ratified by subsequent acts of the state.

The case cited (State ex rel. Richards v. Pittsburgh, C. C. & St. L. R. Co.) pre-

sents not only points of resemblance, but points of difference, which are of not less legal importance. That case affirmed the authority of the state by a proceeding in quo warranto to preserve and protect an interest which it retained in lands, notwithstanding its previous grant of a mere easement. It is no authority whatever for the statement that such an action may be maintained in a case where the state has no interest whatever to protect; and it leaves the question of the state's interest in the present case wholly unaffected. In the present case the grant in controversy was upon a valuable consideration; in the former case it was upon no consideration whatever. In that case nothing was granted but an easement. In the present case the act of the general assembly provided that "the governor on behalf of the state, being satisfied that said connection has been so made and approved and accepted by the board of public works, shall execute and deliver to the city of Cleveland a grant of all the interest of the state in that part of said Ohio canal herein described, to be forever used and occupied by said city, as its council shall determine, for any and all the purposes before mentioned." And the governor, in the exercise of the powers so conferred upon him, did "give, grant, and forever quitclaim unto the city of Cleveland and its assigns, all the right, title, and interest of the state of Ohio" in that part of the canal. In the case cited the city of Cincinnati vacated and abandoned Pearl street, which was a prominent portion of the grant; whereas, here the city has reserved the right to cross the premises leased to the railway company for such streets as it may desire to establish, without the payment of compensation therefor, and it is continuing in the exercise of that right. In that case nothing occurred after the making of the grant whereby the state could be said to be estopped from the assertion of the rights which it claimed, except the legal estoppel arising from its deed and the enactment by which it was supposed to be authorized; whereas, here are numerous acts out of which, by familiar doctrines of equity, estoppels arise against the prosecution of this action by the state, if equitable estoppels may be pleaded against the sovereign.

Moreover, the obvious attempt of the general assembly by a joint resolution to determine the present controversy in accordance with the claim of the plaintiffs in error presents an aspect of the case that was not there present. It should not need the citation of authorities to establish the proposition that a joint resolution is not an act of legislation, and that it cannot be 39 L.R.A. (N.S.)

effective for any purpose for which an exercise of legislative power is necessary, and if a revesting of the title to these lands in the state had occurred by reason of the transactions between the city and the railway companies, it should be conceded that the exercise of legislative power would be necessary to waive the right so revesting. But the action of the legislature in the appointment of a committee to consider and report on the subject of the present controversy, the consideration given to the subject and the report of that committee, followed by the joint resolution, served very conclusively to show the knowledge of the state during all the period of its acquiescence in the assertion by the city of Cleveland and the plaintiffs in error of the rights that are now challenged.

In support of the judgment below, it is urged that an estoppel cannot be pleaded against the state, and very much of the brief of the defendant in error is devoted to supporting that proposition. This portion of the brief shows conclusively that by established law the statute of limitations does not bar an action of this character: that mere laches cannot be pleaded against its prosecution, and that all persons dealing with public officials must take notice of the extent of their authority; but none of these propositions, nor all of them combined, are equivalent to the proposition that when the general assembly of the state, which is vested with all legislative power, and which is the source of power in cases of this character, actively participates in the encouragement of a course of dealing resting upon an assumed state of facts, the state does not thereby become bound. Unquestionably the general assembly represented the state in this matter, and in both the original act and in the subsequent act under which the plaintiffs in error expended money for establishing the boundaries of the premises conveyed, its concurrence and acquiescence with the knowledge clearly imputed to it serves to bind the state, for in this respect the state was acting, not in its capacity as a sovereign, but in its proprietary capacity as the owner of lands, and when it acts in that capacity it is bound by the same rules as those which it applies to its citizens. Nothing presented casts doubt upon the correctness of the view thus comprehensively stated by Ranney, J., in *State v. Butties*, 3 Ohio St. 309: "We agree . . . when she [the state] appears as a suitor in her courts to enforce her rights of property, she comes shorn of her attributes of sovereignty, and as a body politic, capable of contracting, suing, and holding property, is subject to those rules of justice and right which in her sovereign

character she has prescribed for the government of her people." In *State ex rel. Richards v. Pittsburgh, C. C. & St. L. R. Co.* supra, it was said: "This question of jurisdiction does not so much concern the ultimate rights of the parties as it does methods of procedure. The right of suitors respecting the subject-matter in dispute will be determined by applying to the facts, when ascertained, the same principles and rules of law, whether the action was commenced in this court in quo warranto or in the court of common pleas by a real action." A consequence which follows the application of this doctrine to the present case is that the state must fail in its action for want of a provision in the act and a stipulation in the deed for the reversion of title in the state, if the property should be used for a forbidden purpose.

The theory upon which the suit is prosecuted is that the designation of purposes for streets, etc., in the act providing for the grant to the city of Cleveland and carried into the terms of the governor's deed, operated as limitation upon the rights of the city and its assigns, to use the premises for other purposes, and that the devotion of the property to the uses contemplated by the lease of the city to the railway company operated as a perversion. But the state in its proprietary capacity is amenable—if we assume that there was a departure from the designated use—to the rule well established in this state that, however it may be with respect to deeds of gift, where deeds rest upon a valuable consideration, and a statement of inducements or purpose with respect to the use of property granted is disregarded, title will not revert in the grantor unless it be in pursuance of a stipulation in the grant that it shall revert.

In the case of *Ashland v. Greiner*, 58 Ohio St. 67, 50 N. E. 99, where in the opinion deeds of gift were expressly excluded from consideration, the case being one of grant upon consideration, it was said in the second proposition of the syllabus: "As said deed had no words of forfeiture or re-entry, the diverting of said lands to uses and purposes other than those expressed in the deed did not in legal effect revert title to said lands in the grantor or his heirs." Why should it have such effect in the present case? If by the terms of the grant to the city of Cleveland the state has divested itself of all interest in the lands conveyed, in what respect would it be benefited by an observance of the uses that were in mind at the time of the execution of the grant? But here is no perversion of a trust, or departure from the purposes in contemplation. For this conclusion, *Malone* 39 L.R.A. (N.S.)

v. Toledo, 28 Ohio St. 643, is ample authority. That case arose out of the disposition of lands which the state had acquired for canal purposes, and which it originally held by a title differing in no sense from that by which it held those here in controversy. That title, as is there held, was a title in fee simple. As the basis of the decision in that case, notice was taken of the familiar use of premises by streets and railroads in common, and it was said railroads cross highways, and no one has ever supposed that this was such an abandonment of the highway as that the soil reverted to the original owner. All the uses to which it was expected at the time of the grant that these lands would be devoted, and all the uses to which they are now devoted, are uses of like character. This conclusion is supported by other cases cited, as well as by the reasons involved.

The original petition in the case and the brief of the defendant in error wholly ignore the real nature of the transaction between the state and the city of Cleveland. Very obviously the general assembly was of the opinion that the substituted connection of the canal with the Cuyahoga river, which the city was required to construct at its own expense, acquiring the right of way therefore, was the equivalent to the state of the connection over the lands granted to the city. The making of that substituted connection was a valuable consideration for the grant. It is not intimated that the state was in any way defrauded, or even that the legislature exercised an erroneous judgment upon that subject, and yet it is insisted that the state, retaining all that it received in the way of consideration for the grant, may revoke the grant. Of course, there is assigned no reason equal to such a conclusion. In *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. ed. 773, Mr. Justice Story said: "But what, I repeat, is most material to be stated is that all this doctrine in relation to the King's prerogative of having a construction in his own favor is exclusively confined to cases of mere donation, flowing from the bounty of the Crown. Whenever the grant is upon a valuable consideration, the rule of construction ceases; and the grant is expounded exactly as it would be in the case of a private grant, favorably in the grantee. Why is this rule adopted? Plainly, because the grant is a contract, and is to be interpreted according to its fair meaning. It would be to the dishonor of the government that it should pocket a fair consideration, and then quibble as to the obscurities and implications of its own contract."

All agree, and this court has repeated

ly decided in the cases cited in the briefs, that the state became the owner in fee simple of all canal lands upon their construction. By the act of April 29, 1872, the general assembly authorized the governor to execute and deliver to the city of Cleveland a grant of all the interest of the state in the described portion of the canal, and thereupon the governor, being satisfied, according to the requirements of the act, that the city had done all things by it to be done, including the establishing of the substituted connection, executed to the city a deed whereby he did for divers considerations convey all the interest of the state

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to the city. There remains in the state no interest in the lands to be protected by quo warranto, the title of the city is an unqualified fee, and its lease to the railway company is valid. It cannot be necessary to point out other infirmities in the case of the state.

The judgment will be reversed, the demurrer to the petition will be sustained, and the petition dismissed.

Davis, Ch. J., and Price, Johnson, and Donahue, JJ., concur.

Spear, J., dissents.

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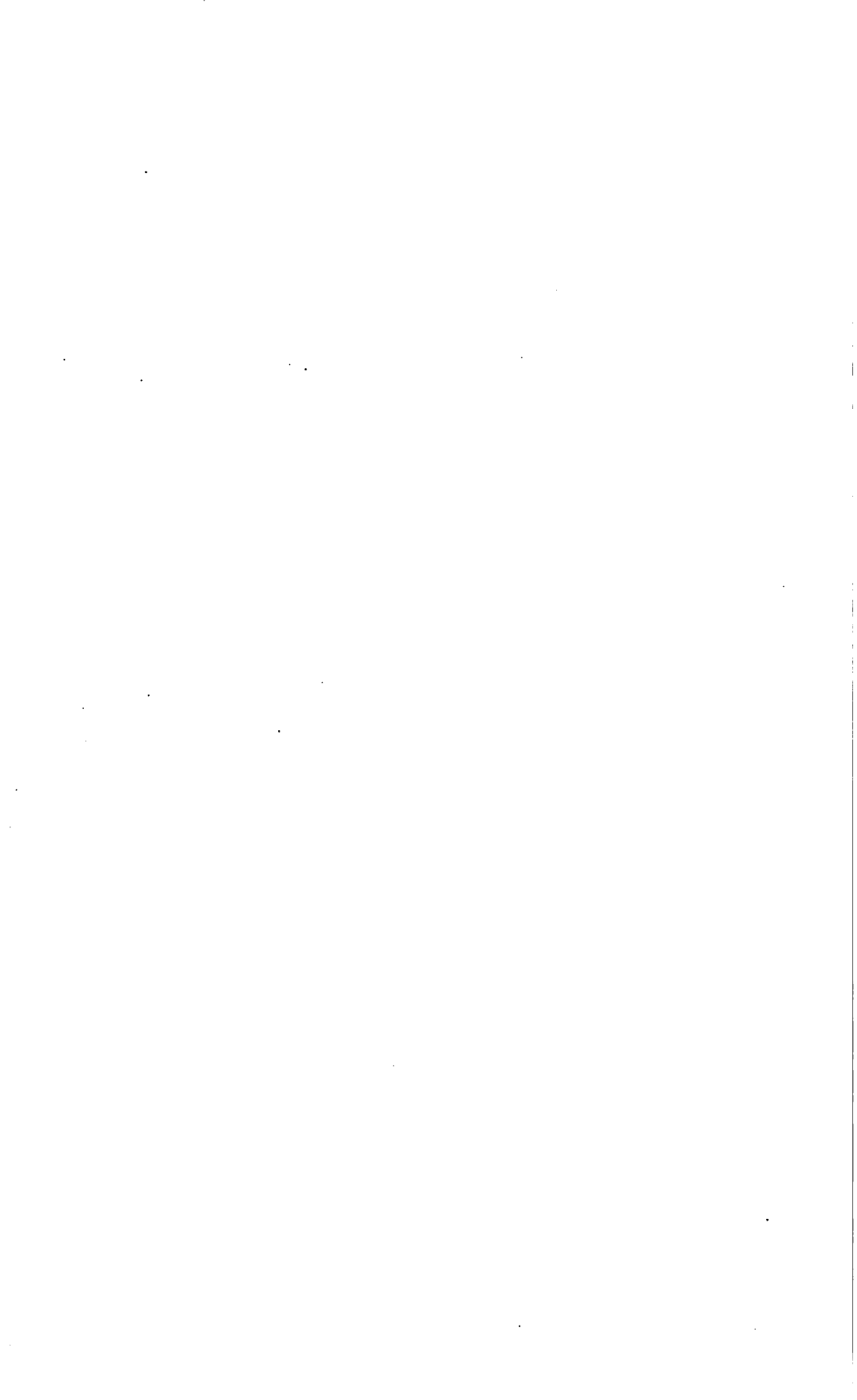
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(Separate Index to Notes Precedes this.)

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1. That a passenger on a street car rode on the platform when he might have ridden inside the car will not preclude his holding the company liable for an injury inflicted upon him while he was attempting to alight from the car at his destination. *Elliott v. Seattle, R. & S. R. Co.* 39: 608, 122 Pac. 614, — Wash. —.

2. The right to waive the tort, and sue in contract for conversion of property, does not fail because the property is consumed rather than converted into money. *Reynolds v. New York Trust Co.* 39: 391, 188 Fed. 611, 110 C. C. A. 409.

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Parties.

1. Although one holding a mortgage on property sought to be subjected to an improvement lien defaulted at the trial, which resulted in defeating the lien, he is a necessary party to an appeal from the judgment, since a reversal of the judgment would re-establish the lien, to his detriment. *Trippier v. Clifton*, 39: 522, 97 N. E. 791, — Ind. —.

Record.

2. A suggested amendment to a pleading not made part of the record by order of court or bill of exceptions cannot be considered on appeal. *Lewis v. Bowling Green R. Co.* 39: 929, 144 S. W. 377, 147 Ky. 460.

3. Where a vacation order of a judge certifies the presentation to him of bills of exception and a transcript of all the evidence, and certifies that, for identification, the bills were numbered and that the certificate of evidence was marked "certificate of evidence," and certifies that the bills were signed and that the certificate of evidence was also signed and ordered to be made a part of the record, the certificate of evidence which is found so marked in the record and referred to as such in the bill of exceptions, about which there is no question, is a part of the record and properly brings the evidence before the court. *Gross v. Gross*, 39: 261, 73 S. E. 961, — W. Va. —.

Objections and exceptions; raising questions in lower court.

4. An objection to the admission of any evidence which is based upon and calls attention to substantial defects in a count of a complaint merely, will not reach a misjoinder of actions or formal defects in plead- 39 L.R.A. (N.S.)

ing. *Sleeper v. Baker*, 39: 864, 134 N. W. 716, — N. D. —.

5. An objection to the introduction of any evidence, upon the ground that the complaint does not state facts sufficient to constitute a cause of action, must specially point out wherein the complaint is defective. *Sleeper v. Baker*, 39: 864, 134 N. W. 716, — N. D. —.

6. An exception to an instruction is sufficient to raise the question of its correctness, although no objection is made to it. *Campbell v. Chillicothe*, 39: 451, 144 S. W. 408, 239 Mo. 455.

7. An objection to the participation, on behalf of the prosecution, in a trial for homicide, of an attorney employed by private parties, made after an amendment to the information and resumption of the trial, is timely, and it is error to overrule the same. *McKay v. State*, 39: 714, 132 N. W. 741, 90 Neb. 63.

8. Objections to a pleading for duplicity can be raised only by motions to strike out or to compel the pleader to elect. *Gately v. Taylor*, 39: 472, 97 N. E. 619, 211 Mass. 60.

Presumptions.

9. Absence of a certificate that the printed case contains all the evidence in an attempt to review exceptions taken at the trial does not entitle the appellate court to assume that there was evidence at the trial sufficient to sustain the verdict, when the record does not disclose it, since such certificate is not necessary to raise such question. *Dupont v. Port Chester*, 39: 1167, 97 N. E. 735, 204 N. Y. 351.

10. A statutory provision that facts necessary to support a judgment founded on a special verdict shall be deemed to have been determined in conformity with the judgment, although omitted from the verdict, does not apply where there was a special request to submit the question to the jury. *Habegger v. King*, 39: 881, 135 N. W. 166, — Wis. —.

Discretionary matters.

11. Permitting an amendment of a plea of the statute of limitations so as to set out the subdivision of the section relied on is not an abuse of discretion where there is only one subdivision that is applicable so that the plea is sufficient without amendment. *St. Paul Title & T. Co. v. Stensgaard*, 39: 741, 121 Pac. 731, — Cal. —.

12. The granting of a preliminary injunction rests in the discretion of the trial court, not in its arbitrary, whimsical will, but in its sound judicial discretion, informed and guided by the established principles, rules, and practice of equity jurisprudence; and where the court has not departed from them, its injunctive orders may not be reversed without clear proof of an abuse of its discretion. *Kryptok Co. v. Stead Lens Co.* 39: 1, 190 Fed. 767, 111 C. C. A. 495.

13. It is error to deny a new trial where nominal damages only have been granted, to a woman against one who, after notice to refrain from doing so, sold intoxicating

liquors to her husband, which resulted in his assaulting her, destroying her property, and materially damaging her means of support, and humiliating and disgracing her. *Fleming v. Gemein*, 39: 315, 134 N. W. 969, 168 Mich. 541.

Questions not raised below.

14. Failure to join a woman in an action to hold her husband liable for injury inflicted by her in driving an automobile cannot be questioned for the first time on appeal. *Minor v. Mapes*, 39: 214, 144 S. W. 219, — Ark. —.

15. Failure to raise the question of the effect of failure to prove payment of premium in an action on an insurance policy is within a statute providing that in no case shall the appellate court decide any question which does not plainly appear to have been raised and decided below. *German Union F. Ins. Co. v. Fred G. Clarke Co.* 39: 829, 82 Atl. 974, 116 Md. 622.

16. Where an action upon a municipal contract void because in excess of the charter authority of the municipality was tried on the theory that the want of power to make the contract was properly raised, a reversal cannot be secured on appeal on the theory that it was not so raised, if no contention is made that the contract had been validated. *Perry Water, L. & I. Co. v. Perry*, 39: 72, 120 Pac. 582, 29 Okla. 593.

Errors waived or cured below.

17. The refusal of a nonsuit for failure of proofs is not ground for reversal if said proofs are afterwards supplied by either party in the progress of the trial. *Dennery v. Great Atlantic & Pacific Tea Co.* (N. J. Err. & App.) 39: 574, 81 Atl. 861, — N. J. —.

Review of facts.

18. An appellate court must consider whether or not a witness was an accomplice of accused, when an appeal from a conviction is upon the ground that the conviction was based upon the uncorroborated testimony of an accomplice. *People v. Coffey*, 39: 704, 119 Pac. 901, 161 Cal. 433.

19. The production by one found in possession of property recently stolen, of a signed and witnessed bill of sale of the property from a stranger, supported by unimpeached testimony of himself and the witnesses that he purchased and paid for it, is not sufficient to overcome the statutory presumption of larceny arising from such possession, so as to authorize the setting aside of a conviction for lack of evidence to support it. *State v. Gurr*, 39: 320, 120 Pac. 209, — Utah, —.

(Annotated)

Grounds for reversal.

20. The admission in evidence upon a trial for homicide, where the only question before the jury is whether or not the defendant committed the murder, of the clothing of the deceased, which in no way tends to identify the murderer, but tends merely to excite the passions and inflame the minds of the jurors, is error. *McKay v. State*, 39: 714, 132 N. W. 741, 90 Neb. 63.

21. It is error to take the right to recover against a municipal corporation for

injury caused by a defect in a sidewalk depend upon actual notice of the defect, if there is evidence tending to show that it was chargeable with constructive notice. *Campbell v. Chillicothe*, 39: 451, 144 S. W. 408, 239 Mo. 455.

22. Instructing a jury to allow damages for pain suffered by one killed by another's negligence, if any is shown by the record, is not reversible error, although the evidence shows instant death, since evidence of pain being absent, it must be presumed that the jury did not allow anything for it. *St. Louis & S. F. R. Co. v. Moore*, 39: 978, 58 So. 471, — Miss. —.

23. Where after an arraignment and plea of not guilty to an information for homicide, an amendment is allowed to correct a defect in the date of the crime, which was alleged therein as subsequent to the filing of the information, it is error for the trial court to require the accused, over his objection, immediately to proceed with the trial without arraignment under, and plea to, such amended information, and without giving him the statutory time in which to plead thereto. *McKay v. State*, 39: 714, 132 N. W. 741, 90 Neb. 63.

Judgment.

24. A conviction of murder will be set aside on appeal for unfairness, where the court room was filled with a hostile crowd who threatened lynching, so that the counsel called upon to defend accused did not dare ask the customary time for preparation, and the space about the judge, counsel, and witnesses was so filled with people that counsel for accused could not see the witnesses, and failed to see the jury until he arose to address them. *State v. Weldon*, 39: 667, 74 S. E. 43, — S. C. —.

(Annotated)

25. A ruling by an appellate court that in assessing benefits for a change in a highway, the court should have considered the history of the change, the fact that the municipality contemplated the change made, and its effect upon abutting property, is the law of the case upon a second appeal. *Park City Yacht Club v. Bridgeport*, 39: 478, 82 Atl. 1035, 85 Conn. 366.

APPRAISAL.

Of insurance loss, see Insurance, 12.

APPURTENANCES.

Easements as, see Easements, 1, 2

ARREST.

Release from, on bail, see Bail and Recognizance.

Of passenger, see Carriers, 2, 3.

ASSAULT AND BATTERY.

On passenger, see Carriers, 1.

Evidence in prosecution for, see Evidence, 22.

Homicide in defending third person against, see Homicide.

New trial for inadequacy of damages, see New Trial, 2.

One is guilty of assault with intent to kill who points a loaded revolver at another to compel him to do a specified act which the assailant has no right to demand, under threat to kill him if he does not comply with the demand, although death may be avoided by such compliance. *People v. Connors*, 39: 143, 97 N. E. 643, 253 Ill. 266. (Annotated)

ASSENT.

Estoppel by, see Estoppel, 2.

ASSESSMENT.

For insurance, see Insurance, 8, 9.

For public improvements, see Public Improvements.

ASSIGNMENT.

Draft as, see Bills and Notes, 1.

Of mortgage, see Mortgage, 3.

Right of set-off as against assignee, see Set-Off and Counterclaim, 2.

Set-off in action on corporation's note of debt due president personally, see Set-Off and Counterclaim, 3.

ASSUMPTION OF DEBT.

By grantee of land, see Mortgage, 1.

ATTACHMENT.

Liability of bond of constable for failure to return to defendant money paid to secure release of goods, see Bonds, 1.

Of mortgaged chattel, see Chattel Mortgage.

ATTORNEY GENERAL.

Right of governor to require attorney general to examine witnesses, see Governor, 1.

Construction of statute as to duty of attorney general to prosecute at request of governor, see Statutes, 5.

A proceeding for the examination of witnesses under the provisions of a prohibitory liquor law (Gen. Stat. 1909, § 4366) is a matter before an officer, in which the state is interested; and when required by the governor the attorney general has no discretion to refuse to prosecute in such a proceeding. *State ex rel. Stubbs v. Dawson*, 39: 993, 119 Pac. 360, 86 Kan. 180.

ATTORNEYS.

Objection to participation of special attorney in prosecution for homicide, see Appeal and Error, 7.

As to attorney general, see Attorney General.

Disqualification of judge to sit at disbarment proceedings, see Judges.

Right of attorney to whom client has assigned interest in action to attack judgment because of perjured testimony, see Judgment, 2.

Effect of slight indulgence to maker by attorney charged with collection of note, on surety's liability, see Principal and Surety, 3.

Liability of church for attorneys' fees, see Religious Societies.

The death pending appeal, of one of several attorneys who have agreed to share a contingent fee to be earned by the successful prosecution of a suit, will not deprive his estate of his share of the fee in case the judgment in favor of their client is affirmed, without allowance to the successors for their labor in the appellate court. *Senneff v. Healy*, 39: 219, 135 N. W. 27, — Iowa, —.

AUTHORITY.

Of agent, see Principal and Agent, 1.

AUTOMOBILES.

Objecting for first time on appeal to lack of parties in action for injury by, see Appeal and Error, 14.

Husband's liability for negligence of wife in driving, see Husband and Wife, 1.

Who is master of negligent chauffeur, see Master and Servant, 1.

Liability of father for negligence of son in operating, see Parent and Child, 2.

Authority of boy operating parent's machine to engage physician to attend person whom he injures, see Parent and Child, 1.

1. To sustain a recovery for injuries caused by being run down by an automobile owned by the defendant, while being operated by another, the plaintiff must show by a preponderance of the evidence that the person in charge of the machine was the defendant's servant, and was at the time of the accident engaged in the master's business or pleasure, with the master's knowledge and direction. *Neff v. Brandeis*, 39: 933, 135 N. W. 232, — Neb. —.

2. The driver of an automobile may be found to be negligent in running his machine at a speed of 10 or 12 miles an hour, on the parallel track past a street car which he has overtaken after it has stopped to discharge passengers from the front door, without taking precautions to ascertain if passengers will attempt to cross in front of the car, where there is a space of 60 feet between the car and the curb which the driver might have used. *Minor v. Mapes*, 39: 214, 144 S. W. 219, — Ark. —.

BAGGAGE.

In general, see Carriers, 14-16.

Innkeepers' liability for, see Innkeepers.

BAIL AND RECOGNIZANCE.

Burden of proof in habeas corpus proceeding for discharge on bail, see Habeas Corpus.

1. The fact that there is a conflict in the testimony at a hearing on the charge of a capital offense, before an examining magistrate, does not necessarily show that the proof of guilt is not evident or the pre-

sumption thereof not great, so that such magistrate may not refuse bail, but, if from the entire evidence a reasonable doubt of the guilt of the accused is not generated, the proof is evident and bail should be denied. *Re Thomas*, 39: 752, 93 Pac. 980, 20 Okla. 167.

2. The burden of proof being on one committed for a capital offense by an examining magistrate, to show that he is illegally deprived of his liberty, upon an application to the supreme court for bail by writ of habeas corpus, if, after hearing the whole evidence introduced on the application for bail, it is insufficient to generate in the mind of the court a reasonable doubt whether the accused committed the act charged and in so doing was guilty of a capital offense, such court will, in the absence of any exceptional circumstance, refuse bail. *Re Thomas*, 39: 752, 93 Pac. 980, 20 Okla. 167. (Annotated)

BAILMENT.

Liability of innkeeper as gratuitous bailee, see Innkeepers, 2.
Question for jury as to negligence, see Trial, 10.

BANKRUPTCY.

Federal bankruptcy court following state decisions, see Courts, 3.
Appointment of receiver in bankruptcy for insured as effecting change in title, see Insurance, 3.
When title passes so as to give trustee in bankruptcy, right to property, see Sale, 1.

1. One whose bonds have been converted and consumed by a brokerage firm cannot, upon the theory that the tort is both joint and several, so as to permit him to proceed in contract, prove his claim in bankruptcy proceedings both against the estate of the firm and that of an individual partner who is not shown to have participated in the conversion or benefited thereby. *Reynolds v. New York Trust Co.* 39: 391, 188 Fed. 611, 110 C. C. A. 409. (Annotated)

2. A contract, express or implied, for which claims may be filed under the bankruptcy act, includes quasi contracts to pay for property converted and consumed by the debtor. *Reynolds v. New York Trust Co.* 39: 391, 188 Fed. 611, 110 C. C. A. 409.

3. A bank cannot assent to the ratification by a partnership of the individual debt of a partner to it after the partnership has become insolvent, so as to be entitled to apply collateral held to secure firm obligations in satisfaction of such indebtedness. *Blake v. Atlantic Nat. Bank*, 39: 874, 82 Atl. 225, 33 R. I. 464. (Annotated)

BANKS.

Application of collateral held to secure firm obligations in satisfaction of individual debt of partner, see Bankruptcy, 3.

Negligence in acceptance of pledge, see Pledge and Collateral Security, 2.

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Proximate cause of loss to bank accepting stolen paying tax certificates, see Proximate Cause.

Stockholders.

1. A purchaser of bank stock may compel, by bill in equity, the transfer of the same on the books of the corporation, or he may sue in conversion and damages for the failure to so transfer. *Ardmore State Bank v. Mason*, 39: 292, 120 Pac. 1080, — Okla. —.

2. By-laws of a bank prohibiting the sale of stock while the holder is indebted to the bank do not apply to a sale by a pledgee who took the pledge to secure a debt at a time when no indebtedness to the bank existed, although, with knowledge of the pledge, the bank subsequently made a loan to the stockholder. *Ardmore State Bank v. Mason*, 39: 292, 120 Pac. 1080, — Okla. —.

3. The statutory lien of a bank on its stock for indebtedness of its holder is subordinate to that of the pledgee of the stock, who takes it to secure a loan at a time when the holder is not indebted to the bank, where, to the knowledge of the bank, the pledge was in existence when it made the loan for which the lien is claimed. *Ardmore State Bank v. Mason*, 39: 292, 120 Pac. 1080, — Okla. —. (Annotated)

Payment of checks; forgeries.

As to rights and liabilities on checks of persons other than banks, see Checks.

4. A bank is liable for paying a check which is countermanded by the drawer before accepted by the bank, although it has been presented to the bank prior to countermand, in the absence of funds and a promise secured that it would be credited to the account of the payee. *First Nat. Bank v. School Dist. No. 4*, 39: 655, 120 Pac. 614, — Okla. —. (Annotated)

5. Checks are but inland bills of exchange and subject to all the rules applicable to instruments of that character, and impose no obligation upon the drawees until accepted; and, until presented and paid, are revocable by the drawer, who has the legal control of the money to his credit until actual acceptance or payment of the checks. *First Nat. Bank v. School Dist. No. 4*, 39: 655, 120 Pac. 614, — Okla. —.

6. The indorsement of a draft in his own name by one into whose hands it falls by mistake, being payable to another person bearing the same name, is a forgery, and will not protect a bank which innocently cashes it upon such indorsement against the claim of the true owner. *Thomas v. First Nat. Bank*, 39: 355, 58 So. 478, — Miss. —.

Certificate of deposit.

7. A bank is not bound to pay over to an administrator money deposited by a person since deceased, until the certificate of deposit executed by it is surrendered or impossibility of surrender is shown. *Divine v. Unaka Nat. Bank*, 39: 586, 140 S. W. 747, — Tenn. —.

Insolvency; trusts.

8. A bank which, while hopelessly insolvent, sells a draft when the statute prohibits it from receiving money, takes the money so paid if the draft is dishonored as a trustee *ex maleficio*. *Widman v. Kellogg*, 39: 563, 133 N. W. 1020, — N. D. —.

(Annotated)

9. Where an agent each day secures a bank draft to forward the receipts of the business, a finding that he deposited the receipts and secured drafts therefor means that he purchased drafts with the receipts. *Widman v. Kellogg*, 39: 563, 133 N. W. 1020, — N. D. —.

10. A receiver appointed for an insolvent bank which has sold a worthless draft takes the funds paid for it as a trustee. *Widman v. Kellogg*, 39: 563, 133 N. W. 1020, — N. D. —.

11. When funds received by an insolvent bank which goes into the hands of a receiver as a trust are not commingled with any of the assets of the bank except cash assets, the preference of the beneficiary is limited to the cash funds of which the receiver took possession, when distinguishable from the other assets of the estate going into his hands. *Widman v. Kellogg*, 39: 563, 133 N. W. 1020, — N. D. —.

12. A package of bills marked with the owner's initials, and delivered to a bank for safe-keeping, and for which a receipt stating that fact is executed by the cashier, is a special deposit, which the owner is entitled to have returned to him in case the assets of the bank pass into the hands of a receiver. *Fogg v. Tyler*, 39: 847, 82 Atl. 1008, — Me. —.

(Annotated)

13. That a package of bills delivered to a bank for safe-keeping as a special deposit cannot be identified when the assets pass into the hands of a receiver does not destroy the prior right of the owner to payment out of such assets, if the cash on hand never fell below the amount of the deposit after it was made. *Fogg v. Tyler*, 39: 847, 82 Atl. 1008, — Me. —.

Savings banks.

When limitations begin to run against liability, see Limitation of Actions, 2.

Pleading in action to hold trustees personally liable, see Pleading, 3.

14. Trustees of a savings bank are personally liable for money lost through loans made without observing the limitations imposed by the rules and by-laws of the institution. *Greenfield Sav. Bank v. Abercrombie*, 39: 173, 97 N. E. 897, 211 Mass. 252.

(Annotated)

15. Salaried trustees of a savings bank are personally liable for loss of its funds which they lend in excess of the statutory limit for the security furnished if, by the exercise of reasonable care and prudence, they ought to have known that they were exceeding the limit. *Greenfield Sav. Bank v. Abercrombie*, 39: 173, 97 N. E. 897, 211 Mass. 252.

16. Statutory requirements that, in 39 L.R.A. (N.S.)

lending money by a savings bank, only first mortgages shall be taken, after report on the value of the property, and that all applications for loans shall be in writing, are mandatory, and trustees will be personally responsible for money lost through loans made without observing these requirements. *Greenfield Sav. Bank v. Abercrombie*, 39: 173, 97 N. E. 897, 211 Mass. 252.

BAR ASSOCIATION.

Disqualification of judge who is member of, to sit in disbarment proceedings, see Judges.

BARRIERS.

Failure to erect barriers in highway, see Trial, 6.

BASTARDY.

Requiring physician or midwife to certify as to legitimacy or illegitimacy, see Constitutional Law, 9.

BATTERY.

See Assault and Battery.

BAWDY HOUSE.

See Disorderly Houses.

BENEFITS.

Estoppel by receiving, see Estoppel, 2.

BEST AND SECONDARY EVIDENCE.

See Evidence, 9.

BILL OF SALE.

Production of, by one accused of stealing property, see Appeal and Error, 19.

BILLS AND NOTES.

Alteration of, see Alteration of Instruments.

Payment of forged draft by bank, see Banks, 6.

As to certificate of deposit, see Banks, 7.

Taking money for draft by bank when insolvent, see Banks, 8-10.

As to checks, see Checks.

Necessity of new consideration for ratification altered note, see Contracts, 3.

Right to refuse payment of draft the proceeds of which are to be used in an illegal transaction, see Contracts, 7.

Right of one paying draft against bill of lading for goods shipped to another to maintain action against carrier, see Parties, 2.

Pleading as to, see Pleading, 7.

Surety on, see Principal and Surety. Set-off in action on, see Set-Off and Counterclaim, 1, 2.

Subrogation of indorsers of note given to pay judgment, to judgment, see Subrogation, 2.

Usury in, see Usury.

1. A draft drawn in the ordinary form does not constitute an equitable assignment *pro tanto* of funds in the hands of the drawee to the credit of the drawer, before such draft has been accepted or presented for payment. *First Nat. Bank v. School Dist. No. 4*, 39: 655, 120 Pac. 614, — Okla. —

Actions; defenses.

2. Payment of a promissory note cannot be avoided on the ground of failure of consideration, where the answer and proofs admit that there was not a total failure of consideration and that the maker in fact received and retains a part of the agreed consideration. *Daniels v. Englehart*, 39: 938, 111 Pac. 3, 18 Idaho, 548.

(Annotated)

3. The maker of a note as to which there has been a partial failure of consideration, in order to obtain relief, must either rescind the contract and return the consideration received, or claim damages for breach of the contract, or pursue some remedy whereby the holder of the note may be enabled to receive just compensation for the part of the consideration which actually passed. *Daniels v. Englehart*, 39: 938, 111 Pac. 3, 18 Idaho, 548.

BILLS OF LADING.

Right of one who is to be notified of arrival of goods consigned to another to maintain action against carrier, see Parties, 2.

BIRTHS.

Validity of statute as to registration of, see Constitutional Law, 9.

BLASTING.

Liability for negligence of independent contractor in, see Master and Servant, 8, 9.

BOARDS.

Validity of contract to pay for services in selling goods to public board, see Contracts, 6.

BONA FIDE PURCHASERS.

Of checks, see Checks.

BONDS.

Bail bonds, see Bail and Recognizance. Conversion of, by bankrupt brokerage firm, see Bankruptcy, 1.

Constitutionality of statute as to contractor's bond see Constitutional Law, 5, 6; Statutes, 3.

Failure of town board to require bond upon making contract, see Contracts, 1.

Of guardian, see Guardian and Ward. Liability and release of surety on, generally, see Principal and Surety.

1. The bond of a constable is not subject to forfeiture, thereby subjecting the sureties to liability thereon, for failure to return to the defendant, upon the success-
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ful termination of an attachment suit, the amount of the plaintiff's claim, which the defendant paid to the officer at the time of the levy, to secure the release of the goods attached, and which the officer paid to the plaintiff's attorney, as this act was not performed in furtherance of the duty of such officer. *Jersey City Use of Elliott v. Schoppe* (N. J. Err. & App.) 39: 577, 82 Atl. 913, — N. J. — (Annotated)
State bonds.

2. The burning of the state capitol building creates an emergency for the securing of money with which to replace it, within the provision of a Constitution authorizing the submission to the voters of a proposition to issue bonds in case of unforeseen emergencies. *Church v. Hadley*, 39: 248, 145 S. W. 8, — Mo. —

3. The fund commissioners may, after they have failed to sell the bonds by their own efforts, pay a commission to brokers to dispose of them, under a statute providing for the issuance of a certain amount of bonds to build a state capitol, which shall be sold for not less than par, and the proceeds, which are estimated by the statute to equal the aggregate amount of bonds authorized to be issued, "more or less," appropriated to the construction of the building. *Church v. Hadley*, 39: 248, 145 S. W. 8, — Mo. — (Annotated)

BONUS.

To purchasing agent to secure his business, see Contracts, 8; Evidence, 17 a.

BOUNDARIES.

The boundary and jurisdiction of a state which has been along the main channel of a stream is not changed by the construction by a railroad company, of a dam which throws the main channel to the other side of an island for the purpose of convenience in the construction of a bridge. *State v. Bowen*, 39: 200, 135 N. W. 494, — Wis. — (Annotated)

BRIBERY.

Corroboration of testimony of accomplice, see Evidence, 33-36.

Acceptance of a gift for prior official action without corrupt private understanding is not bribery. *State v. Coffey*, 39: 704, 119 Pac. 901, 161 Cal. 433.

BRIDGES.

Change of channel of boundary stream by construction of, see Boundaries.

Require removal of building interfering with operation of drawbridge, see Estoppel, 1; Parties, 5; Waters, 1, 2.

BROKERS.

Proving claim in bankruptcy both against estate of brokerage firm and that of individual partner, see Bankruptcy, 1.

Right to pay commission to brokers for disposing of state bonds, see Bonds, 3.

Parol evidence to show agency, see Evidence, 14.

Parol evidence in action to recover secret profits, see Evidence, 14.

BUILDING CONTRACTS.

Measure of damages on, see Damages, 6.

BUILDINGS.

Building contracts, see Building Contracts.

Measure of damages for wrongfully enjoining erection of, see Damages, 12.

Removal of building interfering with drawbridge, see Estoppel, 1; Parties, 5; Waters, 1, 2.

Right of one wrongfully enjoined from erecting to damages, see Injunction, 5.

Demurrer to allegation that owner of building had failed to provide means for extinguishment of fire, see Pleading, 13.

Effect of landlord's failure to equip buildings with fire escapes on right to recover rent, see Landlord and Tenant, 5, 6.

1. A property owner who has provided statutory fire escapes and rented certain stores above the second story in the building to firms engaged in a legitimate manufacturing business is not bound to exercise supervision over the portions of the building rented, so as to insure that the passages or entrances to the fire escapes are at all times kept open. *West v. Inman*, 39: 744, 74 S. E. 527, 137 Ga. 822. (Annotated)

2. A property owner who has provided statutory fire escapes and rented stores above the second story in the building to firms engaged in legitimate manufacturing business is not liable in damages to an employee in the building working on a floor above the second, who suffers injuries from fire in consequence of obstructions placed in the passageway to the fire escape by a tenant who had rented that portion of the building around and about the escape. *West v. Inman*, 39: 744, 74 S. E. 527, 137 Ga. 822.

BULK SALES.

Regulation of, see Fraudulent Conveyances.

BURDEN OF PROOF.

See Evidence, 1-8.

BUSINESS.

Unfair competition, see Unfair Competition.

CANCELATION OF INSTRUMENTS.

Of insurance policy, see Insurance, 2. 39 L.R.A. (N.S.)

CANDIDATES.

Power of political committee to pass on eligibility of, see Elections.

CAPITOL.

Burning of state capitol as an emergency justifying issuance of state bonds, see Bonds, 2.

CARRIERS.

Injury by automobile to passenger alighting from street car, see Automobile, 2.

Damages in action against, see Damages, 4.

Liability for false imprisonment by special officer, see False Imprisonment.

Liability for act of station agent in instituting wrongful search, see Master and Servant, 5a.

Right of one who is to be notified of arrival of goods consigned to another to maintain action against carrier, see Parties, 2.

Instructions as to duty to protect passenger from insult, see Trial, 12.

Assault; arrest.

Evidence on question of damages for, see Evidence, 23.

Evidence as to authority of conductor to cause arrest, see Evidence, 26.

Instructions in action for false imprisonment, see Trial, 12, 16.

1. A street railway company is liable for the death of a boy whom the motorman in charge of the car has received for transportation to the police station, where he refuses to permit him to leave the car, and in attempting to restrain him from doing so the boy falls under the wheels and is killed, since the boy, being a passenger, is entitled to treatment as such, and to have the car stopped at his request to give him an opportunity safely to alight. *Lewis v. Bowling Green R. Co.* 39: 929, 144 S. W. 377, 147 Ky. 460.

2. Express authority to a conductor to cause the arrest and detention of a witness to disorderly conduct on the train is not necessary to render a railroad company liable for such arrest and detention of a passenger, as a witness against a passenger whom the conductor, while acting within the line of his duty, caused to be arrested. *New York, P. & N. R. Co. v. Waldron*, 39: 502, 82 Atl. 709, 116 Md. 441.

3. A railroad company is liable for false imprisonment, if its conductor, when directing officers to arrest a disorderly passenger, causes him to lock up another passenger who merely witnessed the disorder, as a witness against the guilty party. *New York, P. & N. R. Co. v. Waldron*, 39: 502, 82 Atl. 709, 116 Md. 441. (Annotated) Measure of care required; negligence generally.

Presumption and burden of proof as to negligence, see Evidence, 5.

4. The conductor is not bound to stop a car between stations in a subway to per-

mit a passenger to alight to recover property accidentally dropped from the car, where to do so would involve risk of collision and place the passengers in peril. *Bursteen v. Boston Elevated R. Co.* 39: 313, 98 N. E. 27, 211 Mass. 459. (Annotated)

5. A railroad company is not liable for injury to a pregnant woman from sight of a lunatic in the car who was acting strangely, where its employees had no knowledge of her condition, and there was nothing in the conduct of the lunatic to apprise a person of ordinary prudence that danger to other passengers was to be anticipated. *Louisville & N. R. Co. v. Brewer*, 39: 647, 143 S. W. 1014, 147 Ky. 166. (Annotated)

6. A carrier is liable to a passenger who holds a through ticket over its road but who must make a change of trains to reach her destination, for the failure and refusal of its employees to inform such passenger, upon her repeated requests for information, of the place where such change is to be made, by reason of which failure the passenger is carried past her destination, and is required to take passage upon another railroad and to expend an additional sum for fare, and is caused to suffer a loss of time and certain inconveniences. *Lilly v. St. Louis & S. F. R. Co.* 39: 663, 122 Pac. 502, — Okla. —. (Annotated)

7. A street railway company which runs a car at high and dangerous speed without warning, past another which is so overcrowded that the passengers in moving about crowd one of their number, who is standing on the platform, over the line of safety between the two tracks, may be liable for injury to him through collision with the car so operated. *Elliott v. Seattle, R. & S. R. Co.* 39: 608, 122 Pac. 614, — Wash. —.

Duty as to vehicle or place of riding.

8. A street car company which by ordinance is bound to maintain gates upon the sides of car platforms next to parallel tracks is liable for injury to a passenger crowded off the platform and injured by a passing car, although the gate was opened by a fellow passenger. *Elliott v. Seattle, R. & S. R. Co.* 39: 608, 122 Pac. 614, — Wash. —.

9. A street car company is not liable for injury to a passenger who falls from the step of a car which is slippery because of tobacco juice which has been expectorated there, if there is nothing to show that it had been there any length of time, and the conductor is not shown to have been negligent in failing to discover it before the accident happened. *Hotenbrink v. Boston Elevated R. Co.* 39: 419, 97 N. E. 624, 211 Mass. 77. (Annotated)

Ejection of passenger.

10. One holding a return trip railroad ticket which must be validated at the intermediate terminal to be good for return, who applies to the proper officer for validation, and is referred to another official in another city, who refuses to validate the ticket because of alleged want of authority, 39 L.R.A. (N.S.)

informing the ticket holder that the ticket will not be honored, is not deprived of the right to hold the railroad company liable for his ejection from the train by presenting a local ticket to pass the gate keeper, who refuses to pass him on his invalidated ticket; and it is immaterial that the gate-keeper's refusal to honor the ticket was a breach of the carriage contract giving a right of action. *Atchison, T. & S. F. R. Co. v. Lucas*, 39: 512, 144 S. W. 1126, — Tex. —.

Injuries in getting on or off.

Fact that passenger rode on platform as defense in action for injury while alighting from car, see *Action or Suit*, 2.

Presumption of negligence of carrier, see *Evidence*, 5.

Question for jury as to negligence, see *Trial*, 5.

11. One is negligent as matter of law in attempting to board a street car when the vestibule doors are closed and it is in motion, so that all that he can do is to stand on the step and maintain his position by clinging to the hand-holds. *Sigl v. Green Bay Traction Co.* 39: 65, 135 N. W. 506, — Wis. —.

Stations; approaches; platforms.

12. A railroad company is not negligent in placing, in the daytime, a few ties necessary for repairing its tracks along the path between the car exit and the highway at a flag station. *Fulghum v. Atlantic C. L. R. Co.* 39: 558, 74 S. E. 584, 158 N. C. 555. (Annotated)

13. A passenger, in attempting to reach the highway from a car exit along a path upon which ties have been placed for repair purpose, is negligent in stepping upon one which is wet and slippery, and is lying in an inclined position, when he might have stepped over it, or gone around it in safety, and cannot therefore hold the railroad company liable for a resulting injury. *Fulghum v. Atlantic C. L. R. Co.* 39: 558, 74 S. E. 584, 158 N. C. 555.

Baggage.

14. The mere fact that articles tendered by a passenger for transportation as baggage are packed in a basket does not charge the carrier with notice of their character, so as to charge it with liability for their loss as baggage in case they are not properly checked. *St. Louis, I. M. & S. R. Co. v. Miller*, 39: 634, 145 S. W. 889, — Ark. —.

15. Bed linen and other articles designed for use in his business by one moving from one locality to another to engage in the hotel business cannot be carried by him as baggage at the risk of the carrier. *St. Louis, I. M. & S. R. Co. v. Miller*, 39: 634, 145 S. W. 889, — Ark. —. (Annotated)

16. A carrier which accepts for transportation as baggage, articles known by it to be freight, assumes the liability of a freight carrier, and may collect the regular transportation charge where the statute prohibits all discrimination in rates. *St. Louis,*

I. & M. & S. R. Co. v. Miller. 39: 634, 145 S. W. 889, — Ark. —
Carrying live stock.

17. A railroad company which has taken an animal for transportation on a regular freight schedule is not liable for its loss because it refuses to attach the car to a passenger train or otherwise hasten the shipment, upon receiving notice that the animal is ill, where the train carrying it is substantially on schedule time, and there is no faster freight train to which it could be attached. *Pine Bros. v. Chicago, B. & Q. R. Co.* 39: 639, 133 N. W. 128, — Iowa, —
 (Annotated)

Discrimination; exclusion from premises.

18. A railway company has the right to exclude from its depots and warehouses persons who come there in an intoxicated condition, and who are turbulent and troublesome and disturb and interfere with the agents and employees of the company in the discharge of their work, and may also exclude therefrom those who are reported to be dishonest, and on account of whose past presence in and about its depots and warehouses freight had been removed without the company's consent, and for which it was compelled to pay the consignee the value thereof. *Chicago, R. I. & P. R. Co. v. Armstrong*, 39: 126, 120 Pac. 952, — Okla. —

19. A railroad company may justify the exclusion of a particular drayman from its premises, to the injury of his business, by showing that, if he was permitted upon the premises he would go about unattended, and that merchandise had disappeared for which the railroad was compelled to pay; while he was about the premises that he was frequently intoxicated; was quarrelsome and interfered with employees in the performance of their duties, and had been arrested for intoxication and theft. *Chicago, R. I. & P. R. Co. v. Armstrong*, 39: 26, 120 Pac. 952, — Okla. — (Annotated)

CARS.

Insurance of private railroad cars, see Insurance, 12, 13.

CARTMEN.

Discrimination between, by carrier, see Carriers, 19.

CASE.

Conspiracy to induce breach of contract, see Conspiracy, 2.

CATTLE.

Transportation of, see Carriers, 17.

CERTIFICATE.

Of judge to record on appeal, see Appeal and Error, 3.

Effect of absence of certificate that printed case contains on the evidence, see Appeal and Error, 9.

Of deposit, see Banks, 7.

39 L.R.A.(N.S.)

Negligence of city officers in issuing duplicate paving tax certificates, see Evidence, 38.

Proximate cause of loss to bank accepting stolen paving tax certificates, see Proximate Cause.

CERTIORARI.

Certiorari is the proper remedy to review the decision of the governor in removing a county official from office. *State ex rel. Kinsella v. Eberhart*, 39: 788, 133 N. W. 857, 116 Minn. 313.

CHARITIES.

1. The fact that a public charitable hospital receives pay from a patient for lodging and care does not affect its character as a "charitable institution," nor its rights or liabilities as such in relation to such a patient. *Taylor v. Protestant Hospital Asso.* 39: 427, 96 N. E. 1089, 85 Ohio St. 90.

2. A public charitable hospital, organized as such and open to all persons, although conducted under private management, is not liable for injuries to a patient of the hospital, resulting from the negligence of a nurse employed by it. *Taylor v. Protestant Hospital Asso.* 39: 427, 86 N. E. 1089, 85 Ohio St. 90.

CHATTEL MORTGAGE.

Evidence in replevin suit to gain possession of mortgaged chattels, see Evidence, 10.

Right to jury trial in trover to recover possession of mortgaged chattel, see Jury, 3.

1. The attachment of a mortgaged chattel as the property of the mortgagor pending a suit for strict foreclosure of the mortgage is subject to the determination of the foreclosure suit, even though the attachment was levied and the foreclosure suit begun when the property was temporarily in another state. *North Carolina Land & Lumber Co. v. Boyer*, 39: 627, 191 Fed. 552, 112 C. C. A. 162.

2. The declaration of a forfeiture and institution of a proceeding strictly to foreclose a mortgage on chattels vest title in the mortgagee which, when judicially established by judgment, takes precedence of an attachment levied against the property as that of the mortgagor after the foreclosure suit was begun. *North Carolina Land & Lumber Co. v. Boyer*, 39: 627, 191 Fed. 552, 112 C. C. A. 162.

3. The fact that a mortgaged chattel is temporarily out of the state when a forfeiture is declared and proceedings for strict foreclosure instituted does not prevent the title from passing to the mortgagee, which he can assert against subsequent attachments of the property in the state where the property is found as that of the mortgagor. *North Carolina Land & Lumber Co. v. Boyer*, 39: 627, 191 Fed. 552, 112 C. C. A. 162. (Annotated)

CHATELS.

Mortgage on, see Chattel Mortgage.

CHAUFFEUR.

Negligence of, see Automobiles.

CHECKS.

As to duties and liability of bank with respect to, see Banks, 4, 5.

Sufficiency of pleading to show bona fides of purchase, see Pleading, 6.

1. The bona fides of one purchasing a check is not destroyed by the fact that he knows there are no funds on deposit to meet it. *Johnson v. Harrison*, 39: 1207, 97 N. E. 930, — Ind. —. (Annotated)

2. That one takes an overdue check from the payee does not, in the absence of other suspicious circumstances, subject him to equitable defense in an action against the drawer. *Johnson v. Harrison*, 39: 1207, 97 N. E. 930, — Ind. —.

3. One who takes from a payee, who indorses the instrument, a check with the understanding that he is to lend money to the drawer, with the check as security, is a first holder, and not entitled to the rights of a bona fide indorsee, and cannot use any part of the proceeds in satisfaction of his claim against the indorser. *Johnson v. Harrison*, 39: 1207, 97 N. E. 930, — Ind. —.

4. That the one attempting to raise a loan on a check for the benefit of its maker is willing to have a material portion of the proceeds applied on his own debt to the one to whom the paper is offered charges the latter with the duty of inquiring from the maker as to the facts of the transaction, and he can gain no rights in excess of the authority actually conferred on the agent. *Johnson v. Harrison*, 39: 1207, 97 N. E. 930, — Ind. —.

5. One who draws a check and places it in possession of another assumes, as against a bona fide purchaser, the risk of its being diverted from the purpose for which it was executed. *Johnson v. Harrison*, 39: 1207, 97 N. E. 930, — Ind. —.

CHURCHES.

See Religious Societies.

CIVIL DAMAGES.

Refusal of new trial because of inadequacy of damages in action for, see Appeal and Error, 13.

Competency of witness in action under civil damage act, see Witnesses, 1.

CLAIMS.

Against estates, see Bankruptcy.

CLASSIFICATION.

By statute, see Constitutional Law, 2, 3.

CLOTHING.

Admission of, in evidence, see Appeal and Error, 20.

COLLATERAL SECURITY.

See Pledge and Collateral Security.

COMBINATIONS.

Illegal Combinations, see Monopoly and Combinations.

COMITY.

See Conflict of Laws.

COMMERCE.

A package, to be unbroken within the meaning of a law permitting liquor to be delivered in unbroken packages in dry territory, need not necessarily be the one received by the wholesaler, but he may fill a smaller receptacle, as a demijohn, from a larger one, and deliver it in the unbroken form in which he prepares it. *State v. Maire*, 39: 1051, 120 Pac. 87, 66 Wash. 591. (Annotated)

COMMERCIAL TRAVELERS.

Authority of, see Principal and Agent.

COMMISSIONERS.

Validity of regulations by food commissioner, see Food.

COMMISSION GOVERNMENT.

See Municipal Corporations, 1.

COMMITTEE.

Of political party, see Elections.

COMMON CARRIERS.

See Carriers.

COMMUNITY PROPERTY.

See Husband and Wife, 3a; Taxes, 3.

COMPARATIVE INJURY.

Doctrine of, in suit to enjoin infringement of patents, see Injunction, 2.

COMPENSATION.

Compensation of attorneys, see Attorneys.

Of attorney acting as special prosecutor for the state at request of private parties, see District and Prosecuting Attorneys, 3.

Requiring physician or midwife to supply information without compensation, see Constitutional Law, 9.

For taking of property, see Eminent Domain.

Of officer generally, see Officers, 3.

COMPLAINT.

Of plaintiff, see Pleading, 2-10.

CONCEALMENT.

Effect of, on running of limitations, see Limitations of Actions, 3.

CONCLUSIONS.

In pleading, see Pleading, 13.

CONDEMNATION.

Of property, see Eminent Domain

CONDITION.

Of stockholder's right to maintain action, see Corporations, 4.

Relating to real property, see Covenants and Conditions.

In insurance contract, see Insurance.

Of revocation of grant of land by state, see State.

CONDONATION.

In divorce case, see Divorce and Separation, 6.

CONFIDENTIAL RELATIONS.

What constitutes confidential relation which will sustain parol promise to hold property conveyed in trust, see Trusts, 1.

CONFLICT OF LAWS.

Admissibility of judgment of other state, see Evidence, 10.

Action by foreign administrator, see Executors and Administrators, 2, 3.

The courts of a state where gambling transactions are illegal will not enforce a contract growing out of such transaction made in another state, even though the transaction is valid there. *Burrus v. Witcover*, 39: 1005, 74 S. E. 11, 158 N. C. 384.

CONSENT.

Estoppel by, see Estoppel, 2.

Of parent to enlistment of son in militia, see Militia.

CONSIDERATION.

Failure of, as defense in action on note, see Bills and Notes, 2, 3.

Of contract, see Contracts, 3.

Illegality of consideration for contract, see Contracts, 5-7.

Parol evidence as to, see Evidence, 12.

Necessity of return of, on revocation of grant of lands by state, see State.

CONSPIRACY.

Jurisdiction of equity in case of, see Equity, 1.

Injunction against, see Injunction, 3.

Giving perjured testimony in pursuance of, see Judgment, 2; Perjury, 1.

1. In order to sustain a civil action for conspiracy it is generally necessary that there shall be an averment and proof of the commission of an act which, if done by one alone, would at the common law constitute a ground for action on the case. *Sleeper v. Baker*, 39: 864, 134 N. W. 716. — N. D. —

2. The civil action of conspiracy is a tort action, and cannot in general be maintained for inducing a third person to break his contract with the plaintiff, except where direct fraud or force or coercion has been used: the consequence at law being only a broken contract, for which the party to the contract may have his remedy by suing 39 L.R.A. (N.S.)

upon it. *Sleeper v. Baker*, 39: 864, 134 N. W. 716, — N. D. —

CONSTABLE.

Bond of, see Bonds, 1.

CONSTITUTIONAL LAW.

Former jeopardy, see Constitutional Law, 1-3.

As to taking property for public use, see Eminent Domain.

As to enactment of statute, see Statutes.

Ex post facto laws.

1. A statute providing that a person acquitted of a criminal charge on the ground that he was insane when the offense was committed, shall be committed to the asylum for the dangerous insane, and shall not be liberated therefrom except as prescribed in the act, is not *ex post facto* as to a person tried and acquitted on that ground after the statute was enacted for an offense committed before its passage. *Re Clark*, 39: 680, 121 Pac. 492, 86 Kan. 539.

Equal protection and privileges.

See also *infra*, 5.

2. An employees' insurance act which applies to employers employing five or more workmen or operatives does not make an unjust or arbitrary classification. *State ex rel. Yaple v. Creamer*, 39: 694, 97 N. E. 602, 85 Ohio St. 349.

3. A statute making it a misdemeanor to take usury on loans secured by household or kitchen furniture is not invalid as tending to deprive persons lending on such security of the equal protection of the laws, since such articles furnish a proper basis for classification in dealing with usurious loans. *State v. Davis*, 39: 136, 73 S. E. 130, 157 N. C. 648.

Due process of law.

4. No public policy of the state can be allowed to override the positive guaranties of the Constitution, or devalue persons of their title and property except in the way the law provides. *Hill v. Woodward*, 39: 538, 57 So. 294, — Miss. —

5. The attempt to make an owner who fails to take from one contracting to construct for him a ditch or reservoir a bond conditioned to pay all claims for materials, farm produce, provisions, or goods of any kind furnished the contractor or subcontractor, personally liable for such claims, is invalid, as taking property without due process of law, and denying him the equal protection of the laws, so far as it attempts to include claims for materials which do not go to enhance the value of his property. *George Bolln Co. v. North Platte Valley Irrig. Co.* 39: 868, 121 Pac. 22, — Wyo. — (Annotated)

6. Limiting the surety which a property owner may take from one contracting to do work for him to secure payment of laborers and materialmen to incorporated companies deprives him of his liberty to contract, and denies him the equal protection of the laws. *George Bolln Co. v. North*

Platte Valley Irrig. Co. 39: 868, 121 Pac. 22, — Wyo. —

7. A statute providing that when a person is acquitted of a criminal charge on the ground of insanity when the offense was committed, the jury shall so state in their verdict and shall pass specifically on the question of sanity, and thereupon such person shall be committed to asylum for the dangerous insane, and shall not be liberated except upon an order of the court committing him thereto, and until the superintendent of such asylum shall certify in writing to such committing court that in his opinion such person is wholly recovered, and that no person will be in danger by his discharge, is not unconstitutional as being a denial of due process of law within the provisions of the Federal or state Constitution relating thereto. *Re Clark*, 39: 680, 121 Pac. 492, 86 Kan. 539.

8. An employee is not deprived of his recourse to the courts by an employees' insurance act which provides that an employer of five or more workmen who pays a certain premium into the state insurance fund, and posts certain notices to this effect in his place of business, shall be relieved of liability to respond in damages to an employee for injury, except in case of wilful or statutory negligence, and which provides further for a board of awards to hear and determine questions concerning the payment of claims, and for an appeal from their determination in cases where the right of the claimant is denied upon any ground affecting the basis of the claim. *State ex rel. Yaple v. Creamer*, 39: 694, 97 N. E. 602, 85 Ohio St. 349.

Police power.

9. The provisions of an act to establish a bureau of vital statistics, and to provide for a prompt and permanent registration of all births and deaths occurring within the state, which require a physician or midwife in attendance upon the birth of a child to certify, without compensation, as to legitimacy or illegitimacy, and, if legitimate, to supply information in regard to the parents of the child, are an unreasonable and arbitrary exercise of the police power, and therefore unconstitutional and void. *State v. Boone*, 39: 1015, 95 N. E. 924, 84 Ohio St. 346. (Annotated)

10. A statute which provides that an employer of five or more workmen may pay a certain premium into a state insurance fund and, upon posting notices to this effect in his place of business, thereby be relieved from liability for injuries to his employees except in cases of wilful or statutory negligence, and provides further that in case of his failure to accept the benefit of such act he shall be liable to his employees for injuries resulting from negligence, and in such action the defenses of assumption of risk, contributory negligence, and fellow-servant rule shall not be available to him, is a valid and constitutional enactment authorized under the police power of a state. *State ex rel. Yaple v. Creamer*, 39: 694, 97 N. E. 602, 85 Ohio St. 349. 39 L.R.A. (N.S.)

CONSTRUCTION.

Of contract of employment, see Contracts, 4.

Of statute, see Statutes, 4, 5.

Of will, see Wills.

CONSTRUCTIVE TRUSTS.

See Trusts, 3.

CONTEMPT.

Contempt proceedings will not lie to enforce an order of restitution of money secured in satisfaction of a judgment which is subsequently reversed, if, when the order is passed, the money is no longer in possession of the judgment creditor. *Dodson v. Butler*, 39: 1100, 142 S. W. 503, — Ark. — (Annotated)

CONTEST.

Of will, see Wills, 2.

CONTINUING GUARANTY.

See Guaranty.

CONTRACTORS.

Validity of statute as to nature of bonds to be taken from, see Constitutional Law, 5, 6; Statutes, 3.

Liability of contractor not entitled to use union label for use of label on work, see Trademarks, 2.

CONTRACTS.

Whether action one on contract or in tort, see Action or Suit, 2.

Conflict of laws as to, see Conflict of Laws.

Action of conspiracy for inducing breach of contract, see Conspiracy, 2.

Restrictions on right of, see Constitutional Law, 6.

As to covenants, see Covenants and Conditions.

Punitive damages for breach of, see Damages, 3.

Measure of damages as to, see Damages, 5, 6.

Mental anguish as element of damages for, see Damages, 13, 14.

Duress, see Duress.

Power of equity to compel renewal of, see Equity, 1.

Requiring transfer of chattels between husband and wife to be in writing, see Husband and Wife, 2.

Of incompetent person, see Incompetent Persons.

As to insurance contracts, see Insurance.

Contract of employment, see Master and Servant, 2, 3.

As to mortgages, see Mortgages.

Third party's right to sue for breach, see Parties, 3, 4.

Power of partners respecting, see Partnership.

Pleading as to, see Pleading, 6, 7.

Liability of agent on, see Principal and Agent, 2.

Reformation of, see Reformation of Instruments.

Of religious society, see Religious Societies.

Specific performance of, see Specific Performance.

Contracts as to real property generally, see Vendor and Purchaser.

Implied agreements.

1. A town board may audit and allow claims for services rendered under a contract for work and labor, which has been fully performed and the work approved and accepted, although the contract was invalid because no bond for the protection of the town and persons furnishing labor and material was given, as required by statute. *State ex rel. Morris v. Clark*, 39: 43, 134 N. W. 129, 116 Minn. 500. (Annotated)

2. A contract for the purchase of items of personalty by a city in excess of the charter limitation of the amount to be included in one contract is void, and no liability as upon an implied contract is created against the municipality. *Perry Water, L. & I. Co. v. Perry*, 39: 72, 120 Pac. 582, 29 Okla. 593. (Annotated)

Consideration.
3. No new consideration is necessary to validate the ratification of an alteration in a promissory note, under the provisions of the negotiable instruments act that, where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against the party who has himself made, authorized, or assented to the alteration and subsequent indorsements. *Holyfield v. Harrington*, 39: 131, 115 Pac. 546, 84 Kan. 760. (Annotated)

Construction.

4. A promoter of a corporation who undertakes, as part of the inducement to the undertaking, to devote his whole time and attention to the corporate business, without specifying the period over which the services are to extend, is not bound to continue such services for a reasonable time, but may cease to render them at pleasure, without liability to persons who invested their money on the faith of the promise, although the withdrawal of the service wrecks the corporation. *Watson v. Gugino*, 39: 1090, 98 N. E. 18, 204 N. Y. 535.

Validity; public policy.

Implied contract to pay for services rendered or goods obtained under invalid contract, see *supra*, 1, 2.

Effect of public policy on enforcement of contract of other state, see Conflict of Laws.

Validity of contracts between husband and wife, see Husband and Wife, 2.

Replevin to recover property intended for illegal use, see Replevin.

5. A lease is not rendered void by mere knowledge on the part of the lessor of intention to subject the premises for the purpose of running a bawdyhouse. *Ashford v. Mace*, 39: 1104, 146 S. W. 474, — Ark. —. (Annotated)

6. An agreement to pay for services in selling goods to a public board which does not contemplate the exercise of personal or political influence, and in the carrying out of which no such influence is in fact exerted, and which is otherwise unobjectionable, is not rendered void because the salesman's compensation is made to depend upon the success of his efforts, or because he makes a legitimate argument to one of the members of the board while the others are not present. *Kansas City Paper House v. Foley R. Printing Co.* 39: 747, 118 Pac. 1056, 85 Kan. 678. (Annotated)

7. That the acceptor of a draft the proceeds of which are to furnish margins in an illegal transaction in futures was not a party to the illegal transaction does not prevent his setting up the illegality of such transaction out of which the consideration for the acceptance grew, to defeat liability thereon. *Burrus v. Witcover*, 39: 1005, 74 S. E. 11, 158 N. C. 384. (Annotated)

8. No compensation can be recovered by a salesman for services rendered under a contract which contained a provision for reimbursing him a certain sum to be allowed purchasing agents for turning business his way. *Smith v. David B. Crockett Co.* 39: 1148, 82 Atl. 569, 85 Conn. 282. (Annotated)

CONTRADICTION.

Of witness, see Witnesses, 2.

CONTRIBUTORY NEGLIGENCE.

In general, see Negligence, 7-9.

CONVERSION.

By guardian, see Guardian and Ward.
Complaint in action to hold guardian liable for, see Pleading, 2.

In general, see Trover.

CONVICTS.

Ex post facto laws as to, see Constitutional Law, 1.

CORPORATIONS.

Interpretation of contract by promoter to devote his whole time and attention to corporate business, see Contracts, 4.

Setting aside transfer of stock because of duress, see Duress.

Oral evidence to show incumbency of office in private corporation by witness, see Evidence, 9.

Including railroad property in levee district as violation of charter rights, see Levees.

Venue of action against, see Venue, 2.

Liabilities.

1. A private corporation, like an individual, is liable for the acts of its agent, in instituting a malicious prosecution, if the same were done while acting within the scope of his authority. *Chicago, R. I. & P. R. Co. v. Holliday*, 39: 205, 120 Pac. 927, — Okla. —.

2. A corporation cannot avoid liability upon a contract signed by its superintendent.

ent, who had authority to employ men, engaging a person to do a particular part of the work required by the corporation for a term of one year, because his authority was limited to employing help orally from day to day, since the other contracting party had a right to rely upon his apparent possession of the authority which he assumed to exercise. *Slocum v. Seattle Taxicab Co.* 39: 435, 121 Pac. 67, 67 Wash. 220.

Officers; liabilities.

Officers of savings bank, see Banks, 14-16.

3. A managing officer of a corporation which is engaged in the manufacture for general consumption of an article dangerous to use is personally liable for injury to a consumer by its use, if he knows of its dangerous character and actively promotes its manufacture and sale. *Wines v. Crosby & Co.* 39: 901, 135 N. W. 96, — Mich. — (Annotated)

Rights of shareholders; actions.

Stockholders in bank, see Banks, 1-3.

4. Where the officers, of whose mismanagement and misconduct a plaintiff stockholder complains, are in control of the corporation, both by being the officers thereof and the holders of a majority of the stock, it is not necessary for a complaining stockholder to show as a condition necessary to maintain his suit that he first made demand on said officers to proceed on behalf of the corporation to remedy the wrongs complained of. *Exchange Bank v. Bailey*, 39: 1032, 116 Pac. 812, 29 Okla. 246.

Insolvency; rights of creditors.

Insolvency of banks, see Banks, 8-13.

Receivers of insolvent corporation, see Receivers.

5. A holder of preferred stock in a corporation cannot enforce its redemption at par, as provided in his contract, if the assets of the company are not sufficient to pay its debts. *Rider v. John G. Delker & Sons Co.* 39: 1007, 140 S. W. 1011, 145 Ky. 634. (Annotated)

6. The claims of directors and holders of common stock of a corporation for money advanced to keep it a going concern will not be postponed in the winding up of the corporation to the retirement of preferred stock, because at the time they assumed the management, the assets were sufficient to pay preferred stockholders in full, had the concern been wound up at that time. *Fryer v. Wiedemann*, 39: 1011, 146 S. W. 752, 148 Ky. 379.

7. Directors and holders of common stock in a corporation, although occupying a position of trust towards preferred stockholders, do not, by lending money to the corporation to enable it to carry on its business, even as to such an amount as to render the preferred stock worthless, postpone their claims to repayment to the retirement of the preferred stock, which was issued under an agreement that no lien should be placed on the property of the corporation without consent of the preferred stockholders. *Fryer v. Wiedemann*, 39: 1011, 146 S. W. 752, 148 Ky. 379. 39 L.R.A. (N.S.)

8. A holder of preferred stock in a corporation, whose certificate provides that no lien shall be placed upon the corporate property without his consent, is not entitled to priority over corporate creditors in the distribution of its assets. *Fryer v. Wiedemann*, 39: 1011, 146 S. W. 752, 148 Ky. 379.

CORROBORATION.

Of accomplice, see Evidence, 33-36.

COSTS AND FEES.

Liability of grantor for costs of defending title against action by stranger, see Covenants and Conditions, 1.

COTENANCY.

Evidence to establish ownership of cotenant, see Evidence, 19.

Notice to mortgagee of interest of cotenant, see Notice.

Partition between cotenants, see Partition.

Conveyance of land to one in trust for himself and another, see Trusts, 2.

COUNSEL.

See Attorneys.

COUNSEL FEES.

See Attorneys.

COUNTERCLAIM.

See Set-Off and Counterclaim.

COUNTERFEIT MONEY.

Pretended sale of, see False Pretenses.

COUNTIES.

Estoppel of, see Estoppel, 1.

Action to compel removal of obstruction to operation of drawbridge, see Parties, 5; Waters, 1.

Liability for expense of relieving pauper, see Poor and Poor Laws, 1-3.

Liability for injury to pauper by failure to give aid to him, see Poor and Poor Laws, 4.

COUNTS.

In pleading, see Pleading, 4.

COUNTY ATTORNEY.

See District and Prosecuting Attorneys.

COURTS.

Depriving employee of recourse to, see Constitutional Law, 8.

Contempt of, see Contempt.

Aiding in enforcement of illegal contract, see Contracts, 7.

Power to suspend sentence, see Criminal Law, 4.

Power to authorize guardian of incompetent to consent to conveyance of real estate in another state. see Incompetent Persons.

Judicial proceedings on Sunday, see Sunday.

As to venue of action, see Venue.

1. Proceedings for the removal of a public officer from his office are of a judicial character, so that, although the power of removal is conferred by statute upon the governor, his action is subject to review by the courts. *State ex rel. Kinsella v. Eberhart*, 39: 788, 133 N. W. 857, 116 Minn. 313. (Annotated)

2. The proper court of the county in which is located land ceded by a state to the Federal government for a soldiers' home has jurisdiction to grant an administration on the estate of a soldier dying in the home. *Divine v. Unaka Nat. Bank*, 39: 586, 140 S. W. 747, — Tenn. —. (Annotated)

2a. The courts of one state have no jurisdiction to try one for the murder of a person who dies there as the result of an act done in another state after the performance of which the deceased removes from one state to the other. *Com. v. Apkins*, 39: 822, 146 S. W. 431, 148 Ky. 207. (Annotated)

3. A Federal bankruptcy court is not bound by the decisions of the courts of the state in which it is sitting, as to the right of one whose property has been converted and consumed, to waive the tort and sue in contract for its value. *Reynolds v. New York Trust Co.* 39: 391, 188 Fed. 611, 110 C. C. A. 409.

COVENANTS AND CONDITIONS.

Mitigation of damages for breach of covenant, see Damages, 15.

1. A grantor is not, under his covenant to warrant and defend title against all lawful claims, liable for costs of a successful defense against an attempt by a stranger to establish a lien on the property. *Hoffman v. Dickson*, 39: 67, 118 Pac. 737, 65 Wash. 556. (Annotated)

2. When the governor, in the exercise of authority expressly conferred upon him by statute, grants to a municipality "all the interest of the state" in lands which it owns in fee, to be used for streets and other purposes, the municipality, reserving the right to use the same for street purposes without compensation, may execute a valid lease of such lands to a railroad company for its general purposes. *Cleveland Terminal & V. R. Co. v. State ex rel. Ellis*, 39: 1219, 97 N. E. 967, 85 Ohio St. 251.

3. A covenant of general warranty of title is not broken by the existence of a visible easement upon the portion of land granted, consisting of a right to maintain a mill pond upon it. *Bennett v. Booth*, 39: 618, 73 S. E. 909, — W. Va. —.

4. The prima facie presumption established by a Code provision that separation walls betwixt buildings, or yard and garden in cities and town, are owned in common, does not apply to the division wall between a building and vacant lot; and therefore, where by law such a wall erected by the owner of the building remains his exclusive property until the owner of the adjoining lot makes it a wall in common by paying one half the cost of the construction thereof, the owner of such a vacant lot, who

conveys the same "with the buildings and improvements thereon" by a deed of warranty, is not liable for the amount of money his vendee is forced to pay, to give him the right to use such wall in common. *Cordill v. Israel*, 39: 931, 57 So. 778, — La. —.

5. When land is granted to a city upon a valuable consideration, to be used for streets and other purposes, the title will not, in the absence of an express stipulation to that end, revert in the grantor because the land is subsequently used for street and railroad purposes. *Cleveland Terminal & V. R. Co. v. State ex rel. Ellis*, 39: 1219, 97 N. E. 967, 85 Ohio St. 251.

CREAM.

See Food.

CRIMINAL LAW.

Right of accused to statutory time in which to plead as amendment of indictment, see Appeal and Error, 23.

Employment of private counsel to assist prosecution, see Appeal and Error, 7; District and Prosecuting Attorneys.

Review of facts on appeal, see Appeal and Error, 18, 19.

Prejudicial evidence, see Appeal and Error, 20.

Reversal of conviction on appeal, see Appeal and Error, 24.

Duty of attorney general to prosecute liquor case at request of governor, see Attorney General.

Bail and recognizance, see Bail and Recognizance.

Ex post facto laws, see Constitutional Law, 1.

Constitutionality of statute providing for confinement of person acquitted of crime on ground of insanity, see Constitutional Law, 1, 7.

Jurisdiction in criminal case, see Courts, 2a.

Presumption and burden of proof, see Evidence, 4.

Evidence of threats, see Evidence, 22.

Corroboration of testimony of accomplice, see Evidence, 33-36.

Sufficiency of proof, see Evidence, 31, 32.

Habeas corpus, see Habeas Corpus.

Right to trial by jury, see Jury, 5.

Waiver of disqualification of juror, see Jury, 6.

As to requisites, sufficiency of indictment, information, and complaint, see Indictment, etc.

Injunction to abate nuisance which is also a public offense, see Nuisances, 7.

Criminal liability for nuisance, see Nuisances, 7, 10.

Reception of verdict in criminal case on Sunday, see Sunday.

Questions for court or jury, see Trial, 2.

Necessity or propriety of instructions in criminal case, see Trial, 14.

Former jeopardy.

1. Where one accused of a felony is put upon trial under an information defective upon its face, and, after trial begun, the information is amended and the trial proceeded with, there being no change in the offense charged, the accused is not thereby placed in jeopardy a second time. *McKay v. State*, 39: 714, 132 N. W. 741, 90 Neb. 63.

2. Placing one on trial for perjury which secured his acquittal of another offense is not placing him twice in jeopardy for the same offense. *Allen v. United States*, 39: 385, 194 Fed. 664, — C. C. A. —. (Annotated)

3. The reversal for a new trial upon defendant's appeal of a conviction of manslaughter upon a charge of murder, subjects him to a retrial upon the original accusation. *State v. Ash*, 39: 611, 122 Pac. 995, — Wash. —.

Suspension or stay of sentence.

Estoppel of convict to assert invalidity of suspension of sentence, see Estoppel, 2.

4. A court has no inherent power to suspend the execution of a sentence pronounced upon one convicted of crime for the purpose of inducing good behavior on his part. *Fuller v. State*, 39: 242, 57 So. 6, — Miss. —. (Annotated)

CROSSINGS.

Duty of railroad company to keep safe, see Trial, 9.

CROSSWALK.

Accumulation of snow on, see Highways, 6, 7.

CUL DE SAC.

Change in highway causing, see Highways, 8.

CURE.

Of error in trial court, see Appeal and Error, 17.

DAMAGES.

Review of discretion as to refusal of new trial for inadequacy of, see Appeal and Error, 13.

Prejudicial error in instructions as to, see Appeal and Error, 22.

For failure to transfer on books bank stock purchased, see Banks, 1.

Retaining suit for injunction in order to assess damages, see Equity, 2.

Relevancy of evidence as to, see Evidence, 23, 24.

Interest as, see Interest.

Remittitur on motion for new trial, see New Trial, 3.

Remittitur by trial court, see Trial, 19.

Exemplary or punitive.

Duty of court to define punitive damages, see Trial, 13.

1. A wrongful act done under a bona fide claim of right, and without malice in any form, constitutes no basis for punitive damages. *Jopling v. Bluefield Waterworks* 39 L.R.A. (N.S.)

& Improv. Co. 39: 814, 74 S. E. 943, — W. Va. —.

2. Punitive damages cannot be assessed against a telephone company for mere neglect to answer the call of the subscriber, in the absence of anything to show intentional wrong or wilfulness, or conscious indifference to consequences, from which malice may be inferred. *Southern Teleph. Co. v. King*, 39: 402, 146 S. W. 489, — Ark. —.

3. The malicious or wilful removal of a subscriber's telephone in wanton or reckless disregard of his rights may carry punitive damages. *Carmichael v. Southern Bell Teleph. & Teleg. Co.* 39: 651, 72 S. E. 619, 157 N. C. 21. (Annotated)

4. Where the employees of a carrier wilfully neglect and refuse to give a passenger information requested as to a change of trains necessary to reach her destination, such passenger may recover exemplary damages. *Lilly v. St. Louis & S. F. R. Co.* 39: 663, 122 Pac. 502, — Okla. —.

On contracts generally.

Mental anguish for, see *infra*, 13, 14.

Evidence on question of damages, see Evidence, 24.

5. The damages recoverable by a subscriber whose telephone is wrongfully removed after he has paid the rental are not limited, even in an action for breach of contract, to the amount of rent wrongfully exacted, but may include compensation for the inconvenience to which he is put by breach of the contract. *Carmichael v. Southern Bell Teleph. & Teleph. Co.* 39: 651, 72 S. E. 619, 157 N. C. 21. (Annotated)

6. The measure of damages for defects in the construction work of buildings substantially completed according to the plans and specifications is the cost of repairing the defects, and not the difference in value of the building as constructed and what it would have been if constructed strictly according to the plans and specifications. *Graves v. Allert & Fuess*, 39: 591, 142 S. W. 869, — Tex. —. (Annotated)

Personal injuries.

Right to interest on, see Interest.

Instructions as to, see Trial, 13, 15.

Remittitur by trial court, see Trial, 19.

7. The amount to be awarded plaintiff in an action for damages for personal injury cannot be affected by the suggestion or consideration that the defendant company has been placed in the hands of a receiver, and that the plaintiff will realize only a small per cent of his claim. *Rogers v. Hiram J. Allen Lumber Co.* 39: 202, 57 So. 166, 129 La. 899.

8. The damages to be recovered by a child for the wrongful death of its father are not limited to those suffered before attaining majority, under a statute giving heirs a right of action for death, and providing that if deceased leave no widow or issue, then his parents, sisters, or minor brothers who may be dependent upon him for support, may maintain the action, the jury to allow such damages as, under all the circumstances, may seem just. *Roches-*

ter v. Seattle, R. & S. R. Co. 39: 1156, 122 Pac. 23, 67 Wash. 545. (Annotated)

9. The damages to be awarded the widow and children of one killed by another's negligence may include compensation for the injury due to loss of his companionship, under a statute providing that the person suing shall recover such damages as the jury may allow, taking into consideration all damages of every kind to any and all parties interested in the suit. St. Louis & S. F. R. Co. v. Moore, 39: 978, 58 So. 471, — Miss. —

10. Where a young man nineteen years of age who is dependent upon his physical labor for his livelihood loses his right hand through the negligence of his employer, a court is justified in allowing him \$7,500 as damages and reducing the verdict of \$10,000 to this amount. Rogers v. Hiram J. Allen Lumber Co. 39: 202, 57 So. 166, 129 La. 899.

11. The court will declare that the allowance of \$38,750, for injury to a miner capable of earning \$1,200 per year, which consists of the fracture of his collar bone, which shortened in knitting, and of three ribs, which failed to unite, so that normal protection is not given to certain vital parts, and he has to wear a belt to protect them, and the shortening of one leg a half inch, so that he is left slightly lame, is, because of its amount, the result of passion or prejudice, or of a total misconception by the jury of its duties and obligations. Tunnel Mining & Leasing Co. v. Cooper, 39: 1064, 115 Pac. 901, 50 Colo. 390.

Injunction cases.

Right to damages in injunction suit, see Injunction, 5.

12. The damages for wrongfully enjoining the erection of a dwelling on a parcel of real estate are the reasonable rental value of the property with the building upon it, during the time its enjoyment was prevented by the injunction, where the building would have been erected but for the injunction, and was actually built as soon as the injunction was dissolved. Stone v. Hunter Tract Improv. Co. 39: 180, 122 Pac. 370, — Wash. — (Annotated)

Mental anguish.

13. The damages to be awarded for wrongful removal by a telephone company of a subscriber's phone may include compensation for the necessary inconvenience and humiliation fairly attributable to the wrong done, and an allowance may be made for anxiety increased by loss of telephone communication with a relative sick in the hospital, of which fact the telephone company has notice. Carmichael v. Southern Bell Teleph. & Teleg. Co. 39: 651, 72 S. E. 619, 157 N. C. 21.

14. A statute rendering telegraph companies liable for mental suffering due to negligence in receiving, transmitting, and delivering messages does not apply in case of the negligence of telephone companies. Southern Teleph. Co. v. King, 39: 402, 146 S. W. 489, — Ark. —

Mitigation; reduction.

15. A grantor is not, in a suit for breach 30 L.R.A. (N.S.)

of covenant against encumbrances, because of the enforcement against the property of a lien for a share of the cost of a party wall between the property conveyed and that adjoining it, entitled to set off the value to the property of the easement rights acquired by the grantee in the adjoining property because of the party-wall agreement. Hoffman v. Dickson, 39: 67, 118 Pac. 737, 65 Wash. 556.

DAMS.

Change of channel of boundary stream by construction of, see Boundaries.

DANGEROUS PREMISES.

Liability for injury on, see Negligence, 4, 5.

DATE.

Mistake in indictment as to date of commission of offense, see Indictment, 1.

DEATH.

Effect of death pending appeal of one of several attorneys who have agreed to share contingent fee, see Attorneys.

Validity of statute as to registration of, see Constitutional Law, 9.

Measure of damages for, see Damages, 8, 9.

Resulting from obstruction of highway by uncharged electric wire, see Electricity.

Effect to terminate contract for services, see Master and Servant, 2, 3.

Instruction as to damages in action for death, see Trial, 13, 15.

DEBTOR AND CREDITOR.

Insolvency of debtor, see Bankruptcy; Banks, 8-13; Corporations, 5-8.

Liability of heir or devisee for debts of ancestor, see Executors and Administrators, 4.

Conveyances fraudulent as to creditors, see Fraudulent Conveyances.

DECEDENTS.

Administration of estates of, see Executors and Administrators.

DECEIT.

See Fraud and Deceit.

DECLARATIONS.

Evidence of, see Evidence, 18, 20, 21.

In pleading, see Pleading, 2-10.

DEEDS.

Effect of conveyance and reconveyance of estate acquired by inheritance upon its course of descent, see Descent and Distribution, 1.

Alteration of, see Evidence, 8.

Parol evidence as to, see Evidence, 12, 13.

Confirmation of title in grantee from religious society, see Religious Societies, 2.

Rights of purchasers generally, see Vendor and Purchaser.

DEFAULT.

Notice of, to guarantor, see Guaranty, 2.

DEFENSE.

In general, see Action or Suit, 1.
In action against drawer of check, see Checks, 2.
Illegality of contract as, see Contracts, 7.
To action for divorce, see Divorce and Separation, 5, 6.
Burden of proving, see Evidence, 1.
To indictment for obtaining money by false pretenses, see False Pretenses.
To liability for interfering with extinguishment of fires, see Fires, 2.
To application for injunction, see Injunction, 2.
To action for rent under oil and gas lease, see Mines.
Negation of, see Pleading, 5.
Duty of court to give, see Trial, 13.

DELIVERY.

Of personalty sold, see Sale, 1, 2.

DEMURRER.

See Pleading, 11-14.

DEPENDENT.

Who is a dependent within meaning of insurance policy, see Insurance, 16.

DESCENT AND DISTRIBUTION.

Survivor's rights in community property, see Husband and Wife, 3a.
Liability of personal representative who is also a devisee for debts of testator, see Executors and Administrators, 4.

1. The joining by one of several children in a deed of property inherited from their father, to a stranger, for the purpose of securing a title to himself in the whole property, which was done under the erroneous belief that he could not take title directly from the coheirs, does not change the character of the title held by him as heir from inheritance to purchase, and therefore it will descend under the statute providing for inherited land descending to heirs of the half blood as well as of the whole blood, and not under the provision for the descent of land secured by purchase; at least where the intention of the parties was that he should not alienate the property, but permit it to return to the cognators at his death. *Dudrow v. King*, 39: 955, 83 Atl. 34, — Md. — (Annotated)

2. A conviction of manslaughter does not come within a statute forbidding an heir to inherit any portion of the estate of an ancestor for whose murder he has been convicted, where by statute technical words are to receive their technical meaning in statutory construction. *Re Kirby*, 39: 1088, 121 Pac. 370, — Cal. — (Annotated)
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DESERTION.

As ground for divorce, see Divorce and Separation, 3-6.

DESTINATION.

Failure of passenger to reach, because of refusal of information by carrier's employees, see Carriers, 6; Damages, 4.

DETINUE.

See Replevin.

DISBARMENT.

Of attorney, see Attorneys.

DISCHARGE.

Of one joint tortfeasor by release of other, see Joint Debtors and Creditors.
Of surety, see Principal and Surety, 2, 3.

DISCONTINUANCE.

Of action, see Dismissal or Discontinuance.

DISCRETION.

Review of, on appeal, see Appeal and Error, 11-13.
Of attorney general when requested by governor to prosecute proceeding, see Attorney General.

DISCRIMINATION.

By carrier, see Carriers, 16, 18, 19.
Unconstitutionality of, see Constitutional Law, 2, 3.

DISHONEST PERSONS.

Exclusion of, from railway depots and warerooms, see Carriers, 18, 19.

DISMISSAL OR DISCONTINUANCE.

The discontinuance as to some of the defendants of an action against several joint tortfeasors has no effect upon the liability of the others. *Matheson v. O'Kane*, 39: 475, 97 N. E. 638, 211 Mass. 91.

DISOBEDIENCE.

As a contempt, see Contempt.

DISORDERLY HOUSES.

Validity of lease of premises for purposes of, see Contracts, 5.

DISTRICT AND PROSECUTING ATTORNEYS.

Employment of private counsel to assist prosecution, see Appeal and Error, 7.

As to attorney general, see Attorney General.

Removal of county attorney by governor, see Officers, 2.

1. An order made by a court at the opening of a trial for homicide, that an attorney employed by private parties be "permitted" to assist the county attorney, is not a compliance with a statutory provision

that in the trial of a felony the county attorney may, under the direction of the district court, appoint such assistants as he may deem necessary. *McKay v. State*, 39: 714, 132 N. W. 741, 90 Neb. 63.

2. Under a statute making it the duty of a county attorney to prosecute and defend on behalf of the state and county all actions civil or criminal, and containing the further provision that in the trial of a person charged with felony the county attorney may, under the direction of the district court, appoint such assistants as he may deem necessary, it is error to allow an attorney employed by private parties to participate in the trial of a person charged with felony, without any appointment from the county attorney under direction of the district court. *McKay v. State*, 39: 714, 132 N. W. 741, 90 Neb. 63.

3. An attorney acting as special prosecutor for the state by appointment of court, in the absence of the public prosecutor, cannot recover compensation from individuals for his services, although he acted at their request and they expressly promised to pay him. *Coggeshall v. Conner*, 39: 81, 120 Pac. 559, — Okla. —. (Annotated)

DIVORCE AND SEPARATION.

Sufficiency of evidence on action for, see Evidence, 29.

Binding effect in other state of judgment giving father right to receive visits from child, see Judgment, 4.

Annulment of marriage, see Marriage.

The suit and jurisdiction thereof.

1. A wife who has separated from her husband and gone to the home of a relative to live, with the intention of making it her home, establishes there a residence so as to give the courts of the county jurisdiction of a suit by her for divorce. *McClintock v. McClintock*, 39: 1127, 144 S. W. 68, 147 Ky. 409.

Grounds.

2. Under a statute permitting the court to grant a separation for such cause as, in its discretion, it may deem sufficient, one may be granted, with separate maintenance, to a wife whose husband has treated her with indifference and neglect, and said and done things in the presence of strangers to annoy and humiliate her, has exhibited rage towards her without cause, and told her they must separate, the effect of which has been to make her ill. *McClintock v. McClintock*, 39: 1127, 144 S. W. 68, 147 Ky. 409.

3. The essence of a wilful, obstinate desertion by a wife consists in her refusing to live with her husband when he does his marital duty, and wants her to live with him. *Hill v. Hill*, 39: 1117, 56 So. 941, — Fla. —.

4. Where a very young wife, without her husband's consent, goes to her parents' home, and soon thereafter the first child of the couple is born at her parents' home, and the husband makes no proper effort in the discharge of his duty to the wife and child, 39 L.R.A. (N.S.)

and the wife and child remain with her parents, he is not entitled to a divorce on the statutory ground of a wilful, obstinate desertion by his wife. *Hill v. Hill*, 39: 1117, 56 So. 941, — Fla. —. (Annotated)

Defenses.

5. That a man maliciously turned his wife out of doors is no defense to a suit by him for divorce on the ground of her subsequent adultery, where she could have maintained an action for separate maintenance. *Ellett v. Ellett*, 39: 1135, 72 S. E. 861, 157 N. C. 161. (Annotated)

6. Under a statute permitting divorce for desertion for three years next preceding the filing of the libel, renewal of cohabitation as man and wife, even for four days after the three years have expired, removes the cause of divorce, which is not revived by renewed desertion at the expiration of the four days. *Laflamme v. Laflamme*, 39: 1133, 96 N. E. 62, 210 Mass. 156. (Annotated)

Alimony; maintenance.

7. \$100 per month may be awarded to a wife as support, upon granting her a separation from her husband, with the custody and care of her infant child, where he is worth from \$20,000 to \$40,000, and has an income from his business of from \$2,000 to \$3,000. *McClintock v. McClintock*, 39: 1127, 144 S. W. 68, 147 Ky. 409.

Other property rights.

Effect of, on interest in proceeds of insurance policy, see Insurance, 14, 15.

8. Property transferred by a man to his wife to defraud his creditors is not within the operation of a statute providing that in case of divorce any property which either party may have obtained from the other during marriage, in consideration or by reason thereof, shall be restored to the party from whom it was obtained. *Coleman v. Coleman*, 39: 193, 144 S. W. 1, 147 Ky. 383. (Annotated)

DOCUMENTARY EVIDENCE.

See Evidence, 10.

DOGS.

Tax on, see Animals.

DOMICIL.

For purposes of divorce suit, see Divorce and Separation, 1.

DOUBLE COUNTS.

In pleading, see Pleading, 4.

DOWER.

1. A widow is dowable to the extent of one third of the real estate whereof the husband, or anyone to his use, at any time during the coverture, was seised of an inheritance such as that issue of the marriage might inherit the same as heir to the husband, unless her right to dower therein has been lawfully barred or relinquished. *Couch v. Eastham*, 39: 307, 73 S. E. 314, 69 W. Va. 710.

2. Where one is seised of an estate in land that is limited only on his dying without lawful children, the estate, being one that can pass to heirs if lawful children are born, is an "estate of inheritance" in which the widow is dowable though it expire by failure of issue. *Couch v. Eastham*, 39: 307, 73 S. E. 314, 69 W. Va. 710.

(Annotated)

DRAFTS.

Payment of draft by bank on forged indorsement, see Banks, 6.

Taking money for, by bank when insolvent, see Banks, 8-10.

Right to refuse payment of draft the proceeds of which are to be used in an illegal transaction, see Contracts, 7.

In general, see Bills and Notes; Checks.

DRAINS AND SEWERS.

Liability of municipality to employee of one employed to construct, see Master and Servant, 6.

Liability for negligence of independent contractors in constructing, see Master and Servant, 9, 10.

DRAWBRIDGE.

See Bridges.

DRAYMEN.

Discrimination by carrier between, see Carriers, 19.

DRUGS AND DRUGGISTS.

Unlawful sale of liquors by druggist, see Intoxicating Liquors.

1. A druggist is not relieved from liability for injuries caused by the negligence of his clerk in compounding a prescription by the fact that the clerk is a licensed pharmacist. *Tombari v. Connors*, 39: 274, 82 Atl. 640, 85 Conn. 231. (Annotated)

2. A druggist, in the filling of prescriptions, must exercise the highest practicable degree of prudence, thoughtfulness, and vigilance, and the most exact and reliable safeguards, consistent with the reasonable conduct of the business. *Tombari v. Connors*, 39: 274, 82 Atl. 640, 85 Conn. 231.

3. A druggist who reads the name of a drug called for by an illegible Latin prescription, as one which he knows in the quantity specified is likely to do great harm, is bound to take reasonable precautions to ascertain that his reading is right. *Tombari v. Connors*, 39: 274, 82 Atl. 640, 85 Conn. 231.

DRUNKENNESS.

Exclusion of intoxicated person from railway depot, and warerooms, see Carriers, 18, 19.

Guardianship of habitual drunkard, see Incompetent Persons.

DUE PROCESS OF LAW.

See Constitutional Law, 4-8.
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DUES.

For member of benefit association, see Insurance, 8.

DUPLICITY.

In pleading, see Appeal and Error, 8.

DURESS.

A transfer of stock cannot be set aside for duress, because of a threat to imprison the son of the transferrer, who made the contract for the transfer, if it was not carried out. *Sulzner v. Cappeau-Lemley & Miller Co.* 39: 421, 83 Atl. 103, 234 Pa. 162.

EASEMENTS.

Existence of visible easement as breach of warranty, see Covenants and Conditions, 3.

1. If an owner of land erect a milldam upon it, for the purpose of operating a gristmill, and thereafter convey a portion of the land, including a part of the mill pond, there is an implied reservation of an easement upon the land granted, as appurtenant to the gristmill. *Bennett v. Booth*, 39: 618, 73 S. E. 909, — W. Va. —.

2. A conveyance by metes and bounds of a lot with buildings thereon does not carry with it by implication the right to the use of a hallway on adjoining property of the grantor, to reach the rear and upper stories of the building conveyed, if the building is located upon a street with an alley in the rear, so that the use of the hallway is not reasonably necessary to the full enjoyment of the property conveyed, although it had been used for the purpose claimed by the common owners of the property for more than thirty years. *Bussmeyer v. Jablonsky*, 39: 549, 145 S. W. 772, — Mo. —.

3. An easement appurtenant to land is not lost by failure of the owner to use it for a period less than ten years. *Bennett v. Booth*, 39: 618, 73 S. E. 909, — W. Va. —.

EJECTION.

Of passenger, see Carriers, 10.

ELECTION.

Between counts in pleading, see Appeal and Error, 8.

ELECTIONS.

Mandamus to parish committee, see Mandamus, 2.

Who may maintain action to test eligibility of candidate at primary election, see Parties, 6.

A Democratic parish committee has no power to pass upon the eligibility of candidates for public office, as they are not charged with judicial functions or clothed with juridical power. *Roussel v. Dornier*, 39: 826, 57 So. 1007, — La. —.

(Annotated)

ELECTRICITY.

An electrical company is not liable for the death of one driving in a highway,

by his vehicle coming in contact with a wire negligently permitted to sag after being strung across the street by one to whom it has agreed, if such person will place the wires for reception of the current, and connect them with the poles of the electrical company, to furnish current free of charge for a celebration in a park, and the overturning of the seat thereby, if the company has no notice of the defective condition of the wire. *San Antonio Gas & Electric Co. v. Ocon*, 39: 1046, 146 S. W. 162, — Tex. —. (Annotated)

ELECTRIC WIRES.

See Electricity.

EMERGENCY.

Issue of bonds by state in case of, see Bonds, 2, 3.

EMINENT DOMAIN.

An amendment to a statute providing for removal of milldams in the course of improving a living stream of water, that, if the mill has become useless or has been destroyed and has so remained for a period of five years without attempt to repair or rebuild it, it shall be deemed abandoned, and the commissioners may, without bargain or compensation, cause such milldam to be removed,—is an attempt to authorize the taking of private property for public benefit without compensation and therefore void. *Kiser v. Board of County Comrs.* 39: 1029, 97 N. E. 52, 85 Ohio St. 129.

EMPLOYEES.

Statute as to bond to be taken from contractor to secure payment of, see Constitutional Law, 5, 6.

Rights, duties, and liabilities generally, see Master and Servant.

EMPLOYEES' INSURANCE ACT.

See Jury, 4.

EMPLOYER'S LIABILITY.

Constitutionality of statute as to, see Constitutional Law, 2.

ENACTMENT.

Of statutes, see Statutes, 1, 2.

ENTIRETY.

Of insurance contract, see Insurance, 7.

EQUAL PROTECTION AND PRIVILEGES.

See Constitutional Law, 2, 3.

EQUITABLE CONVERSION.

By will, see Wills, 7.

EQUITY.

Compelling transfer of stock on books by bill in equity, see Banks, 1.

Injunction against nuisance, see Nuisances, 2-9.

Enforcement in, of vendor's lien, see Vendor and Purchaser, 5.

See also Injunction.

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1. A manufacturer is entitled to no equitable relief to compel a labor union to renew a contract for the continued services of its members in his business on the same terms accorded his competitors, although its refusal to do so is the result of a conspiracy between the union and his competitors to ruin his business, and his employees are willing to continue work on the basis of the old contract. *Saulsberry v. Coopers' International Union*, 39: 1203, 143 S. W. 1018, 147 Ky. 170.

2. Where equity is by statute denied jurisdiction of claims for injury to property involving unliquidated damages, it cannot retain a suit for injunction and damages for the maintenance of a nuisance, in order to assess the damages, if the right to the injunction fails. *Union Planters' Bank & T. Co. v. Memphis Hotel Co.* 39: 580, 139 S. W. 715, 124 Tenn. 649.

ERROR.

As to appellate review in general, see Appeal and Error.

ESTOPPEL.

Of insurer, see Insurance, 10, 11.

Of county.

1. Permitting a building to stand below high-water mark so as to interfere with the operation of a drawbridge for a period of fourteen months does not estop the county commissioners from requiring its removal. *Lenoir County v. Crabtree*, 39: 1213, 74 S. E. 105, 158 N. C. 357.

By assent.

2. A convict who assents to a void provision in his sentence, that it shall not be executed during good behavior, cannot take advantage of its invalidity when the sentence is sought to be enforced against him, nor of the fact that the original term of sentence has elapsed. *Fuller v. State*, 39: 242, 57 So. 6, — Miss. —.

By negligence or fraud.

3. Where false representations are made by a vendor in the sale of property, the application of the doctrine of equitable estoppel does not necessarily depend upon the knowledge of the vendor of the falsity of the representations, but may rest upon the principle that one who, by representing that a certain state of facts exists, has misled another, is precluded from denying the truth of such representations and from setting up a claim inconsistent with the facts as represented, where such claim would result in loss to the other and operate as a fraud upon him. *Westerman v. Corder*, 39: 500, 119 Pac. 868, 86 Kan. 239.

(Annotated)

EVIDENCE.

As part of record on appeal, see Appeal and Error, 3.

Objection to admission of, because of defects in pleading, see Appeal and Error, 4, 5.

Prejudicial error in admission of, see Appeal and Error, 20.

Admissibility to impeach witness, see Witnesses, 2.

Presumptions and burden of proof.

Presumption on appeal, see Appeal and Error, 9, 10.

Sufficiency of evidence to overcome presumption of larceny arising from possession of stolen property, see Appeal and Error, 19.

Presumption that separation walls between buildings or yards are used in common, see Covenants and Conditions, 4.

Presumption that money of wife invested in land in husband's name is a gift, see Trusts, 4.

Burden of proof in habeas corpus proceeding, see Habeas Corpus.

Presumption where trustee mingles trust funds with his own, that subsequent payments are made from his own portion of fund, see Trusts, 5.

1. In an action in replevin to recover possession of intoxicating liquors it is not necessary for the plaintiff affirmatively to show that they were not seized under a statute which contains the provision that no liquors seized by virtue of any warrant issued under the provisions of the act shall be taken from the possession of the officer seizing the same, under any replevin or other process, where there is nothing in the record to show that the defendants in the replevin suit are officers, or that they had seized or had a right to seize the liquor by virtue of any authority. *Blunk v. Waugh*, 39: 1093, 122 Pac. 717, — Okla. —.

2. Malice may be inferred from want of probable cause, in an action to recover damages for malicious prosecution. *Chicago, R. I. & P. R. Co. v. Holliday*, 39: 205, 120 Pac. 927, — Okla. —.

3. The presumption is that a father who is charged by his son's wife with alienation of her husband's affections, acted without malice, and with good faith, and the burden is on the wife to show malice and absence of such motive. *Gross v. Gross*, 39: 261, 73 S. E. 861, — W. Va. —.

4. No presumption of guilt arises from flight after the commission of a crime. *Territory v. Lucero*, 39: 58, 120 Pac. 304, 16 N. M. 652. (Annotated)

5. The closing of the door of a street car upon a passenger as he is attempting to enter the car, to his injury, shows prima facie negligence on the part of the street car company, although a passenger may have intentionally started the mechanism which caused the door to close. *Craft v. Boston Elevated R. Co.* 39: 878, 97 N. E. 610, 211 Mass. 374. (Annotated)

6. The unexplained presence upon a public highway of a runaway horse harnessed to a wagon, unattended by the owner or other person, is prima facie evidence of negligence on the part of the owner. *Denney v. Great Atlantic & Pacific Tea Company* (N. J. Err. & App.) 39: 574, 81 Atl. 861, — N. J. — (Annotated)
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7. Evidence that the wagon which ran over the plaintiff was specifically marked with the defendant's name is sufficient to justify the inference that the defendant was the owner. *Denney v. Great Atlantic & Pacific Tea Co.* (N. J. Err. & App.) 39: 574, 81 Atl. 861, — N. J. —.

8. One seeking to avoid the effect of a deed because of an alleged alteration has the burden of showing that it was made after delivery. *Tharp v. Jamison*, 39: 100, 134 N. W. 583, — Iowa, —. (Annotated)
Best and secondary.

9. Relation of a witness to the subject-matter of his testimony, such as his incumbency of an office in a private corporation on whose behalf, as a party to the suit, he is to testify, may be shown by his oral evidence. *Star Grocer Co. v. Bradford*, 39: 184, 74 S. E. 509, — W. Va. —.

Documentary evidence.

10. In a replevin suit to gain possession of mortgaged property attached in a suit against the mortgagor in one state, a record of a judgment of a court in another state where the property was located when mortgaged and from which it had been temporarily removed, strictly foreclosing the mortgage in a proceeding instituted before the attachment was levied, is admissible. *North Carolina Land & Lumber Co. v. Boyer*, 39: 627, 191 Fed. 552, 112 C. C. A. 162.

Parol evidence as to writings.

11. Evidence of a conversation between one who guaranteed another's account and the latter, in the absence of the one to whom the guaranty is addressed, is not admissible against the latter, for the purpose of showing the meaning in which the guarantor intended the instrument to be understood. *Newcomb v. Kloeblen*, 39: 724, 74 Atl. 511, 77 N. J. L. 791.

12. In a contest between heirs of the whole blood and heirs of the half blood of an intestate, oral evidence is admissible to prove that the sole consideration for a deed to the ancestor from his mother, whereby he was vested with title to the tract of land in controversy, was love and affection, notwithstanding the sole recitation in the deed of a consideration is a substantial, valuable consideration. *Harman v. Fisher*, 39: 157, 134 N. W. 246, 90 Neb. 688.

13. The effect of an absolute deed of church property by its trustees to a stranger cannot be controlled by parol evidence that the transfer was made upon the understanding that the grantee should take the property in trust in order to secure a revenue from it by leasing it for a purpose which the members of the church would not sanction. *Lafayette Street Church Soc. v. Norton*, 39: 906, 95 N. E. 819, 202 N. Y. 379.

14. In an action to recover from an agent to purchase real estate, the secret profit which he made by falsely representing that he was compelled to pay for the property the price paid him, parol evidence is admissible on the ground of fraud, to show that he had, in fact, been acting as agent, and promised to purchase as cheaply.

as possible, although the positive written contract to pay him a certain sum for the property as vendor is thereby contradicted. *Lavalleur v. Hahn*, 39: 24, 132 N. W. 877, 152 Iowa, 649.

15. The rule excluding parol evidence to contradict or vary a written contract does not exclude parol evidence to show that a person named in a written contract, or signing the same, was the agent of an undisclosed principal. *Davidson v. Hurty*, 39: 324, 133 N. W. 862, 116 Minn. 280.

16. Evidence as to the true ownership of real estate, a contract for the sale of which was entered into by a real estate company as agent for the owner, and approved by the owner's husband, the wife's name not appearing therein, does not necessarily vary or contradict the terms of the contract, since the husband's approval was consistent with his wife's ownership. *Davidson v. Hurty*, 39: 324, 133 N. W. 862, 116 Minn. 280.

17. A statute which prohibits contracts for the sale of real estate between husband and wife does not prevent the introduction of parol evidence in an action by a wife to enforce specific performance of a contract for the sale of her property, which was negotiated by a realty company and approved by the husband in his own name, to prove that the wife was the owner and that her husband acted with her authority. *Davidson v. Hurty*, 39: 324, 133 N. W. 862, 116 Minn. 280.

17a. In an action by a sales agent to recover compensation under a contract which contains a provision for reimbursing him for money paid unknown persons as bonuses, evidence is admissible that the bonuses were used to influence purchasing agents in order to secure their business. *Smith v. David B. Crockett Co.* 39: 1148, 82 Atl. 569, 85 Conn. 282.

Hearsay; declarations; res gestæ.

18. Preliminary proof of relationship is necessary to support declarations tending to establish pedigree. *Vantine v. Butler*, 39: 1177, 144 S. W. 807, — Mo. —.

19. Where the possession of land by two of three tenants in common, who are not the holders of the legal title, is shown, it is competent to prove the neighborhood notoriety of their claim of ownership. *International Harvester Co. v. Myers*, 39: 528, 121 Pac. 500, 86 Kan. 497.

20. Sufficient extrinsic proof of relationship to support declarations of a woman since deceased, that a child was the daughter of a man to whose estate she was attempting to establish heirship, exists where it is shown that the woman, who was the wife of the man, was driven from home pregnant, and shortly after bore a daughter, and that, after staying in the neighborhood of her former home for several years, disappeared with the announced intention of going to a certain place, and was never again seen in that community; that shortly afterwards a woman with her physical characteristics, habits, and beliefs appeared with 39 L.R.A. (N.S.)

a child corresponding to the one which had disappeared, arrived at a town near where the woman announced she was going, and made the declarations in controversy, while the father and members of his family recognized that the missing child was living in the locality to which the woman went. *Vantine v. Butler*, 39: 1177, 144 S. W. 807, — Mo. —.

21. Evidence is not admissible in an action to hold one liable in damages for personal injuries due to his negligence, to the effect that two months after the accident the injured person complained to his physician that he was suffering from dizziness and sleeplessness. *John J. Radel Co. v. Borches*, 39: 227, 145 S. W. 155, 147 Ky. 506.

22. Upon a prosecution for assault with intent to kill evidence is admissible that some days before the assault, threats had been made to the victim, if there is evidence tending to show that the persons making the threats were in the party which committed the assault. *People v. Connors*, 39: 143, 97 N. E. 643, 253 Ill. 266.

Relevancy and materiality.

23. Upon the question of damages for causing the arrest and detention of a passenger as a witness, evidence is admissible that he was taken to the jail and compelled to leave a cash deposit as bail. *New York, P. & N. R. Co. v. Waldron*, 39: 502, 82 Atl. 709, 116 Md. 441.

24. Upon the question of wilfulness in removing a telephone for nonpayment of rent, although the subscriber claimed that he had paid it and had a receipt, evidence is to be considered both that the phone was removed notwithstanding this claim, and that he had been in arrears before, and that the collecting agent had informed the company that only part of the amount due had been paid. *Carmichael v. Southern Bell Tele. & Teleph. Co.* 39: 651, 72 S. E. 619, 157 N. C. 21.

25. Although the fact that an electric light located near the place where an accident occurred on a public street, was not burning at the time of the accident, is not evidence of negligence on the part of the municipality, it may be considered by the jury as tending to show why the injured person did not avoid the obstruction. *Campbell v. Chillicothe*, 39: 451, 144 S. W. 408, 239 Mo. 455.

26. Evidence that the conductor had no authority to cause the detention of a passenger as a witness to a misdemeanor on the train is not admissible in an action to hold the railroad company liable for false imprisonment because of such detention. *New York, P. & N. R. Co. v. Waldron*, 39: 502, 82 Atl. 709, 116 Md. 441.

27. Receipts, statements, and other evidences of liability in the handwriting of the principal are admissible evidence against the sureties, and prove prima facie liability on their part. *Star Grocer Co. v. Bradford*, 39: 184, 74 S. E. 509, — W. Va. —.

Weight, effect, and sufficiency.

Presumption on appeal as to sufficiency of evidence, see Appeal and Error, 9.

Sufficiency of evidence to overcome presumption of larceny arising from possession of stolen property, see Appeal and Error, 19.

New trial for insufficiency of, see New Trial, 1.

Jury as judge of weight of evidence, see Trial, 1.

28. Where a railway track is laid across a traveled public street in a city, a duty arises on the part of the railway company using it to exercise ordinary care to discover and avoid injury to persons or property rightfully on such crossing, so that, where a fire hose laid by the fire department of such city across the crossing to extinguish a fire is cut by the railway running its locomotive over it, thereby interrupting the effort to extinguish the fire and causing destruction to the property, it is not necessary for the owner thereof, in order to recover damages for the loss, to plead and prove wanton negligence of the railway company in cutting the hose, or prove that the person operating the locomotive had actual knowledge of its presence on the crossing. It is sufficient to prove that the failure of the railway company to use ordinary care caused the cutting of the hose and resulted in the destruction of the property. *Erickson v. Great Northern R. Co.* 39: 237, 135 N. W. 1129, 117 Minn. 348.

29. To justify a divorce for adultery, a preponderance of evidence of the fact is sufficient; it need not be clear, cogent, and convincing. *Ellett v. Ellett*, 39: 1135, 72 S. E. 861, 157 N. C. 161.

30. That an impression of the name of the grantee indorsed on the back of a deed, from which an initial had been erased, which was accidentally made upon a blank space on the paper, by exposure to the weather soon after the deed was delivered, shows the initial to be missing, is strong corroborative evidence that the erasure was made before delivery. *Tharp v. Jamison*, 39: 100, 134 N. W. 583, — Iowa, —.

31. That one is found on the street early in the morning with a suit case in which is found 57 half-pint bottles of whisky, with a corkscrew attached to each one, and appears frightened and attempts to get away when approached by an officer, does not warrant a conviction of having in possession intoxicating liquor with intent to sell or give it away in violation of law. *McComb City v. Hill*, 39: 534, 56 So. 348, — Miss. —. (Annotated)

32. An alibi sought to be established by one accused of crime on April 20, by showing that he had been taken ill about the middle of March and could not leave the house until after April 20, may be rejected where he is shown to have voted at elections on April 4 and 11, and subsequently, on cross-examination, fixed the time of his illness as beginning in December. *People v. Connors*, 39: 143, 97 N. E. 643, 253 Ill. 266. 39 L.R.A. (N.S.)

33. Liability to indictment for the same offense is not necessary to render one an accomplice with a person on trial for agreeing to receive and receiving a bribe, under a statute defining accomplices as all persons concerned in the commission of crime, whether they directly commit the act constituting the offense, or aid and abet in its commission. *People v. Coffey*, 39: 704, 119 Pac. 901, 161 Cal. 433.

34. An intermediary representing one who desires to influence the action of a public board by bribery, who makes the bargain with the members and delivers their compensation, is an accomplice with one agreeing to receive and receiving the bribe, under a statute defining accomplices as all persons concerned in the commission of crime, whether they directly commit the act constituting the offense, or aid and abet in its commission, so that his uncorroborated testimony is not sufficient to convict the latter. *People v. Coffey*, 39: 704, 119 Pac. 901, 161 Cal. 433. (Annotated)

35. Establishing the existence of a fund for bribery, and showing a general immunity contract with one accused of agreeing to receive and receiving a bribe, are not sufficient to corroborate testimony of an accomplice who secured the bargain to receive the bribe, so as to support a conviction; nor is the fact that the accomplice sought to secure an abandonment of the prosecution against accused. *People v. Coffey*, 39: 704, 119 Pac. 901, 161 Cal. 433.

36. That an official voted for a proposition to support which he is accused of agreeing to receive and receiving a bribe does not corroborate the testimony of the accomplice that he entered into the agreement, so as to support a conviction. *State v. Coffey*, 39: 704, 119 Pac. 901, 161 Cal. 433.

37. To sustain a conviction of perjury for giving evidence which secured the acquittal of accused upon another charge, the falsity of the oath must be proved by positive and direct testimony, circumstantial evidence alone not being sufficient. *Allen v. United States*, 39: 385, 194 Fed. 664, — C. C. A. —.

Variance.

38. An allegation that by gross negligence of city officers duplicate paving tax certificates were issued and placed on the market is not sustained by proof that they were never delivered by anyone having authority to deliver them, but that they were taken without right by one having no authority to deliver them. *National Bank of Commerce v. Oklahoma City*, 39: 444, 122 Pac. 644, — Okla. —.

39. An allegation of infringement of a label of a local trades council is not supported by proof of infringement of a label of an international union. *People v. Dantuma*, 39: 1190, 96 N. E. 1087, 252 Ill. 561

EXCAVATIONS.

Negligence as to, see Negligence, 9.

EXCEPTIONS.

See Appeal and Error, 4-8.

EXECUTIVE DEPARTMENTS.

Relation of, to court, see Courts, 1.

EXECUTORS AND ADMINISTRATORS.

Jurisdiction of suits affecting, see Courts, 2.

Duty of bank to pay to administrators money deposited, see Banks, 7.

Insurance as assets in hands of administrators, see Insurance, 16.

Effect of appointment to terminate prior contract for care of property, see Master and Servant, 3.

Disregarding official title in action which administrator has right to maintain in his own name, see Pleading, 1.

Description of, as parties, see Pleading, 1.

Fraud in use of name of decedent by executor in carrying on business, see Tradenames.

1. One appointed by a state court to administer the estate of one who died in a soldiers' home, land for which had been ceded by the state to the Federal government, may maintain an action against the officers of the home to recover possession of securities left by decedent. *Divine v. Unaka Nat. Bank*, 39: 586, 140 S. W. 747, — Tenn. —.

2. A judgment obtained by a domiciliary executor, at the place of his residence, is an asset located within that state; and he, in his individual capacity, and not an ancillary administrator appointed at the debtor's residence, in another state, has the right to sue in the courts of the latter state, to enforce the judgment. *Hare v. O'Brien*, 39: 430, 82 Atl. 475, 233 Pa. 330.

3. A statute declaring that foreign letters of administration shall not confer any of the powers or authority conferred by domestic letters does not prevent a domiciliary administrator who has obtained a judgment in the state of his residence from maintaining an action on it in the local courts. *Hare v. O'Brien*, 39: 430, 82 Atl. 475, 233 Pa. 330. (Annotated)

4. Under the New Jersey "act for the relief of creditors against heirs and devisees," which gives a right of action against the heirs or devisees of a deceased debtor, the personal representative of a deceased devisee, who is also a devisee of such devisee, is not liable, in her representative capacity, for the debts of the ancestor, where her decedent dies without selling or aliening the lands devised; and, in the absence of a showing that lands originally belonging to the debtor were devised to her, she is not liable as devisee. *McCarthy v. Mullen* (N. J. Err. & App.) 39: 688, 82 Atl. 51, — N. J. —. (Annotated)

EXEMPLARY DAMAGES.

See Damages, 1-4.

EXEMPTIONS.

From taxation, see Taxes, 1.
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EXPLOSIONS AND EXPLOSIVES.

Liability of seller for injuries by, see Negligence, 1-3.

Question for jury as to nature of explosive substance, see Trial, 11.

Venue of action for damages from explosion of paint drier, see Venue, 2.

EX POST FACTO LAW.

See Constitutional Law, 1.

FACTS.

Review of, on appeal, see Appeal and Error, 18, 19.

FALLING OBJECTS.

Injury to person in highway by, see Highways, 4, 5.

FALSE IMPRISONMENT.

Liability of carrier for arrest of passenger, see Carriers, 2, 3.

Evidence in action for false imprisonment of passenger, see Evidence, 26.

Instruction in action for, see Trial, 12, 16.

A railroad company is liable for the act of a policeman in its employ who, under the state statutes, has the power of a public officer in criminal matters, in arresting a citizen in excess of authority conferred by an execution which had been issued in favor of the corporation in a civil action, and compelled to answer in damages for false imprisonment. *Taylor v. New York & L. B. R. Co.* (N. J. Err. & App.) 39: 122, 78 Atl. 169, 80 N. J. L. 282. (Annotated)

FALSE PRETENSES.

Fraudulent representations in civil action, see Fraud and Deceit.

Indictment for, see Indictment, etc., 2.

It is no defense to an indictment for obtaining money by false pretenses that the transaction in which the money was obtained was a pretended sale of counterfeit money. *Horton v. State*, 39: 423, 96 N. E. 797, 85 Ohio St. 13. (Annotated)

FEDERAL COURTS.

Following state court's decisions, see Courts, 3.

FELLOW SERVANTS.

See Master and Servant.

FERTILIZERS.

Imposing license on business of dealing in, see License, 3.

FIRE DEPARTMENT.

Members of, as servants of person whose property they attempt to save from fire, see Fires, 2.

FIRE ESCAPES.

On buildings, see Buildings.

FIRE INSURANCE.

See Insurance.

FIRES.

Sufficiency of proof of negligence in interfering with extinguishment of, see Evidence, 28.

Liability for injury to infant by, see Negligence, 5.

Negation of contributory negligence in action for interference with extinguishment of, see Pleading, 8.

Demurrer to complaint in action for interfering with extinguishment of, see Pleading, 12.

Demurrer to allegation that owner of building had failed to provide means for extinguishing, see Pleading, 13.

1. A railroad company which permits a train to stand on a street crossing in violation of statute is liable for injury done to private property through the inability of the city fire apparatus to reach it because of such obstruction. *Cleveland, C. C. & St. L. R. Co. v. Tauer*, 39: 20, 96 N. E. 758, — Ind. —. (Annotated)

2. The firemen of a fire department in a city are not the servants or agents of the person whose property they attempt to save from fire, so that their negligence in failing to take the proper course in the extinguishment of the fire avails one who, by a negligent act, cut off the water supply by which the fire was being successfully subdued, and thereby proximately caused the destruction of the property. *Erickson v. Great Northern R. Co.* 39: 237, 135 N. W. 1129, 117 Minn. 348. (Annotated)

FLAG STATION.

Carrier's duty as to, see Carriers, 12, 13.

FLIGHT.

Presumption of guilt from, see Evidence, 4.

FOLLOWING TRUST PROPERTY.

See Trusts, 5.

FOOD.

Where a pure food statute provides that in testing milk or cream for commercial purposes the same shall be done in accordance with the rules and regulations prescribed by the pure food commission, a criminal prosecution cannot be sustained against one for violation of a rule prescribed by the pure food commissioner in accordance with said statute, that payment for cream purchased for commercial purposes should be suspended until the day following the testing or the time of the next delivery. *State v. Elam*, 39: 686, 136 N. W. 59, — Neb. —. (Annotated)

FOREIGN EXECUTORS AND ADMINISTRATORS.

See Executors and Administrators, 2, 3.

FOREIGN JUDGMENT.

As evidence, see Evidence, 10.
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FORFEITURE.

For breach of condition, see Covenants and Conditions, 5.

Of insurance policy, see Insurance.

Of provision in will because of contest, see Wills, 2.

FORGERY.

Payment by bank of forged paper, see Banks, 6.

Of indorsement on paying tax certificates pledged as collateral, see Pledge and Collateral Security, 2.

Of will, see Wills, 2.

FORGETFULNESS.

As negligence, see Negligence, 9.

FORMER JEOPARDY.

See Criminal Law, 1-3.

FRAUD AND DECEIT.

By bank in taking money for draft when insolvent, see Banks, 8-10.

Estoppel by, see Estoppel, 3.

As to false pretense, see False Pretenses.

Transfers in fraud of creditors, see Fraudulent Conveyances.

Annulment of marriage for fraud in procuring, see Marriage.

Loss of right to use of tradename by, see Tradenames.

Rescission of land contract for, see Vendor and Purchaser, 3.

When a false representation is of a matter presumably within the knowledge of the person making it, not made in the way of commendation or as an opinion merely, but as a positive assertion of an existing fact, to induce the other party to enter into the contract, such party, having no knowledge to the contrary, may, if he act in good faith, accept the representation as true, and is not bound to make inquiries or examination for himself. *Westerman v. Corder*, 39: 500, 119 Pac. 868, 86 Kan. 239.

FRAUDULENT CONVEYANCES.

Applicability of statutory provision for restoration of property in case of divorce, to property transferred to defraud creditors, see Divorce and Separation, 8.

Creditors of one who sells a stock of merchandise in bulk for an adequate consideration, without complying with the provisions of the bulk sales law, cannot hold the vendee liable for the value of the property, as trustee, although the statute provides that such sale shall be fraudulent and void as against creditors. *McGreenery v. Murphy*, 39: 374, 82 Atl. 720, 76 N. H. 338. (Annotated)

FREIGHT CARRIERS.

See Carriers.

FRIGHT.

Liability of carrier for injury to passenger by, see Carriers, 5.

FULL FAITH AND CREDIT.

To judgment of other state, see Judgment, 4.

FUNERAL.

Liability of undertaker furnishing carriages for funeral to occupants of carriages, see Master and Servant, 7; Parties, 3.

FUTURES.

Draft given to furnish margins on illegal transaction in futures, see Contracts, 7.

GAMING.

Enforcement of gaming contract, see Contracts, 7.

Enforcement in other state of gaming contract, see Conflict of Laws.

GAS.

As to gas in mines generally, see Mines.

GATES.

Obstruction of highway by, see Highways, 2.

Duty of carrier to keep gates on platform closed, see Carriers, 8.

GENERAL REPORT.

Evidence of, see Evidence, 19.

GIFT.

Acceptance of, by officer as bribery, see Bribery.

Validity of gift by husband to wife, see Husband and Wife, 2.

Presumption that money of wife invested in land in husband's name is a gift, see Trusts, 4.

GOOD FAITH.

Setting out facts in pleading to show, see Pleading, 6, 7.

GOVERNOR.

Duty of attorney general to prosecute liquor case at request of, see Attorney General.

Review of action of, by certiorari, see Certiorari.

Interference of court with, see Courts, 1.

Power of, to remove officer, see Officers, 2.

1. Where it appears that a newspaper correspondent has openly charged in his paper a violation of the liquor laws of a state, the governor, in the exercise of the power of his office, may require the attorney general to proceed to examine such correspondent as a witness, under a statute making the examination of witnesses a distinct proceeding. *State ex rel. Stubbs, v. Dawson*, 39: 993, 119 Pac. 360, 86 Kan. 180.

2. A constitutional provision vesting the supreme executive power of a state in the governor implies that the governor is the highest in authority in the executive department, with such power as will secure a faithful execution of the laws in the 39 L.R.A. (N.S.)

manner and by the methods prescribed by the Constitution and statutes. *State ex rel. Stubbs v. Dawson*, 39: 993, 119 Pac. 360, 86 Kan. 160.

GRANT.

Conditions in grant by state, see Covenants and Conditions, 2, 5.

GUARANTY.

Oral evidence to show intention of guarantor, see Evidence, 11.

1. The promise to be responsible for any bill that a certain person may make is a continuing guaranty, and not limited to the purchase made at the time it is first presented, where the person named has a running account with the one to whom the paper is addressed, who refuses further credit unless the account is guaranteed. *Newcomb v. Kloblen* (N. J. Err. & App.) 39: 724, 74 Atl. 511, 77 N. J. L. 791.

(Annotated)

2. One who guarantees another's account is not entitled to notice of the latter's default, before steps are taken to hold him liable on his guaranty. *Newcomb v. Kloblen* (N. J. Err. & App.) 39: 724, 74 Atl. 511, 77 N. J. L. 791.

GUARDIAN AND WARD.

For incompetent person, see Incompetent Persons.

Complaint in action on bond of guardian, see Pleading, 2.

1. Sureties on the bond of a guardian, executed after he has converted property of his ward to his own use, are liable for the defalcation if, after the bond is executed, he continues solvent, so that he could have restored the funds to the trust, which he failed to do. *Ætna Indemnity Co. v. State use of Gallaspy*, 39: 961, 57 So. 980, — Miss.

(Annotated)

2. Sureties on a guardian's bond are not relieved from liability for an existing defalcation by an order, upon their petition for the execution of a new bond by the guardian, that a new bond be recorded, and that the petitioning sureties be relieved from further liability on the bond. *Ætna Indemnity Co. v. State use of Gallaspy*, 39: 961, 57 So. 980, — Miss. —

GUARDS.

On dangerous machinery, see Master and Servant, 4.

GUESTS.

At hotels, see Innkeepers.

GUILT.

Presumption of, see Evidence, 4.

HABEAS CORPUS.

Under a constitutional provision that all persons accused of crime shall be bailable except in case of one accused of a capital offense when the proof of guilt is evident or the presumption thereof great, upon an application to the supreme court

for bail by writ of habeas corpus after commitment for a capital offense by a justice of the peace, bail not being demandable as a matter of right, the burden is on the petitioner to show that he is illegally deprived of his liberty. *Re Thomas*, 39: 752, 93 Pac. 980, 20 Okla. 167.

HALF BLOOD.

Inheritance by, see Descent and Distribution, 1.

HALLWAYS.

Easement in, see Easements, 2.

HARMLESS ERROR.

See Appeal and Error, 20-23.

HAY.

Lien for storage of, see Liens.

HEADLIGHT.

Negligence in running engine without proper headlight, see Railroads, 2.

HEARSAY.

Evidence of, see Evidence, 18-22.

HEIRS.

As to descent and distribution to, see Descent and Distribution.

HIGHWAYS.

Decision on former appeal as law of the case in action for injury of change of grade, see Appeal and Error, 25.

Lease to railroad of lands granted to municipality for street purposes, see Covenants and Conditions, 2, 5.

Relevancy of evidence as to contributory evidence, see Evidence, 25.

Interference with extinguishment of fire by obstruction of street crossing, see Fires, 1; Pleading, 8; 12.

Who may maintain action on railroad's agreement to keep street in repair, see Parties, 4.

Allegations in petition for injunction against nuisance in, see Pleading, 10.

Rescission of land contract for breach of agreement to construct highway to property, see Vendor and Purchaser, 3.

Rights as to trees in street.

1. Forbidding the removal of trees standing in the street without a permit does not prevent the owner of the tree from removing branches therefrom which have become dangerous to persons using the street. *Dyer v. Danbury*, 39: 405, 81 Atl. 958, 85 Conn. 128.

Liability for injuries on.

Prejudicial error in instructions in action for injury, see Appeal and Error, 21.

Liability for injury by electric wires in highway, see Electricity.

Absence of light as evidence of negligence, see Evidence, 25.

Liability for injury due to negligent driving, see Negligence, 6.

Question for jury as to negligence, see Trial, 6.

Correctness of instructions as to negligence, see Trial, 18.

2. A municipal corporation is liable for injury to a pedestrian on a sidewalk by collision, in the night, with a gate which is so constructed that it will stand open across the walk so as to obstruct it, if the municipality had notice of, or, by the exercise of ordinary care, could have discovered, the defect in time to remedy it prior to the injury. *Campbell v. Chillicothe*, 39: 451, 144 S. W. 408, 239 Mo. 455.

3. A municipal corporation is not liable for injury to a traveler by its failure to remove a nuisance consisting of a dangerous limb on a tree in the street, since the duty to remove it is a governmental one. *Dyer v. Danbury*, 39: 405, 81 Atl. 958, 85 Conn. 128.

4. Statutes making a municipality liable for injuries caused by defective highways do not apply to those caused by the fall of limbs from trees in the street. *Dyer v. Danbury*, 39: 405, 81 Atl. 958, 85 Conn. 128. (Annotated)

5. Charter authority to regulate the planting and removal of trees, and an ordinance providing that no person shall remove or plant a tree in the street without a permit, do not impose upon the municipality the duty of removing dead limbs from trees, so as to render it liable for injury caused by its failure to do so, if under statutory authority a tree warden has been elected who is given the care and control of the public shade trees in the town. *Dyer v. Danbury*, 39: 405, 81 Atl. 958, 85 Conn. 128.

6. Under a charter duty to remove obstructions and encroachments from cross walks, a village is not bound to keep its cross walks free from accumulations of snow and ice, unless dangerous formations or obstacles have been created. *Dupont v. Port Chester*, 39: 1167, 97 N. E. 735, 204 N. Y. 351. (Annotated)

7. A village which is not required to remove the snow from its streets is not negligent in leaving the snow as it falls upon cross walks to facilitate driving in the street, unless there is something in the way in which it falls or the form which it subsequently takes which creates an encumbrance, obstruction, or special danger. *Dupont v. Port Chester*, 39: 1167, 97 N. E. 735, 204 N. Y. 351.

Vacation.

8. The owner of abutting property is entitled to damages for a change in a highway which results in raising a portion of its width to carry it over a bridge, leaving only a narrow strip terminating at the water in front of his property, the effect of which is to cut off travel past his property, and leave access to it only by a cul-de-sac which can be used by vehicles only when they back in one direction. *Park City Yacht Club v. Bridgeport*, 39: 478, 82 Atl. 1035, 85 Conn. 366.

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which induced him to pay money to the defendant, does not aver a crime with reasonable certainty so as to apprise the defendant of what he may expect to meet, and so that the court and jury may know what they are to try, and the court may determine without unreasonable difficulty what evidence is admissible. *Horton v. State*, 39: 423, 96 N. E. 797, 85 Ohio St. 13.

INFANTS.

Damages recoverable by child for wrongful death of father, see Damages, 8, 9.

Measure of damages for injury to, see Damages, 11.

Guardianship, see Guardian and Ward. Enlistment of in militia without consent of parent, see Militia.

Negligence toward, see Negligence, 5.

Negligence of, see Negligence, 7.

Relation of, to parent generally, see Parent and Child.

INFORMATION.

Refusal of, by employees to passenger, see Carriers, 6; Damages, 4.

In general, see Indictment, Information, and Complaint.

INFRINGEMENT.

Of trademarks, see Trademarks.

Of tradenames, see Tradenames.

INHERITANCE.

See Descent and Distribution.

INHERITANCE TAX.

See Taxes, 2, 3.

INJUNCTION.

Review of discretion as to, see Appeal and Error, 12.

Measure of damages in injunction case, see Damages, 12.

Retaining suit for, in order to assess damages, see Equity, 2.

Right to jury in injunction case, see Jury, 2.

Against nuisance, see Nuisances, 3-9.

1. One may not be enjoined from protecting and enforcing his rights by lawful means, unless his acts to that effect are done or threatened unnecessarily, not really for the purpose of protecting his rights, but maliciously to vex, annoy, and injure another. *Kryptok Co. v. Stead Lens Co.* 39: 1, 190 Fed. 767, 111 C. C. A. 495.

Injury or inconvenience to defendant.

2. It is a good defense to an application for an injunction against infringement of a patent, that the wrong and injury likely to be inflicted upon the opponent of the application by its issue will probably be greater than that which the applicant is likely to suffer from its denial. *Kryptok Co. v. Stead Lens Co.* 39: 1, 190 Fed. 767, 111 C. C. A. 495. (Annotated)

Illegal or tortious acts; crimes.

3. A manufacturer cannot enjoin a labor union from removing its stamp from his

shop on failure to renew a contract for labor, although the result of the removal will be to prevent a sale of his product, and the failure to renew the contract is the result of a conspiracy between the union and his competitors to ruin his business. *Saulsberry v. Coopers' International Union*, 39: 1203, 143 S. W. 1018, 147 Ky. 170

As to patents.

4. A patentee will not be enjoined from prosecuting a suit for infringement against a retailer, and commencing other suits against other retailers, by the fact that he has sued the manufacturing infringer for infringement, taken his testimony, and then threatened the manufacturer's customers with infringement suits. *Kryptok Co. v. Stead Lens Co.* 39: 1, 190 Fed. 767, 111 C. C. A. 495.

Bond; damages.

5. One wrongfully enjoined from erecting a dwelling is not precluded from recovering damages therefor because he fails to move to discharge the injunction, where the whole controversy is over the right to erect the building because defendant is of negro blood, and the injunction is not merely ancillary to or in aid of the main issue. *Stone v. Hunter Tract Improv. Co.* 39: 180, 122 Pac. 370, — Wash. —.

INNKEEPERS.

Question for jury as to negligence, see Trial, 10.

1. One who goes into a hotel merely to pass the time and write letters, without registering or purchasing any accommodations, is not a guest so as to render the keeper responsible for the safe-keeping of his baggage. *Baker v. Bailey*, 39: 1085, 145 S. W. 532, — Ark. —.

2. The acceptance by a hotel porter of baggage from one who intends to become a guest at the hotel, but does not do so, establishes merely a gratuitous bailment, and the innkeeper is bound to use only slight care in protecting it. *Baker v. Bailey*, 39: 1085, 145 S. W. 532, — Ark. —.

(Annotated)

INSANE PERSONS.

See Incompetent Persons.

INSOLVENCY.

As to bankruptcy, see Bankruptcy.

Of banks, see Banks, 8-13.

Of corporation, see Corporations, 5-8.

Right to consider insolvency of defendant in awarding damages for personal injuries, see Damages, 7.

Of independent contractors, effect on master's liability, see Master and Servant, 6.

As to receivers, see Receivers.

INSTRUCTIONS.

For instructions generally, and cross-references to same, see Trial, 12-18.

INSURANCE

Raising question for first time on appeal, see Appeal and Error, 15.

Employees' insurance act, see Constitutional Law, 2, 8, 10.

1. A notification from an insurance company that it would protect until the application is acted upon does not place the insurance in force from that date, for the purpose of determining the truthfulness of statements in the application at the inception of the contract. *Carleton v. Patrons' Androscoggin Mut. F. Ins. Co.* 39: 951, 82 Atl. 649, — Me. —.

Cancellation.

See also *infra*, 9.

2. The mailing of a notice of an intention to cancel an insurance policy five days later, which is not received until two days after the mailing, is not, in case no notice of cancellation is given, sufficient to render valid the cancellation on the day named, under a provision in the policy permitting cancellation upon giving five days' notice thereof. *German Union F. Ins. Co. v. Fred G. Clarke Co.* 39: 829, 82 Atl. 974, 116 Md. 622. (Annotated)

Title and encumbrance.

3. No change in the interest, title, or possession of insured property is effected within the meaning of a provision on the policy avoiding it in case of such change, by the appointment of a receiver in bankruptcy proceedings, who, without dispossessing the owner, places a watchman upon the property, effects insurance thereon, and advertises the personal property for sale. *Marcello use of South Side Trust Co. v. Concordia F. Ins. Co.* 39: 366, 82 Atl. 1090, 234 Pa. 31.

Other insurance.

Waiver of provision as to, see *infra*, 10, 11.

4. The insertion by an insurance agent who has failed to secure all the insurance to be placed on a building, of a clause in the policy issued by him making it void if additional insurance is taken, will not prevent recovery on the policy in case of loss, although the intended amount was placed with other companies. *Norfolk F. Ins. Corp. v. Wood*, 39: 1020, 74 S. E. 186, — Va. —.

5. A representation in an application for insurance as to the existence of other insurance on the property must be true when the application is accepted, to comply with a requirement that all facts stated in the application must be true under penalty of avoiding the contract, and if untrue at that time, its truthfulness when made is immaterial. *Carleton v. Patrons' Androscoggin Mut. F. Ins. Co.* 39: 951, 82 Atl. 649, — Me. —. (Annotated)

6. Existing additional insurance upon property unknown to the one issuing a policy thereon avoids the latter policy, which provides that if assured now has or shall hereafter make any other insurance on the property without assent of the insurer, the policy shall be void. *Carleton v.* 39 L.R.A. (N.S.)

Patrons' Androscoggin Mut. F. Ins. Co. 39: 951, 82 Atl. 649, — Me. —.

Severability.

7. A policy of insurance upon a building and contents, which is void as to building because of the existence of additional insurance contrary to its provisions, is void also as to the contents. *Carleton v. Patrons' Androscoggin Mut. F. Ins. Co.* 39: 951, 82 Atl. 649, — Me. —.

Premiums and assessments; rates.

8. Consent by a member of a mutual benefit society, to be bound by all present and future rules of the order, does not empower the society to make an increase in the rate of his assessment date from the inception of his policy, and deduct the amount owing by him under such arrangement from the face of his policy. *Jaeger v. Grand Lodge of Order of Hermann's Sons*, 39: 494, 135 N. W. 869, — Wis. —.

9. A tender or return of the unearned premium is necessary to effect the cancellation of an insurance policy, under a provision in a policy providing that when the policy is canceled by the company it shall retain only the *pro rata* premium. *German Union F. Ins. Co. v. Fred G. Clarke Co.* 39: 829, 82 Atl. 974, 116 Md. 622.

Waiver or estoppel of insurer.

10. The mere suggestion to an insurance agent that other insurance may be secured upon the property will not estop the insurer from contesting the validity of the policy issued by it if other insurance is obtained contrary to the terms of its policy, if neither it nor its agent had notice that additional insurance was in fact obtained. *Carleton v. Patrons' Androscoggin Mut. F. Ins. Co.* 39: 951, 82 Atl. 649, — Me. —.

11. An inadvertent assessment against the premium note of a mutual insurance policy will not waive an objection to the validity of the policy on the ground that other insurance existed upon the property contrary to its terms, nor amount to a ratification of the contract. *Carleton v. Patrons' Androscoggin Mut. F. Ins. Co.* 39: 951, 82 Atl. 649, — Me. —.

Appraisal of loss.

12. Under a statute requiring an insurance company to pay the full amount of the policy in case of a total loss, and in case of a partial loss the amount of loss so sustained, and another statutory provision that, if there is no valuation in the policy, the measure of indemnity in an insurance against fire is the full amount stated in the policy, although a policy covering a private car stipulates that, in case of a loss and disagreement in regard thereto, an appraisal shall be had to determine the loss, no appraisal is necessary to entitle the owner of the car, which was destroyed by fire so that there was nothing left but the iron and steel work, and this was so injured as to be incapable of use in another car, to recover the full amount of the policy. *Springfield F. & M. Ins. Co. v. Homewood*, 39: 1182, 122 Pac. 106, — Okla. —.

Extent of injury.

See also *supra*, 12.

13. When all combustible material in an insured railroad car is destroyed by fire, leaving only the trucks and steel used in its construction, and that is so injured as not to be of use in rebuilding the car, there is a total loss, although the trucks and steel may be worth a small per cent of the original value of the car as old iron or scraps. *Springfield F. & M. Ins. Co. v. Homewood*, 39:1182, 122 Pac. 196, — Okla. —.

(Annotated)

Interest in proceeds.

14. A woman who divorces her husband, who has named her as beneficiary in a mutual benefit certificate, forfeits her rights thereunder where the statute provides that payment of such certificate shall be only to families, heirs, blood relatives, affianced husband, or affianced wife, or to persons dependent on the member. *Green v. Green*, 39: 370, 144 S. W. 1073, 147 Ky. 608.

(Annotated)

15. Designation of a divorced wife who has promised to remarry a holder of a mutual benefit certificate, as beneficiary, is necessary to give her the right to the proceeds as an affianced wife, where the designation in her favor as wife was annulled by the divorce. *Green v. Green*, 39: 370, 144 S. W. 1073, 147 Ky. 608.

16. Brothers and sisters and nephews and nieces not living with or supported by assured are not legal dependents within the meaning of a provision making the proceeds of a benefit insurance policy payable to such persons, and the proceeds are therefore assets in the hands of the administrator. *Caldwell v. Little*. 39: 450, 74 S. E. 10, 158 N. C. 351.

INTENT.

As element of assault, see *Assault and Battery*.

Parol evidence as to, see *Evidence*, 11.

Illegal intent of prosecutor as affecting guilt in obtaining money by false pretenses, see *False Pretenses*.

Question for jury as to, see *Trial*, 3.

Of testator, see *Wills*, 3.

INTEREST.

Illegal interest, see *Usury*.

Interest cannot be allowed as damages for a personal injury, even as compensation for delay in settlement. *Cochran v. Boston*, 39: 120, 97 N. E. 1100, 211 Mass. 171.

INTERPRETATION.

Of contracts, see *Contracts*, 4.

INTERSTATE COMMERCE.

See *Commerce*.

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INTOXICATING LIQUOR.

Refusal of new trial because of inadequacy of damages in action for civil damages, see *Appeal and Error*, 13.

Duty of attorney general to prosecute at request of governor, see *Attorney General*.

Interstate commerce in, see *Commerce*.

Burden of proof in action in replevin to recover possession of, see *Evidence*, 1.

Sufficiency of evidence in prosecution, see *Evidence*, 31.

Right of governor to require attorney general to examine person charged with violation of liquor laws, see *Governor*, 1.

Injunction against liquor nuisance, see *Nuisances*, 7-9.

Removal of county attorney for failure to prosecute liquor cases, see *Officers*, 2.

Allegations as to liquor nuisance, see *Pleading*, 10.

Perjury in making false oath to secure saloon license, see *Perjury*, 2.

Replevin to recover possession of liquors intended for illegal purpose, see *Replevin*.

Wife as competent witness in action under civil damage act for selling liquor to husband, see *Witnesses*, 1.

A statute making it unlawful to sell intoxicating liquor, with or without a license, within a prescribed distance of a school, applies to a physician, who is a pharmacist, prescribing liquor for a patient, and filling the prescription from his stock, which is located within the prescribed distance of a school. *State v. Pomeroy*, 39: 615, 123 Pac. 514, — Wash. —.

(Annotated)

INVERSE ORDER OF ALIENATION.

See *Marshaling Assets and Securities*; *Mortgage*, 4.

IRRIGATION.

Personal liability of purchaser of land on contract with irrigation company under which it is supplied with water, see *Vendor and Purchaser*, 1.

ISLAND.

Effect of change of channel of boundary stream on jurisdiction over, see *Boundaries*.

JEOPARDY.

See *Criminal Law*, 1-3.

JOINT CREDITORS AND DEBTORS.

Effect of discontinuance as to some defendants in action against joint tort feors, see *Dismissal or Discontinuance*.

Right of one joint maker of note to set off against it indebtedness from payee due him individually, see Set-Off and Counterclaim, 1.

Question for jury as to whether money was received in satisfaction of claim, see Trial, 3.

1. A covenant not to sue one of several joint tortfeasors, upon receiving from him a consideration therefor, does not operate to discharge the others, who contribute no part of the consideration, from liability to suit. *Matheson v. O'Kane*, 39: 475, 97 N. E. 638, 211 Mass. 91.

2. A release of, and covenant for a valuable consideration not to sue, one of several joint tortfeasors, which expressly states that the sum received is merely a part satisfaction of the claim, will not prevent a suit against the other wrongdoer. *Kropidlowski v. Pfister & Vogel Leather Co.* 39: 509, 135 N. W. 839, — Wis. —.

JOINT TORT FEASORS.

See Debtors and Creditors.

JUDGES.

That a judge is an honorary member of a bar association does not disqualify him to sit in proceedings instituted by the association for the disbarment of an attorney. *Bar Asso. v. Casey*, 39: 116, 97 N. E. 751, 211 Mass. 187. (Annotated)

JUDGMENT.

Presumption on appeal as to finding of facts necessary to support, see Appeal and Error, 10.

On appeal, see Appeal and Error, 24, 25.

Contempt proceedings to enforce order of restitution of money secured in satisfaction of, see Contempt.

Former judgment of acquittal as bar to criminal prosecution, see Criminal Law, 2, 3.

Record of, as evidence, see Evidence, 10.

Action on, by executor or administrator, see Executors and Administrators, 2, 3.

Official title of administrator as surplusage in proceeding to enforce, see Pleading, 1.

Subrogation to, see Subrogation, 2.

Lien of judgment on property devised with direction for subsequent conversion into personalty, see Wills, 7.

Effect and conclusiveness.

1. A judgment denying relief in an action to recover the contract price and enforce a mechanics' lien for laying a tile floor, because the contract had not been substantially performed, is conclusive against another action to enforce the contract price, based upon evidence that since the former action the owner had completed the work at a nominal cost. *Thompson v. Washington Nat. Bank*, 39: 972, 122 Pac. 606, — Wash. —. (Annotated)

2. An attorney to whom his client has 39 L.R.A. (N.S.)

assigned an interest in the property for which the suit is brought cannot maintain an action against defendants and the witness for conspiring to defeat the claim by perjured testimony, which is successful, although he is thereby deprived of the interest assigned to him since he is concluded by the former judgment in their favor. *Schaub v. O'Ferrall*, 39: 416, 81 Atl. 789, 116 Md. 131.

3. The owner of a patent cannot recover in a suit against a manufacturer of an infringing article which the latter sells to retailers, all the relief to which he is entitled in suits against the latter; and a suit or a decree for an injunction, gains, profits, and damages against the manufacturer is no bar to suits for infringement against those who purchase from him and use or sell the infringing article. *Kryptok Co. v. Stead Lens Co.* 39: 1, 190 Fed. 767, 111 C. C. A. 495.

Foreign judgments.

4. A judgment in a divorce proceeding giving the father the right to receive visits from a child of the marriage, which is awarded to the mother, is not, under the full faith and credit clause of the Federal Constitution, binding upon the courts of another state to which the child and mother remove and where they take up their domicile. *Re Alderman*, 39: 988, 73 S. E. 126, 157 N. C. 507. (Annotated)

JUDICIAL SALE.

A purchaser of land at a judicial sale is privy in estate with him who owned it at the time of sale, and takes the land subject to its burdens. *Bennett v. Booth*, 39: 618, 73 S. E. 909, — W. Va. —.

JURISDICTION.

Of appellate court, see Appeal and Error.

Of courts generally, see Courts.

In divorce suit, see Divorce and Separation.

Retention of, in equity case, see Equity, 2.

JURY.

Functions of, on trial, see Trial, 1-11.

1. In an action to settle disputed questions of title to real estate and to recover possession thereof, either party is entitled to a jury as a matter of right, regardless of the form in which the action may be brought. *Atkinson v. J. R. Crowe Coal & Min. Co.* 39: 31, 102 Pac. 50, 80 Kan. 161.

2. In an action permanently to restrain a person in the actual, exclusive, and peaceable possession of real estate under claim of ownership, who has forcibly prevented another person, who claims to be the owner of the coal and mineral in such land and to have a right to use the surface for mining purposes,—which claim is denied by the person in possession,—from entering thereon, from interfering with the mining and removing of the coal,—the defendant is, as

a matter of right, entitled to a trial by jury. *Atkinson v. J. R. Crowe Coal & Min. Co.* 39: 31, 102 Pac. 50, 80 Kan. 161.

3. In trover by the holder of a chattel mortgage to recover possession of the chattels from one denying his title because of subsequent conveyances, the court cannot deny defendant a jury trial because the matters are so complicated and involved that they cannot be clearly understood by a jury, where no accounting, marshaling, or other equitable relief is necessary. *Daley v. Kennett*, 39: 45, 78 Atl. 123, 75 N. H. 536. (Annotated)

4. An employee is not deprived of his right to trial by jury by an employees' insurance act which provides that an employer of five or more workmen who pays a certain premium into the state insurance fund, and posts certain notices to this effect in his place of business, shall be relieved of liability to respond in damages to an employee for injury, except in case of wilful or statutory negligence, and which provides further for a board of awards to hear and determine questions concerning the payment of claims, and for an appeal from their determination in cases where the right of the claimant is denied upon any ground affecting the basis of the claim. *State ex rel. Yapple v. Creamer*, 39: 694, 97 N. E. 602, 85 Ohio St. 349.

5. The constitutional right to trial by jury is not afforded where a hostile crowd are permitted to pass within the bar to such an extent as to overawe the jury and destroy its impartiality. *State v. Weldon*, 39: 667, 74 S. E. 43, — S. C. —.

6. The statutory property qualification for a trial juror may be waived in a criminal case, and is waived by failing to object to his serving until after verdict. *People v. Cosmo*, 39: 967, 98 N. E. 408, 205 N. Y. 91. (Annotated)

KNOWLEDGE.

Of vendor of falsity of representations, see Estoppel, 3.

Necessity of showing actual knowledge of presence of fire hose on railroad track in action for damages resulting from cutting of, see Evidence, 28.

Of retailer selling stove polish which is really naphtha, see Negligence, 2.

Question for jury as to, see Trial, 4.

LABELS.

Of labor organizations, see Evidence, 39; Trademarks.

LABOR ORGANIZATIONS.

Conspiracy by, see Equity, 1.

Compelling labor union to renew contract with manufacturer for services of members, see Equity, 1.

Proof of allegation of infringement of label, see Evidence, 39.

Injunction against, see Injunction, 3. *3d L.R.A. (N.S.)*

Injunction against removal of union stamps from shop, see Injunction, 3.

Trademark of, see Trademarks.

LACHES.

Estoppel by, see Estoppel, 1.

LAND CONTRACT.

See Vendor and Purchaser.

LANDLORD AND TENANT.

Landlord's liability for obstruction of fire escape, see Buildings.

Lease for immoral purpose, see Contracts, 5.

Revocation by lessee of license, see License, 1, 2.

Injury to tenant falling into excavation made by licensee, see Negligence, 9.

Question for jury as to landlord's knowledge of dangerous condition, see Trial, 4.

Shutting off water from entire building because one tenant fails to pay, see Waters, 4.

1. As a general rule all preceding negotiations relating to a lease of land are merged in the written lease and, in the absence of fraud or mistake, the writing is the controlling evidence of the terms and conditions upon which the property was demised. *Salinger v. North American Woolen Mills*, 39: 350, 73 S. E. 312, — W. Va. —.

2. The lessee of a storeroom, unless restrained by the terms of his lease, has the exclusive right to the use of the outside walls of that portion of the building covered by his lease, for advertising signs, to the exclusion of a lessee of another part of the same building, but he has no right to occupy with such signs, or for any purpose, the outside wall not inclosing his part of the leased premises. *Salinger v. North American Woolen Mills*, 39: 350, 73 S. E. 312, — W. Va. —. (Annotated)

3. The knowledge of a landlord, or of one of his tenants, and his or their acquiescence in the use by another tenant, without consideration, of the outside walls of a portion of the building not inclosing the part occupied by or leased to him, but leased to and occupied by another tenant, amounts simply to a license, revocable at pleasure by the licensor, whether such licensor be the landlord or a tenant. *Salinger v. North American Woolen Mills*, 39: 30, 73 S. E. 312, — W. Va. —.

Liability of landlord.

4. Where a nuisance dangerous to life is created by the owner on his premises, or through his gross negligence is suffered to remain there, he cannot, by leasing the property to another, avoid his own liability to any person who is rightfully upon the premises, and who, without fault, is injured by reason of such nuisance; and this liability extends to a servant of the tenant, notwithstanding the tenant, by

reason of his own fault or neglect or knowledge of the danger, could not have maintained an action against the owner for any injury suffered by himself. *Bailey v. Kelly*, 39: 378, 122 Pac. 1027, 86 Kan. 911.

Rent.

Oil and gas lease, see *Mines*.

Negation of defense in action to recover rent, see *Pleading*, 5.

5. The owner of a building who, during the term of a lease thereof, unlawfully fails to equip such building with fire escapes, cannot maintain an action upon such lease for rent. *Leuthold v. Stickney*, 39: 231, 133 N. W. 856, 116 Minn. 299.

6. One leasing a portion of a building for a moving picture show cannot, upon surrendering the lease, recover from the lessor rent paid in advance, and for time when he had no use of the premises, and the cost of necessary alterations, upon the refusal of the police department to permit him to operate the establishment for the intended purpose because it lacked the fire escapes prescribed by the municipal ordinances, on the theory that the lessor knew that the building could not be used for the purpose intended, and neglected to inform him of the fact. *Rockwell v. Eiler's Music House*, 39: 894, 122 Pac. 12, 67 Wash. 478. (Annotated)

LARCENY.

Sufficiency of evidence to warrant setting aside of conviction on appeal, see *Appeal and Error*, 19.

Review of facts on appeal from conviction, see *Appeal and Error*, 19.

LAW OF CASE.

Decision on former appeal as, see *Appeal and Error*, 25.

LEASE.

For immoral purposes, see *Contracts*, 5.

As encumbrance or conveyance within statute requiring joinder or consent of spouse, see *Husband and Wife*, 3.

Lease in general, see *Landlord and Tenant*, 1.

LEGISLATURE.

Power of, to provide for registration of union label, see *Trademarks*.

LEVEES.

Entitling proceeding to include property in levee district in name of district, see *Parties*, 1.

Assessment on property in district, see *Public Improvements*.

Including railroad property in a levee district does not violate its charter rights, on the theory that the railroad company was not organized to reclaim overflowed lands. *Des Moines & M. Levee Dist. No. 1 v. Chicago, B. & Q. R. Co.* 39: 543, 145 S. W. 35, — Mo. —.

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LIBERTY.

Guaranty of right to, see *Constitutional Law*, 6, 7.

LICENSE.

Negligence as to licensee, see *Negligence*, 4.

Negligence of licensee, see *Negligence*, 9.

Revocation.

Revocation of license to use walls of leased building for advertising, see *Landlord and Tenant*, 3.

1. The rule giving the right to the owner of a fee to revoke at pleasure a mere license to another to occupy his land, or any portion thereof, is equally applicable to his lessee where such lessee is the licensor, unless the latter be restrained by the terms of his lease from granting such license. *Salinger v. North American Woolen Mills*, 39: 350, 73 S. E. 312, — W. Va. —.

2. An agreement in writing by the tenant of a building, granting to another the right to use the outside walls of the part leased by him, is a revocation of a license, without consideration, to another tenant of the same building to use such walls. *Salinger v. North American Woolen Mills*, 39: 350, 73 S. E. 312, — W. Va. —.

From public.

3. A statute imposing a tonnage tax for purposes of inspection on fertilizers, and forbidding "any other tax to be levied by county, city, or town," does not forbid a municipality from imposing a license tax on the business of dealing in such products. *Pocomoke Guano Co. v. New Bern*, 39: 803, 74 S. E. 2, 158 N. C. 354.

4. Charter authority to impose a tax on trades permits the imposition of a tax on the maintenance by a foreign manufacturer of a warehouse for the storage, within the municipality, of its products pending deliveries by agents, to whom the orders are forwarded from the home office in another state. *Pocomoke Guano Co. v. New Bern*, 39: 803, 74 S. E. 2, 158 N. C. 354.

(Annotated)

LIENS.

Parties on appeal in action to subject property to, see *Appeal and Error*, 1.

On bank stock, see *Banks*, 3.

Of chattel mortgage, see *Chattel Mortgage*.

Liability of grantor warranting title for costs of defending attempt to establish lien on property, see *Covenants and Conditions*, 1.

Of mechanic or materialman, see *Mechanic's Liens*.

Of pledge, see *Pledge and Collateral Security*.

Of vendor, see *Vendor and Purchaser*, 4, 5.

The owner of a farm who permits hay to be stored on it under an agreement for the payment of storage charges has

not, unless the contract provides therefor, any lien upon the property to secure payment of the charges. *Lewis v. Gray*, 39: 1164, 83 Atl. 1, — Me. —.

(Annotated)

LIFE ESTATE.

Creation of, by will, see Wills, 4-6.

LIFE INSURANCE.

See Insurance.

LIFE TENANTS.

Venue of action by remainderman for waste, see Venue, 1.

LIGHTS.

Absence of, in highway, see Evidence, 25.

LIMITATION OF ACTIONS.

Review of discretion, in permitting amendment of plea of, see Appeal and Error, 11.

Bar of prior or other claim or portion of claim or defense.

Demurrer to claim where debt is barred by limitations, see Pleading, 14.

1. A vendor's lien is a right created by law as an incident to the debt, and ceases to be available in equity when the debt is not enforceable at law. *Shaylor v. Cloud*, 39: 1171, 57 So. 666, — Fla. —.

(Annotated)

When statute runs.

2. The statute of limitations does not begin to run against liability of trustees of a savings bank for money lost through loans made by them in contravention of statute and the rules of the institution, until the facts are learned by the institution. *Greenfield Sav. Bank v. Abercrombie*, 39: 173, 97 N. E. 897, 211 Mass. 252.

3. A mere change of name without fraudulent intent, after one against whom a judgment has been entered in one state takes up his residence in another state, will not prevent the statute of limitations running in his favor in the latter state. *St. Paul Title & T. Co. v. Stensgaard*, 39: 741, 121 Pac. 731, — Cal. —.

(Annotated)

LIVERY STABLES.

Scope of employment of driver of hired vehicle, see Master and Servant.

An occupant of a hired carriage cannot hold the owner liable for injury due to the running away of the team during the absence of the driver, leaving the team unattended, if the driver acted at the request, or with the consent, of the occupant. *John J. Radel Co. v. Borches*, 39: 227, 145 S. W. 155, 147 Ky. 506.

LIVE STOCK.

Transportation of, see Carriers, 17.

LOAN.

Usury in loans by agent or broker, see Usury.

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LOSS.

Of insured property, extent of, see Insurance, 12, 13.

LUMBER.

Sufficiency of delivery of lumber sold, see Sale, 2.

LUNATICS.

See Incompetent Persons.

MACHINERY.

Injury to employee by, see Master and Servant, 4.

MALICE.

Presumption and burden of proof as to, see Evidence, 2, 3.

In interfering with business of rival, see Unfair Competition.

In instigating action for removal of building obstructing navigation, see Waters, 1.

MALICIOUS PROSECUTION.

Liability of corporation for act of agent in instituting, see Corporations, 1.

Presumption of malice, see Evidence, 2.

As to false imprisonment, see False Imprisonment.

Allegations as to, see Pleading, 9.

Instructions in action for, see Trial, 17.

Probable cause as question for court, see Trial, 17.

1. It is no defense, in an action for malicious prosecution for a wrongful search of a dwelling house, that the affidavit of the party by whom the search warrant was secured did not, in law, authorize its issuance. *Chicago, R. I. & P. R. Co. v. Holiday*, 39: 205, 120 Pac. 927, — Okla. —.

2. A *nolle prosequi*, with leave, after which the prosecution is never renewed, is sufficient termination of the proceeding to support an action for malicious prosecution. *Wilkerson v. Wilkerson*, 39: 1215, 74 S. E. 740, — N. C. —.

(Annotated)

MANDAMUS.

1. The proper function of a writ of mandamus is to compel the doing of a specific thing, something which can be neither diminished nor subdivided, and is not an appropriate remedy to compel a general course of official conduct or a long series of continuous acts, as it is impossible for the court to oversee the performance of such duties. *McAlester-Edwards Coal Co. v. State ex rel. Marshall*, 39: 810, 122 Pac. 194, — Okla. —.

(Annotated)

2. Mandamus will not lie to compel a parish committee, which has no legislative authority, to decide questions of eligibility of candidates at primary elections, to make such a decision. *Roussel v. Dornier*, 39: 826, 57 So. 1007, — La. —.

3. Mandamus is a proper remedy to compel the treasurer of a town to pay valid

orders issued by the board of supervisors, and the validity of such orders may be determined in such proceeding. *State ex rel. Morris v. Clark*, 39: 43, 134 N. W. 129, 116 Minn. 500.

MANDATORY PROVISIONS.

In Constitution, see Statutes, 1.

In statute, see Statutes, 5.

MANSLAUGHTER.

See Homicide.

MANUFACTURERS.

Liability for injury due to defects in articles manufactured, see Negligence, 1.

MARGINS.

Draft given to furnish margins in illegal transaction, see Contracts, 7.

MARRIAGE.

Divorce or separation, see Divorce and Separation.

A marriage cannot be annulled for fraud because the man entered into it to prevent the woman from appearing against him in a prosecution for seduction, with the intention of abandoning her afterwards. *Johnson v. Johnson*, 39: 518, 58 So. 418, — Ala. —.

MARRIED WOMEN.

See Husband and Wife.

MARSHALING ASSETS.

One having a second mortgage lien on property of a man alone cannot, under the doctrine of marshaling, compel a prior mortgagee having a lien on that property and also on property of the debtor's wife as security for the husband's debt, to resort primarily to the wife's property, so as to permit him to make his claim out of that of the husband. *Gaines v. Hill*, 39: 999, 144 S. W. 92, 147 Ky. 445.

(Annotated)

MASTER AND SERVANT.

Landlord's liability for injury to employee in building because of obstruction of fire escape, see Buildings, 2.

Equal protection and privileges as to, see Constitutional Law, 2.

Employees' insurance act as depriving employee of recourse to courts, see Constitutional Law, 8.

Employees' insurance act as exercise of police power, see Constitutional Law, 10.

Statute abolishing fellow servant rule, see Constitutional Law, 10.

Constitutionality of statute making owner personally liable to laborers of contractors because of noncompliance with provisions for their protection, see Constitutional Law, 5, 6.

Authority of agent or officer of corporation to employ help, see Corporations, 2.

Liability of corporation for act of agent, see Corporations, 1.

Measure of damages for injury to servant, see Damages, 10.

Firemen as servants of person whose property they attempt to save, see Fires, 2.

Employees' insurance act as depriving employee as to right of jury trial, see Jury, 4.

Authority of boy to engage physician at parent's expense, see Parent and Child, 1.

When relation exists.

1. The owner of an automobile who lends it for a trip is not liable for the negligent act of the chauffeur, who was sent to run the car by the keeper of the garage where the machine was kept and cared for, for hire which was to include services of chauffeurs, in colliding with a vehicle on the highway, while returning to the garage after termination of the trip, since the chauffeur was not at the time in his service. *Neff v. Brandeis*, 39: 933, 135 N. W. 232, — Neb. —. (Annotated)

Termination of relation.

2. The death of the employer within the year will not terminate a contract for the services, for a year, of one to do the annual assessment work on mining claims and take care of the camp and other property of the employer, the services not to be rendered under the direction of the employer. *Dumont v. Heighton*, 39: 1187, 123 Pac. 306, — Ariz. —. (Annotated)

3. A statute requiring the personal representative to take into possession all the property of the decedent does not terminate a contract for the care, for a year, of the decedent's mining camp and other property, and the doing of the assessment work on the mining claims. *Dumont v. Heighton*, 39: 1187, 123 Pac. 306, — Ariz. —.

Duty as to place and appliances.

4. A mill owner who has allowed a lever operating a saw, and a casing for such saw, to become out of repair, and who has employed a careless workman on an edger near by, is liable to the operator of such saw, who was not guilty of contributory negligence and had not assumed the risk either of the defendant's or the edger operator's negligence, for injuries resulting from his arm being struck and forced upon the saw by a piece of timber carelessly thrown by the edger operator, who was not a fellow servant. *Rogers v. Hiram J. Allen Lumber Co.* 39: 202, 57 So. 166, 129 La. 899.

Master's liability for acts of servant or independent contractor.

Carrier's liability for arrest of passenger, see Carriers, 2, 3.

Liability of charitable institution, see Charities.

Liability of druggist for negligence of clerk, see *Drugs and Druggists*, 1.
 Liability for false arrest of employee, see *False Imprisonment*.

Negligence of driver of hired carriage in leaving team with consent of occupant, see *Livery Stable*.

Liability of city for negligence of its officers or agents, see *Municipal Corporations*, 4.

5. The owner of a hired vehicle is not relieved from liability for injury to an occupant due to the running away of the horses, by the fact that the driver had left the team to visit a saloon, on the theory that by so doing he was acting outside the scope of his employment. *John J. Radel Co. v. Borches*, 39: 227, 145 S. W. 155, 147 Ky. 506.

5a. A railroad company is liable for the acts of its station agent in securing a warrant by which the dwelling of an innocent person was wrongfully searched without probable cause, in furtherance of an attempt to recover property of the company which had been feloniously taken from the possession of the agent, whose duty was to care for it. *Chicago, R. I. & P. R. Co. v. Holliday*, 39: 205, 120 Pac. 927, — Okla. — (Annotated)

6. The employee of one who has undertaken to construct a sewer for a municipality cannot hold it liable for injuries inflicted upon him because of the incompetence of the contractor, even though the incompetence consists of inability to respond in damages for injuries negligently inflicted upon him. *Salmon v. Kansas City*, 39: 328, 145 S. W. 16, — Mo. —

7. An undertaker who contracts to furnish carriages for a funeral cannot escape liability to an occupant of a carriage injured by negligence of the driver, on the ground that he sublet the contract to an independent contractor, if the employers did not consent to the subcontract. *John J. Radel Co. v. Borches*, 39: 227, 145 S. W. 155, 147 Ky. 506.

8. The rule that a municipal corporation cannot avoid liability for injuries caused by blasting which it permits in its streets, by letting the work to an independent contractor, does not apply in favor of the latter's employees; at least not in case the injury is to one drilling the holes, from negligence of the foreman in failing to discover an unexploded charge. *Salmon v. Kansas City*, 39: 328, 145 S. W. 16, — Mo. —

9. A municipal corporation is not liable for injury to the employee of an independent contractor for sewer construction which requires blasting in a public street, because it did not require the contractor to secure a license which its ordinances make a requisite to the doing of that kind of work. *Salmon v. Kansas City*, 39: 328, 145 S. W. 16, — Mo. —

10. A contract for the construction of a sewer for a lump sum is not prevented from being independent, so as to relieve the municipality from liability for injuries 39 L.R.A. (N.S.)

to the contractor's employees, by the fact that the city engineer is given general supervision over the work, with power to require the discharge of incompetent employees, since such provisions are inserted in the contract merely for the protection of the city. *Salmon v. Kansas City*, 39: 328, 145 S. W. 16, — Mo. —

MATERIALITY.

Of evidence, see *Evidence*, 23-27.

MATERIALMEN.

Statute making owner personally liable to, because of noncompliance with provisions for their protection, see *Constitutional Law*, 5, 6.

MAXIMS.

1. *Consensus tollit errorem*. *Fuller v. State*, 39: 242, 57 So. 6, — Miss. —

2. *Salus populi suprema lex*. *State v. Boone*, 39: 1015, 95 N. E. 924, 84 Ohio St. 346.

3. *Verba intentioni debent inservire*. *Kennington v. Hemingway*, 39: 541, 57 So. 809, — Miss. —

4. *Violenti non fit injuria*. *Salmon v. Kansas City*, 39: 328, 145 S. W. 16, — Mo. —

MEANING.

Parol evidence as to, see *Evidence*, 11.

MECHANICS' LIENS.

Conclusiveness of judgment denying release as affected by subsequent events disproving the ground on which it rested, see *Judgment*, 1.

1. A mortgagee out of possession is not an "owner" within the meaning of a statute permitting a mechanics' lien for lumber and materials furnished by consent of the owner, so as to charge his interest with a lien in case he knowingly permits materials to be furnished without protest. *Allis-Chalmers Co. v. Central Trust Co.* 39: 84, 111 C. C. A. 428, 190 Fed. 700.

(Annotated)

Priorities.

2. That the money had not actually been paid on bonds secured by mortgage on real estate before work was done on the property which would support a mechanics' lien does not postpone the mortgage to the lien claimants, if, prior to the origin of the alleged lien, binding agreements had been made to improve the property in consideration of a transfer of the bonds, and to pay the contractor cash for his interest in them. *Allis-Chalmers Co. v. Central Trust Co.* 39: 84, 111 C. C. A. 428, 190 Fed. 700.

3. One who furnishes material or performs labor for improving property which he knows to be subject to a recorded mortgage has no equity to have his claim made superior to that of the mortgagee which will justify a court of equity in displacing vested liens or broadening the language of mechanics' lien statutes by con-

struction, so as to afford a priority. *Allis-Chalmers Co. v. Central Trust Co.* 39: 84, 111 C. C. A. 428, 190 Fed. 700.

4. That funds for the improvement of property were raised by mortgage thereon does not estop the mortgagees from asserting a priority of lien over persons claiming liens for lumber and materials supplied for the improvement. *Allis-Chalmers Co. v. Central Trust Co.* 39: 84, 111 C. C. A. 428, 190 Fed. 700.

5. The lien rights of a subcontractor do not relate back to the time of the execution of the principal contract, so as to give him a priority over a mortgage upon the property, executed to secure bonds delivered to the principal contractor to pay for work to be done by him after the date of the principal contract, where no work was done under the subcontract until after the rights of the mortgagee had become perfected. *Allis-Chalmers Co. v. Central Trust Co.* 39: 84, 111 C. C. A. 428, 190 Fed. 700.

MENTAL ANGUISH.

Damages for, see Damages, 13, 14.

MERGER.

Of prior negotiations in lease, see Landlord and Tenant, 1.

Of mortgage, see Mortgage, 2.

MIDWIFE.

Requiring certificate from, as to legitimacy or illegitimacy, see Constitutional Law, 9.

MILITIA.

The consent of parents is not necessary to render valid the enlistment into state militia of an eighteen-year-old boy, where the Constitution and statutes provide that a militia shall consist of able-bodied men between the ages of eighteen and forty-five years. *Acker v. Bell*, 39: 454, 57 So. 356, — Fla. —. (Annotated)

MILK.

See Food.

MILLDAMS.

Right to compensation for milldams removed in improving navigation, see Eminent Domain.

MILL POND.

Existence of easement of, as breach of warranty, see Covenants and Conditions, 3.

Implied reservation of easement of, see Easements, 1.

MINES.

Right to jury in action to restrain interference with mining and removal of coal, see Jury, 2.

Effect of death to terminate contract for doing assessment work, see Master and Servant, 2, 3.

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Option to explore wife's separate property for oil and gas as an encumbrance or conveyance requiring husband's joinder, see Husband and Wife, 3.

Negation of defense in action to recover rent, see Pleading, 5.

That the lessee never took possession of land under an oil and gas lease does not defeat an action for the compensation provided by the lease to be paid for the right to explore the property for these substances. *Kokomo Natural Gas & Oil Co. v. Matlock*, 39: 675, 97 N. E. 787, — Ind. —.

MINORITY.

Rights of minority members of religious society, see Religious Societies, 1.

MISJOINDER.

Of counts in pleading, see Pleading, 4.

MISTAKE.

As to date in indictment, see Indictment, etc., 1.

Reformation of instrument for, see Reformation of Instruments.

In designating number of bill, see Statutes, 2.

MITIGATION.

Of damages, see Damages, 15.

MONEY.

Contempt in refusing to pay over, see Contempt.

MONOPOLY AND COMBINATIONS.

A contract by a telephone company doing only long-distance business, with a local company doing no long-distance business, by which the former undertakes to furnish apparatus to the latter, and requires it not to extend its lines so as to transact long-distance business or make long-distance connections with other companies without the consent of the contracting party, does not violate a statute making unlawful any combination or contract in restraint of trade, or which shall monopolize or attempt to monopolize the production, management, or control of any kind of business. *Cumberland Teleph. & Teleg. Co. v. State ex rel. Hudson*, 39: 277, 54 So. 670, — Miss. —.

MORTGAGE.

Mortgagee as necessary party to appeal in action to enforce improvement lien, see Appeal and Error, 1.

As to chattel mortgage, see Chattel Mortgage.

Mortgagee as owner within meaning of mechanics' liens law, see Mechanics' Liens, 1.

Priority as to mechanics' liens, see Mechanics' Liens, 2-5.

Notice to mortgagee from possession of land, see Notice.

Reformation of, see Reformation of Instruments.

Subrogation to rights of mortgagee, see Subrogation.

Grantee's liability to mortgagee.

See also *infra*, 4-6.

1. An assumption of an agreement to pay a mortgage, in a deed from a grantor who was not personally liable on the instrument, imposes no liability on the grantee in favor of the mortgagee, where there is nothing to show an intention to benefit him by the contract, which is necessary under the statute to enable him to sue upon it. *Fry v. Ausman*, 39: 150, 135 N. W. 708, — S. D. —. (Annotated)

Merger.

2. Although one cannot be, at the same time, owner and mortgagee of the same property, if the title which apparently conveys perfect ownership and which is supposed to destroy the mortgage, by confusion turns out to be no title, the mortgage thus apparently destroyed, revives, as the cause of its suspension and supposed destruction no longer exists. *Pugh v. Sample*, 39: 834, 49 So. 526, 123 La. 791. (Annotated)

Parties to foreclosure.

3. The foreclosure of one of two simultaneous mortgages by the same person, to the same mortgagee, to secure different debts, which were recorded at the same instant, and one of which has been assigned to a stranger, without making the latter a party, has no effect upon the lien of the assigned mortgage. *Dahlstrom v. Unknown Claimants*, 39: 524, 135 N. W. 567, — Iowa, —. (Annotated)

Order of sale of parcels.

See also *Marshaling Assets and Security*.

4. Where the purchaser of parts of mortgaged premises has on the first purchase assumed the entire mortgage debt and purchased the other parcels subject to said debt, the land so purchased is liable for the mortgage debt before the portion thereof remaining unconveyed by the mortgagor or his estate can be sold in satisfaction thereof. *Chancellor of New Jersey v. Towell* (N. J. Err. & App.) 39: 359, 82 Atl. 861, — N. J. —.

5. Where the purchaser of parts of mortgaged premises has on the first purchase assumed the entire mortgage debt and purchased the other parcels subject to such debt, and the balance remains in the estate of the original owner, the rule in equity that the aliened portions shall be sold in the inverse order of their alienation does not apply. *Chancellor of New Jersey v. Towell* (N. J. Err. & App.) 39: 359, 82 Atl. 861, — N. J. —. (Annotated)

6. In order to avoid circuity of action, equity will not apply the rule that aliened portions of property shall be sold in the inverse order of alienation to pay a mortgage debt, where the first alienee has assumed the payment of the entire debt on his first purchase and subsequently pur-

chased other parts subject to such debt. *Chancellor of New Jersey v. Towell* (N. J. Err. & App.) 39: 359, 82 Atl. 861, — N. J. —.

MOTIONS AND ORDERS.

Raising question for consideration on appeal by motion, see *Appeal and Error*, 8.

MOTIVE.

Of one instigating removal of building obstructing navigation, see *Waters*, 1.

MOVING PICTURE SHOW.

Liability for rent of building leased for, where property cannot be devoted to intended use because of lack of fire escapes, see *Landlord and Tenant*, 6.

MUNICIPAL CORPORATIONS.

First raising objection on appeal in action on municipal contract, see *Appeal and Error*, 16.

Implied contract to pay for services rendered or articles purchased, see *Contracts*, 1, 2.

Restrictions in grant to, by state as to use of property, see *Covenants and Conditions*, 2, 5.

Proof of allegation of negligence in issuing duplicate paving tax certificates, see *Evidence*, 38.

For defects or obstructions in streets, see *Highways*, 2-7.

Power as to license, see *License*.

Liability for negligence of independent contractor, see *Master and Servant*, 8, 8-10.

Criminal liability for nuisance, see *Nuisances*, 10.

Power to remove elective officers, see *Officers*, 1.

Forgery of indorsement on paying tax certificates pledged as collateral, see *Pledge and Collateral Security*, 2.

Proximate cause of loss to bank accepting stolen paving tax certificates, see *Proximate Cause*.

1. Statutory authority to exercise police power over territory outside their corporate limits is applicable to municipal corporations which are under commission form of government with initiative, referendum, and recall. *State v. Rice*, 39: 266, 74 S. E. 582, 158 N. C. 635.

2. Statutory authority to make rules for the preservation of health includes power to forbid the keeping of hogs within the territory over which the municipal authority has jurisdiction. *State v. Rice*, 39: 266, 74 S. E. 582, 158 N. C. 635. (Annotated)

3. The acceptance by a municipality of a charter imposing upon it the duty of removing nuisances does not create a contract between it and the state that it will do so, a breach of which gives a right of

action to one injured by its failure. *Dyer v. Danbury*, 39: 405, 81 Atl. 958, 85 Conn. 128.

4. The driver of a city cart engaged in removing trash or dirt for the city is not engaged in a governmental duty which will relieve the municipality from liability for injuries inflicted by his negligence in managing the outfit. *Pass Christian v. Fernandez*, 39: 649, 56 So. 329, — Miss. —.

(Annotated)

MURDER.

See Homicide.

MUTUAL INSURANCE COMPANY.

See Insurance.

MUTUALITY.

As affecting set-off, see Set-Off and Counterclaim, 1.

NAME.

Effect of charge of, on running of limitations, see Limitation of Actions, 3.

As to tradename, see Tradenames.

NAPHTHA.

Injury to purchaser by explosion of naphtha sold as stove polish, see Negligence, 2, 3.

NAVIGATION.

Taking of private property for improvement of, see Eminent Domain.

NEAR SIGHTEDNESS.

As defense to charge of contributory negligence, see Street Railways, 4.

NECESSITY.

Easement by, see Easements, 2.

NEGATIVE.

In pleading, see Pleading, 5.

NEGLIGENCE.

Prejudicial error in instructions as to damages, see Appeal and Error, 22.

In payment of check or draft, see Banks, 4-6.

Of, or toward, passengers, see Carriers.

Liability of charitable institution for, see Charities.

Measure of damages for negligence causing personal injury or death, see Damages, 7-11.

Of druggists, see Drugs and Druggists. As to electricity, see Electricity.

Presumption and burden of proof as to, see Evidence, 5, 6.

Necessity of proof of wanton negligence of railroad company in cutting fire hose, see Evidence, 28.

Evidence of complaints by person injured, see Evidence, 21.

Sufficiency of proof of, see Evidence, 28. As to fires, see Fires.

Of innkeepers, see Innkeepers.

Interest on amount allowed as damages for personal injury, see Interest.

Of master or servant, see Master and Servant.

Of independent contractor, see Master and Servant, 8-10.

Parent's liability for child's negligence, see Parent and Child, 2.

Liability of undertaker furnishing carriages for funeral to occupants of carriages, see Parties, 3.

Of pledgee in accepting forged collateral, see Pledge and Collateral Security, 2.

Of municipal officers in signing duplicate paving tax certificates, see Proximate Cause.

Of railroad, see Railroads.

Of street railways, see Street Railways. Question for jury as to, see Trial, 6-10.

Remittitur of damages in action for personal injury, see Trial, 19.

Impeachment of witness in action for personal injury, see Witnesses, 2.

Liability of seller or manufacturer.

Personal liability of officer of corporation manufacturing dangerous article, see Corporations, 3.

In sale of drugs, see Drugs and Druggists.

Venue of action for damages from explosion of paint drier, see Venue, 2.

Question for jury as to whether stove polish was naphtha, see Trial, 11.

1. A wholesale dealer who buys a standard paint dryer in the open market without knowledge that it is explosive or inflammable if used with ordinary care is not bound to ascertain its qualities or warn consumers of possible danger in its use, or liable to one for injury by an explosion when he attempts to transfer it from one receptacle to another by artificial light. *Peaslee-Gaulbert Co. v. McMath*, 39: 465, 146 S. W. 770, 148 Ky. 265.

2. A retailer who sells a stove polish which is merely naphtha under an assumed name, the sale of which is prohibited by a statute, is liable for injury caused by its attempted use, although he had no knowledge of the constituent parts of the article. *Gately v. Taylor*, 39: 472, 97 N. E. 619, 211 Mass. 60.

3. A merchant cannot escape liability for injuries caused by his selling naphtha as stove polish contrary to statute, by the fact that other dealers did the same thing. *Gately v. Taylor*, 39: 472, 97 N. E. 619, 211 Mass. 60.

Dangerous premises; injuries to children.

4. A railroad company in cutting, for drainage purposes, a ditch across a path on its right of way, which has been used by the public for many years, is under no obligation to leave it safe for licensees, so as to render it liable for injury to one who, in attempting to use the path in the dark, falls to his injury from a pile of dirt left

in the path. *Chicago, R. I. & P. R. Co. v. Payne*, 39: 217, 146 S. W. 487, — Ark. — (Annotated)

5. A railroad company which does not know of the presence of children on its track, and is not charged with knowledge that they are likely to be there because of their habit of using it as a playground, is not, when burning the grass off the right of way, bound to anticipate the presence of children, and warn them away, under penalty of being liable for injury to one who trespasses upon the track and is burned. *Madden v. Boston & M. R. Co.* 39: 1058, 83 Atl. 129, 76 N. H. 379. (Annotated)

On highway.

In use of automobiles, see *Automobiles*.

Presumption of negligence from running away of horse, see *Evidence*, 6.

As to defects in highways, see *Highways*, 2-7.

Liability of city for negligence of agent in driving, see *Municipal Corporations*, 4.

6. One who drives a vehicle rapidly and negligently upon the street is liable for the injuries proximately resulting from striking a person who is properly walking along or across the street and is in the exercise of ordinary care. *Mugge v. Bracken*, 39: 481, 58 So. 128, — Fla.— (Annotated)

Contributory.

Of passenger, see *Carriers*, 11, 13.

Relevancy of evidence as to, see *Evidence*, 25.

Of occupant of hired carriage, see *Livery Stable*.

Allegation of freedom from, see *Pleading*, 8.

At railroad crossing, see *Railroads*, 3.

Of person crossing street car track, see *Street Railways*.

Question for jury as to, see *Trial*, 5, 7.

7. A four-year-old child is incapable of contributory negligence which will prevent its recovery for injury to it by a vehicle while it is playing in the street. *Pass Christian v. Fernandez*, 39: 649, 56 So. 329, — Mich. —

8. One who attempts to cross a street diagonally at a point other than a cross walk, having his ears covered and looking straight ahead, without heed to traffic on the street, is negligent, and cannot recover for injuries receive by being run down by a passing team. *Peterson v. P. Ballantine & Sons*, 39: 1147, 98 N. E. 202, 205 N. Y. 29. (Annotated)

9. Forgetfulness by an aged tenant whose faculties were unimpaired, of a trench which had been made upon the property by a licensee during the day, when returning to the house after doing an errand in the evening, which results in her falling into the excavation, is negligence as matter of law, which will prevent her holding the licensee liable for the resulting injury. *Reynolds v. Los Angeles Gas & Electric Co.* 39: 896, 122 Pac. 962, — Cal. — (Annotated)

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NEGOTIABLE INSTRUMENTS.

See *Bills and Notes*; *Checks*.

NEW TRIAL.

Review of discretion as to, on appeal, see *Appeal and Error*, 13.

Grounds for, on appeal, see *Appeal and Error*, 24.

1. Where in an action against a railroad company for running over and killing a horse astray upon its tracks, in the night-time, the evidence is such that the jury may reasonably infer that, had there been a proper headlight on the tender in front of the moving train, the enginemmen, in the exercise of due and reasonable care, would probably have discovered the horse in time to avoid injuring him, the question of negligence is one of mixed law and fact for the jury; and the court should not, for want of sufficient evidence, set aside a verdict in favor of the owner of the horse and award defendant a new trial. *Hanger v. Chesapeake & O. R. Co.* 39: 271, 73 S. E. 713, — W. Va. —

2. Where, in an action for damages for assault and battery, the testimony showed that the defendant, without legal justification, struck the plaintiff, causing injury to his nose, followed for over two months by pain and clogging up of the nose, and the defendant admitted the assault and introduced no evidence, and the jury were instructed that, if they found the plaintiff had been unlawfully assaulted, they should allow reasonable compensation, a verdict of \$1 is inadequate and should be set aside. *Sundgren v. Stevens*, 39: 487, 119 Pac. 322, 86 Kan. 154. (Annotated)

3. The court cannot enter judgment upon a verdict after remittitur, which was excessive as a result of passion or prejudice, where the statute provides for a new trial in such cases. *Tunnel Mining & L. Co. v. Cooper*, 39: 1064, 115 Pac. 901, 50 Colo. 390. (Annotated)

NONSUIT.

Prejudicial error as to, see *Appeal and Error*, 17.

NONUSER.

Loss of easement by, see *Easements*, 3.

NOTICE.

To municipality of defect in street, see *Appeal and Error*, 21.

Of default to guarantor, see *Guaranty*, 2.

For cancelation of insurance policy, see *Insurance*, 2.

Of sale of pledged property, see *Pledge and Collateral Security*, 3.

One who has accepted a mortgage from the holder of the legal title, relying on the record title of such mortgagor, and upon his statement that he is the owner of the premises, and that those in possession of the land are in possession as his tenants, is not entitled to enforce his mortgage as

against those in possession of the land, who are in fact tenants in common with the mortgagor, when a very slight investigation and inquiry in the neighborhood would have disclosed the interest of those in possession. *International Harvester Co. v. Myers*, 39: 528, 121 Pac. 500, 86 Kan. 497.

NUISANCES.

Municipal liability for injury due to nuisance in highway, see Highways, 3.

Landlord's liability for injury by, see Landlord and Tenant, 4.

Municipal regulation as to, see Municipal Corporations, 2.

Municipal liability for, see Municipal Corporations, 3.

Allegations as to, see Pleading, 10.

Question for jury as to knowledge of existence of, see Trial, 4.

What are.

1. At the common law acts done in violation of law, or which are against good morals, constitute public nuisances. *State v. Rabinowitz*, 39: 187, 118 Pac. 1040, 85 Kan. 841.

2. A barn located in a thickly settled residence part of a city, in which a large number of horses are stabled, though not *per se* a nuisance, may become such by reason of the manner in which the same is managed and conducted. *Lead v. Inch*, 39: 234, 134 N. W. 218, 116 Minn. 467.

3. If the owner of a barn in a thickly settled residence part of a city so manages the same that noxious and offensive odors escape therefrom, to the detriment, annoyance, and discomfort of adjoining property owners, it is a nuisance, and may be restrained in equity. *Lead v. Inch*, 39: 234, 134 N. W. 218, 116 Minn. 467.

Abatement.

Retaining suit for assessment of damages where right to injunction fails, see Equity, 2.

4. Injunction will not lie to prevent a property owner in a densely populated portion of the city, from causing smoke to issue from the chimneys of his building at an elevation lower than the roofs of neighboring buildings, although permitting it to issue at a lower level constitutes a nuisance to the occupants of such buildings. *Union Planters' Bank & T. Co. v. Memphis Hotel Co.* 39: 580, 139 S. W. 715, 124 Tenn. 649.

5. Equity will interfere to protect offended third persons against a continuing nuisance, although the person responsible for the nuisance be solvent and able to respond in damages. *Lead v. Inch*, 39: 234, 134 N. W. 218, 116 Minn. 467.

6. The injury resulting from a nuisance continuing in character, the annoyance and discomfort of which is incapable of even approximately accurate measurement in money, is irreparable whether the damage be great or small, and equity will interfere to prevent its continuance. *Lead v. Inch*, 39: 234, 134 N. W. 218, 116 Minn. 467.
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7. The fact that the selling and delivery of intoxicating liquors on the streets and alleys of a city may constitute a public offense is no bar to the maintenance of an equitable action to enjoin it as a nuisance. *State v. Rabinowitz*, 39: 187, 118 Pac. 1040, 85 Kan. 841.

8. The selling and delivery of intoxicating liquors on the streets and alleys of a city publicly, repeatedly, and persistently is a common nuisance, and may be enjoined by a court of equity under a statutory provision authorizing the granting of an injunction in the name of the state to enjoin and suppress the keeping and maintaining of a common nuisance. *State v. Rabinowitz*, 39: 187, 118 Pac. 1040, 85 Kan. 841.

9. Under the provisions of a prohibitory law that all places where intoxicating liquors are sold, or given away, or kept for sale or delivery in violation of law, or where persons are permitted to resort for the purposes of drinking intoxicating liquors as a beverage, are common nuisances which may be enjoined and abated at the instance of the state, the occupation and use of a street or alley or other public ground by the defendant for such purpose may be enjoined. *State v. Rabinowitz*, 39: 187, 118 Pac. 1040, 85 Kan. 841.

Criminal liability.

See also *supra*, 7.

10. A city is criminally liable if its officers permit one of its streets, which it is required by statute to maintain, to become so out of repair that it constitutes a public nuisance. *Ludlow v. Com.* 39: 411, 145 S. W. 406, 147 Ky. 706. (Annotated)

NUMBER.

Mistake in numbering bill, see Statutes, 2.

NURSE.

Liability of hospital for negligence of, see Charities, 2.

OATH.

Perjury in making false oath when oath is not required, see Perjury, 2.

OBJECTIONS.

To raise question on appeal, see Appeal and Error, 4-8.

OBSTRUCTION.

Of highways, see Highways, 2, 3.

OFFICERS.

Attorney general, see Attorney General.

Bonds of, see Bonds, 1.

Right to pay commission to brokers for sale of state bonds, see Bonds, 3.

Bribery of, see Bribery.

Certiorari to review action of, see Certiorari.

Certiorari to review discretion in removing, see **Certiorari**.

Validity of contract affecting official action, see **Contracts**, 6.

Of private corporation, see **Corporations**.

Review by court of action of governor in removing, see **Courts**, 1.

District and prosecuting attorneys, see **District and Prosecuting Attorney**.

Power of political committee to pass on eligibility of candidates for office, see **Elections**.

Mandamus to, see **Mandamus**.

Liability for injury to pauper through failure to furnish him aid, see **Poor and Poor Laws**, 4.

Of church, see **Religious Societies**.

1. A municipal corporation has no inherent power to remove its elective officers, where the legislature has made provision for the removal of such officers by judicial proceedings, and it has been given authority to remove nonelective ones. *Legault v. Board of Trustees*, 39: 519, 118 Pac. 706, 161 Cal. 197. (Annotated)

2. Evidence tending to support the charges that a county attorney neglected to give proper legal advice to the county commissioners, that he neglected and refused to prosecute liquor cases, and that indictments had been returned against him for libel and circulating obscene literature, is sufficient to sustain the action of the governor in removing such officer from office. *State ex rel. Kinsella v. Eberhart*, 39: 788, 133 N. W. 857, 116 Minn. 313.

3. A public officer cannot recover compensation from third persons for the performance of acts within the scope of his official duty, even though the acts were performed at their requests, or though they may have expressly promised to pay him. *Coggeshall v. Conner*, 39: 81, 120 Pac. 559, — Okla. —.

OIL.

As to mines generally, see **Mines**.

OPTION.

To explore wife's separate estate for oil and gas, see **Husband and Wife**, 3.

ORAL EVIDENCE.

See **Evidence**, 9, 11-17.

ORDINANCES.

In general, see **Municipal Corporations**, 1, 2.

ORIGINAL PACKAGES.

Interstate commerce in, see **Commerce**.

OWNERSHIP.

Presumption and burden of proof as to, see **Evidence**, 7.

Evidence on question of, see **Evidence**, 19.

Of insured property, see **Insurance**, 3.

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PAINT DRYER.

Injury to purchaser by explosion of, see **Negligence**, 1.

Venue of action for damages from explosion of, see **Venue**, 2.

PARENT AND CHILD.

Damages recoverable by child for wrongful death of father, see **Damages**, 8, 9.

Liability of parent for alienating affections of child from spouse, see **Evidence**, 3; **Husband and Wife**, 5.

Homicide in defending child against assault, see **Homicide**.

Right of divorced father to receive visits from child awarded to mother, see **Judgment**, 4.

Enlistment of, in militia without consent of parent, see **Militia**.

Instructions as to damages in action by minor child for death of parent, see **Trial**, 15.

1. A boy operating his father's automobile for his own pleasure or convenience has no implied authority to engage a physician at his father's expense, to attend a person whom he accidentally injured by the vehicle. *Habegger v. King*, 39: 881, 135 N. W. 166, — Wis. —. (Annotated)

2. A son who has the right to use an automobile which his father provided for the comfort and pleasure of the family is acting as the servant of the father, so as to make him liable for injuries caused by his negligent act when he takes the car without special permission for the entertainment of his sister and her friends. *Stowe v. Morris*, 39: 224, 144 S. W. 52, 147 Ky. 386.

PARKS.

Liability of electric company furnishing electricity free of charge for celebration in, see **Electricity**.

PAROL EVIDENCE.

See **Evidence**, 11-17.

PAROL TRUSTS.

See **Trusts**, 1, 2.

PARSONAGE.

Exemption of, from taxation, see **Taxes**, 1.

PARTIES.

On appeal, see **Appeal and Error**, 1.

Objecting to lack of, for first time on appeal, see **Appeal and Error**, 14.

Effect of discontinuance as to some defendants, see **Dismissal or Discontinuance**.

Who are affected by judgment, see **Judgment**, 3.

On foreclosure, see **Mortgage**, 3.

Description of, in pleading, see **Pleading**, 1, 2.

Plaintiffs.

Action by stockholder of corporation, see Corporations, 4.

Action on behalf of estate generally, see Executors and Administrators, 1-3.

Action by wife for alienation of husband's affections, see Husband and Wife, 4.

1. Entitling a proceeding to include property in a levee district, in the name of the district, which is a public corporation, is not prevented by a statutory provision that it shall be filed by the board of supervisors of the county. *Des Moines & M. Levee Dist. No. 1 v. Chicago, B. & Q. R. Co.* 39: 543, 145 S. W. 35, — Mo. —.

2. The drawee who pays a draft against bill of lading of a carload of coal shipped to consignor's order, with directions to notify the drawee, has no right of action against the railroad company for shortage in tonnage, where the draft was not paid until arrival of the shipment, so that the shortage occurred before his interest accrued. *St. Louis & S. F. R. Co. v. Allen*, 39: 309, 120 Pac. 1090, — Okla. —. (Annotated)

3. Although a contract for carriages for a funeral is made by a member or friend of the family, and the undertaker knows only in a general way the number and names of those who are to be transported, his contract duty of care exists in favor of each passenger. *John J. Radel Co. v. Borches*, 39: 227, 145 S. W. 155, 147 Ky. 506.

4. A railway company that has accepted the terms of a city ordinance granting it the right to construct, maintain, and operate its railway upon the streets and upon and over certain viaducts and bridges, which ordinance contains a provision that the company should repair and keep in repair all parts of such bridges, viaducts, and approaches thereto so as to be safe for public travel, is directly liable to one who is injured through the negligence of such company in permitting a sidewalk, not in any way used by the railway company, but forming part of one such viaduct, to become out of repair, notwithstanding another section of such ordinance providing that such railway company shall respond to the city and save it harmless from damages resulting from the acts and negligence of the railway company.; *Jenree v. Metropolitan Street R. Co.* 39: 1112, 121 Pac. 510, 86 Kan. 479. (Annotated)

5. An action to compel removal of an obstruction to the operation of a county drawbridge is within a statute permitting actions to be brought in the name of the county. *Lenoir County v. Crabtree*, 39: 1213, 74 S. E. 105, 158 N. C. 357.

6. If one who is ineligible has received the majority of votes in a primary election, his right to hold office cannot be tested in a suit brought by an unsuccessful candidate, seeking to be declared entitled to the office, but the question of his eligibility 39 L.R.A. (N.S.)

must be tested in a suit brought in the name of the state. *Roussel v. Dornier*, 39: 826, 57 So. 1007, — La. —.

7. A resident taxpayer cannot maintain an action to annul an independent school district for irregularity in organization, if the proceedings purported to be under color of law. *Crabb v. Celeste Independent School Dist.* 39: 601, 146 S. W. 528, — Tex. —.

PARTITION.

A railroad company which has secured a deed for its right of way from one only of two tenants in common cannot resist partition of the property at the suit of the other tenant, on the theory that it would be contrary to public policy to permit it. *Hill v. Woodward*, 39: 538, 57 So. 294, — Miss. —. (Annotated)

PARTNERSHIP.

Proving claim in bankruptcy both against estate of firm and that of individual partner, see Bankruptcy.

Assent to ratification to individual debt of partner after partnership has become insolvent, see Bankruptcy, 3.

That a contract signed by one partner was in fact a partnership matter is established by testimony of the one who signed it that it was intended as such, and a letter signed by the other partner agreeing that such partner's signature shall be assumed as that of the firm. *Blake v. Atlantic Nat. Bank*, 39: 874, 82 Atl. 225, 33 R. I. 464.

PARTY WALL.

Liability of vendor for amount vendee is forced to pay to give him right to use, see Covenants and Conditions, 4.

Set-off against damages for breach of covenant because of enforcement against property of lien for share of cost of, see Damages, 15.

PASSENGER CARRIERS.

See Carriers.

PATENTS.

Injunction against infringement, see Injunction, 2.

Injunction against suit for infringement, see Injunction, 4.

Decrees in suit against manufacturer of infringing article as bar to suits against purchaser from him, see Judgment, 3.

PAUPERS.

See Poor and Poor Laws.

PAYMENT.

Of checks or drafts by banks, see Banks, 4-6.

Regulating payment for cream purchased for commercial purposes, see Food.

Guaranty of, see Guaranty.

Presumption where trustee mingles trust funds with his own, that subsequent payments are made from his own portion of fund, see Trusts, 5.

PEDIGREE.

Evidence of, see Evidence, 18, 20.

PENALTIES.

Failure of statute as to contractor's bond to fix method for ascertaining penalty of bond, see Statutes, 3.

For use of union label, see Trademarks.

PERJURY.

Trial for perjury which secured acquittal of another offense, as second jeopardy, see Criminal Law, 2.

Sufficiency of proof of, see Evidence, 37.
As ground for lateral attack on judgment, see Judgment, 2.

1. A witness is not liable in a civil action for giving perjured testimony in pursuance of a conspiracy which deprives one of property and injures him in his business. *Schaub v. O'Ferrall*, 39: 416, 81 Atl. 789, 116 Md. 131.

2. Falsely to make oath before a notary public in order to obtain a saloon license is not perjury, when the law governing the issuance of such licenses does not require such an oath. *State v. Parrish*, 39: 96, 56 So. 503, 129 La. 547. (Annotated)

PERSONAL INJURIES.

Measure of damages for, see Damages, 7-11.

Evidence of complaints by person injured, see Evidence, 21.

In highways, see Highways, 2-7.

Interest on amount allowed as damages for, see Interest.

Remittitur of damages in action for, see Trial, 10.

Impeachment of witness in action for, see Witnesses, 2.

PERSONAL PROPERTY.

Mortgage on, see Chattel Mortgage.

PETITION.

Of plaintiff, see Pleading, 2-10.

PHARMACISTS.

See Drugs and Druggists.

PHYSICIANS AND SURGEONS.

Requiring certifying of, as to legitimacy or illegitimacy, see Constitutional Law, 9.

Evidence of complaints to, see Evidence, 21.

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Right of physician who is also a pharmacist to prescribe liquor for patient and fill prescription from his stock, see Intoxicating Liquors.

Authority of boy to engage physician at father's expense, see Parent and Child, 1.

PLATFORM.

Duty of carrier to passenger riding on, see Carriers, 8.

PLEADING.

Motion to compel pleader to elect in case of duplicity, see Appeal and Error, 8.

Suggested amendment as necessary part of record on appeal, see Appeal and Error, 2.

Review of discretion as to, see Appeal and Error, 11.

Raising objection to pleading for duplicity by motion to strike out, see Appeal and Error, 8.

Variance between pleading and proof, see Evidence, 38, 39.

Surplusage.

1. That a domiciliary administrator having a right to enforce in his own name, in the courts of another state, a judgment obtained in the courts of his appointment, institutes the suit in his representative capacity, is immaterial, since the official title is surplusage and may be disregarded. *Hare v. O'Brien*, 39: 430, 82 Atl. 475, 233 Pa. 330.

Declaration or complaint.

Sufficiency of objection to, see Appeal and Error, 4, 5.

Necessity of pleading wanton negligence of railroad company in cutting fire hose, see Evidence, 28.

2. That one seeking to hold the bond of a guardian liable to restore to the ward money converted by the guardian to his own use designates himself as guardian *ad litem*, rather than as next friend, will not defeat the action. *Aetna Indemnity Co. v. State use of Gallaspy*, 39: 961, 57 So. 980, — Miss. —.

3. Allegations that loans were made to assist transactions in which defendants were interested, and that they received considerations for making them, are proper in a bill seeking to hold savings-bank trustees personally liable for losses of funds through loans made by them. *Greenfield Sav. Bank v. Abercrombie*, 39: 173, 97 N. E. 897, 211 Mass. 252.

4. As against a motion to exclude all evidence because the complaint does not state facts sufficient to constitute a cause of action, one count, although misjoined, if otherwise stating a cause of action, will be allowed to stand. *Sleeper v. Baker*, 39: 864, 134 N. W. 716, — N. D. —.

5. One suing for the rental to be paid for an option to explore land for oil and gas need not allege that no well had been completed which would change the measure of compensation, since such fact would be matter of defense. *Kokomo Natural Gas &*

Oil Co. v. Matlock, 39: 675, 97 N. E. 787, — Ind. —.

6. Failure to allege that a note given for a check was negotiable does not show absence of value, so as to destroy the bona fides of the purchase, if it is alleged that the note was paid. Johnson v. Harrison, 39: 1207, 97 N. E. 930, — Ind. —.

7. A complaint in an action to recover on a negotiable instrument may set out facts tending to show plaintiff to be a bona fide holder, for the purpose of anticipating a defense of fraudulent inception of the instrument. Johnson v. Harrison, 39: 1207, 97 N. E. 930, — Ind. —.

8. A complaint, to hold a railroad company liable for injury to property by fire because of its wrongful obstruction of a highway crossing so as to delay the fire apparatus, is insufficient if it does not show freedom from negligence on the part of complainant, bringing about the fire, contributing to its spread, or in removing goods, for which purposes a general allegation that the loss was the proximate result of defendant's acts is not sufficient. Cleveland, C. C. & St. L. R. Co. v. Tauer, 39: 20, 96 N. E. 758, — Ind. —.

9. A petition, in order to state a cause of action for malicious prosecution, must charge: First, that a prosecution was commenced against plaintiff; second, that it was instituted or instigated by defendant; third, that it was malicious; fourth, that it has been legally and finally terminated in plaintiff's favor; fifth, that it was without probable cause. Chicago, R. I. & P. R. Co. v. Holliday, 39: 205, 120 Pac. 927, — Okla. —.

10. An averment in a petition for injunction that the defendant had been using and was still continuing to use the streets and alleys of a certain city for the sale and delivery of intoxicating liquors in violation of the law is a sufficient description of the place within the provision of a statute that all places where intoxicating liquors are sold, or given away, or kept for sale or delivery in violation of law, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, may be enjoined. State v. Rabinowitz, 39: 187, 118 Pac. 1040, 85 Kan. 841. Demurrer.

11. Where a general demurrer is filed to a petition, if any paragraph states a cause of action, the demurrer should be overruled. Ardmore State Bank v. Mason, 39: 292, 120 Pac. 1080, — Okla. —.

12. A complaint, to hold a railroad company liable for injury to private property by fire because of its unlawful obstruction of a highway crossing to the delay of the fire apparatus, is not demurrable for failure to show that the wrong was the proximate cause of the loss, if the facts alleged do not show as a necessary inference that such was not the fact. Cleveland, C. C. & St. L. R. Co. v. Tauer, 39: 20, 96 N. E. 758, — Ind. —.

13. An allegation that the owner of a building had negligently failed to provide

ample means of extinguishing fire is demurrable as a mere conclusion of the pleader, and may be required to be more specific as to what means of extinguishing fires are actually provided. West v. Inman, 39: 744, 74 S. E. 527, 137 Ga. 822.

14. Where, in a suit to enforce a vendor's implied lien, it clearly appears by the specific allegations of the bill of complaint, admitted by the demurrer, that the remedy for recovery of the debt for the purchase price of land conveyed is barred by the statute of limitations, the vendor's implied lien will not be enforced; and, in the absence of other equities to sustain the bill of complaint, it is subject to appropriate demurrer. Shaylor v. Cloud, 39: 1171, 57 So. 666, — Fla. —.

PLEDGE AND COLLATERAL SECURITY.

Application of collateral held to secure firm obligations in satisfaction of individual debt of partner, see Bankruptcy, 3.

Of bank stock, see Banks, 2, 3.

Sale by pledgee of bank stock, see Pledge, 2.

1. In the absence of fraud or a special bailment, a pledge will be deemed to be waived or lost by the surrender of the pledged property by the pledgee. First Nat. Bank v. Bradshaw, 39: 886, 135 N. W. 830, — Neb. —. (Annotated)

2. A bank is negligent in accepting paving tax certificates which had been issued in duplicate and on which the indorsement of the payee had been forged, from a city employee, as collateral for a loan, without investigation as to the delivery or genuineness. National Bank of Commerce v. Oklahoma City, 39: 444, 122 Pac. 644, — Okla. —. (Annotated)

3. The statute requiring the pledgee, before the sale of pledged property, to give notice and sell same at public auction, was enacted for the benefit of the pledgor; and he may waive, by stipulation, both the notice and the public sale, and in that event a private sale is valid. Ardmore State Bank v. Mason, 39: 292, 120 Pac. 1080, — Okla. —.

POLICE.

Liability for false imprisonment by special police officer, see False Imprisonment.

POLICE POWER.

In general, see Constitutional Law, 9, 10.

Exercise of, by municipality, see Municipal Corporations, 1, 2.

POLITICAL COMMITTEES.

In general, see Elections.

Mandamus to, see Mandamus, 2.

POOR AND POOR LAWS.

1. A county is under no implied duty to reimburse another county for expense in-

curred in relieving paupers who first become in need of aid within its borders. *Cerro Gordo County v. Boone County*, 39: 161, 133 N. W. 132, 152 Iowa, 692.

2. To render a county liable for aid furnished to a pauper it must be supplied at the instance of the officers designated by statute to have charge of the relief of the poor. *Cerro Gordo County v. Boone County*, 39: 161, 133 N. W. 132, 152 Iowa, 692. (Annotated)

3. That a county in which a nonresident pauper was found in need of aid did not perform its statutory duty to furnish it, but furnished him with transportation into another county, does not amount to a request to the latter to furnish the aid at its expense, so as to render it liable to reimburse such other county for expense incurred in furnishing the relief. *Cerro Gordo County v. Boone County*, 39: 161, 133 N. W. 132, 152 Iowa, 692.

4. Neither a county nor its overseer of poor is liable for the loss by a transient pauper of his feet because it failed to give him proper attention when he came into its borders with frozen feet, although the statute requires relief to be furnished under such circumstances, at least if the overseer did not know that it was dangerous to send a pauper on his way, as he was empowered by statute to do, without relief. *Wood v. Boone County*, 39: 168, 133 N. W. 377, — Iowa, —. (Annotated)

POSSESSION.

Notice from, see *Notices*.

POWERS.

Of disposal in will, see *Wills*, 4.

PRACTICAL CONSTRUCTION.

Of statute, see *Statutes*, 4.

PREFERENCES.

By insolvent corporation, see *Corporations*, 5-8.

PREFERRED STOCK.

Rights of holder of, see *Corporations*, 5-8; *Receivers*, 2.

PREJUDICIAL ERROR.

See *Appeal and Error*, 20-23.

PREMIUMS.

For insurance, see *Insurance*, 8, 9.

PRESUMPTIONS.

On appeal, see *Appeal and Error*, 9, 10. Presumption that money of wife invested in land in husband's name is a gift, see *Trusts*, 4.

Presumption where trustee mingles trust funds with his own, that subsequent payments are made from his own portion of fund, see *Trusts*, 5.

In general, see *Evidence*, 1-8.

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PRINCIPAL AND AGENT.

Officer of savings bank, see *Banks*, 14-16.

Validity of contract as to compensation, see *Contracts*, 8; *Evidence*, 17 a.

Agents of corporation, see *Corporations*.

Parol evidence of agency, see *Evidence*, 14-17.

Liability for false imprisonment by agent, see *False Imprisonment*.

Firemen as agents of person whose property they attempt to save, see *Fires*, 2.

As to insurance agent, see *Insurance*.

Authority of attorney to extend time of payment of note, see *Principal and Surety*, 3.

Guaranty by agent to effect sale of product, see *Sale*, 3.

When does title pass under consignment of goods to agent for sale with provision in effect that agent shall purchase balance of consignment at termination of certain period, see *Sale*, 1.

Right of principal to maintain action for specific performance, see *Specific Performance*.

1. A traveling agent for the sale of talking machines, who carries printed order blanks, has no implied authority to warrant that one buying a large number of machines to be given away for advertising purposes will sell a certain number of records for each machine within a given time after it is given out, and the purchaser therefore has no right of action for breach of such warranty, if authority to make it had not been actually conferred upon the agent. *Johns v. Jaycox*, 39: 1151, 121 Pac. 854, 67 Wash. 403. (Annotated)

2. One contracting as agent without authority, but making no representations as to his authority that were untrue or that he had reason to believe were untrue, and none that deceived the other contracting party, is not liable in an action against him personally upon the contract, which contains no apt words to bind him personally. *American Surety Co. v. Morton*, 39: 702, 122 Pac. 1103, — Okla. —.

PRINCIPAL AND SURETY.

On bond of public officer, see *Bonds*, 1. Surety on bail bonds, see *Bail and Recognizance*.

Relevancy of evidence against surety, see *Evidence*, 27.

As to guaranty, see *Guaranty*.

Liability on bond of guardian, see *Guardian and Ward*.

Subrogation of surety, see *Subrogation*, 2.

1. Failure of the principal to execute a bond when he is bound by law or a collateral contract recited in the bond, for the performance of the obligation, imposes upon the obligee no duty to inquire as to whether it was delivered by the sureties on condition

that the principal should execute it, nor to require him to do so, since the sureties suffered no substantial prejudice from such omission. *Star Grocer Co. v. Bradford*, 39: 184, 74 S. E. 509, — W. Va. —.

2. Sureties in a bond are not released by omission of the principal to execute it, if he is bound by law or a collateral contract recited in the bond, for the performance of the duty recited in the condition thereof. *Star Grocer Co. v. Bradford*, 39: 184, 74 S. E. 509, — W. Va. —.

3. A slight indulgence by an attorney charged with the collection of a note to the maker, not authorized or ratified by the holder, will not release the sureties on the instrument, if no security for the payment of the note is thereby lost or impaired. *Hall v. Presnell*, 39: 62, 72 S. E. 985, 157 N. C. 290. (Annotated)

PRIORITY.

Between lien of bank on its stock and that of pledgee, see Banks, 3.

Of chattel mortgage, see Chattel Mortgage.

In payment of obligations by insolvent corporation, see Corporations, 6-8.

Between mechanics' liens and other liens, see Mechanics' Liens, 2-5.

Between mortgages, see Mortgage, 3.

PROBABLE CAUSE.

Question for jury as to, see Trial, 17.

PROMOTERS.

Interpretation of contract of promoter with corporation, see Contracts, 4.

PROPERTY.

Guaranty of right to, see Constitutional Law, 4-8.

Condemnation of, see Eminent Domain.

PROSECUTING ATTORNEY.

See District and Prosecuting Attorneys.

PROSTITUTION.

Lease of premises for, see Contracts, 5.

PROXIMATE CAUSE.

The proximate cause of loss to a bank from accepting paying tax certificates which had been signed in duplicate and on which the indorsement of the payee had been forged, from a city employee who had no authority to deliver such certificates, is the fraudulent act of the city employee, and not the fact that duplicate certificates were signed by the city officers. *National Bank of Commerce v. Oklahoma City*, 39: 444, 122 Pac. 644, — Okla. —. (Annotated)

PUBLIC CHARITIES.

See Charities.

PUBLIC CONTRACT.

See Contracts, 1.

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PUBLIC IMPROVEMENTS.

Decision on former appeal as to method of assisting benefits, see Appeal and Error, 25.

Property taken into a levee district cannot be assessed for work done and paid for by the assessment of property within the district prior to the taking in of the new property. *Des Moines & M. Levee Dist. No. 1 v. Chicago, B. & Q. R. Co.* 39: 543, 145 S. W. 35, — Mo. —. (Annotated)

PUBLIC NUISANCE.

See Nuisances.

PUBLIC POLICY.

Effect of, on enforcement of foreign law, see Conflict of Laws.

Overriding positive guaranties of Constitution, see Constitutional Law, 4.

As affecting contracts, see Contracts, 5-7.

PUBLIC SCHOOLS.

See Schools.

PUBLIC WATER SUPPLY.

See Waters, 3, 4.

PUNITIVE DAMAGES.

See Damages, 1-4.

PURE FOOD LAW.

See Food.

QUANTITY.

Of land sold, see Vendor and Purchaser, 2.

QUASI CONTRACT.

Proof of claim for, against bankrupt estate, see Bankruptcy, 2.

QUESTION FOR JURY.

See Trial, 1-11.

RAILROADS.

Change of channel of boundary stream by construction of dam by, see Boundaries.

As carriers, see Carriers.

Lease to railroad of lands granted to municipality for street purposes, see Covenants and Conditions, 2, 5.

Interference by, with extinguishment of, see Evidence, 28; Fires, 1; Pleading, 8, 12.

Liability for false imprisonment by special officer, see False Imprisonment.

Including railroad property in levee district, see Levees.

Liability for wrongful search by agent, see Master and Servant, 5a.

New trial in action for killing horse, see New Trial, 1.

Duty to keep premises safe for license, see Negligence, 4.

Liability to trespassing children, see Negligence, 5.

Liability of railroad company agreeing to keep street in repair to third person injured by lack of repair, see Parties, 4.

Partition of railroad right of way, see Partition.

Question for jury as to negligence of railroad as to condition of crossing, see Trial, 9.

1. A railroad company is reckless in running a train so rapidly through a town on a foggy night that it could not be stopped by the use of the ordinary means and appliances within the distance in which an object could be discovered on the track by the glare of the headlight. *St. Louis & S. F. R. Co. v. Moore*, 39: 978, 58 So. 471, — Miss. — (Annotated)

2. It is negligence *per se* for a railroad company to run an engine backwards over its main track in the nighttime, without the proper headlight on the tender sufficient to enable the enginemen, in the exercise of reasonable and ordinary care, to see ahead a reasonable distance, so as to avoid doing injury to animals astray upon the track. *Hanger v. Chesapeake & O. R. Co.* 39: 271, 73 S. E. 713, — W. Va. — (Annotated)

3. The mere attempt of one on foot to cross over a railroad track at a highway crossing when the gates are down, in doing which he is injured, does not raise a conclusive presumption that "he took all chances of the injury and cannot recover;" but the fact that the gates were closed is a circumstance to be taken into account in determining whether, under all the facts, he was negligent in not observing the warning thereby conveyed. *Samkiewicz v. Atlantic City R. Co.* (N. J. Err. & App.) 39: 571, 81 Atl. 833, — N. J. —

RATES.

Of carrier, see Carriers, 16.

For water, see Waters, 4.

RATIFICATION.

Of alteration in instrument, see Alteration of Instrument; Contracts, 3.

Of contract of partner, see Partnership.

By religious society of conveyance of property, see Religious Societies, 2.

REAL PROPERTY.

Covenants and conditions as to, see Covenants and Conditions.

Easement in, see Easements.

Mortgage on, see Mortgage.

Partition of, see Partition.

Rights, duties, and liabilities on transfer of, see Vendor and Purchaser.

Estates or interest created by will, see Wills, 4-6.

Lien of judgment on, see Wills, 7.

Conversion into personalty, see Wills, 7.

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RECEIVERS.

Following trust funds into hands of bank receiver, see Banks, 8-13.

1. Where the property of a corporation is being mismanaged, or is in danger of being lost to the stockholders and creditors through mismanagement, collusion, or fraud of its officers and directors, a court of equity has inherent power to appoint a receiver for the property of such corporation, and to require the officers to make an accounting, upon petition of a minority stockholder therefor. *Exchange Bank v. Bailey*, 39: 1032, 116 Pac. 812, 24 Okla. 246. (Annotated)

2. A holder of preferred stock in a corporation, whose contract entitles him to have his stock redeemed at par, is not entitled to have the concern placed in the hands of a receiver, in a proceeding to enforce his contract right of redemption, by showing that it is a losing venture, and that its assets are not sufficient to pay its debts, where his right to redemption fails because of insufficiency of assets. *Rider v. John G. Delker & Sons Co.* 39: 1007, 140 S. W. 1011, 145 Ky. 634.

RECOGNIZANCE.

See Bail and Recognizance.

RECORDS AND RECORDING LAWS.

On appeal, see Appeal and Error, 2, 3.

Validity of statute as to registration of births and deaths, see Constitutional Law, 9.

Records as evidence generally, see Evidence, 10.

Necessity of recording gift of ring by man to his wife, see Husband and Wife, 2.

REDEMPTION.

Of preferred stock, see Corporations, 6-7; Receivers, 2.

REDUCTION.

Of damages, see Damages, 15.

REFERENCE.

Where a referee sustains a motion to strike out certain testimony that has been introduced at the trial, and no order is made reinstating it, such testimony cannot be considered by the court in determining whether there was any evidence to sustain the finding of the referee. *Kansas City Paper House v. Foley R. Printing Co.* 39: 747, 118 Pac. 1056, 85 Kan. 678.

REFORMATION OF INSTRUMENTS.

1. Where the owner of two lots of land intended to execute a mortgage upon a certain lot, but described therein a different lot, after foreclosure of the mortgage and a sale of the property described therein, a court of equity may cancel the master's deed to the property actually mortgaged, sold, and conveyed, and reform the mortgage, upon sufficient showing, so as to

embrace the land intended to be mortgaged. *Fisher v. Villamil*, 39: 90, 56 So. 559, — Fla. —. (Annotated)

2. When a mortgage misdescribes the property intended to be mortgaged, the mistake may be corrected by a proper proceeding before judicial foreclosure; but, if the mistake has been carried into a bill filed for the purpose of foreclosure of such mortgage, into the decree ordering foreclosure, into the advertisement, and into the deed, the purchaser at such foreclosure sale cannot maintain a bill in equity to correct the description of the land as contained in the mortgage, in the decree, and in the deed. *Fisher v. Villamil*, 39: 90, 56 So. 559, — Fla. —.

RELATIONSHIP.

Necessity of proof of, to support declarations tending to establish pedigree, see Evidence, 18, 20.

RELEASE.

Of one joint tortfeasor, see Joint Debtors and Creditors.

Of surety, see Principal and Surety, 2, 3.

Of joint tortfeasor, question for jury as to, see Trial, 3.

RELEVANCY.

Of evidence, see Evidence, 23-27.

RELIANCE.

On false representations, see Fraud and Deceit.

RELIGIOUS SOCIETIES.

Parol evidence that transfer of property was made in trust, see Evidence, 13.

Exemption from taxation, see Taxes, 1.

Grantee of property of, as trustee, see Trusts, 1, 3.

1. The trustees and majority members of a religious corporation who in good faith have attempted to make a use of the property which the minority allege to be a diversion from the trust for which it was acquired may bind the corporation for counsel fees in defending their position against the attack of the minority, although the minority are successful and the contemplated diversion is enjoined. *Kanneberg v. Evangelical Creed Congregation*, 39: 138, 131 N. W. 353, 146 Wis. 610.

2. Confirmation in the grantee of title to property conveyed by the trustees of a religious society, which conveyance was made in consideration of the execution of mortgages for the full value, and is claimed to have been in trust, is effected by the acceptance at the expiration of the mortgage of a partial payment thereon, and the extension of the time for paying the balance, with promise to make payments in instalments. *Lafayette Street Church Soc. v. Norton*, 39: 906, 95 N. E. 819, 202 N. Y. 379.

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REMEDIES.

In case of illegality of contract, see Contracts, 7.

REMITTITUR.

On motion for new trial, see New Trial, 3.

By trial court, see Trial, 19.

REMOVAL.

Of officers, see Officers.

RENT.

Liability for generally, see Landlord and Tenant, 5, 6.

As to water rents, see Waters, 4.

REPLEVIN.

Presumption and burden of proof, see Evidence, 1.

Admissibility of evidence, see Evidence, 10.

An action in replevin cannot be maintained to recover possession of an interstate shipment of intoxicating liquors, by the consignee, who claimed not to be the owner but merely the distributing agent for certain people whose names were marked on the various parcels and to whom he was to deliver same, where such transaction would constitute a violation of the laws of the state. *Blunk v. Waugh*, 39: 1093, 122 Pac. 717, — Okla. —. (Annotated)

REPUTATION.

Evidence of general repute, see Evidence, 19.

RESCISSION.

Of grant of land by state, see State.

Of land contract, see Vendor and Purchaser, 3.

RES JUDICATA.

See Appeal and Error, 25; Judgment, 1-3.

RESULTING TRUSTS.

See Trusts, 4.

RETAINING JURISDICTION.

See Equity, 2.

RETIREMENT.

Of preferred stock, see Corporations, 5-7; Receivers, 2.

REVERSIBLE ERROR.

See Appeal and Error, 20-23.

REVERSION.

Of title for breach of condition as to use of land granted, see Covenants and Conditions, 5.

REVIVAL.

Of mortgage which has merged by conveyance, see Mortgage, 2.

REVOCATION.

Of license generally, see License, 1, 2.

RING.

Validity of gift of, by husband to wife, see Husband and Wife, 2.

RULES.

Of water company, see Waters, 3, 4.

RUNAWAY.

Presumption of negligence from, see Evidence, 6.

Presumption as to ownership of runaway horse, see Evidence, 7.

Running away of hired horses, see Livery Stable; Master and Servant, 5.

Question for jury as to negligence of driver, see Trial, 8.

SALARY.

Of public officers, see Officers, 3.

SALE.

Validity of contract to pay for services in selling goods to public board, see Contracts, 6.

Sale in bulk, see Fraudulent Conveyances.

Of pledged property, see Pledge and Collateral Security, 3.

Of land generally, see Vendor and Purchaser.

Passing of title; delivery.

1. In a contract by which one undertakes to act as sales agent for another, for a definite period of time, and to buy and pay for at certain prices all stock on hand at the expiration of such period, title to the property passes at such expiration, and a bankruptcy trustee of the agent will be entitled to it as against the claims of the principal. *Parlett v. Blake*, 39: 620, 188 Fed. 200, 110 C. C. A. 72.

(Annotated)

2. Sufficient delivery of lumber stacked in the mill yard to pass the title as against subsequent purchasers is effected by the agent of the buyer, upon paying a portion of the purchase price, estimating the quantity and marking the stacks with the name of the purchaser, the intention of both parties being thereby to transfer the title, and that the balance of the purchase money shall be paid when the lumber is smoothed and barked. *McDermott v. Kimball Lumber Mfg. Co.* 39: 461, 144 S. W. 524, — Ark. —.

Rights and remedies of parties generally.

3. That when a customer learns that the seller repudiates a guaranty made by his agent to effect the sale of his product, he has placed himself in a position where he must have the goods, does not affect the effect of his ordering them to be shipped with knowledge of the repudiation, as a waiver of the warranty. *Johns v. Jaycox*, 39: 1151, 121 Pac. 854, 67 Wash. 403. 39 L.R.A. (N.S.)

SALESMAN.

Authority as to warranty, see Principal and Agent, 1.

SAVINGS BANKS.

See Banks, 14.

SCHOOLS.

Sale of liquors near, see Intoxicating Liquors.

Private action to annul district for irregularity in organization, see Parties, 7.

A tax voted by the taxpayers of the school district in the manner provided by the Constitution cannot be extended over territory added to the district after the vote was taken, without giving the taxpayers of such addition an opportunity to adopt or reject it in the manner provided by the Constitution, if the proceedings for the addition of the territory did not meet the constitutional requirements for the adoption of the tax. *Crabb v. Celeste Independent School Dist.* 39: 601, 146 S. W. 528, — Tex. —. (Annotated)

SEARCH AND SEIZURE.

Action for malicious prosecution for wrongful search, see Malicious Prosecution, 1.

Master's liability for wrongful search by servant, see Master and Servant, 5a.

SECOND APPEAL.

See Appeal and Error, 25.

SECRET PROFITS.

Parol evidence in action to recover, from agent, see Evidence, 14.

SEDUCTION.

Annulment of marriage entered into by man to prevent woman from appearing against him in prosecution for seduction, see Marriage.

SEPARATE PROPERTY.

What constitutes encumbrance of, see Husband and Wife, 3.

SEPARATION.

See Divorce and Separation.

SERVICES.

Interpretation of contract for, see Contracts, 4.

Validity of contract to pay for services in selling goods to public board, see Contracts, 6.

SET-OFF AND COUNTERCLAIM.

Setting off benefits from easement against damages for breach of covenant against encumbrances, see Damages, 15.

1. One joint maker of a note can set off against it an indebtedness from the payee due him individually. *McKay v. Hall*, 39: 658, 120 Pac. 1108, — Okla. —.

2. A defendant may set off a debt arising upon a contract due him from the payee of a negotiable note, against the note in the hands of a person to whom the payee transfers it after maturity. *McKay v. Hall*, 39: 638, 120 Pac. 1108, — Okla. —. (Annotated)

3. The request by the president of a corporation, that an account owing him personally by the holder of the corporation's note be credited on such note, amounts to a transfer of the account by the president to the corporation, and in an action upon the note the plaintiff cannot object to the account being used as an offset on the ground that no formal assignment had been made. *Kansas City Paper House v. Foley R. Printing Co.* 39: 747, 118 Pac. 1056, 85 Kan. 678.

SEVERABILITY.

Of insurance contract, see Insurance, 7.

SHADE TREES.

In highways, see Highways, 1.

SHELLEY'S CASE.

Rule in, see Wills, 5, 6.

SIGNATURE.

Of presiding officer of each house to statute, see Statutes, 1.

Of testator, see Wills, 1.

SIGNS.

Use of walls of leased building for, see Landlord and Tenant, 2, 3.

SIMULTANEOUS MORTGAGES.

Effect of foreclosure of one upon the other, see Mortgage, 3.

SMOKE.

As nuisance, see Nuisances, 4.

SNOW.

On street or sidewalk, liability for injury by, see Highways, 6, 7.

SOLDIERS' HOME.

Jurisdiction to grant administration on estate of soldier dying in, see Courts, 2.

Action by administrator of estate of one dying in, to recover assets from, see Executors and Administrators, 1.

SPECIAL DEPOSIT.

As trust fund, see Banks, 12, 13.

SPECIFIC PERFORMANCE.

An undisclosed principal who has carried out all provisions of a contract for the sale of real estate and tendered a properly executed deed may maintain an action for specific performance of the contract. *Davidson v. Hurty*, 39: 324, 133 N. W. 862, 116 Minn. 280. (Annotated) 39 L.R.A. (N.S.)

SPEED.

Injury to passenger because of excessive speed, see Carriers, 7.

Of railroad train, see Railroads, 1.

STABLES.

As nuisance, see Nuisances, 2, 3.

As to livery stables, see Livery Stables.

STAMPS.

Injunction against removal of union stamp from shop, see Injunction, 3.

STATE.

Bonds of, see Bonds, 2, 3.

Boundaries of, see Boundaries.

Restrictions in grant by, to municipality as to use of property, see Covenants and Conditions, 2, 5.

Necessity of suit in name of, to test eligibility of candidate in primary election, see Parties, 6.

In conducting transactions with respect to its lands, the state acts in a proprietary, and not in a sovereign, capacity, and, being amenable to all the rules of justice which it prescribes for the conduct of its citizens, it will not be permitted to revoke a grant of lands made upon a valuable consideration which it retains. *Cleveland Terminal & V. R. Co. v. State ex rel. Ellis*, 39: 1219, 97 N. E. 967, 85 Ohio St. 251.

STATE COURTS.

Federal courts following decisions of, see Courts, 3.

STATIONS.

Carrier's duty as to station, see Carriers, 12, 13.

STATUTE OF FRAUDS.

As to parol trust, see Trusts, 1, 2.

STATUTES.

Enactment.

1. A constitutional provision requiring the presiding officer of each house, in the presence of the house over which he presides, to sign all bills passed immediately after their titles have been publicly read, and the fact of the signing to be at once entered upon the journal, is mandatory. *George Bolln Co. v. North Platte Valley Irrig. Co.* 39: 868, 121 Pac. 22. — Wyo. —.

2. An erroneous number of original bill, employed by mistake of the clerk in attempting to give a double description to a bill signed by the presiding officer of a legislative body, while giving its correct number as enrolled bill, will be rejected as surplusage if the records show that the specified number of original bill was not passed, but that the enrolled bill mentioned was passed, duly signed, and filed in the proper archives. *George Bolln Co. v. North Platte Valley Irrig. Co.* 39: 868, 121 Pac. 22. — Wyo. —.

Validity.

3. A statute requiring a property owner to take a good and sufficient bond from one contracting to do work for him, to pay claims of laborers and materialmen, is insufficient which does not fix any method for ascertaining the penalty of the bond. *George Bolln Co. v. North Platte Valley Irrig. Co.* 39: 868, 121 Pac. 22, — Wyo. —. Construction; operation; effect.

4. In the absence of ambiguity in a statute, the practice of the taxing officers with respect to the levying of inheritance taxes cannot be taken into consideration in ascertaining the meaning of the statute. *Swift ex rel. State Treasurer v. Barney*, 39: 1024, 97 N. E. 750, 211 Mass. 134.

5. A statute making it the duty of the attorney general, when required by the governor, to appear for the state and prosecute in any court or before any officer, in any cause or matter, civil or criminal, in which the state may be a party or interested, is mandatory. *State ex rel. Stubbs v. Dawson*, 39: 993, 119 Pac. 360, 86 Kan. 180.

STOCKHOLDERS.

In banks, see Banks, 1-3.

STORAGE.

Imposing license tax on storage warehouse, see License, 4.

Liens for storage of hay, see Liens.

STOVE POLISH.

Injury to purchaser of, see Negligence, 2, 3; Trial, 11.

STREAMS.

As state boundary, see Boundaries.

STREET RAILWAYS.

Injury by automobile to passenger alighting from street car, see Automobile, 2.

As carriers, see Carriers.

Question for jury as to negligence of person when crossing track, see Trial, 7.

Rescission of land contract for breach of promise to build electric railway to property, see Vendor and Purchaser, 3.

Nearsightedness will not relieve one from the charge of contributory negligence, who steps upon a street car track immediately in front of a moving car, where the view of the track is unobstructed. *Flynn v. Pittsburgh R. Co.* 39: 1055, 83 Atl. 207. 234 Pa. 335. (Annotated)

SUBROGATION.

1. Children of a wife who mortgaged her real estate as surety for her husband's debt may, in case the mortgagee resorts to her property, be subrogated to the right of the mortgagee against property of the husband on which he also had a lien, as against the claim of a second mortgagee of the husband's property alone. *Gaines v. Hill*, 39: 999, 144 S. W. 92, 147 Ky. 445. 39 L.R.A. (N.S.)

2. When a principal against whom a judgment has been obtained executes his note, indorsed by other parties, who are condemned by the same judgment as his sureties, for the purpose of borrowing money with which to pay the judgment, the proceeds of the discount are as if loaned to the maker, and the payment of such proceeds in satisfaction of the judgment as payment by the maker, so that the indorsers are not subrogated to the judgment. *Pugh v. Sample*, 39: 834, 49 So. 526, 123 La. 791.

SUBWAY.

Duty to stop car in, to permit recovery of property dropped from car, see Carriers, 4.

SUCCESSION TAX.

See Taxes, 2, 3.

SUFFRAGE.

Right of, see Elections.

SUNDAY.

A verdict in a criminal case, which was found by the jury on a secular day, is not rendered invalid by reason of the fact that it was returned into and received by the court on Sunday, notwithstanding a statute which authorizes the impaneling of a jury or the taking of evidence on a trial, to be continued by order of the court, upon a legal holiday, if not a Sunday or Christmas Day, since such statute adds nothing to the pre-existing prohibitions against the performance of judicial acts on Sunday, and has no application to mere ministerial acts. *State v. Keatine*, 39: 844, 58 So. 139. — La. —. (Annotated)

SURETYSHIP.

See Principal and Surety.

SURPLUSAGE.

In pleading, see Pleading, 1.

SURVIVOR.

Rights of survivor in community property, see Husband and Wife, 3a.

SUSPENSION.

Of sentence, see Criminal Law, 4; Eschoppel, 2.

TALKING MACHINES.

Authority of agent to warrant that one buying talking machines to be given away as advertisement will sell certain number of records, see Principal and Agent, 1.

TAXES.

On dogs, see Animals.

Negligence of city officers in issuing duplicate paving tax certificates, see Evidence, 38.

Accepting forged paving tax certificates as collateral for loan, see Pledge and Collateral Security, 2.

Proximate cause of loss to bank accepting stolen paving tax certificates, see Proximate Cause.

Matters peculiar to school taxes, see Schools.

Exemptions.

1. An exemption from taxation of property used exclusively for religious work does not include a parsonage used as a residence for the pastor of a church and his family, and such religious work as naturally would center around the pastor's residence. First Congregational Church v. Board of Review, 39: 437, 98 N. E. 275, 254 Ill. 220.

(Annotated)

Succession tax.

Construction of inheritance tax statute, see Statutes, 4.

2. Under a statute imposing an inheritance tax upon all property within the jurisdiction of the commonwealth, and providing that no bequest, devise, or distributive share shall be subject to the provisions of the act unless its value exceeds a certain amount, only property within the commonwealth is to be considered in determining whether or not the specified amount is exceeded, and if such property does not exceed the amount no tax can be imposed, although the sum received by the beneficiary from portions of the estate located in other jurisdiction exceeds the specified limit. Swift ex rel. State Treasurer v. Barney, 39: 1024, 97 N. E. 750, 211 Mass. 134.

(Annotated)

3. Under the provisions of an inheritance tax law that all property which shall pass by will or by the intestate laws of the state from any person who may die seised or possessed of the same while a resident of the state shall be subject to an inheritance tax, the one half of the community property which vests in the survivor of a community, subject to the community debts, is not subject to such tax. Kohny v. Dunbar, 39: 1107, 121 Pac. 544, 21 Idaho, 258.

(Annotated)

TAXPAYER'S SUIT.

Right to maintain, see Parties, 7.

TELEGRAPHS.

Recovery for mental anguish from delay, see Damages, 14.

TELEPHONES.

Punitive damages for failure to answer call of subscriber, see Damages, 2.

Punitive damages for removal of subscriber's telephone, see Damages, 3.

Measure of damages for wrongfully discontinuing services, see Damages, 5.

Mental suffering as element of damages for wrongful removal of telephone, see Damages, 13.

Mental suffering as element of damages from delay in transmitting telephone message, see Damages, 14.

Evidence on question of wilfulness in removing telephone, see Evidence, 24.

Combinations between telephone companies, see Monopoly and Combinations.

A telephone subscriber cannot hold the company, which fails to answer his call, liable for injury caused by going to the central office in a sick and weakened condition to obtain medical aid for a member of his family, where it had no notice that such injury was likely to result from its negligence. Southern Teleph. Co. v. King, 39: 402, 146 S. W. 489, — Ark. —.

(Annotated)

TENANTS IN COMMON.

See Cotenancy.

THEFT.

Exclusion from railroad premises of person arrested for, see Carriers, 19.

Of duplicate paving tax certificates issued by city officers, see Evidence, 38; Proximate Cause.

Pledge of stolen property, see Pledge and Collateral Security, 2.

THREATS.

As duress, see Duress.

Evidence of, see Evidence, 22.

Effect on liability of parent for killing person making assault on child, see Homicide, 3, 5.

TICKETS.

Ejection of passenger because of defective ticket, see Carriers, 10.

TIME.

For taking exception, see Appeal and Error, 7.

Denial of statutory time in which to plead to amended information, see Appeal and Error, 23.

Mistake in indictment as to time of commission of offense, see Indictment, 1.

TITLE.

Covenant as to, see Covenants and Conditions, 1, 3.

Of insured, see Insurance, 3.

Right to jury in action to settle question of, see Jury, 1, 2.

Of personal property, passing of, see Sale, 1, 2.

TOBACCO JUICE.

On street car step, see Carriers, 9.

TORTS.

Whether action on contract or in tort, see Action or Suit, 2.

Liability of corporation for, see Corporations, 1.

Husband's liability for torts of wife, see Husband and Wife, 1.

Master's liability for, see Master and Servant, 5-11.

Matters as to negligence generally, see Negligence.

Parent's liability for torts of child, see Parent and Child, 2.

TOWNS.

Implied contract of, to pay for services rendered, see Contracts, 1.

Mandamus to compel treasurer to pay town orders, see Mandamus, 3.

1. Where a new township is created out of a part of the territory of an old one, unless some provision is made in the act creating the new, or exists under the statute, respecting the property and existing liabilities of the old township, the old township retains the title to all the public property, except such as may be located in the detached territory, and is responsible for the debts contracted before the division. *Union Twp. v. Oakdale Twp.* 39: 284, 120 Pac. 968, — Okla. —.

2. A portion of an existing township cut off from it and organized into a new township is not, in the absence of statute or order of the commissioners making the division, entitled to share in the cash in the treasury or in taxes collected from levies made prior to the division. *Union Twp. v. Oakdale Twp.* 39: 284, 120 Pac. 968, — Okla. —. (Annotated)

TRADEMARK.

As to trademark, see Tradenames.

Proof of allegation of infringement, see Evidence, 39.

1. The legislature may provide for the registration of a union label, and make the unauthorized use thereof a misdemeanor. *People v. Dantuma*, 39: 1190, 96 N. E. 1087, 252 Ill. 561.

2. One not entitled to use a union label, who contracts to do a job of printing, is not subject to a penalty for use of the label on the work if it is placed there by a subcontractor who has a right to use it, and to whom the job was sublet in good faith with nothing in the contract to prevent it. *People v. Dantuma*, 39: 1190, 96 N. E. 1087, 252 Ill. 561. (Annotated)

TRADE NAMES.

The personal representative of one who has established a trade right in the use of his own name in connection with a manufactured product may lose the right of protection in the use of such name in the business continued by him, if he leads the public to believe that the originator of the business is still alive, and his personality was a factor in the creation and retention of the good will which the product enjoyed. *Hazlett v. Pollack Stogie Co.* 39: 632, 195 Fed. 28, — C. C. A. —.

TRADE UNIONS.

See Labor Organizations.

TREES.

In street, rights as to, see Highways, 1.
Obstruction of highway by limb on, see Highways, 3.

Injury by fall of limb from, in highway, see Highways, 4, 5.

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TRESPASS.

Negligence as to, see Negligence, 5.

TRIAL.

Prejudicial error in conduct of, see Appeal and Error, 23.

Questions of law and fact.

1. While the jury are conclusive judges of the credibility of witnesses, they are not authorized arbitrarily, or from partiality or caprice, to disregard uncontradicted and unimpeached testimony, or facts shown beyond question both by testimony and by admission. *Sundgren v. Stevens*, 39: 487, 119 Pac. 322, 86 Kan. 154.

2. Whether or not a witness is an accomplice of accused is for the determination of the jury on conflicting evidence, but for the court where his acts and conduct are admitted. *People v. Coffey*, 39: 704, 119 Pac. 901, 161 Cal. 433.

3. The jury must determine the effect of evidence tending to show that money received from one of several joint tortfeasors was not intended as a satisfaction of the claim. *Matheson v. O'Kane*, 39: 475, 97 N. E. 638, 211 Mass. 91.

4. When a landlord is sought to be held liable to the tenant's servant because of injury due to a nuisance on the property, it is for the jury to determine whether or not the owner knew of the dangerous condition of the premises at the time of the letting, or in time to have abated the nuisance before the injury occurred, or should have known it by the exercise of ordinary care. *Bailey v. Kelly*, 39: 378, 122 Pac. 1027, 86 Kan. 911.

5. Whether or not a street car passenger is negligent in attempting to alight on the left side of the car is for the jury, under evidence tending to show that the car was so crowded that he could not reach the right-hand exit. *Elliott v. Seattle, R. & S. R. Co.* 39: 608, 122 Pac. 614, — Wash. —.

6. Delay for four hours by a municipality in placing barriers at a small ditch or gully washed by an unprecedented storm in a park road, which is not extraordinarily dangerous, to prevent injury to travelers, is as matter of law not negligence where the locality is neither central nor much traveled. *Cohen v. New York*, 39: 985, 97 N. E. 866, 204 N. Y. 424.

7. The jury must determine whether or not a passenger who alights from a street car is negligent in attempting to cross the street in front of a standing car without looking to see if vehicles are coming on the parallel track which may render the crossing dangerous. *Minor v. Mapes*, 39: 214, 144 S. W. 219, — Ark. —.

8. Where there is proof that the driver of a young horse which he was driving for the first time drove it up to a railroad crossing where the gates were down and upon which a freight train was drilling at the time, and left it a short time with its head toward the gates and with the hitching weight attached, and then returned and took the hitching weight off, and, in order:

to see that all was right with the goods in the wagon, went to the rear thereof, so that he did not reach the reins when the horse took fright at the noise of the train and ran away, it is a question for the jury as to whether or not the driver was negligent. *Dennery v. Great Atlantic & Pacific Tea Co.* (N. J. Err. & App.) 39: 574, 81 Atl. 861, — N. J. —.

9. Under a statute making it the duty of a railroad company controlling a right of way to provide and keep in repair a safe and sufficient passageway over it where any public highway shall cross the same, where it appears that the edge of a plank used to provide a crossing is so worn as to permit the foot of a person crossing the same to slip between the worn plank and the rail so that release could not be obtained by any reasonable effort in time to avoid injury by a train passing along the rail, an inference may be drawn that the crossing was not in good order, and the question as to whether the company negligently omitted to maintain a safe crossing was for the jury. *Samkiwicz v. Atlantic City R. Co.* (N. J. Err. & App.) 39: 571, 81 Atl. 833, — N. J. —.

10. Whether or not an innkeeper who has assumed the obligation of a gratuitous bailee for the care of baggage has performed his duty is, in case of an attempt to hold him liable for its loss, a question for the jury. *Baker v. Bailey*, 39: 1085, 145 S. W. 532, — Ark. —.

11. The jury must determine whether or not stove polish composed of naphtha, colored and slightly thickened so as to make the mixture adhesive when applied, is merely naphtha under an assumed name, the sale of which is prohibited by statute. *Gately v. Taylor*, 39: 472, 97 N. E. 619, 211 Mass. 60.

Instructions.

Sufficiency of objection and exception, see Appeal and Error, 6.

Prejudicial error as to, see Appeal and Error, 21, 22.

12. An instruction that it is the carrier's duty to use reasonable care to protect its passenger from personal injury and insult, in an action to hold it liable for causing his false imprisonment, is not abstract, because not based on any state of facts in the case. *New York, P. & N. R. Co. v. Waldron*, 39: 502, 82 Atl. 709, 116 Md. 441.

13. The court need not define punitive damages in authorizing the jury to allow such damages for wrongfully causing death. *St. Louis & S. F. R. Co. v. Moore*, 39: 978, 58 So. 471, — Miss. —.

14. If one accused of murder is, on the facts, guilty of that offense unless, by reason of his mental condition, he was not responsible for his acts, an instruction of manslaughter is erroneous. *State v. Ash*, 39: 611, 122 Pac. 995, — Wash. —.

15. Whether or not the jury should be instructed to allow a minor such damages as they find he would suffer after majority, because of the wrongful killing of his father, will depend upon the character of the evidence, indicating the probability of

such loss because of the character of the father. *Rochester v. Seattle, R. & S. R. Co.* 39: 1156, 122 Pac. 23, 67 Wash. 545.

16. The assumption in an instruction in an action to hold a railroad company liable for false imprisonment of a passenger, that the conductor telegraphed for "officers," is not error, although the evidence tends to show that he telegraphed for an officer, if more than one met the train in response to the message. *New York, P. & N. R. Co. v. Waldron*, 39: 502, 82 Atl. 709, 116 Md. 441.

17. The question of what is probable cause in an action for malicious prosecution being one of law, the court must, in instructing the jury, point out what facts which the evidence tends to support would, if found to exist, constitute probable cause. *Wilkerson v. Wilkerson*, 39: 1215, 74 S. E. 740, — N. C. —.

18. The court need not make use of the word "nuisance" in instructing the jury as to what will render a city liable for permitting one of its streets to become so out of repair as to constitute a public nuisance, but it is sufficient if it tells the jury that the city may be found guilty if it finds certain facts with respect to the condition of the street. *Ludlow v. Com.* 39: 411, 145 S. W. 406, 147 Ky. 706.

Verdict.

Presumption as to finding the facts necessary to support judgment founded on special verdict, see Appeal and Error, 10.

New trial for errors in verdict, see New Trial, 1, 2.

Remittitur on motion for new trial, see New Trial, 3.

Findings by referee, see Reference.

19. A finding by a court that the verdict in a personal-injury action was excessive, and its direction of a remittitur, amounts, as matter of law, to a finding that it was the result of passion or prejudice, where, under the statute, the court has no authority to interfere with the verdict except for such cause, although the court may expressly declare that it is not able to see that the verdict is the result of passion or prejudice. *Tunnel Mining & L. Co. v. Cooper*, 39: 1064, 115 Pac. 901, 50 Colo. 390.

TROVER.

Right to waive tort and sue in contract for conversion, see Action or Suit, 2.

Conversion of bonds by brokerage firm, see Bankruptcy, 1.

Proof against bankrupt estate of claim of property converted, see Bankruptcy, 2.

Suing in conversion for failure to transfer bank stock on books, see Banks, 1.

Federal court following state decision as to right to waive tort and sue on contract, see Courts, 3.

Denial of jury trial in action of trover, see Jury, 3.

TRUSTEES.

Personal liability of trustees of savings banks, see Banks, 14-16.

Of religious society, see Religious Societies.

TRUSTS.

Property left in trust for incompetent person, see Incompetent Persons.

Limitations of actions as to, see Limitation of Actions, 2.

Conveyance in trust by religious society, see Religious Societies, 2.

Parol trusts.

Parol proof of trust, see Evidence, 13.

1. The fact that one taking a conveyance of property from a religious association is a brother and partner of one of the trustees does not prevent his becoming a purchaser of the property, or establish a relation of confidence between the parties which would uphold a parol promise to hold the property in trust for the association, against the terms of the absolute conveyance. *Lafayette Street Church Soc. v. Norton*, 39: 906, 95 N. E. 819, 202 N. Y. 379.

2. An express trust with respect to real estate may not be created or declared by parol, but, if a parent conveys a tract of land to her son for his benefit and also the benefit of his brother, and for more than ten years subsequently they occupy the land as tenants in common, the brother tilling the farm and making lasting and valuable improvements thereon under a claim of ownership, the grantee conceding during that period that his brother owns one-half the land, the heirs of the grantee will not be permitted to disturb the brother in his possession and title to an undivided one-half of the real estate, notwithstanding there is no written evidence of a trust or of the brother's title, and none was ever executed. *Harman v. Fisher*, 39: 157, 134 N. W. 246, 90 Neb. 688.

Constructive trusts.

Bank taking money for draft when insolvent as trustee ex maleficio, see Banks, 8.

3. A transaction by which a religious society, for the purpose of disposing of unused and unproductive property, which it has been unable to do otherwise, conveys it to a stranger, taking mortgages for its full value, upon condition that he shall care for and rent the property, pay the rent to the society, and reconvey it in case he cannot effect a lease, is not so unconscionable as to require him to account as trustee for the profits in case, after caring for the property for a number of years, he sells it at a large advance in price. *Lafayette Street Church Soc. v. Norton*, 39: 906, 95 N. E. 819, 202 N. Y. 379. (Annotated)

Resulting trusts.

4. Money of a wife invested in land in the husband's name is presumptively a gift; and, in the absence of facts and circumstances rebutting the presumption, such as violation of a prior or contemporaneous agree-

ment to take the title in the wife's name, ignorance of its having been taken in the husband's name, subsequent expenditure of the wife's money in improvements thereon, an effort on her part to obtain the title after discovery of its condition, control of the property as her own against the husband, or the like, there is no resulting trust in her favor. *Whitten v. Whitten*, 39: 1026, 74 S. E. 237, — W. Va. —.

Following trust property.

Money for draft taken by bank while insolvent, see Banks, 7-10.

Trust funds in insolvent bank generally, see Banks, 11-13.

5. When a trustee mingles trust funds with his own and subsequently pays out a portion of the commingled funds, it will be presumed that he made his payments from that portion of the fund belonging to himself and retained the funds which did not belong to him; and, except in so far as he may distinguish what is his own, the whole fund will be treated as the trust property. *Widman v. Kellogg*, 39: 563, 133 N. W. 1020, — N. D. —.

UNDERTAKERS.

Liability of undertaker contracting to furnish carriages for injury, see Master and Servant, 7; Parties, 3.

UNFAIR COMPETITION.

1. An ice company and its general manager are liable in damages to another dealer in ice for malicious interference with his customers by representations that he was not a member of the ice dealers' association, and would be unable to secure ice after his supply was exhausted, and that the defendants and the ice dealers' association would refuse to furnish those who remained his customers with ice, and they would therefore be unable to obtain it. *Schonwald v. Ragains*, 39: 854, 122 Pac. 203, — Okla. —.

2. It is not necessary, in order to render the action of an ice company and its general manager malicious, that they be actuated by motives of ill-will toward a dealer with whose business they interfered; it is sufficient that the acts complained of were done intentionally and without just cause or excuse. *Schonwald v. Ragains*, 39: 854, 122 Pac. 203, — Okla. —.

UNIFORMITY.

Of dog tax, see Animals.

USURY.

Denial of equal protection by statute as to, see Constitutional Law, 3.

That the security did not in fact sell for the amount of the loan does not purge the usury in a transaction by which for a loan of \$10 only \$8.25 of which was advanced, a note is executed for \$16.75 payable in thirty days, and secured on property worth \$25. *State v. Davis*, 39: 136, 73 S. E. 130, 157 N. C. 648.

VACATION.

Of highways, see Highways, 8.

VALIDATION.

Of passenger's ticket, see Carriers, 10.

VALIDITY.

Of contract, see Contracts, 5-7.

Of statute, see Statutes, 3.

VARIANCE.

Between pleading and proof, see Evidence, 38, 39.

VENDOR AND PURCHASER.

Covenants between, see Covenants and Conditions.

Estoppel of vendor by false representations, see Estoppel, 3.

Sale under execution or attachment, see Judicial Sale.

Sale of incompetent's property, see Incompetent Persons.

Rights and liabilities of purchaser of land subject to mortgage, see Mortgage, 4-6.

Confirmation of title in grantee from religious society, see Religious Societies, 2.

Specific performance of contract, see Specific Performance.

Grant of lands by state, see State.

Grantee as trustee, see Trusts, 1, 3.

1. A purchaser of land from one who holds a water-right contract thereon with an irrigation company, and who takes title thereto by a deed containing the ordinary covenants of warranty, with no reference to the question of water rights, and who refuses to accept water from the company, is not personally liable for the maintenance fee mentioned in the water-right contract between his grantor and the irrigation company; and an action cannot be maintained against him to recover a personal judgment therefor. *Farmers' & M. Irrig. Co. v. Hill*, 39: 798, 134 N. W. 929, 90 Neb. 847. (Annotated)

Deficiency in quantity.

2. When there is a deficiency of land in a sale *per aversionem*, the court cannot order the vendor to supply the deficiency out of land not included in the tract intended to be sold. *Adams v. Porter*, 39: 785, 57 So. 528, 129 La. 1085. (Annotated)

Rescission of contract.

3. That a purchaser might have ascertained the untruthfulness of the representation does not prevent his rescinding a contract for purchase of real estate because the vendor falsely represented that he had a good title, that the land was in a recorded plat to which the deed referred, and that he would build an electric railway line and a highway to the property. *Fischer v. Hillman*, 39: 1140, 122 Pac. 1016, — Wash. —. (Annotated)

Vendor's lien.

Bar of debt as bar to enforcement of vendor's lien, see Limitation of Actions, 1.

Demurrer to complaint in suit to enforce vendor's lien, see Pleading, 14.

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4. A vendor's lien upon land conveyed by him does not result from agreement, but it is a right given by implication of law and enforceable in equity where the vendor is entitled to it. *Shaylor v. Cloud*, 39: 1171, 57 So. 666, — Fla. —.

5. Where land is conveyed and a note is taken for the purchase price without any collateral security or contract mortgage upon the property to secure the payment of the purchase price, the law by implication gives to the vendors a right in the nature of a lien upon the property for the purchase price, which right, if not waived or abandoned, may be enforced in equity at any time before the remedy by action on the note is barred by the statute of limitations. *Shaylor v. Cloud*, 39: 1171, 57 So. 666, — Fla. —.

VENUE.

1. A statutory action brought by a remainderman against a life tenant, to declare a forfeiture for waste, is a suit "respecting titles to land" the venue of which is in the county in which the land involved is located. *Brown v. Martin*, 39: 16, 73 S. E. 495, 137 Ga. 338.

2. An action to recover damages for injury caused by the explosion of a paint dryer because of failure to put a caution signal on the package may be brought in the county where the injury occurred, under a statute permitting actions in tort against corporations to be brought in the county where the tort was committed, although the package was sold at defendant's place of business in another county. *Penslee-Gaulbert Co. v. McMath*, 39: 465, 148 S. W. 770, 148 Ky. 265.

VERDICT.

Presumption as to, on appeal, see Appeal and Error, 10.

New trial for errors in, see New Trial, 1, 2.

Remittitur from, on motion for new trial, see New Trial, 3.

In general, see Trial, 19.

VITAL STATISTICS.

Validity of act to establish bureau of, see Constitutional Law, 9.

VOTERS AND ELECTIONS.

See Elections.

WAIVER.

Of pledge by surrender of pledged property, see Pledge and Collateral Security, 1.

Of notice of sale of pledged property, see Pledge and Collateral Security, 3.

By insurer, see Insurance, 10, 11.

Of disqualification of juror, see Jury, 6.

Of warranty on sale of personalty, see Sale, 3.

WARD.

See Guardian and Ward.

WAREHOUSE.

Imposing tax on maintenance of warehouse by foreign manufacturer for storage of its own products within municipality, see License, 4.

WARNING.

Duty to warn purchaser of possible danger in use of article, see Negligence, 1.

WARRANTY.

Covenant of, see Covenants and Conditions, 1, 3.

Agent's authority as to, see Principal and Agent, 1.

On sale of personalty, see Sale, 3.

WASTE.

Venue of action for, see Venue, 1.

WATERS.

Compensation for property taken in improving navigation, see Eminent Domain.

Estoppel to require removal of building interfering with operations of drawbridge, see Estoppel, 1.

As to levees, see Levees.

Who may maintain action to compel removal of obstruction, see Parties, 5.

Personal liability of purchaser of land on contract with irrigation company under which it is supplied with water, see Vendor and Purchaser, 1.

1. That a rival merchant instigated the action of county commissioners to require the removal of a building which interferes with the free operation of a public drawbridge is no ground for interfering with such removal. *Lenoir County v. Crabtree*, 39: 1213, 74 S. E. 105, 158 N. C. 357.

2. A riparian owner having a qualified title to the land between high and low water mark of a navigable river cannot place a building thereon in such a manner as to interfere with the free operation of a public drawbridge over the stream. *Lenoir County v. Crabtree*, 39: 1213, 74 S. E. 105, 158 N. C. 357. (Annotated)
Public water supply.

3. The rules of a waterworks company, adopted for the government of its relations with its patrons, do not become parts of a contract between it and a patron, made in terms and upon conditions not contemplated by such rules and regulations, and radically different therefrom. *Jopling v. Bluefield Waterworks & Improv. Co.* 39: 814, 74 S. E. 943, — W. Va. —.

4. A rule of a water company making the property owner liable for water supplied to tenants through a common service pipe and authorizing it to cut off the water from the building upon failure to pay for water furnished any tenant, does not apply in case of a contract to furnish water to one tenant, so as to permit the cutting off of the water upon failure of another to pay his rental. *Jopling v. Bluefield Water-works & Improv. Co.* 39: 814, 74 S. E. 943, — W. Va. —. (Annotated)

works & Improv. Co. 39: 814, 74 S. E. 943, — W. Va. —. (Annotated)

WATER SUPPLY.

See Waters, 3, 4.

WILFULNESS.

Evidence on question of, see Evidence, 24.

WILLS.

Matters concerning executors and administrators, see Executors and Administrators.

Signature of testator.

1. A holographic will executed on a printed blank is properly subscribed by the testator at the end of it, if the signature appears in the proper place in the blank, although in the blank left for the disposing clause testator states that he disposes of his property as per the provisions of the pages attached and consecutively numbered to a number specified, which sheets are then pinned in the blank, one on top of the other, with writing on one side only, and when read as though inserted where pinned, the will reads logically and consecutively. *Re Field*, 39: 1060, 97 N. E. 881, 204 N. Y. 448. **Contest.**

2. Contesting a will upon probable cause for alleged forgery does not work a forfeiture under a provision therein that if anyone mentioned in the will shall attempt to break it, he shall have only a nominal sum, and his share shall be divided amongst other persons mentioned. *Rouse v. Branch*, 39: 1160, 74 S. E. 133, — S. C. —. (Annotated)

Construction generally.

3. A will that is clear and unambiguous in its terms must be interpreted by those terms. The true inquiry is not what the testator meant, but what the terms used by him express. *Couch v. Eastham*, 39: 307, 73 S. E. 314, 69 W. Va. 710.

Nature of estate or interest created.

4. A devise of property to one for life, and then "to dispose of as she sees proper," does not convey a fee. *Chewning v. Eason*, 39: 805, 74 S. E. 357, 158 N. C. 578. (Annotated)

5. Where there is a devise in trust to pay the net income to A for life, with a discretionary power in trustees to use part of such income to pay off the mortgage encumbrance upon the land, and after the death of A a devise in fee simple to her heirs at law, the words "heirs at law" are used to designate the persons who at the time of A's death would be her heirs at law, and consequently the rule in *Shelley's Case* does not apply. *Shugrue v. Long* (N. J. Err. & App.) 39: 257, 82 Atl. 905, — N. J. —.

6. Where the particular estate for life devised is equitable and the remainder in fee is the legal estate, the rule in *Shelley's Case* cannot operate to increase the equitable life estate into a legal estate in

fee simple. *Shugrue v. Long* (N. J. Err. & App.) 39: 257, 82 Atl. 905, — N. J. —. Equitable conversion.

7. Where a will contains a provision purporting to devise real estate to several persons, followed by a direction that it be sold by the executor and that the proceeds be divided equally among them, the right with respect to such property acquired by one of them is subject to the lien of a judgment existing against him at the time of the testator's death. *Penalosa State Bank v. Murray*, 39: 817, 121 Pac. 1117, 86 Kan. 766. (Annotated)

WITNESSES.

Duty of attorney general to examine at request of governor, see *Attorney General*.

Arrest by conductor of passenger as witness against other passenger arrested, see *Carriers*, 2.

Secondary evidence to show relation of, to subject-matter of his testimony, see *Evidence*, 9.

Corroboration of testimony of accomplice, see *Evidence*, 33-36.

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Detention of passenger as witness to misdemeanor on train, see *Evidence*, 28.

Right of governor to require attorney to examine, see *Governor*.

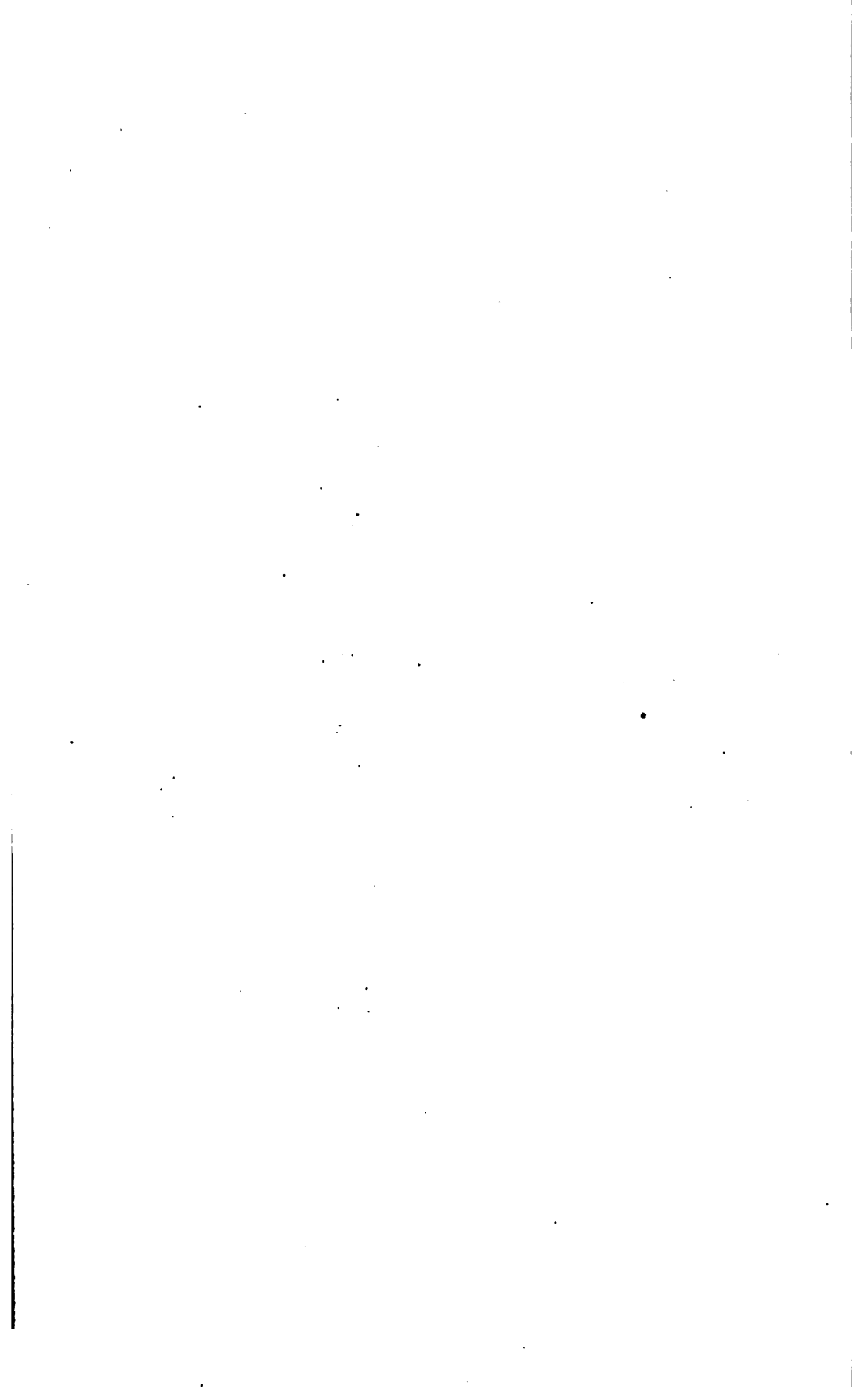
Perjury by, see *Perjury*.

Question whether witness is an accomplice, see *Trial*, 2.

Jury as judges of credibility of witnesses, see *Trial*, 1.

1. A woman is a competent witness in an action under the civil damage act against one who sold intoxicating liquor to her husband after notice not to do so, to show his acts and conduct towards her during times of intoxication through liquor sold him by defendant. *Fleming v. Gemein*, 39: 315, 134 N. W. 969, 168 Mich. 541. (Annotated)

2. In an action to hold the owner of a vehicle liable for injury to an occupant through the driver's negligence, a statement by the driver after the accident is admissible in evidence to contradict statements made by him as a witness. *John J. Radel Co. v. Borchas*, 39: 227, 145 S. W. 155, 147 Ky. 506.





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